Queensland Law Society

The Australian Solicitors' Conduct Rules

A Commentary for Legal Practitioners in Queensland

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Acknowledgements

2026 edition

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2012 edition

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Overview

The *Australian Solicitors' Conduct Rules 2012* replaced the *Legal Profession (Solicitors) Rule 2007* on 1 June 2012. Subsequent amendments to the *Australian Solicitors' Conduct Rules 2012* came into effect on 1 April 2022 in NSW, Victoria, and South Australia (with some minor variations). Western Australia adopted these amendments on 1 July 2022. The Uniform States (NSW, Victoria, and Western Australia) rely on the Law Council of Australia's commentary.[1]

On 27 September 2024, the *Australian Solicitors' Conduct Rules 2023* ('*ASCR*') came into effect in Queensland by notification under s 225(1) of the *Legal Profession Act 2007* (Qld) ('*Legal Profession Act*'). The *ASCR* included most changes that the above jurisdictions adopted but retained the original 2012 wording for rules 23.2, 29.7, 29.12.5 and the definitions of 'Principal' and 'Serious Criminal Offence' in the Glossary. There was also a slight modification to rule 11A.

This ASCR Commentary was produced by the Queensland Law Society ('QLS') and acknowledges the extensive contributions of the QLS Ethics and Practice Centre and the QLS Ethics Advisory Committee. Solicitors should note that this ASCR Commentary that appears with the *ASCR* does not constitute part of the rules and is provided only as guidance. References to case law and legislation are current as at May 2026.

Differing forms of legal practice as a solicitor

The *ASCR* apply to all solicitors and Australian-registered foreign lawyers acting in the manner of a solicitor including, but not limited to, those engaged in:

- private legal practice,
- legal practice as 'in-house' (or corporate) counsel,
- legal practice as government legal officers[2] (who hold a practising certificate), and
- legal practice by bodies such as legal aid organisations and community legal centres.[3]

Definitions and interpretation

Words and expressions used in the *ASCR* and referred to in this Commentary have the same meaning as they have in the *Legal Profession Act* unless defined in the Glossary. In that case, the Glossary definition applies, reflecting the different nature, scope or subject matter of the *ASCR* compared to the *Legal Profession Act*.[4]

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1 Law Council of Australia, *Commentary to the Australian Solicitors' Conduct Rules* (March 2024) ('Law Council of Australia 2024 Commentary').

2 Government legal officers who do not hold a practising certificate should be cognisant that the *ASCR* reflect many aspects of the common law which are still applicable to them.

3 See also Law Council of Australia 2024 Commentary (n 1) 5-6.

4 *Forsyth v Deputy Commissioner of Taxation* (2004) NSWLR 132, [28] (Spigelman CJ); *Legal Profession Uniform Law 2014* (NSW), ss 7(3), 423(2).

2. Purpose and effect of the rules

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

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

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

Solicitors to observe the highest standards

The *ASCR* are not the sole touchstone for determining a solicitor's ethical obligations. In providing guidance to solicitors, this Commentary also refers to relevant common law and legislation. These references are illustrative and do not exhaustively detail all relevant common law and legislation.

Where there is a difference in the standards between the *ASCR* and common law or legislation (in any jurisdiction), the *ASCR* require a solicitor to comply with the higher standard.

There may be circumstances where it is unclear whether the higher standard is contained within the *ASCR* or the common law. It may be that the *ASCR* and the common law prescribe different approaches. In these instances, rule 2.2 does not indicate which approach should be followed.

Unsatisfactory professional conduct or professional misconduct

Rules 2.2 and 2.3 adopt the definitions of 'unsatisfactory professional conduct' and 'professional misconduct' provided by ss 418–419 of the *Legal Profession Act*. Section 418 defines 'unsatisfactory professional conduct' to include

> conduct of an Australian legal practitioner happening 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.[5]

Section 419 defines 'professional misconduct' as conduct that is more serious than 'unsatisfactory professional conduct' and includes:

(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.[6]

The *Legal Profession Act* clarifies that a breach of a professional conduct rule is conduct capable of constituting 'unsatisfactory professional conduct' or 'professional misconduct' as defined by the Act.[7] A breach of a professional conduct rule that is capable of constituting 'unsatisfactory professional conduct' or 'professional misconduct' may give rise to disciplinary proceedings.

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5 *Legal Profession Act 2007* (Qld) s 418 ('*Legal Profession Act*').

6 Ibid s 419(1). Note that these definitions are repeated in the *ASCR Glossary*, except that the *ASCR Glossary* refers to the conduct as 'occurring' rather than 'happening'.

7 See, eg, *Legal Profession Act* (n 5) s 420(1)(a) and accompanying note.

Because professional rules are an articulation of the standards expected from its members, they are relevant to 'determining whether disciplinary proceedings should be commenced against a lawyer and in the hearing of those proceedings'. [8]

Objective of disciplinary proceedings

The objective of disciplinary proceedings is not punishment.

The Law Council of Australia 2024 Commentary noted[9] that disciplinary proceedings seek to protect clients and the public interest in the proper administration of justice:

> from a legal practitioner who displays a lack of competence or diligence in legal practice, or from a legal practitioner whose conduct calls into question the fitness and propriety of that person to continue to be an officer of the court entrusted to engage in legal practice.[10]
>
> … [A] legal practitioner who commits a civil or criminal offence will incur the appropriate civil or criminal penalty for that offence and may also, depending on the circumstances, incur disciplinary consequences. This is why the legal profession laws applying in all states and territories include conviction for a serious offence, a tax offence, or an offence involving dishonesty as conduct capable of constituting 'unsatisfactory professional conduct' or 'professional misconduct'.[11]

Inherent jurisdiction of the court

The statutory 'complaints handling' scheme found in legal profession laws are not the only means by which a matter may be raised for disciplinary examination. In *Eden King Lawyers Pty Ltd v Makari (No 2),*[12] the Court relied upon its inherent jurisdiction to direct the solicitor to show cause why the Court should not refer potential disclosure and misuse of client confidential information to the NSW Law Society.[13]

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8 GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 7th ed, 2021) [1.125], cited in Law Council of Australia 2024 Commentary (n 1) 11–12.

9 Law Council of Australia 2024 Commentary (n 1) 12.

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

11 See, eg, *Legal Profession Act* (n 5) s 420(c).

12 [2022] NSWSC 479.

13 Law Council of Australia 2024 Commentary (n 1) 14.

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.

Duty to the court and administration of justice prevails

The duty to the court is well established at common law. The duty derives from the lawyer's special role as an officer of the court.[14] A lawyer becomes an officer of the Supreme Court on admission to the legal profession.[15] The court has inherent jurisdiction to supervise the solicitor's relationship with the court, including their entitlement to practise law (through admission) as well as fulfilling the purpose of protecting the public interest in the proper administration of justice.

The duty to the court and administration of justice has been said to comprise four mutually supporting categories:

- a duty of disclosure to the court,
- a duty not to abuse the court's process,
- a duty not to corrupt the administration of justice, and
- a duty to conduct cases efficiently and expeditiously.[16]

The Hon David Ipp explains:

> The first three mentioned general duties are derived from the public interest in ensuring that the administration of justice is not subverted or distorted by dishonest, obstructive, or inefficient practices. The essence of these duties is the requirement for lawyers (within the context of the adversarial system) to act professionally, with scrupulous fairness and integrity and to aid the court in promoting the course of justice. By their nature, these requirements are immutable, but the content of the particular duties that flow therefrom may change over time as litigation practices and social values change.[17]

The duty to the court involves solicitors acting with 'candour, honesty and fairness'.[18] In addition, a solicitor's duties of disclosure involve:

- not misleading the court or withholding authority or documents unfavourable to the client,
- informing the court of relevant legal authorities that may be unfavourable to their client's case,[19] and
- avoiding making unfounded allegations against other parties.

The expectation that counsel should practice forensic discretion to ensure the 'speedy and efficient administration of justice' and meet their duties to the court is well established.[20] Increasingly, civil justice is conceptualised as efficient case management as well as substantive justice.[21] In *Virgtel Ltd v Zabusky (No 2)*,[22] McMurdo P noted that 'lawyers also have an obligation, not just to their clients but also to the administration of justice, to do everything possible to ensure the matter is soon concluded in a timely and cost efficient way'.[23]

Rule 17.2 provides an exception to duties to follow client instructions where the exercise of forensic

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14 *Myers v Elman* [1940] AC 282, 316–19.

15 *Legal Profession Act* (n 5) s 38(1).

16 David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 65.

17 Ibid.

18 *Council of the Queensland Law Society Inc v Wright* [2001] QCA 58, [67].

19 *Glebe Sugar Refining Co Ltd v Greenock Port and Harbours Trustees* [1921] SC (HL) 72, 74, cited in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [112].

20 *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

21 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

22 [2009] QCA 349.

23 Ibid [30] (Mullins and Philippides JJ agreeing).

judgment is necessary to confine any hearing to those issues which the solicitor believes to be the real issues; present the client's case as quickly and simply as may be consistent with its robust advancement; or inform the court of any persuasive authority against the client's case.

The *ASCR* contains later rules which impose specific duties that give effect to the general duties to the court and administration of justice, for example, a solicitor must:

- exercise forensic judgment and act independently when representing a client before the court, rather than acting as the mere mouthpiece of the client (rule 17.1),
- not deceive or knowingly or recklessly mislead the court (rule 19.1),
- not knowingly make a false or misleading statement to an opponent in relation to the case (rule 22.1),
- make responsible use of court process and privileges (rule 21), and
- not make public comments which may prejudice a fair trial or the administration of justice (rule 28).[24]

The duty to the administration of justice extends outside the courts. The *ASCR* defines 'court' to mean

> any body described as such; any tribunal exercising judicial, or quasi-judicial, functions; a professional disciplinary tribunal; an industrial tribunal; an administrative tribunal; an investigation or inquiry established or conducted under statute or by a Parliament; a Royal Commission; an arbitration or mediation or any other form of dispute resolution.

A solicitor acting for a client in any of these contexts is subject to the above duties.[25]

Paramount duty to the court and administration of justice

The duty to the court and to the administration of justice prevails to the extent of inconsistency with any other duty, including a solicitor's duties to the client or others.[26] As expressed by Lord Reid:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.[27]

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[24] Law Council of Australia 2024 Commentary (n 1) 16.

[25] *Legal Services Commissioner v Mullins* [2006] LPT 12; *Legal Services Commissioner v Garrett* [2009] LPT 12.

[26] *Giannarelli v Wraith* (1988) 165 CLR 543, 555-6 (Mason CJ), 572 (Wilson J).

[27] *Rondel v Worsley* [1969] 1 AC 191, 227.

4. Other fundamental 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.

Acting in the best interests of the client

The ethical duty to act in the best interests of the client is best understood through the observation of specific duties described later in the *ASCR*, such as:

- The duty to maintain client confidentiality (rule 9), and
- The duty of loyalty to the client, which includes,
  - duties owed to a former or a potential client (rule 10),
  - duties owed to concurrent clients (rules 11, 11A), and
  - the duty to avoid conflict with the solicitor's own personal interests (rule 12).

These duties are examples of the fundamental principle and give effect to the general duty.

Honesty and courtesy

The duty of honesty is considered in detail under rule 5 below.

The duty of courtesy derives from an expectation that solicitors assist the public interest in the appropriate administration of justice, as well as contractual and other legal obligations owed to clients and third parties. The use of insulting, offensive, or discourteous language by a solicitor towards clients, other practitioners, court officers, and members of the public is likely to bring the legal profession into disrepute.[28] Courtesy has a 'real power' as explained in *Lander v Council of the Law Society of the Australian Capital Territory*:

> A lawyer can be firm and tough-minded while being unfailingly courteous. Indeed, there is a real power that comes from maintaining one's dignity in the face of a tantrum, from returning courtesy for rudeness, from treating people respectfully who do not deserve respect, and from refusing to respond in kind to personal insult.[29]

The Court noted that a solicitor's choice to be confrontational rather than persuasive may not be an effective option, but this would not ordinarily be considered unsatisfactory professional conduct. However, it:

> is misconduct to abuse [a practitioner's] privilege by making unfounded accusations knowing that there was no reasonable basis for them, worse if done gratuitously or even more pertinently, if it were shown to be for a collateral purpose.[30]

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28 *Baker v Legal Services Commissioner* [2006] QCA 145; *Legal Services Commissioner v Winning* [2008] LPT 13.

29 *Lander v Council of the Law Society of the Australian Capital Territory* [2009] ACTSC 117, [23], quoting Matthew B Durant, 'Views from the Bench: Civility and Advocacy' [2001] *Utah Bar Journal* 35.

30 Ibid [32].

In considering where the boundaries of acceptable, ethical conduct lie, courts have applied the interrelated tests of:

- whether the impugned behaviour of the solicitor pursued legitimate interests of their client,
- whether the solicitor had a reasonable professional basis for the behaviour, and
- whether the solicitor was acting in a way that maintained the integrity and reputation of the legal profession.

In *Victorian Legal Services Commissioner v McDonald*,[31] the Court considered a case where a solicitor wrote a letter in which he described an opposing legal practitioner as being 'fundamentally dishonest' and 'telling lies' which was repeated in a second letter.[32] The Court ultimately found that:

> it is important to take into account the right — and indeed the duty — of a practitioner to fearlessly and fully propound the client's interests. The fulfilment of that duty to the client, may, on occasion, call for robust advocacy on the client's behalf. However, that advocacy is regulated by a professional rule that requires practitioners to take all reasonable care to maintain the integrity and reputation of the legal profession and … instrumental to that objective is the obligation of professional courtesy and the avoidance of offensive or provocative language or conduct.[33]

In *Legal Services Commissioner v Winning,*[34] the Tribunal concluded that expletive and derogatory comments spoken in court were 'offensive, insulting and discourteous not just to the opponent but also troubling to the Bench'. However, the Tribunal disagreed that the comments:

> had the potential or tendency to bring the criminal justice system into disrepute … given that an apology was offered immediately once the true facts were understood by the respondent so that any person in the courtroom who heard the disparaging words would have heard the apology.[35]

Another disciplinary charge relating to offensive language during a private telephone call with a Crown Prosecutor was also dismissed because of a lack of potential to bring the legal profession or criminal justice system into disrepute. However, the solicitor was found guilty of professional misconduct on a charge relating to grossly offensive and discourteous behaviour in open court, with the Court finding:

> Such language from a legal practitioner in a public forum would be inexcusable. In submissions in a court it was likely to undermine the confidence of the public in a serious way in the administration of criminal justice in Queensland.[36]

The rule extends to conduct outside courts. The Tribunal noted in *Legal Services Commissioner v XBT* that:

> there is no question that sending rude, demeaning, derogatory, disparaging, personally abusive or offensive, undisciplined and discourteous correspondence to or about a third party with an opposing interest in a matter where the practitioner acts for a client breaches rule 28(5) *Solicitors Rule 2007* (since repealed) and meets the statutory description of unprofessional conduct.
>
> The conduct diminishes the dignity and high standing of the profession and tends to reduce community respect for it. It is unbecoming and suggests a loss of the objectivity, independence and judgment needed for the proper discharge of professional responsibilities on which the administration of justice depends and the court relies.[37]

The duty not to diminish the public confidence in the administration of justice or bring the profession into disrepute is considered in further detail under rule 5 below.

For Queensland practitioners, see *Guidance Statement No. 31 - Courtesy in communications*.[38]

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31 [2019] VSCA 18.

32 Ibid [19].

33 Ibid [121].

34 [2008] LPT 13.

35 Ibid [32].

36 Ibid [64].

37 [2018] QCAT 64 [19]-[20].

38 Queensland Law Society, *Courtesy in communications* (Guidance Statement No. 31, 22 October 2024).

Competence

Civil and professional standard of care

Solicitors must deliver legal services competently, diligently, and promptly. The duty of competence exists once there is an express or implied engagement of the solicitor. The retainer between the solicitor and client, whether in writing or oral,[39] identifies the client and defines the lawyer's duties to the client.[40]

Some duties can be implied by a court. In *Robert Bax and Associates v Cavenham Pty Ltd*,[41] the Court held a retainer extended beyond mechanical tasks of document preparation.[42] In the circumstances of this case, the Court found the solicitor should have evaluated certain risks and advised his client about them, even though such advice had not been specifically requested. A duty to advise may exist even if the client does not request it, especially if the client lacks experience or is unfamiliar with common legal practices.[43]

A solicitor is not required to take on every matter. Instructions should only be accepted by a solicitor who is confident that they have the necessary degree of competence to undertake the matter. The solicitor should also ensure that they take all reasonable measures to properly verify the identity of their client.[44] Solicitors are reminded that they may have legislative obligations such as conducting customer due diligence as required under the *Anti-Money Laundering and Counter-Terrorism Act 2006* (Cth).

In addition to the solicitor's civil law duty to exercise reasonable care and skill in the provision of professional advice, the *Legal Profession Act* establishes minimum standards of competence which apply to lawyers as a professional requirement. Section 418 of the *Legal Profession Act* provides that unsatisfactory professional conduct:

> includes conduct of an Australian legal practitioner happening 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.

Section 419 of the Act provides that 'if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence' it may constitute professional misconduct.

Courts have considered the threshold required to warrant a disciplinary finding against a solicitor. In *Legal Services Commissioner v Bone,*[45] it was found that the question for a disciplinary Tribunal was whether the conduct was 'sufficiently substantial to warrant the conclusion that it 'constitutes unsatisfactory professional conduct'.

In *Di Giovanni v Council of the Law Society of New South Wales* the Tribunal found:

> Not every professional failing constitutes unsatisfactory professional conduct. Rather, the 'falling short' of the standard of competence and diligence contemplated by s 296 of the Uniform Law must be sufficiently substantial. An isolated instance, not involving unethical conduct and more in the nature of conduct which might give rise to an assertion of negligence is less likely to amount to unsatisfactory professional conduct.[46]

In *Legal Services Commission v Laylee & Anor*,[47] a solicitor lodged a caveat pursuant to an equitable mortgage without a written agreement and another solicitor in the firm billed the client for this work while the initial solicitor was on leave. Here the Tribunal found:

> that the conduct was more in the nature of a mere slip and certainly not, as is submitted by the Commissioner, a very stark misapprehension of instructions followed by an equally stark lack of curiosity and it was not conduct

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39 Note *Legal Profession Act* (n 5) pt 3.4 div 3 regarding legislative requirements for costs disclosure.

40 GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 8th ed, 2025) 86.

41 [2012] QCA 177.

42 Ibid [54].

43 *Littler v Price* [2005] 1 Qd R 275, [51].

44 *Youssef v New South Wales Legal Services Commissioner* [2020] NSWCATOD 85.

45 *Legal Services Commissioner v Bone* [2013] QCAT 550, [64].

46 [2024] NSWCATOD 66, [76].

47 [2016] QCAT 237.

> which fell so far short of accepted standards of competence that it amounted to unsatisfactory professional conduct. … the conduct was not sufficiently substantial to be unsatisfactory professional conduct.[48]

The Tribunal also considered how to apply the professional statutory standard in *Legal Services Commissioner v Trost*:

> But these breaches are not, by their very nature, so trivial as to warrant exoneration. Each was a significant departure from appropriately competent professional conduct, and ought be characterised as such.
>
> Even if one applies the definition in s 418, this Tribunal considers that members of the public are entitled to expect that reasonably competent Australian legal practitioners will observe the professional rules which bind them and, more fundamentally, act in accordance with their paramount duty to the administration of justice.[49]

Supervision

Discipline might also result from a failure of a solicitor to take responsibility for the lack of competence shown by a solicitor under their supervision. In *Doolan v Legal Practitioners Admissions Board* the Tribunal found that:

> [s]upervision and appropriate support of staff is part and parcel of the employers' role. After all, the allocation and supervision of all professional legal work carried out on a firm's behalf is an elemental and non-delegable duty the practice owner owes to clients.[50]

In *Legal Services Commissioner v Stevenson*[51] the Tribunal considered the context in which a solicitor might fail to provide appropriate supervision:

> [A] picture emerged of a sole practitioner who was labouring under sustained and significant personal and professional pressures and who was simply not coping. His evidence revealed a person who, whilst well-intentioned, was lacking any proper administrative structure, or any other form of scaffolding which would support him in the pursuit of his professional practice. Of further concern to the Tribunal at that time were the details that emerged of his supervision, or lack of supervision, of junior solicitors who were employed in the course of his practice.[52]

For Queensland practitioners, see *Guidance Statement No. 16 – Supervision*.[53]

Technology

The duty of competence includes competent use of relevant technology.

All aspects of professional practice are increasingly impacted by technology from basic office management systems to virtual court appearances, and advanced technology for large case management.

Courts around the world have even acknowledged that competent performance of work may require the use of technology in relation to legal research or large scale document discovery.[54]

Artificial Intelligence (AI) technology also presents potential benefits and risks in legal practice. Courts and professional bodies have issued practice and guidance notes alerting their users to the dangers of AI associated with the likelihood of generating incorrect authorities and possible breaches of confidentiality duties and the law.[55] In *Valu v Minister for Immigration and Multicultural Affairs (No 2)* ('*Valu*')[56] and *Re Dayal*,[57] practitioners made submissions which contained fictitious cases generated

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48 Ibid [72].
49 [2019] QCAT 357 [96]–[97].
50 [2016] QCAT 98, [135].
51 [2021] QCAT 275.
52 Ibid [7].
53 Queensland Law Society, *Supervision* (Guidance Statement No. 16, 18 March 2019).
54 *Drummond v The Cadillac Fairview Corp. Ltd* 2019 ONCA 447, [10]; *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 2)* [2017] VSC 640.
55 See also Queensland Law Society, *Artificial Intelligence in Legal Practice* (Guidance Statement No. 37, 24 October 2024).
56 [2025] FedCFamC2G 95 ('*Valu*').
57 [2024] FedCFamC2F 1166.

by AI, unchecked by the solicitor. In both cases, the Court referred the practitioner to the relevant disciplinary authority for possible charges. In *Valu,* Skaros J commented that:

> [t]here is a strong public interest in referring this conduct to the regulatory authority in NSW given the increased use of generative AI tools by legal practitioners. The use of generative AI in legal proceedings is a live and evolving issue. [58]

For Queensland practitioners, see:

Guidance Statement No. 25 – Professional Standards When Appearing in Court Remotely[59]

Guidance Statement No. 37 – Artificial Intelligence in Legal Practice[60]

Queensland Courts and Tribunals: The use of Generative Artificial Intelligence (AI); Guidelines for Responsible Use by Non-Lawyers (Updated September 2025)

Supreme Court of Queensland, Practice Direction Number 5 of 2025: Accuracy of References in Submissions (September 2025).

Diligence and promptness

Breaches of the requirement under this rule to deliver legal services competently, diligently and as promptly as reasonably possible may result in substantial delays or total failure to deliver services to the client. This can include missing deadlines or failing to file documents in court or administrative proceedings. Where these failings involve an isolated incident and there is some explanation for the failure, tribunals have generally characterised this conduct as constituting unsatisfactory professional conduct.[61]

However, as noted in *Legal Services Commissioner v Smith,* '[g]ross neglect and delay, particularly if it is part of pattern, can attract a finding of professional misconduct'. [62] For instance, in *Legal Services Commissioner v Coburn,*[63] the solicitor failed to appear in a hearing in a criminal matter where an adverse order was made against the client. The Tribunal determined that the solicitor's conduct was 'a solitary instance which, in the panel's view, means it falls readily, and much more apparently, within the definition of unsatisfactory professional conduct'.[64]

In *Legal Services Commissioner v Mouritz*,[65] the solicitor delayed initiating proceedings on behalf of the client for two years and failed to respond to the client's repeated emails and telephone calls over a significant period. The Tribunal noted that the client was 'able to resolve the matter through the steps which he took after termination of the retainer, and … [the solicitor] did not engage in a complete lack of work nor completely failed to engage with' the client and characterised the conduct as unsatisfactory professional conduct.[66] In contrast, in *Legal Services Commissioner v Bussa*[67] the Tribunal found a delay of 10 years to file a personal injuries claim (which resulted in the client's claim being statute barred) amounted to professional misconduct. Similarly, in *Legal Services Commissioner v McHenry*[68] there were 30 separate disciplinary charges against the practitioner, with many relating to substantial delays in acting for clients or failure to initiate actions over significant periods, as well as making false representations to clients. The solicitor was struck from the roll.

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58 *Valu v Minister for Immigration and Multicultural Affairs (No 2)* [2025] FedCFamC2G 95, [37].

59 Queensland Law Society, *Professional Standards When Appearing in Court Remotely* (Guidance Statement No. 25, 30 October 2024)

60 Queensland Law Society, *Artificial Intelligence in Legal Practice* (Guidance Statement No. 37, 31 May 2024).

61 *Legal Services Commissioner v McDonald* [2024] QCAT 193.

62 [2011] QCAT 126, [10].

63 [2013] QCAT 435.

64 Ibid [15].

65 [2023] QCAT 325.

66 Ibid [22].

67 [2005] LPT 5.

68 [2018] QCAT 423.

Integrity and professional independence

An aspect of a solicitor's duty is exercising independent judgment in the context of a client's matter. A lack of objectivity or integrity undermines the justice system. Sir Gerard Brennan wrote:

> If a lawyer undertakes to give more than practical legal guidance he has started to identify himself with his client's case… The objective of a total service may be seen to be the achieving of results satisfactory to the client and that would eliminate the distance between the lawyer's duty to the law and the lawyer's interest in the client's affairs. Keeping that distance is essential to the integrity of the lawyers' conduct… clients seek a lawyer's guidance precisely because it is independent of the client's interests and objective in its legal content.[69]

Independence and integrity are also core aspects of specific duties including

- avoiding conflicts between duties owed to current and former clients (rule 10),
- avoiding conflicts between duties owed to two or more clients (rule 11),
- avoiding conflict between the duty to serve the best interests of a client and the interests of the solicitor (rule 12),
- exercise of forensic judgment in a matter that is before the court (rule 17.1), and
- the solicitor material witness rule (rule 27).

Solicitors must be careful that their relationship with the client remains professional. This is one of the reasons that there is a rule that prohibits a solicitor becoming the surety for the client's bail (rule 17.4). Solicitors should also give careful reflection as to whether it is appropriate to act for family or friends.

Where a family or personal connection exists between a lawyer and the opposing lawyer, care should be taken to make appropriate disclosures and obtain informed consent.[70]

In *Legal Services Commissioner v Sullivan* the Tribunal noted a potential for a serious conflict of interest when a solicitor employed his wife for client services:

> Leaving aside the eyewatering amount of funds effectively diverted to the [lawyer's] wife by reason of his dishonest conduct, it is quite clear that the [lawyer's] failure to declare to his employer firm, and to his clients, the relationship between the service provider – in this case his wife or his wife's firm – was a fundamental failure to observe the necessary standards of integrity and professional independence. In short, one struggles to find a more stark example of what could, in shorthand, be described as a patent conflict of interest, and the need for there to be appropriate disclosure of that conflict in the context of the provision of professional services. [71]

See also the High Court's consideration of a claim of apprehended judicial bias in *Charisteas v Charisteas*[72] relating to several social interactions between the trial judge and a representing barrister during a long-running family law case.

For Queensland practitioners, see *Guidance Statement No. 23 – Acting for Family and Friends* and *Guidance Statement No. 38 – Disclosure of third party relationships*.[73]

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[69] Sir Gerard Brennan, 'Pillars of Professional Practice: Functions & Standards' (1987) 61(3) *Australian Law Journal* 112, [117].

[70] *R v Szabo* [2000] QCA 194.

[71] [2018] QCAT 423, [16].

[72] [2021] HCA 29.

[73] Queensland Law Society, *Acting for Family and Friends* (Guidance Statement No. 23, 29 October 2024); Queensland Law Society, *Disclosure of third party relationships* (Guidance Statement No. 38, 4 September 2024).

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.

Fit and proper person to practise law

Rule 5 draws together three essential qualities that a solicitor of good standing and repute commits to. The Law Council of Australia describes this solicitor as ‘a fit and proper person to practise law, advancing and promoting public confidence in the administration of justice, and upholding the reputation and standing of the legal profession’.[74]

Reflecting the common law approach, the prohibitions in rule 5 relate to a solicitor’s conduct during their professional practice and in other aspects of their life.

The requirement of fitness to practise is enshrined in common law and is central to the disciplinary and practising certificate provisions of the *Legal Profession Act 2007*.[75]

The primary purpose of disciplinary proceedings is to protect the public and to maintain ‘standards of professional practice’.[76] In *Legal Services Commissioner v Shand,* McMurdo JA stated (with whom Morrison JA and Brown J agreed):

> The protection of the public, of course, is a purpose also served by an order which affects an existing or future practising certificate. By an order affecting a practising certificate, the public is immediately protected from the risks to which those who would encounter an unfit person would be exposed.
>
> The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts, and the public is prejudiced. The Court’s Roll of practitioners is an endorsement of the fitness of those who are enrolled.[77]

The crucial question for the disciplinary tribunal is whether the conduct engaged in by the practitioner indicates that the practitioner is no longer a fit and proper person to be entrusted with the important duties and grave responsibilities of a solicitor.[78]

However, this consideration must have regard to the case-by-case nature and context of the practitioner’s conduct. In *Ziems v Prothonotary of the Supreme Court of New South Wales,*[79] Kitto J noted that ‘[i]t is not capable of more precise statement. The answer must depend upon one’s conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a [lawyer].’

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74 Law Council of Australia 2024 Commentary (n 1) 21.

75 *Legal Profession Act* (n 5) ss 50(2), 67, 69, sch 2.

76 *Harvey v Law Society of NSW* (1975) 49 ALJR 362, 364; *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301, [122].

77 [2018] QCA 66 [53]–[55].

78 *Attorney-General v Bax* [1999] 2 Qd R 9, 12.

79 (1957) 97 CLR 279, 298.

In *Legal Services Commissioner v McDonald*, the Tribunal stated:

> While consistency and treating like cases alike is one of the tribunal's stated objects perfect uniformity is unachievable. Past sanctions are not binding and there is no rule that later cases religiously follow earlier ones or that a sanction in one case is some kind of norm to be applied in similar cases. [80]

In *Prothonotary of the Supreme Court of NSW v P*,[81] the Prothonotary applied to remove from the roll a solicitor who pleaded guilty to and was sentenced to a six-month custodial sentence for importing cocaine. Chief Justice Young developed the following summary of applicable principles:

- The onus is on the regulating agency to show that the solicitor is not a fit and proper person. It is a civil onus.[82]
- An order striking off the roll should only be made when the probability is that the solicitor is permanently unfit to practise.[83]
- The fact that the applicant has a conviction for a serious offence is not necessarily a sufficient reason for an order striking that person off the roll.[84]
- The fact of conviction and imprisonment is far from irrelevant and may be regarded as involving a degree of disgrace itself.[85]
- The court needs to consider the conduct involved in the conviction and see whether it is of such personally disgraceful character that the solicitor should not remain a member of an honourable profession.[86]
- The fact that the solicitor pleaded guilty to the charge will usually be counted in their favour.[87]
- Conduct not occurring in the course of professional practice may demonstrate unfitness if it amounts to incompatibility with the personal qualities essential for the conduct of practice. There may not even have been any criminal conviction with respect to that conduct. This is particularly so where the conduct over a long period shows systematic non-compliance with legal and civil obligations.[88]
- The concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in the relevant community, character refers to the person's actual nature.[89]
- The attitude of the professional association is that the application is of considerable significance.
- The question is one of present fitness, not fitness at the time of the crime.[90]

His Honour did not demur[91] from the following ten propositions of mitigation put forward by counsel for the solicitor in that case:

- absence of prior disciplinary record,
- absence of motive for personal enrichment,
- genuine remorse,
- honesty and co-operation with the authorities after detection,
- the offences being unrelated to the practice of law in that the addiction had not impacted on her professional duties and had not resulted in harm to her clients or other people,

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80 [2018] QCAT 82, [70].

81 [2003] NSWCA 320, [17].

82 *Re Evatt; Ex parte NSW Bar Association* (1967) 67 SR (NSW).

83 *Prothonotary of the Supreme Court of New South Wales v Ritchard* (New South Wales Court of Appeal, Kirby P, Mahoney and McHugh JJA, 31 July 1987); *NSW Bar Association v Maddocks* [1988] NSWCA 102.

84 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 283.

85 Ibid 288.

86 *Re Weare* [1893] 2 QB 439, 446; *Barristers' Board v Darveniza* (2000) 112 A Crim R 48.

87 *NSW Bar Association v Maddocks* [1988] NSWCA 102.

88 *NSW Bar Association v Cummins* (2001) 52 NSWLR 279, 289; *NSW Bar Association v Somosi* (2001) 48 ATR 562.

89 *McBride v Walton* [1994] NSWCA 199 (Kirby P); *Clearihan v Registrar of Motor Vehicle Dealers* (1994) 117 FLR 455, 459.

90 *Prothonotary v Del Castillo* [2001] NSWCA 75, [71].

91 Ibid [24].

- the shame of having suffered a criminal conviction and the deterrent element,
- the absence of premeditation with respect to the commission of the crime,
- evidence of good character,
- voluntary self-imposed suspension from practice, and
- convincing evidence of rehabilitation.[92]

Determining whether a lawyer is a fit and proper person requires consideration of the whole position with meticulous care.

In *A Solicitor v Council of the Law Society of New South Wales,*[93] the High Court held that when the solicitor was aware the Society was considering disciplinary action for conduct, frankness required him to inform the Society of the further convictions and sentences for similar offences, even if he regarded them as unjust and hoped they would be set aside on appeal. The High Court also found his failure to inform the Society was professional misconduct. In determining whether a solicitor was a fit and proper person to be a legal practitioner it was held that it was correct to consider the combined significance of the misconduct which was the subject of the first convictions and the separate conduct constituted by the subsequent lack of candour to the Society. However, the High Court held that the Court of Appeal gave insufficient weight to the isolated nature of the admitted offences and the subjective case made on behalf of the solicitor. The Court ordered that the solicitor be suspended for five years.

Conduct

Conduct that has been relevant to an assessment of the solicitor as unfit to practise includes:

- dishonest, deceitful, or fraudulent conduct, or
- a breach of the criminal law.

Dishonest, deceitful, or fraudulent conduct

Generally, findings of dishonest conduct by a solicitor will be characterised as professional misconduct. As the Tribunal noted in *Legal Services Commissioner v Hunter*, '[h]onesty is an essential and fundamental trait for legal practitioners'.[94] However, in *Attorney-General v Bax,* Pincus JA also held that 'dishonesty, like other forms of misbehaviour, has grades of seriousness'.[95]

The concern is whether the conduct suggests that the practitioner does not possess the expected qualities of honesty needed for the practice of law. As Chief Justice de Jersey stated in an admission case: '[l]egal practitioners must exhibit a degree of integrity which engenders in the Court and in clients unquestioning confidence in the completely honest discharge of their professional commitments'.[96]

Similarly, the Court found in *Barristers' Board v Darveniza*:

> Generally speaking the quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practises.[97]

A breach of the criminal law

Convictions for a 'serious offence', a 'tax offence', or an 'offence involving dishonesty' may amount to unsatisfactory professional conduct or professional misconduct.[98] The seriousness of a breach of the criminal law must call into question the solicitor's willingness and ability to obey the law.[99] Chief Justice Warren noted that:

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92 *Legal Services Commissioner v McKenzie* [2021] QCAT 377.

93 (2004) 216 CLR 253, 266.

94 [2024] QCAT 220, [64].

95 [1999] 2 Qd R 9, 20.

96 *Re AJG* [2004] QCA 88, 3.

97 [2000] QCA 253, [33].

98 *Legal Profession Act* (n 5) s 420(1).

99 *Legal Services Board v McGrath (No 2)* [2010] VSC 332, [14]–[16].

> any suggestion that crimes committed at arm's length, such as those which involve child pornography, can be considered of lesser seriousness in deciding upon an individual's fitness to remain on the Roll should be the subject of intense scrutiny.[100]

In *Legal Services Commissioner v Munt*,[101] the solicitor had been convicted of trafficking and supplying a dangerous drug for which he was sentenced to three years' imprisonment wholly suspended for four years. The Tribunal characterised the solicitor's conduct as professional misconduct but made an order that the solicitor be restrained from obtaining a practising certificate for a period of five years. The circumstances in that case, however, did not involve offences of dishonesty and there was evidence of rehabilitation.

In contrast, in *Legal Services Commissioner v Ioannides*,[102] a solicitor was convicted and sentenced for multiple counts of trafficking of methylamphetamine and GHB. Justice Daubney observed:

> Whilst the conduct … did not happen in connection with the practice of law, it was conduct by which the respondent committed serious criminal offences. It amounted to protracted criminality which involved the serious offence of trafficking in dangerous drugs, as well as many other offences, including breaches of bail undertakings given to the court.
>
> The seriousness and persistence of the offending conduct was completely at odds with all norms which the community expects of those engaged in legal practice; and, as noted above, conduct for which there is a conviction for a serious offence is conduct which may be held to constitute professional misconduct. The respondent's criminal conduct, including, of course, the drug trafficking, undoubtedly demonstrated that, at the time, she was not a fit and proper person to engage in legal practice. By s 419(1)(b) of the LPA, the term 'professional misconduct' includes conduct of a legal practitioner 'whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice'.[103]

In *Legal Services Commissioner v SD*,[104] two discipline charges arose out of conduct for which he was convicted of a serious offence of common assault–domestic violence. A third disciplinary charge related to the solicitor's failure to give the Society notification of having been charged with a serious offence under s 57 of the *Legal Profession Act*. The Tribunal ordered that the practitioner's name be removed from the roll noting the factors relating to the solicitor's fitness to practice:

> The fact that the Respondent has not at all engaged in respect of this very serious professional matter is itself indicative of a lack of remorse and indeed, a lack of insight into the characteristics which attach to membership of an honourable profession. … Notably, at no time has the Respondent, either in the course of the criminal proceedings or in the course of this discipline application, expressed any insight into the seriousness of his conduct, either at a personal level or, relevantly for today's purposes, in respect of the implications that this sort of conduct has so far as his professionalism is concerned. The highest that the Respondent could pitch his behaviour was in a submission he made to the QLS under s 68 of the LPA in which he sought to explain why he was and remained a fit and proper person to continue to hold a practising certificate, at which time he advanced arguments that there had been no elements of dishonesty or fraud in the offence, and that the offence was very unlikely to happen again. Casting his submissions in that way indicated that, again, the Respondent had no insight into the very serious personal and professional issues that arise and are evidenced by the conduct which led to his being convicted of the serious offence of common assault–domestic violence.[105]

Factors bearing on the seriousness of the breach

If there has been potentially disreputable conduct, the courts will consider:

- the connection between the conduct and practice of a solicitor,
- the persistence of the conduct,
- any previous disciplinary proceedings,

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100 Ibid [16] (Warren CJ), quoted in *Legal Services Commissioner v CBD* [2012] QCA 69, [18].

101 [2019] QCAT 160.

102 [2020] QCAT 479.

103 Ibid [13]–[14].

104 [2021] QCAT 204.

105 Ibid [14]–[15]; *Legal Services Commissioner v Magin* [2023] QCAT 124.

- the level of remorse,
- the 'moral blameworthiness' of the conduct, and
- any temporary medical condition that contributed to the conduct.

Each consideration will influence whether the conduct is found to be unsatisfactory professional conduct or professional misconduct.

Connection to practice

Conduct during practice has a 'much more direct bearing of a man's fitness to practise than [personal misconduct]'.[106] However, personal misconduct may influence the court's assessment if the conduct is 'so connected' to the practice of law that it could be considered professional misconduct.[107]

Persistent conduct

In *NSW Bar Association v Evatt*,[108] a barrister was found guilty of professional misconduct in that he actively assisted in and facilitated a systematic course of action whereby two solicitors charged extortionate and grossly excessive sums as costs to clients. By continuing to act, Mr Evatt charged fees as a barrister which were excessive and which he knew would be paid from the amounts charged by the solicitors. The Court held that '[t]he facts proved and found demonstrated unfitness to be a member of the Bar – not some isolated or passing departure from proper professional standards.'[109]

Previous disciplinary proceedings

In *Legal Practitioners Conduct Board v Le Poidevin,*[110] the practitioner had been previously suspended from the right to practise for two years. Whilst suspended the practitioner engaged in practice. The practitioner also ignored statutory notices to respond to the Society. The Tribunal found the practitioner guilty of unprofessional conduct. The Board applied to the Full Court of the Supreme Court of South Australia for the removal of the practitioner from the roll. Chief Justice Doyle said:

> The conduct of the defendant absent any explanation suggests that he has no regard at all for his obligation as a practitioner. He is not to be punished twice for the same matter but when the present matters are viewed in the context of the earlier findings of unprofessional conduct it suggests to me the defendant is no longer fit to remain a practitioner of this court.[111]

In *Youssef v New South Wales Legal Services Commissioner,*[112] the solicitor failed to adequately verify the identity of a client before acting on their behalf to lodge a caveat on property. In determining that the conduct constituted unsatisfactory professional conduct, the Tribunal noted the solicitor's 'lack of insight into her conduct'.[113]

The Tribunal rejected this submission stating that previous disciplinary findings were not 'irrelevant considerations' and could be considered, having regard to the objectives of the Uniform Law (which are replicated in *Legal Profession Act*) as

> to provide a scheme for the discipline of the Australian legal profession, in the interests of the administration of justice and for the protection of clients of law practices and the public generally; and to monitor, promote and enforce the professional standards, competence and honesty of the Australian legal profession.[114]

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106 *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 290.
107 *A Solicitor v Council of the Law Society of NSW* (2004) 216 CLR 253.
108 (1968) 117 CLR 177. See also *Attorney-General v Bax* [1999] 2 Qd R 9.
109 *NSW Bar Association v Evatt* (1968) 117 CLR 177, 183.
110 (2001) 83 SASR 443.
111 Ibid 446, [18].
112 [2020] NSWCATOD 85.
113 Ibid [84].
114 Ibid [96].

Level of remorse

A lack of remorse over the offence, or 'lack of ethical insight', or a failure to understand the error of their ways demonstrates an unfitness to belong to the profession. The failure to understand the impropriety of conduct may be a factor of great importance.[115]

Moral blameworthiness

In *Ziems v Prothonotary of the Supreme Court of NSW*,[116] the practitioner had been convicted of vehicular manslaughter and sentenced to two years imprisonment with hard labour. Evidence had been led at the trial that at the relevant time the practitioner was under the influence of alcohol. Kitto J observed:

> The conviction is of an offence the seriousness of which no one could doubt. But the reason for regarding it as serious is not, I think, a reason which goes to the propriety of the barrister's continuing a member of his profession. The conviction relates to an isolated occasion… it does not warrant any conclusion as to the man's general behaviour or inherent qualities… It does not indicate a tendency to vice or violence, or any lack of probity. It has neither connexion with nor significance for any professional function.[117]

Medical conditions

A finding that the solicitor's misconduct was the result of a medical condition will not avoid the imposition of a disciplinary penalty if the condition is ongoing. This is because the primary issue is the protection of the public and ensuring confidence in the administration of justice.[118] However, if the misconduct occurred when the solicitor was affected by a temporary medical condition, this may be taken into consideration because it is fitness to practise at the time of the hearing – not the time of the disciplinary offence – that is relevant.

Compliance with these Rules and the law

Solicitors must comply with the law.[119] As officers of the court, lawyers have a duty to assist the public interest in the proper administration of justice and rule of law.

Where solicitors have been convicted of a breach of law, disciplinary proceedings may result in a finding of professional misconduct.[120] In the case of *Legal Services Commissioner v Beatty*, the Tribunal found:

> It is trite to note that a fundamental incident of the privilege of legal practice is an obligation to obey the law. That includes the statutory requirements of the legislation by virtue of which a practitioner has the rights and privileges of practice.[121]

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115 *The Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 [35]; *NSW Bar Association v Evatt* (1968) 117 CLR 177, 183–184; *Legal Services Commissioner v SD* [2021] QCAT 204; *Legal Services Commissioner v Magill* [2023] QCAT 124.

116 (1957) 97 CLR 279.

117 Ibid 299.

118 *Legal Practitioners Conduct Board v Phillips* (2002) SASR 467; *Legal Practitioners Conduct Board v Thomson* (2009) SASC 149.

119 See above for rule 2 commentary on the relationship between the *ASCR* and the law.

120 *Legal Services Commissioner v McKenzie* [2021] QCAT 377; *Legal Services Commissioner v Hunter* [2024] QCAT 220.

121 [2019] QCAT 45, [14].

6. Undertakings in the course of legal practice

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

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

Honouring an undertaking

An undertaking is a promise (whether oral or written) to do or refrain from doing something. A solicitor may provide an undertaking:

- to the court, another lawyer, a client, or a third party, and
- on their own or on a client's behalf.

The professional obligation in rule 6.1 to honour an undertaking reflects the common law.[122] A prudent solicitor should ensure that they:

- give or confirm their undertakings in writing as expressed in clear, precise, and unambiguous terms (this applies to both the provision of a personal undertaking and an undertaking on behalf of a client),
- give their undertaking in accordance with their client's instructions, and
- have complete control over their ability to fulfil the undertaking (otherwise it must be subject to conditions).

A solicitor may be held to an undertaking even if the solicitor has erred, made an oversight, circumstances have changed radically, or may cause hardship to the solicitor.[123]

Personal responsibility

There is an important distinction between undertakings given by a solicitor personally and undertakings given on behalf of the client. Where an undertaking is given by a solicitor personally, it will bind that solicitor. Whether or not the undertaking binds the solicitor is a question of fact determined with reference to the circumstances.

In *Gorman v Norton*,[124] a case from the 1880s, a writ had been issued for the arrest of the client who was expected to leave NSW the following day. An undertaking was given by his solicitors 'on behalf of the defendant to pay any sum that may be awarded'[125] in civil proceedings. Where parties sign an agreement in their own names, they are personally liable unless the document indicates they are contracting as agents. In this case, because the defendant's future absence would render the undertaking practically worthless to the plaintiff, the undertaking was interpreted as having been given personally by the solicitors.

The case shows it may be insufficient to avoid personal liability by providing an undertaking in the terms: 'I undertake on behalf of my client'. It is preferable to say: 'I am instructed that my client undertakes'.[126]

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[122] *National Westminster Finance New Zealand Ltd v Bryant* [1989] 1 NZLR 513, 518–19; *Countrywide Banking Corporation Ltd v Kingston* [1990] 1 NZLR 629, 640 (Wylie J); *Re Nelson* (1991) 106 ACTR 1, 22 (Higgins and Foster JJ); *A Ltd v B Ltd* [1996] 1 WLR 665, 674 (Sir John Vinelott). An undertaking should be fulfilled in best faith: *Re McDougall's Application* [1982] 1 NZLR 141.

[123] Duncan Webb, *Ethics, Professional Responsibility and the Lawyer* (LexisNexis, 2nd ed, 2006) [15.9.17].

[124] (1887) 8 LR 479.

[125] Ibid 481.

[126] Law Institute of Victoria, *Undertakings* (Guideline, 12 October 2022).

Principles behind undertakings

Where an undertaking is ambiguous, it will generally be construed in favour of the recipient and against the solicitor.

In *Auckland Standards Committee 3 of New Zealand Law Society v W*,[127] the following principles of interpretation were said to apply to undertakings:

- being documents of a commercial nature and intended to facilitate the completion of commercial dealings, they should if possible be given commercial significance, and
- undertakings given by solicitors should be construed having regard to their substance and intention, not in a technical or legalistic fashion.[128]

An undertaking given by a solicitor's employee is an undertaking by the solicitor even if the employee did not have proper authority from the solicitor.[129] Principal solicitors should consider clear mandates for employees to give undertakings. Similarly, a partner who gives an undertaking binds the firm's other partners, and the partners are jointly and severally liable for its breach.[130]

Breach of an undertaking

The obligation of a solicitor to perform an undertaking is a fundamental duty. As noted in *Legal Services Commissioner v Wrightway Legal*:

> [i]t 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.[131]

Failing to honour an undertaking may have three consequences:

- contempt of court proceedings,
- disciplinary proceedings, and
- breach of contract.

Contempt of court

Where an undertaking is given to the court, the court has inherent supervisory and summary jurisdiction over solicitors to enforce undertakings.[132] The jurisdiction is aimed at getting the undertaking honoured, not penalising the solicitor. A solicitor must not violate an undertaking, even if instructed to by a client. In *Legal Services Commissioner v Wrightway Legal* the Tribunal found that a better course of action for a solicitor instructed to act against an undertaking '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.'[133]

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127 [2011] NZLR 117.

128 Ibid 11.

129 *Hawkins v Gaden* (1925) 37 CLR 183; *Legal Services Commissioner v King* [2013] QCAT 260.

130 *Hirst v Etherington* [1999] Lloyd's Rep PN 938*; Burbery Mortgage Finance & Savings Ltd (in receivership) v O'Neill* [1995] ANZ ConvR 387.

131 [2015] QCAT 174, [26].

132 *Udall v Capri Lighting Ltd* [1988] QB 907.

133 *Legal Services Commissioner v Wrightway Legal* [2015] QCAT 174, [33]. See also Law Council of Australia Commentary 2024 (n 2) 23.

Disciplinary proceedings

Breaches of undertakings have been characterised as professional misconduct or unsatisfactory professional conduct depending on the circumstances and seriousness of the breach. Caselaw indicates that disciplinary bodies consider the following factors:

- whether the undertaking was given during practice[134] or in a personal matter,[135]
- whether the breach is characterised as unintentional,[136] 'reckless or foolish,'[137] or deliberate,[138] and
- the disciplinary consequences of a breach of undertaking may be mitigated by appropriate remedial action.[139]

In *Legal Services Commissioner v McColm,*[140] following an unintentional breach of an undertaking to hold funds in trust, the practitioner restored the deficiency personally and held the funds pending judicial determination of the parties' entitlements. The solicitor's conduct was found to fall just short of professional misconduct but still amounted to unsatisfactory professional conduct.

Breach of contract

As Dal Pont notes, '[a]n undertaking given to a third party, or to another lawyer, may be enforced by way of civil claim for breach of contract if the requirements of a contract are met',[141] and 'a lawyer assumes no contractual liability to non-clients unless they undertake a contractual relationship with those persons.[142]

For Queensland practitioners, see *Guidance Statement No. 1 – Undertakings*.[143]

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134 *Legal Services Commissioner v Zaghini* [2005] LPT 4.

135 *Legal Services Commissioner v Gregory* [2009] LPT 6 [14]–[18].

136 *Legal Services Commissioner v McColm* [2006] LPT 14.

137 *Legal Services Commissioner v Tunn* [2004] QCA 412 [9].

138 *Legal Services Commissioner v Zaghini* [2005] LPT 4 [5].

139 *Legal Services Commissioner v McColm* [2006] LPT 14.

140 Ibid.

141 Dal Pont (n 8) [22.10].

142 Ibid [22.15].

143 Queensland Law Society, *Undertakings* (Guidance Statement No. 1, 28 March 2023).

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.

Clear and timely advice

The solicitor's duty is to assist the client to understand the relevant legal issues and to make informed choices about potential actions. In particular, the solicitor must provide clear and timely advice on the risks of the transaction and their consequences.[144] The retainer may specify that the advice required is limited to the legal risks and consequences and not commercial, or personal ones. The rule is a specific application of the fundamental ethical duties in rule 4**.**

The duty to advise may arise where advice is not specifically requested.[145]

Alternative dispute resolution

To make an informed choice, a client needs to be aware of alternatives to litigation. Unless the solicitor has reasonable grounds to believe the client is aware of the alternatives, the solicitor must include them in their advice. The rule shifts focus away from litigation by ensuring that an otherwise unaware client makes informed choices on alternatives to the fully contested adjudication of cases.

[144] *Fox v Everingham* (1983) 50 ALR 337; *Henderson v Amadio Pty Ltd (No 1)* (1995) 62 FCR 1.

[145] *Littler v Price* [2005] 1 Qd R 275, [51]; *Yates Property Corporation v Boland* (1998) 85 FCR 84; *Robert Bax and Associates v Cavenham Pty Ltd* [2012] QCA 177.

8. Client instructions

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

Lawful and proper

Solicitors must not engage in dishonest, illegal, or unprofessional behaviour which is likely to be prejudicial to, or diminish public confidence in, the administration of justice. A solicitor must not seek to advance their client's interests in an unfair or dishonest way.[146] Solicitors should not knowingly assist a client, another lawyer, or a third party to breach the law.

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

> It is a basic precept of the legal profession that lawyers owe a duty of honesty and candour to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or misled the Judge as to the true facts, or conceal from the court facts which ought to be brought to the Judger's attention, or knowingly permit a client to deceive the court…Legal practitioners owe this duty when performing any act in the course of practising their profession, not only when making submissions to the court. [147]

Amongst other professional obligations, what are considered lawful and proper instructions will be informed by rules 3, 9, 17, 19, 20 and 21.

Competent instructions

At common law, every adult is presumed to be competent to make decisions unless otherwise proven.[148] The onus of proof is on the person alleging incapacity or incompetence.[149]

The tests for competency depend on the nature of the intended transaction. For those insured with Lexon, the Lexon checklist on capacity states those tests comprehensively. Age, incapacity, mental infirmity, or restraints on the exercise of free will may be factors. The tests for litigation and contract, enduring documents, and wills are discussed below.

For Queensland practitioners, see the Queensland Handbook for Practitioners on Legal Capacity.[150]

Litigation and contract (capacity tests and comment)

The capacity required for a person to participate in legal proceedings is the same for a person to enter into legal transactions. Each party 'shall have such soundness of mind as to be capable of understanding the general nature of what he is doing'.[151] The question is whether the client can understand the nature of the legal consequences of the legal proceedings.[152] This is a subjective test. It is designed to 'ensure that plaintiffs and defendants who would otherwise be at a disadvantage are properly protected'.[153]

The relevant issues will vary from case to case but will generally require that the litigant understands the 'nature of the litigation, the purpose and its possible outcomes, including the risks in costs'.[154]

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146 Dal Pont (n 8) [19.05].

147 [1999] WASCA 115, [12]–[13].

148 *Murphy v Doman* (2003) 58 NSWLR 51.

149 *Dalle-Molle v Manos* (2004) 88 SASR 193; *Pratt v Dickson* [2000] QSC 314.

150 Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (Guide, 1 July 2014).

151 *Gibbons v Wright* (1954) 91 CLR 423, 437.

152 Ibid 438.

153 *Masterman-Lister v Brutton (Nos 1 and 2)* [2003] 1 WLR 1511, [31].

154 *Pistorino v Connell & Ors* [2012] VSC 438, [21] (Dixon J).

When a client becomes incapacitated, their solicitor's authority ends.[155] Even though there is a presumption of the client's capacity to instruct, the solicitor must be satisfied of that capacity. Indeed, where 'circumstances place the lawyer on notice that the client's mental capacity is in issue, active consideration will be required'.[156] If a solicitor is not satisfied that the client has the mental capacity to instruct in the litigation, the solicitor must raise the issue with the court.[157] Supreme Courts have inherent jurisdiction to order that a litigant be independently examined for mental capacity.[158] In *Till v Nominal Defendant*,[159] the plaintiff's action was stayed until his capacity to provide instructions and make decisions about his legal rights was established.

Not only does the authority end, but the solicitor has a duty of care not to follow instructions when a client lacks the mental capacity to give them. In *Goddard Elliott v Fristch,* Bell J found:

> it always to be expected of a lawyer exercising ordinary skill and competence that they are reasonably satisfied of their client's mental capacity to instruct…[and] the lawyer owed the client a duty of care not to take or act on instructions when it knew or should have known that he lacked the mental capacity to give instructions.[160]

Justice Bell went on to find that:

> [w]here the client does not have that capacity the lawyer does not have the authority to represent them in the proceeding, except for certain limited purposes, most particularly perhaps for the purpose of an inquiry into that question. *I say perhaps because they are not really representing the client in that process, but rather assisting the court as an officer of the court*.[161]

Enduring documents

Enduring powers of attorney and advance health directives are enduring documents.[162]

When solicitors are requested to witness an enduring document they provide a certificate stating that, at the time the principal signed (or someone on behalf of the principal), the principal appeared to have the capacity necessary to make the enduring document.[163]

A principal has capacity to make an enduring power of attorney,[164] or an advance health directive, only if the principal:

- is capable of making the enduring power of attorney or advance health directive freely and voluntarily, and
- understands the nature and effect of the enduring power of attorney/advance health directive.[165]

To satisfy themselves that the principal does have the necessary capacity, the solicitor should be familiar with the Queensland Capacity Assessment Guidelines 2020 and the capacity assessment checklist.[166] Although the guidelines were introduced to assist in the assessment of an adult's capacity for the purposes of the *Guardianship and Administration Act 2000* (Qld), the definitions of 'capacity' in the *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld) are relatively the same.[167] It is important to note that the courts are not bound by the Capacity Guidelines.[168]

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155 *Yonge v Toynbee* [1910] 1 KB 215.

156 *Goddard Elliott v Fritsch* [2012] VSC 87, 119 [418].

157 Ibid 166 [568].

158 *Re Magavalis* [1983] 1 Qd R 59, 63–4.

159 [2010] QSC 121.

160 [2012] VSC 87119–121.

161 Ibid 157 [549] (emphasis added).

162 *Powers of Attorney Act 1998* (Qld) s 28.

163 Ibid ss 44(4)(b), 44(5)(c).

164 Ibid s 41(1).

165 Ibid s 42(1).

166 Attorney-General and Minister for Justice, Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (Guideline, 7 April 2021).

167 *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'capacity'); *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity').

168 *Lambourne & Ors v Marrable & Ors* [2023] QSC 219 [62].

The court is required to presume an adult has capacity for a matter until the contrary is proven.[169] This presumption may be rebutted if ‘the contrary is proven’ to the civil standard on the balance of probabilities but also to the *Briginshaw* standard.[170]

The following five principles are contained within the Queensland Capacity Assessment Guidelines:

- **Always presume an adult has capacity.** An adult should not be presumed to lack capacity due to their age, appearance, conduct and personal habits, beliefs, language and communication skills, or the presence of an intellectual disability or physical impairment.
- **Capacity is decision-specific and time-specific.** An adult may lack capacity for some decisions but not others.
- **Provide the adult with the support and information they need to make and communicate decisions.** As explained above, capacity can depend on the level of support and information available to them. All practicable steps should be taken to provide them with necessary information and support before a finding of impaired capacity can be made.
- **Assess the adult’s decision-making ability rather than the decision they make.** A person may make a bad decision or take a risk but still have capacity to exercise the decision-making process.
- **Respect the adult’s dignity and privacy.** Assessment should occur in a place with limited distractions. The person must be informed that they are being assessed and the consequences of the assessment must be explained to the person.[171]

In *Adamson v Enever*,[172] Applegarth J identified some matters that are relevant to whether an adult is capable of making the enduring document freely and voluntarily.[173] These include:

- that the adult making the decision is not being pressured or coerced into making the decision,
- matters which might be considered as affecting the ability to freely and voluntarily make a decision include:
  - family conflict
  - the history of threats or perceived threats of violence
  - the withdrawal of care and support
  - sudden and out of character decisions to make changes to arrangements, and
- merely seeking advice from another does not necessarily mean that the person has not acted freely and voluntarily in making the decision.

Section 41(1)(b) of the *Powers of Attorney Act 1998* (Qld) requires that the adult understands the ‘nature and effect’ of the enduring power of attorney.[174] The matters listed in s 41(2) are inclusive and there may be other matters which are relevant to the consideration of understanding. Please see ss 42(1)-(2) regarding advance health directives considerations.

In *Legal Services Commissioner v Ford*, Fryberg J indicated that the practitioner should be ‘a careful observer carrying out the steps required by the Act and in accordance with the guidelines for the execution of a power of attorney’. [175] Justice Fryberg considered the practitioner

> ought to have been particularly alert to the possibility that there might be some question as to [the adult’s] capacity … She was, to his knowledge, an elderly person. She was in a nursing home. She was cutting her family out of her will. She was leaving everything to the person who was facilitating the arrangements.[176]

169 *Powers of Attorney Act 1998* (Qld) s 111A.

170 *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Lambourne & Ors v Marrable & Ors* [2023] QSC 219 [43].

171 Attorney-General and Minister for Justice, Queensland Government, *Queensland Capacity Assessment Guidelines 2020* (Guideline, 7 April 2021) 9.

172 [2021] QSC 221, [46]–[48].

173 *Powers of Attorney Act 1998* (Qld) ss 41(1)(a)–(b) address enduring powers of attorney and advance health directives.

174 *Lambourne & Ors v Marrable & Ors* [2023] QSC 219 [91].

175 [2008] LPT 12, 21.

176 Ibid.

A solicitor may face disciplinary action for failing to ensure an adult understands and is capable of signing legal documents.[177]

For Queensland solicitors, see [Guidance Statement No. 5 – Witnessing Enduring Powers of Attorney][178] and those insured by Lexon Insurance should refer to their *Wills and EPA Risk Procedure Pack*.

Will instructions

For a will to be valid, the testator must have testamentary capacity which the solicitor must assess when taking instructions. If a client shows signs of lacking capacity, the taking of instructions requires particular care.[179]

The test for testamentary capacity is set out in *Banks v Goodfellow* by Cockburn CJ:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[180]

The time for determining mental capacity is the time of signing the will.[181] However, in *Campbell v Campbell*, Mullins P stated:

> Where there is a decline in the mental condition of a testator between the date instructions were given for the will and the date the will is executed, the critical date for determining testamentary capacity is the date the testator gave instructions for the will, *if the testator accepts when executing the will that it reflects the instructions given by the testator*.[182]

The absence of testamentary capacity is a matter for the court to decide and an assessment of capacity requires consideration of all the circumstances, not just medical evidence.[183] Where there are indications of a possible lack of testamentary capacity, a medical opinion should generally be requested. As de Groot notes, the more detailed the medical opinion, the more probative value it has to the court.[184] The solicitor's duty is not to gather or record only evidence which supports the making of the will, but all information which may be of assistance to the court.[185]

The checklist provided by Kunc J in *Ryan v Dalton; Estate of Ryan*,[186] is likely to be considered the baseline of a solicitor's standard of reasonable care in assessing capacity.[187] The following list combines both the starting point checklist in *Ryan v Dalton; Estate of Ryan* and Catanzariti's commentary.[188] This list provides:

- The client should be interviewed alone and preferably in person rather than remotely or through third parties. If an interpreter is required, ideally it should not be a family member or proposed beneficiary.
- The issue of capacity and the possibility of undue influence should be considered in all cases, if only to dismiss it.

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177 Ibid [22]–[23].

178 Queensland Law Society, *Witnessing Enduring Powers of Attorney* (Guidance Statement No. 5, 17 October 2024)

179 John K de Groot*, Wills Probate and Administration Practice Queensland* (online at 6 November 2024) [206].

180 (1870) LR 5 QB 549, 565. See also *Frizzo v Frizzo* [2011] QCA 308.

181 *Marquess of Winchester's Case* (1598) 6 Co Rep 23; *Arthur v Bokenham* (1708) 11 Mod Rep 148; *Re Crooks (Estate); Ackerman v Brown* (Supreme Court of New South Wales, Young J, 14 December 1994).

182 *Campbell v Campbell* [2023] QCA 3, [23] (emphasis added).

183 *Sullivan v Greig* [2023] QCA 240, [158].

184 John K de Groot*, Wills Probate and Administration Practice Queensland* (online at 6 November 2024) [206].

185 Ibid [206.1].

186 [2017] NSWSC 1007, [107].

187 Therese Catanzariti, 'Dealing with Clients with Potentially Impaired Mental Capacity', *13 Wentworth Selborne Chambers* (Paper, 23 October 2017) 3.

188 Ibid.

- Ask non-leading questions. The questions and answers should be carefully recorded. Some factors to consider are:
  - The client may need additional time to consider and respond.
  - The practitioner should focus on one question at a time.
  - The practitioner should avoid leading questions.
  - The practitioner should ask the client to repeat their understanding of the question.
  - The practitioner should reframe the question if the client doesn't respond to question.
  - The practitioner should require the client to answer the question, not the client's carer, spouse, or child.
  - The practitioner should not expect the client to retain large quantities of information.
  - The practitioner should not give the client too many choices.
- If the client is over 70 years,[189] being cared for by someone, is hospitalised, convalescing or bedridden, is known or suspected to be addicted to drugs or alcohol, has a history of mental ill-health, resides in a care facility or if the circumstances otherwise warrant it a solicitor should seek specialised advice from qualified health professionals as to the capacity of the client to make a will.
- Where there is doubt about capacity, at the time of signing the will, the solicitor should again ask non-leading questions to confirm the client's instructions and understanding.
- It is essential that the solicitor make full, contemporaneous file notes of the attendances, events and discussions which have taken place.

In *Ryan v Dalton; Estate of Ryan*, the Court found that 'a good understanding of the issues surrounding mental capacity is an essential skill for any solicitor who holds himself or herself out as competent to provide legal services to natural persons'.[190]

A solicitor is not required to piece together incoherent instructions. Where there are doubts about the testator's capacity, a lawyer should not draw the will. To do so would expose the solicitor to civil liability or professional discipline.'[191] Court authorised (or statutory) wills have been introduced for persons who lack testamentary capacity. The court may, upon application, make an order for a will to be made, altered or revoked, or partially revoked.[192]

Queensland practitioners insured by Lexon Insurance should refer to the *Wills and EPA Risk Procedure Pack*.

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189 2017] NSWSC 1007, [107].

190 [2017] NSWSC 1007, [105].

191 GE Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) 750.

192 *Succession Act 1981* (Qld) s 21(1).

9. Confidentiality

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

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

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

EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose confidential client information if:

9.2.1 the client expressly or impliedly authorises disclosure;

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

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

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

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

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

Duty to keep information confidential

The duty of confidentiality is both a fiduciary duty to the client and an implied term in the retainer contract.[193] It is a duty not to disclose. The steps required to fulfil the duty will be influenced by factors such as its sensitivity and likelihood of disclosure.[194] The only exceptions are as set out in rules 9.1.1, 9.1.2 and 9.2. A law practice may also have *Privacy Act* obligations.[195]

What is Confidential Information?

The discussion of what constitutes confidential information under rule 9 applies equally to rule 10. There is an important distinction between confidentiality and privilege which will be discussed later.

The Law Council of Australia 2024 Commentary noted[196] that:

> [t]he term 'confidential information' is not defined in the Rules. For the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, Lightman J said:
>
> [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

[193] *Parry-Jones v Law Society* [1969] 1 Ch 1.

[194] GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2021) [10.145]

[195] *Privacy Act 1988* (Cth). See Privacy guidance for reporting entities under the Anti-Money Laundering and Counter-Terrorism Financing Act | OAIC

[196] Law Council of Australia 2024 Commentary (n 1) 44.

> capable, on memory being triggered, of being recalled and c) relevant to the subject matter of the subsequent proposed retainer.[197]
>
> There is no one precise formulation for determining whether information is confidential. However, within the context of the relationship between a solicitor and their client, the concept is not to be construed narrowly.[198] That said, the information must be confidential (as information generally is not protected). Further, the confidential information in question must be identified with precision and not merely in global terms.[199]

The implied contractual term regarding confidentiality embraces 'all communications made by the client about his affairs, and all information learnt directly or indirectly about the client, in the course of the professional relationship'.[200]

In *Legal Practitioners Complaints Committee v Trowell*,[201] the Tribunal distinguished between 'directly' and 'indirectly'. They found that the duty of confidence extends to:

- information about the client that a solicitor learns in the professional relationship;
- information which the solicitor would not have had but for the relationship;
- information of a confidential nature acquired by the solicitor before the relationship of solicitor and client is established; and
- opinions formed by the solicitor about the client's affairs.[202]

In *Legal Services Commissioner v Tampoe*,[203] the solicitor was found to have:

- disclosed information provided confidentially about past criminal convictions in the client's family;
- made statements deriding the client and her family; and
- disclosed some information regarding the client's defence.

As Atkinson J observed:

> This is certainly likely to bring the legal profession into disrepute with the public. In fact, a person acting as a criminal defence legal practitioner cannot under any circumstances invent facts or invent a defence. To say such a thing is scandalous and is likely to cause the public to lose confidence in not only the legal profession but in the criminal justice system, because it suggests that in response to a criminal charge what one should do is find a legal practitioner who will make up a defence for the alleged offender.[204]

In *Trowell*, the practitioner was found guilty of unprofessional conduct and fined after disclosing confidential information to Australian media. The Western Australian court discussed whether a lawyer's disclosure of confidential information in relation to alleged illegal activity was justified:

> In our opinion, disclosure by a lawyer of such confidential information could only be justified if made to the appropriate authority or otherwise in accordance with the exceptions to rule 6.3. It is difficult to see how it could ever justify publication to the press. The exceptions to the rule indicate how confined are the circumstances where disclosure is permitted and the appropriate authorities to whom disclosure may be made.[205]

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[197] *In Re A Firm of Solicitors* [1997] Ch 1, 9–10.

[198] *Nash v Timbercorp Finance Pty Ltd* [2019] FCA 957, [73]–[77].

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

[200] *Re a Firm of Solicitors* [1992] 1 QB 959, 970, cited in *Unoil International Pty Ltd v Deloitte Touche Tohmatsu* (1998) 17 WAR 97.

[201] [2009] WASAT 42, [191] ('*Trowell*').

[202] Ibid [366]–[372].

[203] [2009] LPT 14 ('*Tampoe*')

[204] Ibid 7–8.

[205] *Legal Practitioners Complaints Committee v Trowell* [2009] WASAT 42, [384].

Public domain

Even information in the public domain may be confidential to the client. A solicitor that repeats or confirms information can lend the information credibility it might not otherwise possess.[206] Solicitors should disclose that information with the greatest caution.[207] In *Tampoe,* the solicitor contended that the disclosed information was in the public domain and as result he committed no misconduct. However, it was held that the information had been communicated by the client on a confidential basis and that the solicitor had, in fact, breached his duty to the client in disclosing it on national television.

Imputed knowledge within a legal practice

Solicitors may disclose confidential information to another lawyer in the law practice, or another lawyer representing the same client.[208] Conversely, solicitors in the same legal practice are presumed to share confidential knowledge about a client as there is a 'strong inference that lawyers who work together share confidences'.[209] However, in practice this presumption may not reflect the actual knowledge of solicitors in all law practices and so may be rebutted.[210]

Duration

Once established, the duty of confidentiality, subject to disclosure with the client's consent, is permanent. It continues after the termination of the retainer and even beyond the client's death, upon which the duty is owed to the legal personal representatives of the deceased.[211]

Metadata, technology, and outsourcing

Solicitors should take care when transmitting documents and files to persons or entities not authorised to receive client confidential information. Steps should be taken to check any metadata in documents containing client information to ensure confidential information is not unintentionally disclosed.

Solicitors also need to manage the risks inherent in outsourcing, technology and AI. They should consider issues such as:

- the inability to contract out of or delegate professional obligations to a third-party which includes the use of AI,[212]
- whether there is a need to obtain informed client consent to use outsourced services and technologies that may involve the collection, storage and transmission of client confidential information,
- whether there is a need to comply with the *Privacy Act 1988* (Cth).

The Law Council of Australia 2024 Commentary also added[213] the following additional issues to consider:

- Due diligence on the ability of the outsourced provider to perform the work to the required standard of competence and to provide security of client confidential information.
- Understanding the laws and regulatory issues where outsourcing and technology services are provided in jurisdictions outside of Australia, and the implications for the solicitor's or law practice's professional obligations and liabilities.
- Potential conflicts of interest between clients and the need for effective information barriers.
- Internal practice management systems.
- Avoiding compromise to the duty to the court and the administration of justice.

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206 *Camp v Legal Practitioners Complaints Committee* [2007] WASC 309.

207 Law Council of Australia 2024 Commentary (n 1) 36.

208 See also *Legal Profession (Barristers) Rules 2011* (Qld), rr 111–112 also reflecting the practicalities of sharing confidential information between a client's legal representatives.

209 *MacDonald Estate v Martin* [1990] 3 SCR 1235.

210 See below for commentary on rule 10 about information barriers.

211 *Gartside v Sheffield, Young and Ellis* [1983] NZLR 37.

212 *Valu v Minister for Immigration and Multicultural Affairs (No 2)* [2025] FedCFamC2G 95; *Re Dayal* [2024] FedCFamC2F 1166.

213 Law Council of Australia 2024 Commentary (n 1) 35.

Exceptions to duty of confidentiality

Rule 9.2 sets out the circumstances in which confidential information may be disclosed. Confidentiality may be overridden by the duty 'to comply with the law of the land'.[214]

A solicitor who discloses confidential information in such circumstances should make a comprehensive note of their reasons for doing so. The note should include:

- The circumstances of the disclosure including the date, time, place, the confidential information, and the person to whom the disclosure made.
- The grounds for the disclosure. For example, the details of the harm to be prevented under rule 9.2.5**.**

Authorised by client (rule 9.2.1)

The client may expressly or impliedly authorise disclosure.[215] Where a solicitor has joint clients, consent provided by each client is necessary to waive confidentiality.[216]

The purpose of the express or implied authorisation exception in rule 9.2.1 is to enable disclosure of information:

> precisely so that it can be used or disclosed for its purpose in the representation' [and the duty of confidentiality] 'must be read subject to the lawyer's authority to use and disclose information - albeit for the limited purpose of the retainer – where this is necessary for, or incidental to, the proper and normal conduct of the retainer.[217]

For example, a solicitor engaged to act in a property conveyance is, at least, impliedly authorised to disclose relevant client information to certain parties where it is necessary to complete the transaction. This could include the other party, their solicitors, financial institutions, and government agencies.[218]

Permitted or compelled by law (rule 9.2.2)

The general duty to maintain confidentiality can be overridden by a legally authorised direction to disclose the information. A solicitor may disclose confidential information without the client's authority in limited circumstances when permitted or compelled by law.

Examples include:

- In the case of risk of harm to children, s 197A of the *Child Protection Act 1999* (Qld) provides for a statutory disclosure regime which is likely to allow disclosure in a wider range of circumstances.
- Section 229BC of the *Criminal Code Act 1899* (Qld) imposes a mandatory reporting obligation on all adults if, without reasonable excuse, they believe that a child sexual offence is being or has been committed against a child by another adult.
- Reporting obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.*

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[214] *Parry Jones v Law Society* [1969] 1 Ch 1, 9.

[215] *Marriage of Griffis* (1991) 14 Fam LR 782, 786 (Mullane J); *Mortgage Express Ltd v Bowerman & Partners* [1999] 2 All ER 836, 844 (Millett LJ).

[216] *Singla v Stockler* [2012] EWHC 1176.

[217] Dal Pont (n 8) [10.55].

[218] Law Council of Australia 2024 Commentary (n 1) (n 11) 38.

Privilege

Many warrants, subpoenas, or other processes that override confidentiality obligations do not displace privilege.

Privilege belongs to the client, not the lawyer. A client may assert privilege to resist the handover of documents if the documents containing confidential communication between themselves and their solicitor were made for the dominant purpose of obtaining legal advice or for actual or contemplated litigation.[219] Privilege may only be waived by the client either expressly or impliedly.

If information is privileged, a solicitor must not disclose it unless required by a statute that clearly abrogates the privilege.[220] There are no specific rules on legal professional privilege in the *ASCR*. Privileged communications are always confidential, but not all confidential information attracts legal professional privilege.

Examples

Two examples of disclosure contemplated by rule 9.2.2 are:

- A solicitor may disclose confidential information to establish or collect the solicitor's professional fees and outlays, but this should be strictly limited to information that is required just for that purpose.
- A solicitor facing a disciplinary charge or complaint from a client may disclose the client's confidential information under *Legal Profession Act* s 491(1).[221]

Section 491 does not expressly refer to information that is also subject to privilege. However, it confirms that a solicitor may use the confidential information in a defence against an allegation of impropriety and incompetence brought through a disciplinary complaint. It is also available in a civil claim alleging negligence, or a former client's alleged incompetence in a criminal appeal. By taking these actions, the client may waive their legal professional privilege.[222]

The implied waiver would extend only to information or representations that are relevant to the allegations being made.[223] The waiver is also limited to the purpose of the disciplinary proceedings and for the particular persons who need to see documents for that purpose.[224] In *Goldberg v Ng*,[225] the solicitor relied on the implied waiver of his client's legal professional privilege to disclose documents to the NSW Law Society on the proviso they would not be shown to anyone else. The NSW Law Society then received a subpoena requesting the documents. The High Court decided the implied waiver of privilege was for a limited purpose (the disclosure by the solicitor to the NSW Law Society) and the documents were not to be otherwise disclosed.

Disclosure to obtain ethical or legal advice (rule 9.2.3)

A solicitor may disclose confidential information in a confidential setting for the sole purpose of obtaining advice on their legal or ethical obligations. Examples of such disclosure include:

- In *Legal Services Commissioner v Mullins,*[226] the matter involved a personal injury mediation. The solicitor sought advice from senior counsel to determine whether he should disclose his client's life expectancy following a cancer diagnosis.
- In *McKaskell v Benseman*,[227] the solicitor showed his client's letter to a senior practitioner for advice on an ethical matter. It was not a breach of confidentiality as it was carried out

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[219] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [9].

[220] *Baker v Campbell* (1983) 153 CLR 52.

[221] Dal Pont (n 8)) [10.90].

[222] Stafford Shepherd, 'Keeping secrets – or not: when and why client confidences may need to be shared' (2012) 32(7) *Proctor* 32, 32.

[223] *R v Paddon* [1999] 2 Qd R 387.

[224] *Goldberg v Ng* (1995) 185 CLR 83, 96.

[225] (1995) 185 CLR 83.

[226] [2006] LPT 012.

[227] [1989] 3 NZLR 75.

during ‘a serious and earnest search for assistance in the interests of his clients’.[228] Such a disclosure cannot amount to ‘frivolous or promiscuous revelation’ of the client’s personal information.[229] In the same case, there were additional disclosures at a social occasion. However, rule 9.2.3 requires ‘a confidential setting’ which may disallow disclosures at a social occasion.

- In *Australian Commercial Research and Development Ltd v Hampson*,[230] the defendant was briefed by the plaintiff who briefed 14 other Queen’s Counsels on the same matter. The defendant believed the plaintiff was attempting to corner the market by disqualifying barristers from representing their opponent in the matter. He consulted with the President of the Bar Association for advice. The disclosure of confidential information to the President was permitted, though the court confirmed that the defendant was disqualified from acting for the ANZ Bank in the matter.

Avoiding probable crimes (rule 9.2.4)

A solicitor may disclose confidential information under rule 9.2.4 for the sole purpose of avoiding the probable commission of a serious criminal offence. The exception also exists at common law.[231]

The Law Council of Australia 2024 Commentary noted[232] that

> disclosing confidential client information is a significant professional and moral judgment for a solicitor to make. The gravity of the decision and the consequences of disclosing client confidential information with an improper motive were illustrated by the High Court’s condemnation of the conduct of the barrister turned police informant in *AB and CD, EF and CD*.[233]

In this case, the barrister’s actions in ‘purporting to act as counsel for the convicted persons while covertly informing against them were fundamental and appalling breaches’[234] of her obligations as counsel to her clients and to the court.

Preventing physical harm (rule 9.2.5)

A solicitor must use common sense and sound judgment before disclosing confidential information to prevent serious imminent physical harm to a client or another person.[235] The solicitor should consider:

- the seriousness of the potential injury,
- the imminence and likeliness of the harm occurring, and
- the absence of other feasible ways to prevent the harm.

Information disclosed to the insurer (rule 9.2.6)

The Law Council of Australia[236] noted:

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

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228 Ibid 88.

229 Ibid.

230 [1991] 1 Qd R 508.

231 *R v Cox and Railton* (1884) 14 QB 253. See also *Bullivant v Attorney-General for Victoria* [1901] AC 196.

232 Law Council of Australia 2024 Commentary (n 1) 40.

233 *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2018] HCA 58.

234 Ibid [10]; Law Council of Australia 2024 Commentary (n 1) 40.

235 Queensland Law Society, ‘What should I do if I believe that my client intends to physically harm someone?’; Queensland Law Society, Can I disclose information for the purpose of preventing imminent serious physical harm to my client, Queensland Law Society, Responding to threats of imminent serious physical harm, *Rules and Resources* (Web Page, 2020); David Bowles, ‘When can I report a dangerous or suicidal client?’, *Proctor* (Web Page, 30 April 2024), <https://www.qlsproctor.com.au/2024/04/duty-of-confidence-not-absolute/>.

236 Law Council of Australia 2024 Commentary (n 1) 40.

10. Conflicts concerning former clients

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

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

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

10.2.2 an effective information barrier has been established.

Overview

Rule 10 deals with a conflict between a duty owed to a former client and a duty that is actually or potentially owed to a current or prospective client, known as 'successive representation'. See rule 11 for where a solicitor is simultaneously representing two clients.

For the purposes of rule 10, a 'former client' extends beyond someone who has previously retained the solicitor and may include a person or entity that has previously instructed:

- the solicitor;
- the solicitor's current or former law practice (while the solicitor was at that practice)
- the former 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, who has provided confidential information to the solicitor, notwithstanding that the solicitor was not formally retained and did not render an account.[237]

Ongoing duty of confidentiality

A solicitor who has ceased to act for a client no longer has a fiduciary duty to that client, and may act against the interests of that client, including by acting as a solicitor for others. However, the duty of confidentiality continues after the termination of the retainer and indeed beyond the death of the former client, see rule 9.[238] This means a solicitor cannot disclose any confidential information of the former client. Rule 10 concerns the conflict between that duty of confidentiality and a solicitor's duty to use all their knowledge and skill for the benefit of a second client.[239]

If a solicitor possesses confidential information about a former client and acts for a new client against the former client's interest, and that confidential information is relevant to the new matter, that solicitor is in a duty-duty conflict. This means there is a real risk of misuse of the former client's confidential information.[240]

In *Groupline Constructions Pty Ltd v CDI Lawyers Pty Ltd*, Muir J noted that '[i]t has long been recognised that a solicitor who, with the best will in the world, is determined not to make sure of a client's confidential information for the benefit of another, may subconsciously do so'.[241] In these situations, solicitors must exercise vigilance.

[237] See definition of 'former client' in Glossary.

[238] See also *Groupline Constructions Pty Ltd v CDI Lawyers Pty Ltd* [2024] QSC 209, [43].

[239] This conflict was recognised in *Spector v Ageda* [1973] Ch 30.

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

[241] [2024] QSC 209, [50].

The Law Council of Australia 2024 Commentary[242] notes:

> When taking new instructions from a client which may be regarded as being against a former client's interests, a solicitor or law practice must determine whether it is in possession of any confidential information of the former client that is material and relevant to the new matter. If it is, the solicitor or law practice can only act, or continue to act, if one of the exceptions in Rule 10.2.1 or 10.2.2 applies.
>
> Example 1
>
> A solicitor acted for an individual in fraud proceedings. After being acquitted by the court for lack of evidence, the client admitted to the solicitor he had acted dishonestly. Subsequently, the solicitor is briefed by a lender that intends advancing money to the former client. The solicitor has a conflict of duties. They must preserve the confidentiality of the former client's admission. On the other hand, the solicitor is also duty bound to disclose the risk the information poses to the lender's interests. The solicitor must refuse the subsequent client's instructions in a way that does not compromise the former client's confidential information.

Duty of loyalty

The weight of authority in Australia supports the proposition that, once a solicitor's retainer with a client is at an end, the solicitor does not have any continuing equitable or contractual duty of loyalty to their former client.[243] In *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd*,[244] Beach J conducted a detailed analysis of the controversy over whether a solicitor's duty of loyalty survives the termination of their retainer and observed that there was no 'secure foundation in the authorities' for it.[245]

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

> 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.[246]

In Victoria, Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd*[247] identified that there was an equitable obligation of loyalty that survives the retainer. This is premised on a court's inherent jurisdiction over its officers[248] and appears to be unique to Victoria and Western Australia.[249]

Courts in other jurisdictions such as Queensland prefer an approach similar to *Prince Jefri.* In *Maxwell-Smith v S & Hall Pty Ltd,* Barret JA observed that:

> after the solicitor-client retainer has come to an end, there is no continuing equitable or contractual duty of loyalty on the part of the solicitor to the former client and that the court's jurisdiction to restrain a solicitor from acting is based not on any conflict of duty or interest but on the protection of the confidences of the former client or, as applicable, the protection of the integrity of the judicial process and the due administration of justice. [250]

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[242] Law Council of Australia 2024 Commentary (n 1) 42-43.

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

[244] [2014] FCA 1065.

[245] Ibid [42].

[246] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 235 ('*Prince Jefri*').

[247] [2001] VSCA 248.

[248] See rule 3 above for further discussion about the inherent jurisdiction of the court.

[249] *Walthamstow Pty Ltd v Caratti [No 2]* [2023] WASC 363.

[250] (2014) 86 NSWLR 481, [24] (Beazley P and McColl JA agreeing); *Kallinicos & anor v Hunt & ors* [2005] NSWSC 1181.

Following Barret JA's decision, one commentator wrote:

> 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 academic criticism for stretching fiduciary loyalty 'too far out of shape in pursuit of an objective that is not one of its core purposes'.[251]

Confidential information

The Law Council of Australia 2024 Commentary notes[252] that:

> Classes of information that may be confidential for the purposes of former client conflicts include:
>
> (a) information of a former client that is directly related to a matter for an existing client, for example information belonging to an insurer concerning a potential claim, in circumstances where the solicitor is asked to accept instructions to act for the claimant;
>
> (b) information of relevance to a competitor, such as product pricing or business models; and
>
> (c) in some circumstances, particularly intimate knowledge of a client, its business, personality and strategies.[253]
>
> Whether information falling within the third category can be said to be truly confidential is a question of fact and likely to depend on the client. Individuals or small organisations may have a close and enduring relationship with a solicitor who will consequently obtain much confidential information concerning these more personal factors, and who would have difficulty demonstrating that he or she could act against that client. This is unlikely to be the case for a large corporation or government body, or where there is regular turnover of management with the passage of time, particularly where business practices and strategies are so well-known that they do not constitute confidential information.[254]

Solicitors should note that their opinions of former clients may also be confidential. Relevant examples of former client information being held confidential include:

- *Magro v Magro*,[255] in which a solicitor previously retained by the wife was prevented from representing the husband in contested property proceedings. The wife could not identify particular information that could be prejudicial, however the Court accepted that 'impressions of the wife's personality gained after many hours of confidence could be exploited by a skilful advocate'.[256]
- 'Getting to know you' factors, from which a solicitor might know of a former client's strengths, weaknesses, honesty or lack thereof, reaction to crisis, pressure or tension, and attitude to litigation and settling cases.[257] Even information that is not sourced from a client may be classified as confidential information.
- Where there is a possibility of the action triggering memory of confidential information, that 'unconscious memory' is protected.[258]

The testimony of the solicitor and the former client as to what confidential information was shared is subject to the normal rules of evidence.[259]

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251 Ian Dallen, 'The Rise of the Information Barrier: Managing Potential Legal Conflicts Within Commercial Law Firms' (2014) 88 ALJ 428, 434.

252 Law Council of Australia 2024 Commentary (n 1) 44.

253 See, eg, *Yunghanns v ELFIC Ltd* (Supreme Court of Victoria, Gillard J, 3 July 1998), [10]–[11].

254 Law Council of Australia 2024 Commentary (n 1) 45. See, eg, *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* (2000) 181 ALR 78, [44] (in the context of barristers).

255 (1989) FLC 92-005.

256 Ibid [38].

257 See *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 123; *Yunghanns v ELFIC Ltd* (Supreme Court of Victoria, Gillard J, 3 July 1998), [10]–[11].

258 *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429.

259 *Mills v Day Dawn Block Gold Mining* Co *Ltd* (1882) 1 QLJ 62.

Material and detrimental to the interests of the former client if disclosed

A solicitor, or law practice, can be restrained from acting against a former client if the risk of misusing confidential information is clearly shown, the information is materially relevant to the new matter, and its disclosure would be detrimental to the interests of the former client.

The Law Council of Australia 2024 Commentary notes[260] that:

> [the] test of materiality is an objective one, namely whether the confidential information might reasonably be expected to be material. Materiality and 'detriment' may arise at any time. A solicitor must continually reassess whether confidential information in the solicitor's possession has become material to an ongoing matter and its disclosure may be of detriment to a former client.
>
> In *Fordham v Legal Practitioners Complaints Committee*, a case on cross-examining a former client, Malcolm CJ asked 'whether a reasonable observer, aware of the relevant facts, would consider that the confidential information given to the solicitor by the former client *was being used* by the solicitor to advance the interests of the new client to the detriment of the former client'.[261]

The former client must have an interest in the current matter if they are to prevent the solicitor acting on it. The former client must prove that the solicitor has confidential information, and that the information may be relevant to the new matter in which the interests of the new client may be adverse to those of the former client.[262]

Whether the information is disclosed is an important consideration. Rule 10 prevents the solicitor acting if the information that, if disclosed, might be detrimental to the interests of the former client. It contemplates a situation where:

- information that is confidential to a former client is relevant to a current matter, and
- the disclosure of that information may be detrimental to the former client.

The latter situation need not involve a matter in which the interests of the new client are adverse to those of the former client. The incidental disclosure of the confidential information in a matter not involving the former client may be detrimental enough.

The possible detriment to the former client arises from the possession of information in relation to which the solicitor owes the former client a duty of confidentiality. In *Nasr v Vihervaara*,[263] the Full Court of the Supreme Court of South Australia in setting aside an injunction found that the solicitor had obtained no relevant confidential information while acting for the former client in earlier matters which were factually unrelated to the later proceedings in which the solicitor acted for the former client's de facto partner. Doyle CJ noted that 'theoretical possibility is not a sufficient basis' for a finding that the solicitor possessed relevant confidential information.

Informed consent as an exception to the duty

Rule 10 recognises two alternative circumstances where the potential conflict arising from successive representation may be overcome. One exception is informed consent.

A former client must give informed consent for a solicitor to act where subsequent representation is adverse to a former client. By obtaining informed consent, a solicitor may rebut a potential breach of fiduciary obligation. The question of informed consent is a question of fact, having regard to the circumstances of each case. Advising of the importance of obtaining independent and skilled advice from a third party may be one circumstance which negates a breach of fiduciary obligation.[264] Although the law does not strictly require that informed consent be in writing, it is recommended as it reduces the risk of misunderstandings and is a clear record for the solicitor, should the client claim that informed consent was not given.

[260] Law Council of Australia 2024 Commentary (n 1) 46.

[261] (1997) 18 WAR 467, 488.

[262] *Prince Jefri* (n 256).

[263] (2005) 91 SASR 222.

[264] *Maguire v Makaronis* (1997) 188 CLR 449, 466-96.

Information barriers as an exception to the duty

Rule 10 also recognises that where there are potential conflicts arising from successive representation, they may be overcome using information barriers. This involves a law practice setting up mechanisms to attempt to quarantine some sections of the practice from others.

If a successful information barrier is established, then confidential information about a former client is effectively quarantined. This allows other sections of the practice to act in circumstances where the disclosure of confidential information may be adverse to a former client. However, the tests for a successful information barrier are rigorous. A barrier must prevent both deliberate and inadvertent disclosure of confidential information.[265]

Required strength of information barriers

The principles by which an effective information barrier can be raised in a law practice were set out by Lord Millett in *Prince Jefri.* Given that the risk of disclosing or using confidential information is an avoidable one, because a law practice does not have to take on the later client, Lord Millett found it difficult to justify exposing the former client to any risk of disclosure or use of the information. He noted that there is an unqualified duty to preserve confidentiality, not merely to take reasonable steps to preserve it:

> No solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.[266]

Accordingly, an information barrier is not legally effective unless the different sections are almost permanently, physically, and operationally segregated.[267] Relevant undertakings by people who possess the information are essential, but insufficient by themselves.

Whether an information barrier is sufficient may also depend on the practice area.

- **Civil matters:** For the solicitor to rely on an information barrier and act for the later client in civil matters, there must be no real or sensible possibility of the practice misusing the confidential information.[268] In *Prince Jefri* Lord Millett concluded that although 'the risk must be a real one, and not merely fanciful or theoretical', it need not be substantial.[269]
- **Family law matters:** In family law matters, the court requires the applicant to demonstrate a real as opposed to theoretical possibility that confidential information is at risk.[270] In *Osferatu*, the court indicates a willingness to accept an information barrier as a solution to the problem posed by a migratory solicitor.
- **Criminal matters:** The similar higher standard, protecting against even theoretical risks, is expected in criminal proceedings. In *Mallesons Stephen Jaques v KPMG Peat Marwick*, Ipp J emphasised the importance 'not only that justice is done, but also that it is apparent that it is done'.[271]

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265 *Asia Pacific Telecommunications Limited v Optus Networks Pty Ltd* [2007] NSWSC 350.

266 *Prince Jefri* (n 256) 227.

267 For example, *Groupline Constructions Pty Ltd v CDI Lawyers Pty Ltd* [2024] QSC 209, [74].

268 *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357.

269 *Prince Jefri* (n 256) 236–237

270 *Osferatu v Osferatu* [2015] FamCAFC 177.

271 (1990) 4 WAR 357, 374. See also *R v Pham* [2017] QCA 43.

Guidelines for information barriers

The QLS Information Barrier Guidelines[272] specify a number of measures that should be put in place if a law practice is to act against a former client without being in breach of rule 10**.** These Guidelines were prepared by the Law Society of NSW in consultation with the Law Institute of Victoria and have been adopted in Queensland, the ACT, NSW and Victoria, and should be strictly followed. They include:

- the appointment of a compliance officer,
- obtaining the consent of the current client that confidential information held for the former client is not disclosed,
- identifying any people in the practice who possess information about which a duty of confidentiality is owed to the former client,
- undertakings by those people not to disclose information to others in the practice,
- the physical segregation of people who acted for the former client and documents held in relation to that client,
- a continuing education program in the practice in relation to these duties, and
- careful segregation of IT resources available to the 'screened' team.

Undertakings in information barriers

The Guidelines require the giving of undertakings by anyone in the practice who has acted for the former client. The undertakings confirm that:

- they understand they may possess (or come to possess) confidential information,
- they understand they must not discuss that information or the matter generally with any other person within the law practice,
- they have not previously had such discussions or done anything which would amount to a breach of the information barrier,
- they will inform the designated compliance officer immediately upon becoming aware of any possible breach of the information barrier, and
- if they are required to produce documents, for example, in order to comply with a subpoena or a notice to produce, they will forward the relevant material (including the former client's physical or electronic files) to the compliance officer.

These undertakings are a necessary element of an acceptable information barrier.[273] However, they are not sufficient on their own, because no matter how strong the integrity and standing of those making the undertakings are, inadvertent disclosures may still occur.

In *Mallesons Stephen Jacques v KPMG Peat Marwick*,[274] the Court accepted that the solicitors giving the undertakings were of the highest integrity and standing. However, Ipp J held that the duty of a fiduciary to avoid a conflict of duties to different clients was absolute and inflexible, and could not be cured by an undertaking.

In *Fruehauf Finance Corp Pty Ltd v Feez Ruthning (a firm)*,[275] Lee J accepted that an information barrier allowed a law practice to act against a former client because, amongst other things, the solicitors involved gave undertakings not to share the former client's information and had not in fact disclosed any such information.

A breach of an undertaking may be grounds for an order that the solicitor not represent a new client. In *Asia Pacific Telecommunications Limited v Optus Networks Pty Ltd*,[276] the law practice had previously taken instructions from a company related to the applicant against the respondent. The practice sought

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[272] Queensland Law Society, 'Information Barrier Guidelines', *Rules and Resources* (Web Page, 2023) <https://www.qls.com.au/practising-law-in-qld/ethics/australian-solicitors-conduct-rules/rules-resources/information-barrier-guidelines>.

[273] *Prince Jefri* (n 256) 530.

[274] (1990) 4 WAR 357.

[275] [1991] Qd R 558.

[276] [2007] NSWSC 350.

to represent the respondent in a new matter and established an information barrier that included sworn undertakings from solicitors who had acted for the former client that they would 'not undertake in any capacity any work or other activity' concerning the new matter. However, a partner who had given the undertaking signed a consent order for the litigation between the applicant and the respondent, because there was a shortage of people in the office who had signing authority.

This was regarded as a breach of his undertaking, although it was at 'the lower end of the spectrum of involvement' in the proceedings, was inadvertent, and there was no disclosure of confidential information.[277] However, the breach led Bergin J to conclude that the information barrier was not as strong as had been thought and that the risk of disclosure was now real and not fanciful.[278] As a result, the firm was restrained from acting for the respondent.

For Queensland practitioners, see [*Guidance Statement No. 1 – Undertakings*].[279]

The inherent jurisdiction to restrain a solicitor from acting for a client

The court has an inherent jurisdiction to supervise the conduct of solicitors as officers of the court. A court may use its inherent jurisdiction to decide that it is in the interests of justice to restrain a solicitor from acting for a particular client.

The circumstances in which a court should exercise this jurisdiction were well-described by Brereton J in *Kallinicos v Hunt*.[280] In this decision, Brereton J found that:

- The relevant test is whether a ‘fair-minded, reasonably informed member of the public’ would conclude that the proper administration of justice requires that a solicitor should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice.
- The jurisdiction of the court is to be regarded as exceptional and to be exercised with caution, with weight given to the public interest in a litigant not being deprived of their solicitor of choice without due cause.
- The timing of the application is relevant in that the cost, inconvenience or impracticality of requiring solicitors to cease to act may provide a reason to refusing to grant relief.[281]

Examples of where the court has exercised the inherent jurisdiction include:

- where a solicitor has a personal (whether financial, personal or reputational) stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees,[282]
- a perception that the solicitor is changing sides,[283] and
- where a solicitor's professional conduct comes under scrutiny.[284]

The onus of providing that confidential information could be misused rests with the plaintiff who is seeking to restrain a former solicitor from acting. This was established in *Prince Jefri* which provided that

> it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.[285]

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277 Ibid [27].

278 Ibid [41].

279 Queensland Law Society, *Undertakings* (Guidance Statement No. 1, 28 March 2023).

280 (2005) 64 NSWLR 561.

281 Ibid [76]. See also *Potts v Jones Mitchell & Anor* [2004] 2 Qd R 298.

282 *Mitchell v Burrell* [2008] NSWSC 772. See also *R & P Gangemi Pty Ltd v D & G Luppino Pty Ltd & Anor* [2012] VSC 168.

283 *Cleveland Investments Global Ltd v Evans* [201] NSWSC 567.

284 *Bahonko v Nurses Board of Victoria (No 3)* [2007] FCA 491.

285 *Prince Jefri* (n 256) [235].

This issue was also discussed in *Osferatu v Osferatu.*[286] The Court held that a party seeking to restrain a solicitor carries the burden of proof and must clearly outline the information at risk and how misuse of that information would cause detriment.[287]

If a former client has proved a solicitor possesses confidential information, the next step is to assess the likelihood that the relevant information may be disclosed. In *Osferatu v Osferatu* the Court concluded that '[t]he consideration should be whether there is a real risk of misuse as opposed to one which is merely fanciful'.[288]

The risk of disclosure is to be determined by considering the risk of any protective measures taken or proposed by the solicitor or his or her new firm. The evidentiary burden regarding those protective measures falls squarely on the firm responsible for implementing them.[289]

When deciding whether to use their inherent jurisdiction to restrain a solicitor, a court must balance:

- the nature of the information against a consideration of the person to whom the information was given,
- when the information was given,
- the relevance of that information to the current proceedings,
- the risk of disclosure, and
- any proposed protective measures.[290]

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[286] *Osferatu v Osferatu* [2015] FamCAFC 177.

[287] Ibid [26]–[28].

[288] Ibid [39].

[289] Ibid [33].

[290] Ibid [35].

11. Conflict of duties concerning current clients

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

Duty of loyalty

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

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

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

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

Duty of confidentiality

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

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

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

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

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

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

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

Overview

Rule 11 deals with concurrent client conflicts, also known as 'duty-duty' conflicts. The rule only allows a solicitor to act for two clients in the same or related matter where they have the fully informed consent of all clients. Rule 11 is also relevant where a solicitor is acting for two clients in unrelated matters where there is confidential information from one client that becomes relevant to the other. In such cases, they are required to only proceed when consent from all clients is provided to disclose and use that information for the benefit of the other, or if an effective information barrier can be established.

Duty to avoid conflicts between current clients

Rule 11.1 recognises that conflicts may occur and should be managed. Solicitors should employ practice management skills to manage actual or perceived conflicts of interest before they arise. Examples of managing real or potential risk include identifying areas of risk, educating staff about conflicts, and developing policies to avoid and respond to conflict situations.

In most cases, the conflicting duties will be the duty to maintain the confidences held for one client against the duty to use all the solicitor's knowledge and skill for the benefit of a second client.[291]. The risk of conflict is heightened where the solicitor acts for separate clients in the one matter. These are described as 'same matter conflicts' and have been described as going to 'the very heartland of fiduciary law'.[292] In *Hilton v Barker Booth and Eastwood (a firm)*,[293] the solicitors did more than allow the possibility of conflict in acting for both vendor and purchaser in a conveyance. The solicitors knew that the purchaser had been a bankrupt, was convicted of fraudulent trading and did not disclose this to the vendor. After the transaction collapsed, the vendor successfully sued the solicitors for breach of their contractual duty.

As with rule 10, rule 11 reflects the common law obligation to avoid conflicts and may apply in scenarios more nuanced than *Hilton v Barker Booth and Eastwood.* A breach of the obligation to avoid conflicting duties between two existing clients can result in a claim for civil compensation or an injunction. The solicitor may also be subject to disciplinary proceedings.[294] In some circumstances, acting for two or more parties in a transaction will result in a deterrent excess being applied by the professional indemnity insurer should a claim arise from that transaction.

The court also has an inherent jurisdiction to supervise solicitors as officers of the court and can restrain a practitioner from acting.[295]

Duty to withdraw from one or both clients

Rule 11.2 states that the solicitor 'must not act' unless the exception at rule 11.3 applies. This means that the solicitor should not act for either client, except as permitted by the rules. At common law, where a significant possibility of a conflict between the duties owed to both clients arises, the proper course for the solicitor to take is to withdraw from acting for both. It is not acceptable to withdraw from acting for only one of the clients, as in doing so the solicitor is likely to be acting in breach of duties that were owed to the other.[296]

Informed consent

Rule 11.3 acknowledges that solicitors may act for two or more existing clients in the same or related matter so long as both of the clients have given informed consent. The rule mirrors the common law, as expressed in *Farrington v Rowe McBride & Partners*:

[291] *Spector v Ageda* [1973] Ch 30.

[292] *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 47–8.

[293] Ibid.

[294] See, eg, *Re X* (Queensland Statutory Committee, 3 June 1997) 388.

[295] See above for rule 10 discussion about the inherent jurisdiction of the court.

[296] *Maguire v Makaronis* (1997) 188 CLR 449, 465.

> A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting ... And there will be some circumstances in which it is impossible, notwithstanding such disclosure for any solicitor to act fairly and adequately for both.[297]

Accordingly, there will be cases in which acting for more than one client in the same or related matter will create irreconcilable duties between clients and it will be improper to act, regardless of whether consent has been obtained. Though the clients may be willing to permit multiple representation, it is the solicitor's 'integrity and common sense' that will answer whether or not to proceed.[298]

The existence of informed consent negates what would otherwise be a breach of fiduciary obligations.[299] The High Court has observed that:

> if the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies, it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. The circumstances of the case may include (as they would have here) the importance of obtaining independent and skilled advice from a third party. On no footing could it be maintained that the appellants had taken the necessary steps of this nature to answer the charge of breach of fiduciary duty. However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty.[300]

What is informed consent?

Informed consent requires transparency, full disclosure of all material issues and frankness to all the parties in any proposed multiple representation. What fully informed consent constitutes is a question of fact in all the circumstances of each case. There is no precise formula.[301]

In 'same matter conflicts', the following test was set by *Clark Boyce v Mouat*:

> [C]onsent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act.[302]

It is recommended that solicitors do the following when obtaining informed consent:

- explain (in writing) in language the clients will understand, and with consideration of their experience of legal matters:
  - the actual or potential conflict in the duties owed,
  - the risks and consequences of the multiple representation,
  - the advantages and disadvantages of the multiple representation.
  - how issues of confidentiality will be dealt with,
  - available alternatives to the multiple representation, and
- where the circumstances of the case require it, recommend that the clients obtain independent and skilled advice from a third party.[303]

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297 [1985] 1 NZLR 83, 90 (Richardson J).

298 *Lie Hendri Rusli v Wong Tan and Molly Lim (a firm)* [2004] 4 SLR (R) 594, [47].

299 *Maguire v Makaronis* (1997) 188 CLR 449, 467.

300 Ibid [43].

301 Ibid 466.

302 [1994] 1 AC 428, 435 (Lord Jauncey).

303 *Maguire v Makaronis* (1997) 188 CLR 449 466–7; *Commonwealth Bank of Australia v Smith* (1991) 42 FLR 390.

Preliminary consent to disclosing information that is confidential may be needed. There is no implied right to disclose information because it is required to secure consent. Neither would it be an answer to failing to make full disclosure that you were unable to obtain the necessary consent to do so. If there is information that should be disclosed that cannot be, informed consent will be impossible to achieve.

Consent in writing

Although rule 11.3 does not stipulate that the informed consent be obtained in writing, it is strongly recommended that solicitors obtain the consent of both parties in writing where possible and appropriate. If not obtained in writing the solicitor ought to make a file note of it. The consent should also be documented with the explanations, information, and disclosures made.

In *Legal Services Commissioner v Taylor*,[304] the solicitor acted for both vendor and purchaser in a conveyance. In disciplinary proceedings, the solicitor admitted that it should have been apparent to himself and his conveyancing clerks that the clients' interests were in conflict, and that he failed to properly supervise his clerks to ensure that he ceased to act for both parties immediately upon the conflict arising. Although he had later told his clients of the conflict, he failed to provide them with that information in writing and failed to obtain written acknowledgement from the parties that he was acting on behalf of both. The solicitor was found to have committed unsatisfactory professional conduct.

Multiple representations by type of matter

Cases and other guidelines provide some assistance in managing risks of conflict in conveyancing, contentious, and criminal matters.

Conveyancing

Solicitors should avoid acting for both parties in conveyancing transactions unless the informed consent of each party to the transaction is obtained before retainers are accepted. It is noted that in Queensland, unlike some other jurisdictions, this is not a common practice. Relevant cases include:

- In *Clark Boyce v Mouat*,[305] a solicitor acted for both a mother as mortgagor and a son as guarantor. The solicitor advised the mother to obtain independent legal advice because if her son failed to meet the mortgage payments, she would lose her own property. The solicitor was held to have made adequate disclosure and have secured fully informed consent to the transaction.
- In *Re Yarwood*[306] and in *Re Evans*[307] the Tribunal ultimately dismissed disciplinary charges against two solicitors but observed that it is undesirable for solicitors to act on behalf of both the vendor and the purchaser in the one transaction. Although technically permissible to act for both, informed written consent should be obtained from both parties.

The deterrent excess in the Lexon Master Policy applies in circumstances where a claim arises from a transaction in which a practitioner acted for:

- both vendor and purchaser,
- both lender and borrower, or
- both lessor and lessee.[308]

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[304] [2011] LPC 003.
[305] [1994] 1 AC 428.
[306] [2003] SCT 91.
[307] [2003] SCT 93.
[308] Unless the firm is acting as the unpaid agent of another law practice for the purposes of effecting settlement. See the most recent Lexon Master Policy for current wording.

Contentious litigation

In litigation, the duty to avoid conflicting duties to two or more clients is more onerous. Parties to litigation who have potentially adverse interests must be separately represented. A solicitor may act for two or more parties in litigation only if the parties are on the same side in the proceedings and their interests coincide. If either of these conditions are not met, the leave of the court must be obtained to represent more than one of the parties. This is an express requirement under Commonwealth rules for family matters.[309]

Criminal matters

The representation of multiple criminal defendants produces an inherent conflict of duties, as each co-accused may attempt to incriminate another. In addition, a solicitor may be obliged to inform a client of the benefits of informing on a co-defendant and the benefits of entering an early plea of guilty. When an actual or foreseeable conflict of interest arises, it cannot be cured by information barriers or by briefing of separate counsel to represent each co-accused client.

The leading decision of *R v Pham* [2017] QCA 43 states:

> [58] It has been a longstanding, reasonably common practice for a solicitor's firm or a legal practitioner to act for one or more co-defendants in criminal matters. As the appellant submits and the ASCR recognise, it is a practice fraught with danger.
>
> [59] Even if there is no immediately apparent conflict of duties concerning the co-defendants, conflicts can easily arise during trials, which are notoriously unpredictable.
>
> [60] The practice is apt to undermine public confidence in the legal profession and should be discouraged. Unless there is no possibility of a conflict existing or emerging, and such cases will be rare, co-defendants should have separate legal representation. These observations apply equally to solicitors and barristers. If legal practitioners persist in acting for co-defendants, they must be assiduous in meeting their arising ethical responsibilities.

The Law Institute of Victoria provides guidelines for representing co-accused clients and recommends that the solicitor should:

- advise the clients as soon as is reasonably practicable in relation to the risks and consequences that may flow if a conflict subsequently arises in the course of the proceedings,
- record the fact of such advice in writing, and
- provide the co-accused clients with a copy of the notice 'Information for persons jointly charged' which states:

  > You may all be represented in court by the one solicitor or firm of solicitors only if there is no current or likely future conflict of interest between you and any other person who has been charged with you …
  >
  > If there is, or is likely to be, any disagreement between you and any other person charged with you about your role in the crime, then you should be represented in court from the start of your case by a different solicitor or firm of solicitors to any other person charged with you.[310]

Queensland Solicitors are referred to: *Guidance Statement No. 12 – Conflicts of Interest in Criminal and Crime and Corruption Commission Proceedings*.

Confidentiality to be protected by information barriers

Rule 11.4 allows a legal practice to represent clients in conditions that would otherwise amount to a conflict where the informed consent of both clients is obtained, or an effective information barrier is in place.

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309 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*

310 Law Institute of Victoria, *Guidelines for the Representation of Co-defendants in Criminal Proceedings* (Guideline, 12 October 2022) 2.

The Law Council of Australia 2024 Commentary notes[311] that:

> In the Rule 11.4.1 situation, the one solicitor (or same set of solicitors) is able to act for each client in the same or related matters as the form of each clients' consent removes the potential for confidential information conflicts as between those clients.
>
> Importantly, it is only in the Rule 11.4.1 situation (i.e. where the consent permits the sharing and use of confidential information by the solicitor as between the concurrent clients) that the one solicitor (or the same set of solicitors) can act for each client in the same or related matters.
>
> In the Rule 11.4.2 situation, an effective information barrier must be established to protect each clients' confidential information and, as such, the one solicitor (or the same set of solicitors) cannot act for each client in the same or related matters. Rather, for an effective information barrier to be established in relation to the same or related matters, different solicitors within a law practice must act for each client in accordance with strict information barrier (separation) protocols to ensure that the solicitors on each side of the information barrier act separately and independently from each other.

The commentary for Rule 10, above, discusses information barriers in more detail.

Conflict arising during course of matter

In summary, rule 11.5 provides that if a legal practice is representing two or more clients in a matter and a new conflict arises between duties owed to them, then the practice may only continue to act (at all) if no duty of confidentiality is put at risk.

As always, all parties must give their informed consent. But even with that consent, the legal practice must be satisfied that confidential information will not be disclosed. The rule should only be relied on in the rarest circumstances. Solicitors finding themselves in positions of actual conflict should withdraw from acting for both clients.[312]

The relevant test was set out in *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*:

> [I]n my opinion, in every case involving an application to restrain a solicitor from acting, it is a question of balancing the competing considerations – one party's right to be represented by solicitors of its choosing against another party's right not to have its (former) solicitors acting against it in the same or substantially the same proceeding.[313]

Queensland Solicitors are referred to: *Guidance Statement No-17- Conflicts of interest in work health safety investigations.*

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[311] Law Council of Australia 2024 Commentary (n 1) 53–54.

[312] See above for rule 11.2 commentary.

[313] [2002] VSC 324, [25] (Habersberger J).

11A. Short-term legal assistance services

11A.1. If a solicitor providing short-term legal assistance services forms a reasonable belief that the solicitor cannot screen for conflicts of interest due to circumstances where it is not reasonably practicable, the solicitor must ensure, to the extent reasonably practicable, that —

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

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

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

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

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

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

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

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

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

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

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

11A.4. In this Rule:

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

Overview

The Law Council of Australia 2024 Commentary provides the following guidance[314] on rule 11A:

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

[314] Law Council of Australia 2024 Commentary (n 1) 66–67

Rule 11A is not directed towards the application of the conflict of interest principles set out in Rules 9 and 10 in the provision of 'unbundled' or 'limited-scope' legal services generally. 'Unbundling' separates the package of legal services that may be required to handle a dispute [or matter] into components, and the client and lawyer agree to what parts of the package the lawyer will provide.[315] In other words, a limited range of legal services is being provided under an agreement negotiated beforehand between the solicitor or law firm and the client.

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

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

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

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

The Rule has three elements:

1. A reasonable belief (that)
2. Circumstances exist where it is not reasonably practicable to screen for conflicts (because)
3. The time required to do so may result in a real risk of being denied access to legal assistance.

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

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

[315] Ibid

Application

Legal assistance service provider

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

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

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

No continuing legal advice or representation in the matter

The second limb of the definition of short term legal assistance services is that both the client and the solicitor have the expectation that the service to be provided is not part of or will not lead to continuing legal advice or representation in the matter. This specifically means that there is a mutual expectation that the solicitor will not provide continuing legal services in the matter, nor take carriage of the matter in an ongoing, representative capacity.

As a result, the definition of 'short term legal assistance services' excludes limited-scope or unbundled legal services not provided as a legal assistance service. It also excludes situations where there has been a grant of legal aid to enable a legal assistance service provided to provide full representation to a legal aid client.

The Law Council of Australia 2024 Commentary continues:[316]

> Rule 11A.1 is the substantive provision of Rule 11A, with two elements:
>
> i. if solicitor has formed a reasonable belief that because of circumstances it is not reasonably practicable to screen for conflicts of interest as the time required to do so may result in a real risk of the client being denied access to legal assistance;
>
> the solicitor may provide the legal assistance service, provided that:
>
> ii. the solicitor has disclosed the nature of the services to the client, there is no actual or potential conflict of interest, and the client has given informed consent to the provision of the service.
>
> The circumstances in which it would not be reasonably practicable to screen for conflicts of interest will vary according to the setting in which the legal assistance service is to be provided. One example is the combination of lack of access to communications technology and advance notice of potential clients in prison outreach clinics.
>
> Rule 11A.1 requires that the solicitor form a *reasonable belief*. A prudent solicitor should ensure that a record is kept as the existence of the circumstances and factors that lead to the reasonable belief that there would be a real risk of the client being denied access to legal assistance.
>
> Rule 11A.2 reflects the general principles in Rules 10 and 11 that a solicitor or law practice should not act for two or more clients in a matter where there is a conflict or potential conflict between the interests of those clients. A conflict may arise because the interests of two current clients are adverse (Rule 11). A conflict may also arise because there is confidential information of a current client (Rule 11) or of a former client (Rule 10) that is material to the matter of the client currently to receive the legal service, which would be detrimental to the interests of the other current client or former client if disclosed.

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[316] Law Council of Australia 2024 Commentary (n 1) 68–69.

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

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

In the context of the provision of short term legal assistance services, where it is quite possible that the two parties to a dispute may each seek short-term legal assistance, it is prudent practice to inform a client of this possibility before providing the legal assistance service, that the short-term legal assistance service will be provided without disclosure of confidential information to any other person, and that the client consents to the provision of the legal assistance service on this basis.[317]

[317] Ibid.

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 mut not do anything:

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

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

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

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

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

UNLESS the client is:

(i) an Authorised Deposit-taking Institution;

(ii) a trustee company;

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

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

(v) the employer of the solicitor.

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

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

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

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

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

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

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

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

(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.

Conflict with solicitor's own interests

Rule 12.1 captures the fundamental principle underlying every fiduciary relationship between a solicitor and a client, which is that a solicitor must never secure a benefit at the client's expense during work defined by the retainer. The only exception is the receipt of fair and reasonable professional fees to which the solicitor is legitimately entitled.[318]

Solicitors must be vigilant in their dealings to avoid actual and potential conflicts between their own interests and their duty of 'undivided loyalty' to their client. In *O'Reilly v Law Society of NSW,* Clarke JA expressed that 'whenever a solicitor, either personally or through his company, seeks to deal with his own client, then the potential for conflict is so great that it will only be in rare cases that such a dealing could be acceptable.'[319]

Rule 12.1 supports rule 4.1.1 in reflecting the solicitor's fundamental duty to act in the best interests of a client in any matter in which the solicitor represents the client. A solicitor cannot misuse their influence over a client, actively or passively.[320] A solicitor must promote the best interests of the client, even where that will be to a personal disadvantage. If there is a conflict with the solicitor's personal interests or their associates, then the solicitor cannot act except as permitted by rule 12. The associates may be professional, financial, or family.[321]

318 *Law Society of NSW v Harvey* [1976] 2 NSWLR 154. See also Law Council of Australia 2024 Commentary (n 1) 71.

319 (1988) 24 NSWLR 204, 219.

320 See, eg, PD Finn, *Fiduciary Obligations* (The Law Book Company Ltd, 1977) 161–168.

321 See Glossary to the ASCR.

The circumstances in which a conflict between duty and interest might arise are varied, and can include transactions involving:

- the charging of excessive fees or disbursements (see rule 12.2),
- lending to or borrowing from a client (see rule 12.3),
- a will or other instrument benefiting the solicitor (see rule 12.4),
- receiving or paying a referral fee or commission (see rule 12.4),
- inter vivos gifts and benefits to the solicitor,[322]
- conducting a managed investment scheme,[323]
- buying from or selling to a client,
- investment in a client's business,
- the exercise of a power of attorney, and
- the representation of friends and family members.

Accepting gifts

Whether a solicitor can accept a gift from a client will depend on the nature of the gift and whether the solicitor is continuing to represent the client. For example, if the solicitor's retainer has ended, or a transaction has been completed, then a modest gift given in gratitude by the client is acceptable.[324]

Benefits in excess of fair remuneration

Other than as expressly permitted by rule 12, a solicitor must not gain benefit in excess of fair remuneration for legal services. Any excess benefit is presumed to be an exercise of undue influence over the client (see below). Rule 12.2 reflects the civil law prohibition against a fiduciary deriving a financial advantage through undue influence and extends to any financial dealings with their clients beyond charging a fair and reasonable fee. If a breach is found, the transaction may be set aside in equity with damages and an account of profits, in addition to any disciplinary charges.[325]

Presumption of undue influence

The nature of the solicitor and client relationship is one of trust and confidence. As with all fiduciary relationships, there is a presumption of undue influence that stems from the imbalance in power and knowledge.[326] Any excessive gain by the solicitor is presumed to be a result of the undue influence. That presumption can only be rebutted by the client receiving full disclosure and independent advice. Any apparent common intention on the part of the solicitor and the client is irrelevant.

Fair remuneration

The negotiation of legal costs is the transaction in which the solicitor's superiority of knowledge and experience, and therefore influence, is most apparent. The client's interests are therefore protected in equity, by the *Legal Profession Act* and by the *ASCR*. The twin objectives of consumer protection and professional standards are met by the costs disclosure and assessment regime of pt 3.4 of the *Legal Profession Act*. The non-exclusive grounds for the setting aside of costs agreements are instructive as to what are 'fair and reasonable' costs.[327]

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322 *Re a Solicitor* [1975] QB 475.

323 *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204.

324 See below page 60 for further discussion about gifts.

325 *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154.

326 *Wright v Carter* [1903] 1 Ch 27, 50.

327 *Legal Profession Act* (n 5) s 382(2).

The charging of excessive legal costs can constitute unsatisfactory professional conduct or professional misconduct.[328] The court also has an inherent jurisdiction to supervise the conduct of solicitors in relation to costs and address any breach.[329]

Borrowing from clients

Rule 12.3 prohibits a solicitor from borrowing from a client, or from a former client who continues to rely on the law practice for advice relating to investments. The prohibition operates regardless of any consent from the client.

Exceptions to the prohibition on borrowing

Rule 12.3 also contains exceptions. The solicitor may avoid disciplinary action where the client is:

- the solicitor's employer,
- an authorised deposit-taking institution under the *Banking Act 1959* (Cth) (such as a bank),
- a trustee company,
- the responsible entity or custodian of a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001* (Cth) or a custodian for such a scheme, or
- the solicitor's associate, and all fiduciary duties are discharged (these duties are discussed below).

In all these cases, the solicitor still owes the fiduciary obligations noted above to obtain the client's fully informed consent to the terms of the loan.

Satisfying the fiduciary duty

The fiduciary obligation to a client in respect of borrowing, where permitted under one of the exceptions noted above, is particularly onerous. The solicitor must show that all steps have been taken to protect the client's interests. The duty is discharged if:

- the solicitor has given full and frank disclosure of their personal interest,
- has advised the client to obtain independent advice, and
- has secured the client's fully informed consent to the terms of the loan.[330]

These actions prevent solicitors taking advantage of clients by providing inadequate security, poor terms or interest, or by exposing the client to excessive risk.

Even if there is technical compliance with rule 12, it is still possible that a solicitor could act in a way that places their interest above a client and could still result in a disciplinary application for breach of the fiduciary duty.[331]

Rule 12.3 prohibition compared with common law

The prohibition in rule 12.3 is significantly stricter than the solicitor's fiduciary duty expressed in common law as borrowings are prohibited unless allowed by the express exceptions in the rule. Breaches of the predecessor rule have led to solicitors being removed from practice.[332]

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[328] *Legal Profession Act* (n 5) s 420(1)(b). See also *Council of the Queensland Law Society v Roche* [2004] 2 Qd R 574; *Legal Services Commissioner v Duffield* [2007] LPG 05/07; *Law Society of New South Wales v Foreman* [1994] 34 NSWLR 408.

[329] *Re Morris Fletcher and Cross' Bill of Costs* [1997] 2 Qd R 228.

[330] *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154

[331] See, eg, *Legal Services Commissioner v Hoolihan* [2006] LPT 003, 9–10.

[332] *Queensland Law Society Rule 1987* (Qld) r 86; *Re Barry* SC 372, 30 October 1996; *Re Andersen* SCT 74, 13 August 2002.

No amount of client consent can cure the breach of professional standards. The following are examples of prohibition borrowing:

- In *Re X*[333] a solicitor advised the client to obtain independent advice but the client refused to do so. The solicitor was still found to be in breach of the former rule 86 and fined $2,500.
- In *Queensland Law Society v Wakeling*,[334] a solicitor received instructions to act for clients A, B and C in a sale of land. He was paid $10,000 by the purchaser as a deposit, which the solicitor held in his trust account. However, before completion of the contract, client A authorised the solicitor to transfer the $10,000 to his office account as an unsecured loan for 'general use'. Neither B nor C nor the purchaser gave permission for this transfer, so the transfer was not properly authorised. Even if it was authorised, the court noted that such a borrowing contravened the rule.[335]
- The prohibition on borrowing is violated when a solicitor makes an unauthorised withdrawal of trust money that is subsequently reimbursed. If the solicitor secured some use of the money in the period before reimbursement, there has effectively been a borrowing from the client.

Solicitor as executor

Although not an unusual request, a solicitor should nonetheless exercise caution before agreeing to accept appointment as an executor of a client's will. If the solicitor accepts the appointment, they must make the disclosures required by rule 12.4.1 before the will is signed and otherwise satisfy their fiduciary duty to their client. The law restricts the preparation of a will containing a gift to the solicitor preparing it other than the solicitor's proper fees or which may be part of an executor's commission (see rule 12.4.2). Exceptions exist where the will is prepared by the solicitor for an immediate family member, for an immediate family member of the solicitor's spouse, or for certain colleagues (law firm partner, employer or employee).

As there is a real potential for conflict, solicitors should carefully consider whether it is appropriate to act as an executor, including whether the solicitor has sufficient experience in wills and estate. In *Re Will and Estate of Mary Irene McClung* the court stated that

> [t]he occasion on which a solicitor receives instructions for the preparation of a will for a client by a solicitor can place the solicitor on the horns of a dilemma if the solicitor is asked to act as executor under the will. It is not a position which the solicitor should seek.[336]

Informed consent of client

Rule 12.4.1 sets out the disclosures that must be made in writing prior to the client signing the will. They include:

- any entitlement to a commission for acting as executor,
- that the client may appoint another person with no entitlement to commission, and
- any entitlement to claim legal costs.

The intention is to ensure that the client understands the entitlement of the solicitor and the consequences of the appointment of the solicitor as executor. In *Re Will and Estate of Mary Irene McClung,*[337] the court noted that with respect to costs it may be reasonable for a solicitor to accept the position as executor provided they preface any acceptance with a requirement that the will includes a charging clause for legal services performed for the estate. However, requesting a charging clause for

333 [1999] SCT 13.
334 [2004] QCA 42.
335 Ibid [18].
336 [2006] VSC 209, [34]. See also *Walker v O'Alessandro* [2010] VSC 15; *Re Will and Estate of Foster* [2012] VSC 315.
337 [2006] VSC 209.

all possible executor services 'is not reasonable unless the solicitor ensures that the will provides that such charges may be made in lieu of any entitlement to commission and the full import of the clause is explained to the client'.[338]

The solicitor should also inform the client of the maximum rate of commission which would be charged, and the possible burden such commission may impose both on the corpus and income of the estate.[339] A solicitor executor who charges a commission beyond that entitled may be guilty of professional misconduct.

Solicitor executors who are sole practitioners should also be aware of the unique challenges in accepting such an appointment.[340]

Solicitor as beneficiary

Rule 12.2 does not allow a solicitor to receive a substantial gift from a client under a will or other instrument prepared by the solicitor and is a special case of the general rule against receiving benefits in excess of fair and reasonable remuneration. Both the professional conduct standards and the common law restrict such gifts. The rule is not concerned with insignificant gifts.

A solicitor may receive a substantial benefit under a will drafted by the solicitor if the testator is in their immediate family, the immediate family of their spouse, or a partner, employer, or employee solicitor (or their immediate family). In other cases, the solicitor cannot prepare the will and may face disciplinary penalties in addition to civil law remedies.[341]

Prohibition against acting if a beneficiary

The common law suggests that, as a professional conduct standard, a solicitor who is to receive a benefit under a will or other instrument should not act.

Rules 12.1 and 12.4.2 prohibit the solicitor from acting for the client even if the client is exercising a free judgment in leaving the gift to the solicitor, subject to exceptions.

Rule 12.4.2 allows the solicitor to obtain a material benefit under a will drafted for their close family and associates. It is the only exception to the prohibition.

The presumption of undue influence

Nevertheless, the presumption of undue influence will still apply in these cases, and some of those listed may be people who are even more vulnerable because of undue pressure. Accordingly, the solicitor must be prepared to rebut the civil law presumption of undue influence. If not, there may still be disciplinary proceedings for breach of the civil standard.[342]

The relationship between solicitor and client has long been presumed by courts of equity to be one of undue influence. As a result, a solicitor who receives a benefit (such as a gift or a legacy) under the will or instrument of a client is presumed to have exercised undue influence even if the solicitor is allowed to draft the will under rule 12.4.2. Without proving anything more, other beneficiaries of the client may have the gift or legacy set aside.[343]

Importantly, it is not necessary that the solicitor who received the gift or legacy is actually the solicitor who drew the will or instrument. The presumption may arise where the solicitor has been instructed in other matters. The source of equity is the habitual reliance and confidence arising from the relationship. Nevertheless, it would normally be the case that the relationship between solicitor and client is close and maintained for a significant period. Therefore, the presumption would not necessarily arise where the solicitor has been instructed in one isolated matter (other than the drawing of the will in question),

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338 Ibid 209, [34] (emphasis added). For Victoria, see now ss 65B and 65C of the *Administration and Probate Act 1958* (Vic) (refer to LCA Commentary, 73).

339 Ibid [35].

340 *Legal Services Commissioner v Bone* [2013] QCAT 550; New South Wales Law Society*,* Solicitors as Executors - Q&As, 2018.

341 See above page 57 for further discussion about gifts.

342 *Legal Practitioners Complaints Committee v Clark* [2006] WASAT 119 (this case pre-dates the ASCR and the client would not have fallen within the categories in rule 12.4.2).

343 *Dowsett v Reid* (1912) 15 CLR 695, 707.

if the client has simultaneously retained a number of different solicitors for different matters, or if a considerable period of time had elapsed since the solicitor ceased acting for the testator.

If the presumption exists, and undue influence is raised by another beneficiary, the onus will be on the solicitor wishing to keep the gift to show that:

- 'the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee', and
- that the transaction cannot be attributed to the relationship of inequality between solicitor and client.[344]

How that 'free judgment' is shown will depend on the circumstances. Advising the client to obtain independent advice is an important factor in determining whether the gift is the 'pure, voluntary, well-understood act of the mind of the donor'.[345] The more valuable the gift, the more important independent legal advice will be.[346] Where a presumption is raised, the court will set aside the gift unless the solicitor can establish it was the spontaneous act of the donor acting in circumstances which enabled the donor to exercise an independent will. Whether the client is generally 'sophisticated and well-informed' will be a factor.

Referral fees paid two or received from third parties

A solicitor may receive a referral fee or commission from a third party in where the solicitor refers a client to that third party (such as a real estate agent) provided the client has been made aware in advance of the arrangement. For Queensland practitioners, see *Guidance Statement No. 4 – Receiving Referral fees and Rule 12.4.3 Australian Solicitors' Conduct Rules*.[347]

Serious criminal responsibility can also arise in any case where a solicitor secretly receives a commission from a third party in relation to a client's business, or that would in any way influence the solicitor's representation of the client.[348] These criminal offences provisions operate in addition to disciplinary rules.

In Queensland, no person can reward or receive a reward from another for soliciting or inducing a 'potential claimant' to make a claim for compensation or damages for personal injury.[349] A solicitor who pays a referral fee may be soliciting a potential claimant to make a claim, and the solicitor who receives a referral fee may be involved in that inducement.

Referral fees paid to third parties

Apart from the statutory prohibitions noted under rule 12.4.3, a solicitor may pay a third party a benefit for referring the client, if benefit is disclosed to the client.

For Queensland practitioners, see *Guidance Statement No. 3 – Paying Referral Fees and Rule 12.4.4 Australian Solicitors Conduct Rules*.[350]

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344 *Johnson v Buttress* (1936) 56 CLR 113, 134–5, discussed in *Weiss v Barker Gosling* (1993) 16 Fam LR 728, 761.

345 Ibid 113.

346 *Union Fidelity Trustee Company of Australia Ltd v Gibson* [1971] VR 573, 577.

347 Queensland Law Society, *Receiving Referral Fees and Rule 12.4.3 Australian Solicitors Conduct Rules* (Guidance Statement No. 4, 28 April 2023).

348 *Criminal Code 1899* (Qld), ss 442A–442M.

349 *Personal Injuries Proceedings Act 2002* (Qld) s 68(1); Legal Services Commission - Guidance on Claim farming.

350 Queensland Law Society, *Paying Referral Fees and Rule 12.4.4 Australian Solicitors Conduct Rules* (Guidance Statement No. 3, 10 July 2023).

13. Completion or termination of engagement

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

13.1.1 the client has otherwise agreed;

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

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

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

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

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

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

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

Completion of legal services

Subject to rule 13.1, a solicitor must complete the work for which they were retained before any liability for costs arises with the client (subject to the express terms of any retainer). Solicitors' retainers are in this way viewed as entire contracts.[351] This presumption is not unqualified. For example, a solicitor has a right to recover their professional costs on a restitutionary basis for work done before termination of the engagement.[352] The solicitor and client can agree that the solicitor is entitled to charge on an interim basis for professional services and disbursements.

The engagement can only be terminated as provided by rule 13.1:

- by prior agreement of the client,
- by the client discharging the solicitor,
- by the solicitor terminating the engagement for just cause and on reasonable notice, or
- by operation of law.

For Queensland practitioners, see *Guidance Statement No. 8 – Termination of a retainer*.[353]

351 *Cutter v Powell* (1795) 101 ER 573.

352 *Planché v Colburn* [1831] ER 856; *Legal Services Commissioner v Baker* [2006] QCA 145, [3].

353 Queensland Law Society, *Termination of a retainer* (Guidance Statement No. 8, 16 October 2024).

14. Client documents

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

14.1.1 the client or former client; or

14.1.2 another person authorised by the client or former client,

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

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

Introduction

The Law Council of Australia 2024 Commentary noted[354] that:

> The first principle underpinning Rule 14.1 is that client documents remain the property of the client and must be returned to the client at the completion or termination of the engagement between the client and solicitor.
>
> The second principle underpinning Rule 14.1 is that a solicitor has a common law lien over property of the client in his or her possession, which entitles the solicitor to nevertheless retain possession of the documents (or trust money or trust property) until his or her taxable costs have been paid.[355]
>
> Rule 14.2 provides that it is acceptable for a solicitor to destroy client documents 7 years after the engagement was completed or terminated unless there are client instructions or legal obligations to the contrary.

Application

The Glossary defines 'document' as:

any record of information, and includes:

(a) anything on which there is writing, and
(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, and
(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, and
(d) a map, plan, drawing or photograph,

and a reference to a document includes a reference to –

(e) any part of the document, and
(f) any copy, reproduction or duplicate of the document or any part of the document, and
(g) any part of such a copy, reproduction or duplicate.

When is a document a client document?

Whether a document belongs to the client or the solicitor will depend on the circumstances.

The Glossary defines 'client documents' to mean 'documents of a client', examples of which are set out in Appendix C.

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354 Law Council of Australia 2024 Commentary (n 1) 79.

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

Any original documents that were created by the client or third parties before the solicitor was formally retained but are later provided to the solicitor (either by the client or by third parties) during the course of the retainer are held by the solicitor on behalf of whoever provided them. This effectively means that those documents remain the property of the client (or the third party), not the solicitor. This will not ordinarily extend to electronic copies of original documents provided to the solicitor, where the original remains in the client's or third party's possession, or to electronic documents and files such as emails and their attachments that are forwarded to the solicitor by the client or a third party. However, electronic documents on physical media that have been provided to the solicitor where the client does not retain the original files should be treated as 'client documents'.

A solicitor may nonetheless own the intellectual property (such as copyright) in a document even though it is a 'client document' and the client's right to use it beyond the scope of the retainer will depend on the circumstances.

In *Wentworth v de Montford,* Hope JA identified types of documents brought into existence during the retainer.[356] The general approach adopted by Hope JA is that documents belonging to the client are those:

- prepared by the solicitor for the benefit of the client and which may be said to have been paid for by the client, and
- prepared by a third party and sent to the solicitor (other than at the solicitor's expense) with the intention that they belong to the client.

Documents belonging to the solicitor are those:

- prepared by the solicitor for their own benefit or protection, and not regarded as an item chargeable against the client,[357] and
- sent by the client and intended by the client to belong to the solicitor.

File notes that have been prepared for the solicitor's benefit (and are not charged to the client) will usually be considered to be the solicitor's documents but there may be instances where a file note taken during a meeting will be the client's document as the solicitors have charged the client for the work that they have done while attending the meeting.[358]

Handing over client documents on request

Rule 14.1 applies when a client's matter is completed, or the retainer terminated. Unless there is an effective lien,[359] when a client or former client, or a person authorised by them, requests client documents, then the solicitor is to deliver any client documents as soon as reasonably possible. What is considered a 'reasonable time' is a question of fact that will depend on the circumstances.

Once a solicitor has delivered the client documents to the client, there is no obligation to hand over further copies. If the client loses them and/or asks for another set, the solicitor is under no duty to provide a further complete set or a copy of selected documents. The solicitor may nonetheless retain copies for their own purposes, although the client should not be charged for such copies. Many or even all of the documents to which the client may be entitled may have already been provided to the client during the course of the matter.

Means of delivery

Whether a solicitor effectively delivers client documents will also depend on the circumstances. Where the solicitor and client have explicitly or implicitly agreed that client documents are to be held in a specific format (for example electronically or in hard copy), then delivery in that format would be appropriate.

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[356] (1988) 15 NSWLR 348, 355–6.

[357] *McGrath v Macrossan & Amiet* [2007] QSC 305, [6].

[358] *Alexiou v Alexandra White and ors t/as HWL Ebsworth Lawyers* [2021] NSWSC 485, [73].

[359] See below page 70 for rule 15 commentary on lien over documents.

For Queensland practitioners, see [Guidance Statement No. 6 – Form of Delivery for Client Documents](#).[360]

Destruction of client documents

Client consent

Rule 14.2 on its face allows a solicitor to destroy client documents seven years after the engagement ends, subject to client instructions or legislation. Nonetheless, client consent is best secured for the destruction.

Queensland solicitors are referred to the *Legal Profession Act* which determines what solicitors should do if they have not obtained such client consent.[361] It is strongly recommended that solicitors have a file destruction clause in the costs agreement from the outset and remind the client of this clause at the end of the retainer.[362]

Period of retention

Rule 14.2 states that documents are to be kept for seven years or as legal obligations demand (such as ongoing proceedings).

As claims arising from the retainer can take time to mature, it may be prudent to keep client documents beyond the period suggested by the rule.

The specific limitation periods of the matter also need to be considered before destroying client documents.[363] In some cases it is recommended to retain relevant material for up to 25 years or longer, or if the file relates to the creation of a document with long term operation, for the entire lifespan of that document plus six years.

Section 60 of the *Legal Profession Regulation 2007* (Qld) requires the retention of trust records for a period of seven years, excluding the client's instructions or consent to destroy it earlier.

The approach to document retention must also be balanced against the risks associated with retaining client information longer than necessary, such as the very real risks arising from cyber attacks, for which the solicitor may be liable. This risk may or may not be covered by professional indemnity insurance.

Practices covered by the *Privacy Act 1988* (Cth) also need to bear in mind Australian Privacy Principle 11 which mandates the destruction of personal information no longer needed by the firm (provided retention is not required by another law).

The retention of information for protection of the solicitor needs to be balanced in this way against the risk to the client from retention and supplemented by appropriate security measures. A periodic review of client information held with a schedule for regular destruction and / or deletion in keeping with rules for retention is recommended.

For Queensland practitioners, see the QLS [Client Document Retention Guidance](#).[364]

Safe custody documents such as wills and other original documents

In *The Public Trustee of Queensland as a Corporation Sole*, Daubney J stated that:

> [a] solicitor to whom a testator entrusts a testamentary document for safekeeping holds that document as bailee. The existence of the bailment gives rise to a range of obligations on the bailee (not the least of which is not to part with possession of the bailed property other than in accordance with the bailer's instructions) and a range of rights in the bailer.[365]

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[360] Queensland Law Society, *Form of Delivery for Client Documents* (Guidance Statement No. 6, 20 November 2024).

[361] *Legal Profession Act* (n 5) s 713A.

[362] Howard Moses, 'Destroying Client Files? Not without client instructions!' (2008) 28(11) *Proctor* 14–16.

[363] For relevant times see *Legal Profession Act* (n 5) s 713A; *Limitations of Actions Act 1974* (Qld); *Personal Injuries and Proceedings Act 2002* (Qld).

[364] Queensland Law Society, *Client Document Retention Guidance* (Guide, March 2024).

[365] [2012] QSC 178, [14].

15. Lien over documents

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

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

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

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

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

Lien over client's documents

Where a retainer ends and a client instructs a new solicitor while still having outstanding costs to the former solicitor, that former solicitor may exercise a retaining lien over client documents necessary for ongoing proceedings. However, where there is reasonable security for costs on the outstanding amount, the former solicitor must deliver the documents to the new solicitor.

Delivery should be to the new solicitor who is offering that security (rule 15.1.1), or otherwise to the client (rule 15.1.2).

For Queensland solicitors insured by Lexon, please refer to Lexon's insurance checklist on the transfer of a client file[366] See also *Guidance Statement 6 – Form of Delivery for Client Documents* and *Guidance Statement 30 – Transfer of files*.[367]

A retaining lien enables a solicitor to 'withhold possession of the documents or other personal property of his client or former client' until their costs are paid.[368] The lien exists no matter whether the client discharged the solicitor, or the solicitor discharged the client (provided that the solicitor's termination was for 'just cause'). If a solicitor terminates the retainer, the solicitor's rights to exercise the lien are qualified. The lien is qualified in the sense that the court can require the solicitor to deliver up the client documents to the new solicitor, who holds subject to the former solicitor's lien. This prevents a client from:

> in effect getting solicitors' work done for nothing by the simple expedient of changing his solicitor as often as he chose, leaving a trail of unpaid costs in his wake and demanding the papers without payment when he had no just cause to complain of the conduct of the solicitors instructed and discarded.[369]

The retaining lien may be exercised over a client's passport[370] and monies in a trust account.[371] However, a solicitor cannot claim a lien over a will.[372]

366 Lexon Insurance, *LastCheck > File Transfer – Sending and Receiving* (Checklist, January 2025).

367 Queensland Law Society, *Form of Delivery for Client Documents* (Guidance Statement No. 6, 20 November 2024); Queensland Law Society, *Transfer of files* (Guidance Statement No. 30, 23 February 2022).

368 *Barratt v Gough-Thomas* [1951] Ch 242, 250.

369 *Hughes v Hughes* [1958] 3 All ER 179, 180–181.

370 *Xu v Council of the Law Society of NSW* [2009] NSWCA 430.

371 *Legal Profession Act* (n 5) s 258(1)(a).

372 *Hawkins v Clayton* (1988) 164 CLR 539, 550.

Reasonable security for essential documents

At common law, the court has discretion to order a solicitor to hand over documents to new solicitors to 'save the client's litigation from catastrophe'. This is subject to the new solicitor's undertaking 'to preserve the original solicitor's lien and to return the papers to the original solicitor, for what they are worth, after the end of the litigation'.[373]

Reasonable security is understood to mean 'the provision, in lieu of payment, of something of monetary value which would ensure the satisfaction of the possessory lien'.[374] Apart from undertakings, tripartite deeds may be regarded as reasonable security and templates have been approved for the purpose by the Law Society of New South Wales. However, where the solicitor has terminated the retainer without good cause, the court can require the solicitor to deliver up the file to the new solicitor, but 'the court will not … be overly fastidious to ensure the adequacy of the former solicitor's security for his fees'.[375]

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373 *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 WLR 614, 624–5.

374 *Bechara t/as Bechara & Co v Atie* [2005] NSWCA 268, [64].

375 *Stark v Dennett* (2008) 2 Qd R 72, [49] (Keane JA).

16. Charging for document storage

16.1 A solicitor must not charge:

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

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

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

Charging for storage

In *Legal Services Commissioner v Rose (No 2) (Legal Practice)*,[376] the Tribunal found the solicitor guilty of unsatisfactory professional conduct for charging a retrieval fee without the client's written consent. Rule 16 was amended to clarify that from 27 September 2023 the rule extends to all forms of storage of documents and the proviso applies where client consent has been provided (whether or not in writing).[377]

Where a solicitor makes a copy of a client's documents prior to the client collecting them, such copies must be made at the solicitor's cost. This is because they are being retained for the solicitor's benefit, not the client's.

Where the solicitor proposes to charge for imaging documents for electronic archiving on the client's behalf, the client should be informed that they are entitled to instead collect the file without charge.

[376] [2007] VCAT 2465.

[377] Law Council of Australia 2024 Commentary (n 1) 84.

Advocacy and litigation

17. Independence – avoidance of personal bias

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

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

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

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

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

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

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

A solicitor must not be a mere mouthpiece

A solicitor takes responsibility for a client's matter and cannot 'shelter' behind the client. They must exercise their independent forensic judgment (see rule 17.2) and cannot 'slavishly … follow a client's instructions as to how a case is to be conducted'.[378] A solicitor who allows themselves to be controlled by their clients exposes the solicitor to personal liability for costs.[379]

Where a client wishes to take over a matter, a solicitor should withdraw from representation. A solicitor who withdraws in such circumstances can remain in the background in order to advise and assist the client.[380] Staying on the record as the client's representative means retaining responsibility for the matter.

Exercising forensic judgment

A solicitor must exercise their independent 'forensic judgment' in making decisions in the course of a case, other than those which are the client's decision alone.[381] Such client decisions may include:

- the commencement of proceedings,
- the joinder of parties,

[378] *Queensland Law Society v Stevens* [1996] 17 Qld Lawyer Reps 27, 30; *Owen v Skarps Constructions Pty Ltd* [2022] NSWSC 1225, [25]–[26].

[379] *Wentworth v Rogers* [1999] NSWCA 403, [46]–[47].

[380] Ibid [46].

[381] *Legal Services Commissioner v Cooper* [2016] QCAT 122.

- admissions or concessions of fact,
- amendments of pleadings,
- undertakings to a court, and
- a plea in criminal proceedings.

Client decisions nonetheless include advice given to assist the client or the instructing solicitor to make such decisions.[382]

The decisions include limiting a hearing to 'the real issues', presenting the client's case efficiently, and informing the court of relevant authorities.[383] At common law the decisions in rule 17.2 are seen as positive duties for the solicitor. For example, a solicitor must exercise forensic judgment to 'prune' the case of 'irrelevancies and side issues that seem important to the client' but are not important to the determination of the case.[384]

Rule 17.1 requires the solicitor to give 'appropriate consideration of the client's and the instructing solicitor's instructions'. However, a solicitor will not breach their duty by exercising independent judgment, particularly for 'any act honestly done in the conduct or management of the cause'.[385]

Personal opinion

Rule 17.3 requires a solicitor not to offer a personal opinion on the merits of any material evidence or issue. It is not the role of a lawyer to 'express personal opinions or enter the fray as a contestant' in court.[386] For example, where a prosecutor expresses a personal opinion, there is a risk a jury will consider that opinion rather than whether the evidence proves the Crown case.[387] In those circumstances, an accused person could be denied a fair trial.[388]

By limiting the rule to 'material' evidence or issues, 'trivial' or 'merely procedural matters' may on occasion be the subject of personal opinion.[389]

No surety for client's bail

Solicitors must not allow themselves to become the surety for their client's bail, as doing so may risk damaging their professional judgment, the appearance of independence, or identifying with the client's cause.[390]

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382 'Forensic judgment' is not defined in the *ASCR*, however, the repealed *Legal Profession (Solicitors) Rule 2007* (Qld) excluded this list of decisions from its definition.

383 See below page 79 for commentary under rule 19.6 about the duty not to withhold authorities to the court.

384 *Rondel v Worsley* [1969] 1 AC 191, 264.

385 *Giannarelli v Wraith* (1988) 165 CLR 543, 556–7.

386 *R v Callaghan* [1994] 2 Qd R 300, 306.

387 *GDD v The Queen* [2010] NSWCCA 62, [53].

388 *Whitehorn v The Queen* (1983) 152 CLR 657.

389 Dal Pont (n 8) [17.40] quoting Australian Bar Association, *Report of the Committee on Standard Advocacy Rules* (February 1995) 2.

390 Dal Pont (n 8) 583.

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.

Terms of informal personal familiarity

Solicitors should respect the independence and integrity of the administration of justice and deal with the court formally. Solicitors should avoid using familiar terms with the court and avoid being alone with a judge or magistrate during a matter. With consent from the other side a solicitor could seek private audience with a judge or magistrate,[391] but should not raise matters with the court beyond what was agreed.

A New South Wales decision has warned against 'salutations by advocates' and advised that this conduct 'should be completely abandoned in all contentious litigation'.[392] In this case, the solicitor said 'good morning' both in announcing his appearance to the Bench and at the beginning of his cross-examination of the witness. Justice Palmer noted that this may have caused a 'misapprehension in the mind' of one of the self-represented litigants of the case.[393]

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[391] *Charisteas v Charisteas* [2021] HCA 29, [16].

[392] *Wilson v Department of Human Services – re Anna* [2010] NSWSC 1489, [106].

[393] Clive Wall, 'Good morning, Your Honour' (Conference Paper, Central Queensland Law Association Conference, 26–28 October 2012); see also more recently *Amirbeaggi (Trustee), in the matter Billiau (Bankrupt) v Billiau* [2023] FedCFamC2G 949.

19. Duty to the court

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

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

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

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

19.4.1 are within the solicitor's knowledge;

19.4.2 are not protected by legal professional privilege; and

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

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

Duty not to deceive or mislead the court

A solicitor must make any reasonable argument that the evidence supports if it aids their client.[394] However, a solicitor who knowingly or recklessly deceives or misleads the court undermines the confidence that the court and members of the profession can place in that solicitor.[395] It is also conduct inconsistent with a solicitor's duties of candour and honesty[396] and so will trigger the court's disciplinary jurisdiction.[397]

Truth of the client's statements

A solicitor must not assist a client if they suspect:

- the client is being dishonest,
- the client has ulterior and improper reasons for the proceedings, or
- the court process is likely to be abused.

Solicitors may typically presume that their client's instructions are truthful unless it becomes known that the initiation of proceedings is an abuse of process.[398] This may warrant 'caution, even mild scepticism, to a client's narrative'.[399] This mild scepticism might lead the solicitor to 'take reasonable steps to verify the client's contentions', especially where serious allegations are made towards another person.[400] A solicitor should 'press' the client until uncertainty about instructions is removed and, in the interim,

394 *Tuckiar v The King* (1934) 52 CLR 335, 346.

395 *New South Wales Bar Association v Thomas (No 2)* (1989) 18 NSWLR 193, 205.

396 See above for rule 4 commentary about the standard of conduct and dishonest or disreputable conduct.

397 *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56, 58.

398 *Orchard v South Eastern Electricity Board* [1987] QB 565, 572.

399 Dal Pont (n 8) 593.

400 GE Dal Pont, *Lawyer's Professional Responsibility* (Law Book Company, 1st ed, 1996) 354–5, cited with approval by Santow J in *Kavia Holdings Pty Ltd v Werncog Pty Ltd* [1999] NSWSC 839, [2].

refuse to make the 'potentially misleading' submissions in court.[401] If the client persists, the lawyer may have 'just cause' to terminate the retainer.[402]

Duty to correct a misleading statement

Rule 19.2 mirrors the common law obligation to correct an error, unintentional or otherwise, at the earliest available opportunity.[403] The duty was held to apply in *Perpetual Trustee Company Limited v Cowley*.[404] In this case, the solicitor had stated in his affidavit that his client's mortgage payments had been made which was a misleading statement. The court accepted the solicitor had not made it knowingly, but as soon as he realised, or must have realised that the statement was misleading, he was under an obligation to the court to take all necessary steps to correct it.[405]

A solicitor's obligation to correct a misleading statement is not subject to instructions.

Errors of opponents

The duty to the court is not so great that a solicitor is required to correct a statement of an opponent or another person in the court. Rule 19.3 provides this exception to the duties set out in rules 19.1 and 19.2. The rule reflects the common law that a solicitor 'would fail in his duty to his own client were he to supplement the deficiencies in his opponent's evidence'.[406]

Full disclosure in *e*x parte applications

In making ex parte applications, a solicitor must disclose all adverse matters that they know and that are not protected by legal professional privilege. The rule reflects the common law duty to show fairness and good faith and ensure that all relevant matters, whether for or against the application, are brought to the attention of the court.[407]

The solicitor must provide 'all the material facts which [the absent] party would presumably have brought forward in his defence to that application'.[408] Due to the 'high standard of candour and responsibility' expected, a failure to make full disclosure confers upon the other party the right to apply for discharge of the order made.[409]

See to rule 22.5 for further discussion about communications with the court outside an ex parte application or hearing.

Duty not to withhold authorities

Rule 19.6 requires that a solicitor must ensure the court is informed of all relevant legislation, binding authority, and Australian appellate court decisions. Rule 19.7 provides an exception to the rule which applies when the opponent concedes the case. Rule 19.6 is in place to assist the court to apply the relevant law. Solicitors owe a duty not to withhold authorities 'which may tell against his clients but which the law or the standards of his profession require him to produce'.[410]

Rule 19.8 extends the duty to where judgment has been reserved and remains pending. If the solicitor becomes aware of a relevant authority, they must inform the court by letter or seeking relisting of the matter. In both cases, the opponent must first be consulted. Rule 19.9 applies only in criminal law matters to preserve certain rulings about inadmissible evidence.

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401 *Kavia Holdings Pty Ltd v Werncog Pty Ltd* [1999] NSWSC 839, [2].

402 Ibid. See also above rule 13 commentary about completion or termination of engagement.

403 *Myers v Elman* [1940] AC 282, 294.

404 [2010] QSC 65.

405 Ibid [17], [132].

406 *Khudados v Hayden* [2007] EWCA Civ 1316, [38].

407 *Re Cooke* (1889) 5 TLR 407, 409.

408 *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 682.

409 *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662, 667. See also *Gold Ribbon (Accountants) Pty Ltd (in Liq) v Sheers* [2003] 1 Qd R 683; *Re South Down Packers Pty Ltd* [1984] 2 Qd R 559. In relation to the duty of disclosure on an *Anton Piller* application see *Lego Australia v Paraggio* (1993) 44 FCR 151; *International Entertainment New Zealand Ltd v Lewis* [1998] 1 IPR 162; *Universal Music Australia Pty Ltd v Sharman License Holdings Limited* (2004) 205 ALR 319.

410 *Rondel v Worsley* [1969] 1 AC 191, 227–8, cited with approval in *Giannarelli v Wraith* (1989) 165 CLR 543, 556.

Client's previous convictions

At common law, the defence is not under a positive duty to disclose prior convictions.[411] Doing so may breach the solicitor's duty to act in a client's best interests (rule 4.1.1) and the duty of confidentiality to the client (rule 9.1). It is incompatible with those duties for the solicitor in an adversarial system 'to bring forward everything adverse to the offender's interests on sentencing'.[412]

The court decides cases based on the evidence before it, and so it is no miscarriage of justice if the prosecutor fails to introduce an accused's previous convictions and the defence does not correct it.[413] Accordingly, a prior conviction should not be disclosed to the prosecutor or the court without the client's instructions.

However, as stated in *Boyd v Sandercock; ex parte Sandercock,* 'where a party deliberately misleads the court, other remedies may exist. For example, if fraud is practised upon the court a remedy is available either by order to review or by certiorari'.[414] This general principle shifts in circumstances where a defence solicitor suggests otherwise, for example, by 'ask[ing] a prosecution witness whether there are previous convictions … in the hope of receiving a negative answer' or submitting that 'his client is a man of good character'.[415] In these circumstances, a solicitor would be breaching his duty not to mislead the court (rule 19.1).[416] Rule 19.10 therefore prohibits such questions, to protect the accused.

Court's misapprehension as to the effect of an order

The duty not to mislead the court and opponents 'continues … until the judge has given judgment'.[417] However, rule 19.11 requires that if the court is making an order with a misapprehension as to its effect, a solicitor must so inform the court.

Duty to correct mistaken concessions

While rule 19.3 does not require a solicitor to correct an error or another person, rule 19.12 requires a solicitor to alert the opponent and, if necessary, inform the court if the opponent in a civil trial makes any concession about evidence, case law, or legislation that the solicitor knows is mistaken.

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[411] *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289, 297.

[412] *R v Bourchas* [2002] NSWCCA 373, [92].

[413] *Boyd v Sandercock; ex parte Sandercock* [1990] 2 Qd R 26, 28.

[414] Ibid, citing *Hallahan v Campbell; Ex parte Campbell* [1964] Qd R 337, 348.

[415] Dal Pont (n 8) 646–7.

[416] *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289, 297.

[417] *Vernon v Bosley (No 2)* [1999] QB 18, 38.

20. Delinquent or guilty clients

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

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

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

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

must -

20.1.4 omitted

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

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

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

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

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

20.2.4 must ensure that the prosecution is put to proof on its case,

20.2.5 may argue that the evidence as a whole does not prove that the client is guilty of the offence charged,

20.2.6 may argue that for some reason of law the client is not guilty of the offence charged,

20.2.7 may argue that for another reason not prohibited by Rule 20.2.2 or 20.2.3 the client should not be convicted of the offence charged, and

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

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

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

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

20.3.3 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.

Falsehoods learned during hearing

Rule 20.1 applies where the solicitor learns of the client's or witness's lie, falsification, or suppression 'during a hearing or after judgment or the decision is reserved and while it remains pending'. In that case, the solicitor must refuse to take any further part unless the client authorises the solicitor to inform the court of the lie, falsification, or suppression and upon receiving those instructions, must promptly inform the court.

The solicitor cannot inform the court of the lie, falsification, or suppression without the client's instructions when withdrawing from the case.[418] Although other parties and the judge may suspect the reason of the solicitor's withdrawal, the fact of the withdrawal should not be taken as disclosure of the solicitor's knowledge of the perjury.

Falsehoods known prior to hearing

A solicitor cannot prepare and file an affidavit that they know would be a perjury.[419] Similarly, a lawyer must not prepare pleadings that contain allegations of fact that the lawyer knows to be false.[420] In these circumstances (the filing of an affidavit known to be false and the pleading of allegations known to be false) the solicitor would be in breach of their duty to the court unless the solicitor disclosed to the court 'the true position'.[421]

Amendment to rule 20

Rule 20.1.4 previously required the solicitor to advise the client that the court should be informed of the falsehood. This was omitted because there was no equivalent obligation in the Barristers' Rules. The rationale was that this requirement is implicit in rule 20.1.5 and the harmonisation of the Barristers' Rules with the *ASCR* 'would avoid any suggestion that there are intended differences between these equivalent Rules'.[422]

Guilt of the accused

Possible courses of action

In criminal proceedings, where a client confesses guilt to the solicitor but maintains a not-guilty plea, the solicitor can only continue to act in the client's defence subject to the client accepting the constraints set out in rules 20.2.2–20.2.8.

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[418] Rule 20.1.5. See also *Perpetual Trustee Co Ltd v Cowley* [2010] QSC 65.

[419] *Myers v Elman* [1940] AC 282; *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56, 60 (Ipp J).

[420] *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)* (1997) 18 WAR 190; *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56.

[421] *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56, [9].

[422] Law Council of Australia 2024 Commentary (n 1) 92.

Limitations when continuing to act

If the solicitor continues to act, then they:

- must not falsely suggest that some other person committed the offence charged,
- must not set up an affirmative case inconsistent with the confession (for example, by calling evidence in support of an alibi),[423]
- must ensure that the prosecution is put to proof on its case,
- may argue that the evidence as a whole does not prove that the client is guilty of the offence charged,[424]
- may argue that for some reason of law the client is not guilty of the offence charged (for example, the defence of insanity),
- may argue that, for another reason not prohibited by rules 20.2.2 or 20.2.3, the client should not be convicted of the offence charged, and
- 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.

The client ought to be informed of and must agree to these limitations before the solicitor proceeds on this basis.

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[423] *New South Wales Bar Association v Punch* [2008] NSWADT 78.

[424] *Tuckiar v R* (1934) 52 CLR 335, 346.

21. Responsible use of court process and privilege

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client's case on its merits;

21.1.3 is not given principally in order to harass or embarrass a person; and

21.1.4 is not given principally in order to gain some collateral advantage for the client or the solicitor or a third party out of court.

21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client's case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

21.3 A solicitor must not allege any matter of fact in:

21.3.1 any court document settled by the solicitor;

21.3.2 any submission during any hearing;

21.3.3 the course of an opening address; or

21.3.4 the course of a closing address or submission on the evidence,

unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.1, 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 domestic or family violence, sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

21.9 A solicitor does not infringe Rule 21.8 merely because:

21.9.1 the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of a statement made by the witness, or

21.9.2 the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

Responsible use of court process

Rule 21.1 requires a solicitor to ensure that a matter is reasonably justified on the merits and an advancement of the client's case and is not made principally to harass someone or gain some collateral advantage.[425] The rule supports the duty not to abuse court processes.[426] A solicitor may face disciplinary proceedings or a personal costs order for supporting any abuse of the court's process.

Cases without merit

A solicitor must believe that the factual material available provides reasonable grounds, or a proper basis, for invoking the coercive powers of a court. They must apply independent judgment[427] to decide whether the points the client wishes to argue can be argued.[428]

In *Steindl Nominees Pty Ltd v Laghaifar*, Davies JA said that '…it is improper for counsel to present, even on instructions, a case which he or she regards as bound to fail because, if he or she so regards it, he or she must also regard it as unarguable'. [429]

425 *Re Majory* [1955] Ch 600.

426 *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169.

427 See above for rule 17.2 commentary about forensic judgment.

428 *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683.

429 Ibid 689.

However, Williams JA (with Phillipides J agreeing) cited Lord Hobhouse in *Medcalf v Mardell*[430] and found that:

> it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is also entitled to be heard…The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process.[431]

Baseless accusations or allegations

Rule 21.2 similarly requires that any allegations or suggestions under privilege must be reasonably justified and an advancement of the client's case, and not made principally to harass someone.[432] Solicitors must maintain standards of decency and fairness. They may 'speak out fearlessly, to denounce some person or the conduct of some person' but, due to the 'ruinous consequences' to the person attacked, cannot introduce damaging matters which cannot be substantiated or justified by evidence.[433] The reasoning in *Clyne v NSW Bar Association*[434] supports rules 21.1–21.4.

Allegations of criminality, fraud, or other serious misconduct

Allegations of fraud or other misconduct should not be made lightly.[435] Professional disciplinary consequences may follow for lawyers who do not 'take care to have specific instructions and an appropriate evidentiary foundation, direct or inferred, for alleging or pleading fraud'.[436]

Courts have also ordered that solicitors pay or contribute to a party's costs where claims were made in breach of rule 21.4.[437]

Witnesses

Solicitors face censure if they put to a witness any propositions that have no basis in evidence or are irrelevant to the witness's credibility.[438]

Allegation of domestic violence

This rule has been amended to extend to allegations of domestic or family violence.

Solicitors should take care in questioning victims of alleged domestic or family violence, sexual assault, or indecent assault. Solicitors should pay attention to the special vulnerability of the alleged victims and have regard to improper questions set out in s 41 of the *Evidence Act 1995* (Cth) when cross-examining alleged victims as witnesses.

Solicitors should also have regard to ss 102NA and 102NB of the *Family Law Act 1975* (Cth).

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430 [2003] 1 AC 120, 143–144.

431 *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 Qd R 683, 692.

432 See also below page 101 for rule 29.3 commentary about prosecutor duties not to seek to inflame or bias the court against the accused.

433 *Clyne v NSW Bar Association* (1960) 104 CLR 186, [23].

434 Ibid.

435 *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; *Clyne v NSW Bar Association* (1960) 104 CLR 186.

436 *Minister Administering the Crown Lands Consolidation Act and Western Lands Act v Tweed Byron Local Aboriginal Land Council* (1990) 71 LGRA 201.

437 *Kaji Australia Pty Ltd v Glover (No. 5)* [2020] NSWSC 1576 (upheld on appeal in *Muriniti v Mercia Financial Solutions Pty Ltd* [2021] NSWCA 180); *Young v Hughes Trueman Pty Ltd (No. 4)* [2017] FCA 456; *Descon Group Australia Pty Ltd v Rodd* [2023] FCA 1494.

438 *Vella v R* (1990) 47 A Crim R 119, 124 (Malcolm CJ).

22. Communication with opponents

22.1 A solicitor must not knowingly make a false or misleading statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false or misleading statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false or misleading.

22.3 A solicitor will not have made a false or misleading statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

Communicating with opponents

Rules 22.1 to 22.3 prohibit a solicitor from making false or misleading statements to opponents. This rule applies during negotiations.[439] These rules were recently amended by replacing each reference to the term 'false statement' with the term 'false or misleading statement'.

Where the opponent individual is insured, rule 22.4 requires a solicitor to obtain the consent of the insurer and the individual opponent before communicating with the insured party.

[439] *Legal Services Commissioner v Mullins* [2006] LPT 12; *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352; *Legal Services Commissioner v Garrett* [2009] LPT 12.

Communication with the Court

Rules 22.5 to 22.7 prohibits a solicitor from communicating with the court in the opponent's absence on matters of substance. The only exceptions are where the opponent's solicitor has provided consent before the communication takes place or the limited situation described in rule 22.5.1 exists (see further commentary below). These rules reflect the 'fundamental principle that a judge must not hear evidence or receive representations from one side behind the back of the other'.[440] Whether the communication in question is a 'matter of substance' should be assessed in the context of the relevant proceedings.[441]

Practitioners should note that merely copying in the opponent in email correspondence to the court does not mean the communication is effectively made in their presence. It also does not satisfy the requirement to give the opponent 'proper notice' required by rule 22.5.[442] The few exceptions include ex parte applications and non-contentious housekeeping or logistical questions.[443]

There may be occasions where communication under rule 22.5.1 will also need to comply with rule 22.5.2. This means that even if a solicitor is contacted by the court and asked to respond, they may need to ensure the opponent is aware of this and has agreed to the way the response is to be made. An example might be where the court has communicated on an issue of substance as opposed to a mere administrative issue. Solicitors should refer to specific practice directions in determining when email communication is possible.[444]

Compliance with rules 25.5.2 and 22.7 will not remove the requirement of compliance with rule 22.6.[445]

Courts have criticised parties for ex parte communications with a tribunal.[446]

Notices of adjournment

A solicitor has an obligation to inform their opponent and the court as soon as possible that there will be an application to adjourn any hearing. This is also reflected in the duty to inform the court at the earliest reasonable opportunity when a listed matter settles.[447]

Whilst providing a copy of communication with the court to one's opponent is good practice, it will not cure failure to obtain consent in advance.

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440 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 346. See also *Porter v Australian Prudential Regulation Authority* [2009] FCA 1148, [20].

441 Richard Lilley and Justin Carter, 'Communications with the Court' (2013) 87(2) *Australian Law Journal* 121, 122.

442 *Legal Services Commissioner v Trost* [2019] QCAT 357; *FAL Management Group Pty Ltd v Denham Constructions Pty Ltd* [2015] NSWSC 1035; *Heritage Bank Limited v Gleeson & Anor (No 4)* [2020] QDC 224.

443 *Hughes v Janrule Pty Ltd* [2011] ACTCA 23, [27].

444 Mark Steele and Kirsty Gothard, 'Communicating with the court', *QLS Proctor* (Web Page, 27 July 2023) <https://www.qlsproctor.com.au/2023/07/communicating-with-the-court/>.

445 Ibid.

446 *R v Fisher* (2009) 22 VR 343; *John Holland Rail Pty Ltd v Comcare* (2011) 276 ALR 221.

447 Justice Margaret McMurdo, 'Address to Cooper Grace Ward Technical Excellence Program' (Speech, Cooper Grace Ward, 3 September 2013) 11.

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 does not breach Rule 23.1 simply by:

23.2.1 telling a prospective witness or a witness that the witness 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.

Witnesses open to both parties

A solicitor cannot prevent a prospective witness from being interviewed by the opponent, though they can advise on the witness's right to refuse the interview, and on any relevant obligations of confidentiality.

There is no property in a witness whether expert or lay.[448] If there were, one party may be able to 'buy up all possible experts' in a certain area.[449] A prospective witness has no obligation to give evidence. If no statement is provided, the witness can be subpoenaed.[450]

[448] *Harmony Shipping Co SA v Davis* [1979] 3 All ER 177, 180 (Lord Denning MR).

[449] Ibid 184.

[450] *Commonwealth Bank of Australia v Cooke* [2000] 1 Qd R 7, 12.

24. Integrity of evidence – influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

False or misleading evidence

In addition to rule 24.1.1, see s 127(1) of the *Criminal Code Act 1899* (Qld) for the criminal consequences of inducing a witness to give false testimony or withhold true testimony.

No coaching

A solicitor's role when taking evidence requires protecting the integrity of the evidence. This is part of their duties in the administration of justice and to promote confidence and trust in the legal profession.[451]

In interviewing witnesses and preparing proofs of evidence, solicitors need to be mindful of not crossing the line between 'proofing' a witness and 'coaching' the evidence to be given by the witness. Coaching evidence can lead to a breach of rule 24.1.2.

The distinction between 'proofing' and 'coaching' a witness can be a difficult line to draw in practice.[452] The difference has been described in *Majinski v The State of Western Australia* which quotes with approval *R v Momodu*:[453]

> There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness … The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so.

451 Dal Pont (n 8) [17.150]. See also Law Council of Australia 2024 Commentary (n 1) 97.

452 *Re Equiticorp Finance Ltd*; *Ex parte Brock [No 2]* (1992) 27 NSWLR 391.

453 *R v Momodou* [2005] 2 All ER 571, [61] (Judge LJ), quoted in *Majinski v The State of Western Australia* [2013] WASCA 10, [29]–[36] (references omitted).

In *Re Equiticorp Finance Ltd; Ex parte Brock [No 2]* Young J noted that a witness might confer with their lawyer or the lawyer for the party calling the witness. During such conferences, the lawyer or lawyers may provide the witness with advice. That advice may include:

- advice that the witness should refresh their memory from contemporaneous documents,
- directing the witness's mind to the point about which questions may be asked,
- giving the witness a sketch of court procedure,
- directing the witness's attention to points in their evidence which appear to be contradictory or fantastic,
- reminding the witness to bring all relevant documents,
- advising the witness as to the manner of answering questions (for example, when cross-examined, listen to the question and answer the question as concisely as possible), and
- giving advice as to appropriate dress and grooming.[454]

The Law Council of Australia 2024 Commentary noted[455] that:

> Questioning of a witness moves beyond 'proofing' to impermissible 'coaching' when the witness' true recollection of events is supplanted by another version suggested by the interviewer or other party, whether by repetitive reading of a statement to the point where their testimony is mere regurgitation or by otherwise influencing the witness.[456]

Amongst other things, a solicitor must not:

- suggest to a prospective witness evidence that the witness should give,
- encourage or coach the witness to give evidence different to that which the witness believes to be true,
- suggest answers to questions that might be asked of the witness,
- counsel a witness to be forgetful and evasive in giving evidence,[457] or
- advise a client or a witness of the consequences of giving particular evidence with the hope or intention of encouraging the witness to legitimately avoid those consequences.[458]

In *Re Equiticorp Finance Ltd; Ex parte Brock [No 2],* Young J held that a solicitor advising the witness on how to answer questions went over the line. Other cases that help describe the dividing line are:

- In *R v Noble*,[459] Pincus JA held that it is improper to train witnesses 'to use particular expressions, differing from those the witness had in mind'. This compares with a witness permissibly recalling the effect of a conversation.
- In *Legal Practitioners Complaints Committee v Caine*,[460] the Committee defined the limits of witness preparation. Permissible conduct includes clarifying matters, questioning and testing witness's recollection of events and drawing matters to the witness's attention. Rehearsing, practising or coaching witnesses concerning evidence or suggesting answers to be given are impermissible.
- In *Day v Perisher Blue Pty Ltd*,[461] the defendant's solicitors prepared a detailed document for their client with potential lines of questioning to be shared with respective witnesses with suggestions as to appropriate responses. The solicitors also held pre-trial conferences where witnesses discussed evidence to be given at trial. Together this was taken to undermine the trial and 'tainted' the defendant's case.

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454 *Re Equiticorp Finance Ltd*; *Ex parte Brock [No 2]* (1992) 27 NSWLR 391, 395.

455 Law Council of Australia 2024 Commentary (n 1) 99.

456 *HKSAR v Tse Tat Fung* [2010] HKCA 156.

457 *R v Sweezey* (1987) 39 CCC (3d) 182 (Newfoundland Court of Appeal).

458 Dal Pont (n 8) 600–601.

459 (2000) 117 A Crim R 541, [19].

460 [2010] WASAT 178, [142].

461 (2005) 62 NSWLR 731.

- In *Kennedy v Council of the Incorporated Law Institute of New South Wales*,[462] Mr Kennedy had his name struck from the roll of solicitors after attempting to influence a witness to change her testimony. The same outcome occurred in *Attorney-General and Minister of Justice v Gregory*,[463] in which the solicitor's conduct of offering money to influence two witnesses into changing their testimony resulted in his being struck off. The conduct 'struck audaciously into the heart of the judicial process',[464] and involved an absence of 'honesty, objectivity, respect for the court and respect for the process'.[465]
- In *Legal Practitioners Complaints Committee v Pepe*,[466] the solicitor was in an abusive and violent relationship with her client. She attempted to dissuade another witness from giving evidence against her client fearing personal repercussions from her client. Having earlier been convicted of attempting to pervert the course of justice, the solicitor was struck off.

Questioning of witnesses

Rule 24.2.2 makes clear that questioning or testing in conference the version of evidence to be given from a prospective witness does not contravene rule 24.1.

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462 (1939) 13 ALJR 563.
463 [1998] QCA 409.
464 Ibid [4].
465 Ibid.
466 [2009] WASC 39.

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.

One witness at a time

The purpose of rule 25.1 is to avoid the risk of evidence being contaminated through collusion.[467] Several recent cases illustrate the nature of the rule and the consequences of its breach:

- *Legal Profession Complaints Committee v Caine* found that witnesses should give evidence which is ‘the product of their own independent knowledge and recollection unaffected by the views or evidence of others’. [468] In this case the solicitor was found guilty of unsatisfactory professional conduct by encouraging a witness to confer with others to harmonise their evidence.
- In *Day v Perisher Blue,* the court expressed concern that in talking with more than one witness, a solicitor may be intending to ensure witnesses ‘all speak with one voice’, thereby affecting the integrity of the process.[469] The court may set aside the verdict and judgment and order a new trial. In this case, the judgment and appeal papers were ultimately referred to the Legal Services Commissioner.[470]
- To constitute a breach, there must be a conference between two witnesses and the solicitor, not one witness incidentally over-hearing a conversation between another and a solicitor. The rule is to avoid the ‘vice’ of two or more witnesses ‘conferring about contentious issues in the proceedings’ and being ‘encouraged to modify, or be at risk of modifying, or changing, the evidence that they might give’.[471] In *Legal Services Commissioner v Hansen*,[472] a barrister allegedly conferred with a witness outside his chambers whilst the accused was ‘within earshot’. The charge was ultimately dismissed, as the Tribunal was not satisfied that the barrister had conferred with ‘more than one lay witness at a time’.[473]

For the same reason, a witness ought not to be shown another witness’s statement, although specific elements may be put to them for comment.[474]

467 Dal Pont (n 8) 599.

468 [2010] WASAT 178, [143].

469 (2005) 62 NSWLR 731, [30].

470 *Day v Perisher Blue Pty Ltd [No 2]* [2005] NSWCA 125, [35], [37].

471 *Legal Services Commissioner v Hansen* [2008] LPT 7, [26].

472 [2008] LPT 7.

473 Ibid [23].

474 Kylie Downes, ‘Witness Wisdom’ (2012) 32(11) *Proctor* 6.

Exceptions

Rule 25.2 provides an exception to provide that a solicitor does not breach rule 25.1 by conferring with more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings, or compromise.

Expert witnesses

Conferring with two or more expert witnesses to ensure a ‘common line’ compromises the independence of those witnesses. Their duty is to assist the court on the subject matter and test the evidence and the information relied upon. However, when the expert witnesses are in a court-ordered conclave to produce a joint report on relevant issues, a solicitor may confer with them in accordance with the process of that conclave.

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.

Under cross-examination

Rule 26 is breached only if the communication occurs while the cross-examination is in progress.

In *R v Shepherd,*[475] the prosecutor consulted with the complainant for an hour after cross-examination was adjourned. This was found to be highly irregular conduct but in the circumstances of that case did not lead to the possibility of a miscarriage of justice.

[475] [2001] 1 NZLR 161, [17].

27. Solicitor as material witness in client's case

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member must not continue to act for the client if doing so would prejudice the administration of justice.

Advocate in court cannot also be material witness

A solicitor who is to give material evidence may not appear as advocate for the client in the hearing for the client. The question is what constitutes 'material' evidence. In *Mitchell v Burrell*, Brereton J in a 2008 case pre-dating the *ASCR* saw the rule as one supporting the general duty to avoid a conflict of interest (see now Rule 12), and limited the materiality to one where the solicitor has a personal interest:

> I do not accept that in every case where a solicitor acting for a party is a material witness even on a controversial matter, the Court will restrain the solicitor from continuing to act. … [T]he line is crossed only when the solicitor has a personal stake in the outcome of the proceedings or in their conduct, beyond the recovery of proper fees for acting, albeit that the relevant stake may not necessarily be financial, but involves the personal or reputational interest of the solicitor, as will be the case if his or her conduct and integrity come under attack and review in the proceedings. The presence of such circumstances will be a strong indication that the interests of justice – which in this field involve clients being represented by independent and objective lawyers unfettered by concerns about their own interests – require the lawyer to be restrained from continuing to act.[476]

Justice Brereton noted that there is no default presumption that a solicitor must be restrained from continuing to act for a client where the solicitor is a material witness, even if the matter is controversial. Case law indicates that there are circumstances in which an instructing solicitor may also give evidence as a witness. For example, in *Scallan v Scallan*,[477] Windeyer J pointed out that it is not unusual for instructing solicitors in contested probate matters to give evidence of facts relevant to instructions for and execution of a will.[478] Similarly in contested conveyancing matters, it is not unusual for solicitors who have acted in the conveyance to continue to act in proceedings for specific performance, recession, or termination and to give evidence in those proceedings.

While there is no presumption against a solicitor continuing to represent a client when they witness a document such as an enduring power of attorney, solicitors should take care to avoid conflicts between duties to the client and duties to the court. For example, in *Re MV* the solicitors witnessed enduring powers of attorney and also represented the principal, and then had to appear before the Guardianship tribunal to give evidence in relation to the execution of the document.[479] This case cautions solicitors risking conflicting duties. In *Chapman v Rogers; ex parte Chapman*, Rogers CJ observed that it is generally 'unwise' for a solicitor to continue to act in a client's case if it is known or becomes apparent that they will be called as a material witness.[480]

Rule 27 applies to 'material' issues. Matters in which a solicitor is to give evidence on uncontested issues or matters of formality will not normally be considered 'material' for the purposes of the rule.

[476] [2008] NSWSC 772, [20].
[477] [2001] NSWSC 1078.
[478] Ibid [11].
[479] *Re MV* [2005] QGAAT 46.
[480] *Chapman v Rogers; ex parte Chapman* [1984] 1 Qd R 542, 545.

Solicitor, associate or law practice can nonetheless continue to act if no prejudice to justice

The Law Council of Australia 2024 Commentary provides the following guidance on rule 27.2:[481]

> Rule 27.2 deals with the question of whether or not an associate of a solicitor or the solicitor's law practice may continue to act for the client where a solicitor representing a client is, or is likely to become, a material witness in the client's case. Rule 27.2 requires the solicitor to carefully consider whether or not it is desirable that the solicitor should continue to act. The reason for this is that the solicitor would be in a position of apparent conflict between the duty to advance the interests of the client and the duty to the court to give impartial evidence[482] which may prejudice the administration of justice.[483]
>
> The test to be applied in determining whether continuing to act would prejudice the administration of justice is an objective one.[484] The question is whether a fair minded and reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor should be prevented from continuing to act for the client, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.
>
> In making its determination on whether continuing to act would prejudice the administration of justice, a court must balance this apparent conflict of duties with other considerations affecting the due administration of justice, such as
>
> - due weight being given to the public interest in a litigant not being deprived of the solicitor of their choice without due cause; and
> - the timing of the application, which may be relevant, in that the cost, inconvenience or impracticability of requiring a solicitor or law practice to cease to act may provide a reason for refusing to grant relief.[485]
>
> The jurisdiction of a court to exercise its power to restrain a solicitor or law practice from acting is exceptional and is exercised with caution.[486]

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481 Law Council of Australia 2024 Commentary (n 1) 103.

482 D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 (January) *Law Quarterly Review* 63, 92.

483 See, eg, *Paino v MDN Mortgages Pty Ltd* [2009] NSWSC 898.

484 *UTi (Aust) Pty Ltd v Partners of Piper Alderman* [2008] NSWSC 219, [46]–[52].

485 *Bufalo Corporation Pty Ltd v Lendlease Primelife Ltd* [2010] VSC 672, [9].

486 *Kallinicos v Hunt* (2005) 64 NSWLR 561, [76].

28. Public comment during current proceedings

28.1 A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.

Publication

Publication of material concerning current proceedings could lead to the disclosure of confidential information[487] and other information that may prejudice a fair trial.[488] The rule is not limited to media publication.

In *Legal Services Commissioner v Orchard*,[489] material was sent to the employer of a party to proceedings. In that case, the Tribunal said that the rule:

> does not on its face reveal an intention only to prohibit media activity. Rather, its apparent intent is to ensure a fair trial of proceedings, and to maintain the proper administration of justice and the word 'publication' is not used in a way, or in any context, suggesting the rule is only intended to prevent general or widespread publication, e.g. via the media.[490]

For Queensland practitioners, see *Guidance Statement No. 32 – Solicitors commenting to the media*.[491]

[487] See above page 30 for rule 9 commentary about confidentiality.

[488] See also *MG v R* (2007) 69 NSWLR 20 for consideration of r 59 of the former New South Wales barristers' conduct rule on media statements which was similar to r 28 of the *ASCR*.

[489] [2012] QCAT 583.

[490] *Legal Services Commissioner v Orchard* [2012] QCAT 583, [21].

[491] Queensland Law Society, *Solicitors commenting to the media* (Guidance Statement No. 32, 14 October 2022).

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 obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material; and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

29.9 A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.

29.10 A prosecutor must not inform the court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

29.11 A prosecutor who has informed the court of matters within Rule 29.10, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

29.12 A prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence;

29.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;

29.12.3 must assist the court to avoid appealable error on the issue of sentence;

29.12.4 may submit that a custodial or non-custodial sentence is appropriate; and

29.12.5 may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant decisions.

29.13 A solicitor who appears as counsel assisting an inquisitorial body such as the Crime and Corruption 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.

Duty of prosecutorial fairness

Prosecutors must fairly assist the court to arrive at the truth and to enable the law to be properly applied to the facts. Rules 29.2–29.4 require them to present a full and firm case, but no more. In *Whitehorn v R,* Deane J described the duty as one of 'fairness and detachment':

> Prosecuting Counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and helping to ensure that the accused's trial is a fair one.[492]

[492] (1983) 152 CLR 657, 663.

The Director of Public Prosecutions of Queensland has Guidelines outlining the duties of prosecutorial fairness.[493]

No 'struggle for conviction'

An accused is entitled to 'have his case tried fairly, free from bias and prejudice and free from the introduction of any extraneous matters calculated to influence the jury improperly in arriving at a determination'.[494] A prosecutor must 'not let their understandable distaste for the factual situations of the individual case become zealotry in the misguided belief that convictions must be obtained at any cost'.[495] Prosecutors are 'ministers of justice' and 'ought not to struggle for a conviction nor be betrayed by feelings of professional rivalry'.[496]

Inflaming the court

Prosecutors should avoid the use of language that would lead a jury to base its verdict on 'prejudice, sympathy, fear or irrelevant emotion'.[497] Whether a retrial is needed because of prejudicial language by the prosecution depends on the facts of the case.[498] Care must be taken to avoid inflammatory or emotive language in cases such as child sexual abuse.[499] In *R v Livermore*,[500] *,* a sexual assault case, the prosecutor continually described a witness for the accused as an 'idiot.'[501] The Court held that prosecutor's use of ridicule towards the witness went beyond fair advocacy, improperly pressuring the jury to dismiss the possibility of consent. This was because as a prosecutor is known to represent the community interests and the state, the jury may form the view that the prosecutor would also consider them 'idiots' for accepting the witness's evidence for the defence.[502] The submission was 'insidious' as it inflamed the jury's prejudice towards the witness, rather than resorting to 'balanced and rational argument based upon the evidence in the trial'.[503]

The rule does not preclude prosecutors addressing the jury with spontaneity or with the occasional flourish:

> [U]nless we are to interrupt criminal trials so that counsel may first write out their speeches, closing addresses must remain at least partly driven by adrenalin. Spontaneity is a valuable asset in criminal trials even if it leads to the occasional flourish that would be deleted on more mature reflection.[504]

Prosecutor's duty of disclosure

A prosecutor must disclose to the opponent all relevant evidence (including witnesses), unless:

- it is subject to statutory immunity, or
- the prosecutor believes the disclosure would seriously threaten personal safety or the administration of justice.

Rule 29.6 provides that the decision not to disclose will put the charge itself into question.

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493 Queensland Director of Public Prosecutions, *Director of Public Prosecutions guidelines* (Guidelines, 30 June 2024).

494 *Croll v McRae* (1930) 30 SR (NSW) 137, 143.

495 *R v Kennedy* (1997) 94 A Crim R 341, 353.

496 *R v Lucas* [1973] VR 693, 705; *R v Puddick* (1865) 176 ER 662, 663 (Crompton J); *King v R* (1986) 161 CLR 423, 426 (Murphy J).

497 *R v Day* (2000) 115 A Crim R 80, 86. See also rule 21.

498 *R v Knuth* [1998] QCA 161 (Lee J).

499 *R v Day* (2000) 115 A Crim R 80. See also *R v M* [1991] 2 Qd R 68, 82–3 (Cooper J).

500 (2006) 67 NSWLR 659.

501 Ibid [35].

502 Ibid [36]–[38].

503 Ibid [36].

504 *R v Day* (2000) 115 A Crim R 80, 86–7 (Thomas JA).

The duty reinforces s 590AB of the *Criminal Code 1899* (Qld), which requires the prosecution to give full and early disclosure of:

- all evidence the prosecution proposes to rely on in the proceeding, and
- all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person.

The duty of disclosure is a necessary incident of the 'power imbalance' between the resources available to the prosecution against that of the defence. It overcomes or mitigates the 'defence's inability to investigate matters as thoroughly as the prosecution' and makes certain each side is fully informed of the strengths and weaknesses of the evidence.[505]

A failure to comply with the duty of disclosure can lead to disciplinary proceedings. In *Legal Profession Complaints Committee v Bates,*[506] it was alleged that the solicitor in their former role as a prosecutor had failed to comply with his duty of disclosure in that he failed to disclose what he had been told by an investigating officer that certain injuries did not match a sketch of the wrench purported to have caused the injuries. The Tribunal accepted that the conduct occurred almost 17 years ago and that there was no suggestion of any deliberate misconduct. The practitioner was fined $10,000 and reprimanded.

Duty to call witnesses

Having disclosed relevant witnesses under rule 29.6, the prosecutor must call them, unless:

- the opponent consents, or
- the prosecutor has informed the opponent that the matter has been already adequately dealt with or that the prosecutor believes the testimony is plainly untruthful or unreliable.

In *R v Apostilides*¸ the Court stated that '[t]he Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown'.[507] It is 'not only a lonely responsibility but also a heavy one'.[508] The trial judge may question the prosecutor to discover the reasons for the decision but cannot adjudicate the sufficiency of those reasons.[509]

In making their decision, the prosecution may consider

> whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few [factors].[510]

For disciplinary cases, a refusal to call a witness is only justified in the circumstances outlined in rule 29.7.

At common law, a conviction will only be set aside if the decision, viewed in the context of the whole trial, caused a miscarriage of justice.[511]

Both under the rule and at common law, it stands that the fact that the evidence does not help the prosecution is not a reason for the prosecutor to refuse to present it.[512]

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505 *R v Ulman-Naruniec* (2003) 143 A Crim R 531, [136]–[137].

506 [2012] WASAT 150.

507 (1984) 154 CLR 563, 575–6

508 Ibid.

509 Ibid.

510 *Richardson v R* (1974) 131 CLR 116, 119 (Barwick CJ, McTiernan and Mason JJ).

511 *R v Apostilides* (1984) 154 CLR 563, 576, cited in *Nguyen v The Queen* [2020] HCA 23.

512 *Seneviratne v R* [1936] 3 All ER 36.

Sentencing

The duty of fairness requires that submissions on sentence are made 'fairly and in an even-handed manner', and the prosecution should 'not, as an adversary, press the sentencing court for a heavy sentence'.[513] Rule 29.12 sets out obligations of the prosecutor to assist in fair sentencing that would withstand appeal.

The duty to assist the court to avoid appealable error (see rule 29.12.3) applies 'whether at trial or on sentencing'.[514] Among the prosecution roles, one is to assist the court by making submissions about 'the range of sentences… appropriately open' or even any relevant principles of sentencing.[515] For example, a prosecutor may submit that a custodial or non-custodial sentence is appropriate.[516]

Note that rule 29.12.5 was removed from the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* on 1 April 2022 by the Uniform States but retained in Queensland because of ss 3 and 5 of the *Penalties and Sentences Act 1992* (Qld).

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513 *R v Tait and Bartley* (1989) 46 FLR 386, 389.

514 *R v S* [2007] VSCA 134, [39].

515 *R v Casey* (1986) 20 A Crim R 191, 196; *R v Tait and Bartley* (1989) 46 FLR 386, 389.

516 *R v Wilton* (1981) 28 SASR 362, 368 (King CJ); *R v Economedes* (1990) 58 A Crim R 466.

Relations with other solicitors

30. Another solicitor or other person's error

30.1 A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

No taking advantage of error

Rule 30 is aimed at sharp practice. It is unprofessional and unconscionable to take advantage of an obvious error. A solicitor owes a professional responsibility to disclose to the other side any error the opponent has made which would operate to the detriment of the opponent's client. An attempt to take advantage of the other party's 'clerical or arithmetical error' is 'just a shabby trick and indubitably unconscionable' and will produce a result against which equity will give relief.[517]

The solicitor is under no duty to seek the client's instructions before informing the opponent of the error. If a solicitor informs a client of an obvious error, the matter should be presented as requiring action rather than as an enquiry into the client's preferred course.

Should a solicitor take advantage of an obvious error, they may breach their paramount duty to the court and the administration of justice. Neither is it in the client's best interests. In *Tamlura NV v CMS Cameron McKenna*,[518] a draft share sale agreement erroneously contained a mechanism for valuing the shares that differed from that previously agreed by the parties and that error was corrected by the opposing solicitors during negotiations without consulting with their client and it was the corrected version that was signed, even though retaining the error would have been to their client's advantage. In a subsequent action for negligence brought by the client of the solicitors who pointed out the error, Mann J found that the solicitors were not obliged to not take advantage of the mistake and were not obliged to contact the client before signing to see if the client wished to do so. If on the other hand the solicitors had taken advantage of the mistake of their own accord this may have resulted in the client becoming involved in a rectification action, imperilled the transaction, or resulted in misleading other shareholders.

Similar cases may lead to a finding of misleading or deceptive conduct, or other negative consequences for the client.

Note that there is an exception for a defence lawyer who has no duty to disclose a client's previous convictions when the prosecution has failed to do so. This is discussed above under rule 19.10.

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[517] *Deputy Commissioner of Taxation v Chamberlain* (1990) 93 ALR 729, 741, cited with approval in *Paynter Dixon Queensland Pty Ltd v The Ayr Anzac Memorial Club Inc* [2002] QDC 227, 13.

[518] [2009] EWHC 538, [168].

Disciplinary consequences

The Law Council of Australia's 2024 Commentary provides that:[519]

> 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'.[520] Thus, as a general principle, a solicitor does not have a duty to remedy deficiencies or errors in an opponent's case.
>
> However, in *Chamberlain v Law Society of the Australian Capital Territory*,[521] 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'.[522]
>
> Black CJ considered the notions of fairness and common decency, and explained the drawing of the line between permissible and impermissible taking of advantage of an opponent's mistake. His Honour said, at [155]:
>
> Whilst in some circumstances it may be in order to take advantage of a mistake, in other circumstances the attention of the practitioner should be drawn to a mistake or oversight. But, in any event, where there is a mistake that may involve the other practitioner's client in unnecessary expense or delay the practitioner should not do or say anything to induce or foster that mistake. To induce or foster such a mistake would be detrimental to a relationship characterised by courtesy and fairness that ought to exist between members of the legal profession. A relationship of that nature ... has as its justification not merely in social or ethical mores; it has an additional justification referrable to the public interest, in that courtesy and fairness contribute materially to the effective and expeditious performance of legal work.

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519 Law Council of Australia 2024 Commentary (n 1) 111.

520 *Holborow v Macdonald Rudder* [2002] WASC 265.

521 (1993) 43 FCR 148.

522 Ibid 166.

31. Inadvertent disclosure

31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must:

31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and

31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

31.2.1 not disclose or use the material, unless otherwise permitted or compelled by law,

31.2.2 notify the opposing solicitor or the other person immediately, and

31.2.3 not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

Not to use inadvertently disclosed material

Rule 31 is designed to preserve confidential information which may have been accidentally disclosed. A solicitor who mistakenly receives information that they reasonably suspect to be confidential must stop reading it, destroy or return it, and notify the solicitor who sent it. The rule applies to any mistaken disclosure, not only to privileged communications, or to disclosures in discovery or other curial processes. The Law Institute of Victoria's *Inadvertent Disclosure Guidelines* give practical advice on the operation of the rule.[523]

If the receiving solicitor believes that there is a genuine dispute over the 'confidentiality' of the material, then the material should be secured, pending resolution of the issues in dispute by agreement or court order.

This rule does not alter the law concerning express or implied waiver of legal professional privilege, see further discussion above for rule 9.2.2.

The High Court of Australia considered the question of inadvertent disclosure in the context of discovery in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.[524] In this case, the appellant solicitors claimed that a number of documents had been inadvertently disclosed to the respondent solicitors and were subject to professional privilege. They requested the disclosed documents be returned and that the respondent solicitors provide an undertaking to not use information gained as a result of the inadvertent disclosure. The respondent solicitors disputed their obligation to return the documents and give such an undertaking. The High Court considered a number of issues:

- **Waiver:** 'Waiver is an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege)'.[525] A mistake does not amount to an abandonment of privilege and that any question the respondents had about the appellant's claims for privilege were dispelled by the letter from

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523 Law Institute of Victoria, *Inadvertent Disclosure Guidelines* (Guideline, 12 October 2022).

524 [2013] HCA 46. See also Nick Knowlman, 'Inadvertent Disclosure and your Duty to the Administration of Justice', *Queensland Law Society* (Note, 3 December 2013).

525 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 326.

the appellant's solicitors promptly advising of the inadvertent disclosure. The court also said that the issue of waiver should never have been raised.[526]

- **Complexity of the discovery process:** Discovery is not intended to affect a person's ability to maintain confidentiality of documents where the law permits. The Court said that '[i]t follows that where a privileged document is inadvertently disclosed, the court should ordinarily permit the correction of the mistake and order the return of the document, if the party receiving the documents refuses to do so'.[527]
- **Professional responsibility:** the Court referred to a solicitor's responsibility in these words:

  > The question for a party to civil proceedings and its legal representatives is not just whether there is any real benefit to be gained from creating a dispute about whether a mistake in the course of discovery should be corrected. The CPA imposes a positive duty upon a party and its legal representatives to facilitate the CPA's purposes. Requiring a court to rule upon waiver and the grant of injunctive relief in circumstances such as the present could not be regarded as consistent with that duty.[528]

A solicitor's duty should be directed towards assisting:

> the court to facilitate the overriding purposes of the CPA [*Civil Procedure Act* 2005 (NSW)]. It is an example of professional, ethical obligations of practitioners supporting the objectives of the proper administration of justice.[529]

Consequences

While solicitors receiving confidential information are bound by rule 31, solicitors who have made the inadvertent disclosure may have breached their duty to the client.[530] All solicitors should therefore establish systems to avoid the risk of mistaken disclosure. Solicitors should also consider, in the context of disclosure or discovery, the consequences of waiver: express, implied, or imputed.[531]

In *Kingston v State Fire Commission*,[532] solicitors for the plaintiff briefed counsel to advise on liability, quantum, and evidence in a personal injuries action. The barrister mistakenly returned the brief to the solicitors for the defendant, who, acting upon advice, read the brief, took notes, and made photocopies. The Court held that inadvertent disclosure of the material caused it to lose its privileged status, but this did not mean that the plaintiffs had waived privilege. The confidential status of the material had not been lost. The defendant's solicitors and counsel were restrained from making any use of the inadvertently disclosed material for the purpose of the action.

Dal Pont discusses further the issues that may arise from the sending of documents between opponents and the need to prevent 'mining' of metadata.[533]

For Queensland practitioners, see *Guidance Statement No. 18 – Inadvertent disclosure*.[534]

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526 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46, [35].

527 Ibid [45].

528 Ibid [64]. The *Uniform Civil Procedure Rules 1999* (Qld) are the analogous rules to the New South Wales legislation referred to by the court.

529 Ibid [67].

530 See above for rule 9 commentary about confidentiality.

531 Dal Pont (n 8) [11.245].

532 (1998) 8 Tas R 152.

533 GE Dal Pont, 'Reading outside the lines' (2012) 50(1) *Law Society Journal* 40.

534 Queensland Law Society, *Inadvertent disclosure* (Guidance Statement No. 18, 20 April 2020).

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.

Unfounded allegations

Section 487 of the *Legal Profession Act* applies to a person who makes a complaint about the conduct of an Australian lawyer or a law practice employee. A person who makes a complaint is protected from civil and criminal liability, whether in court or other administrative proceedings. Section 487 also provides that simply making the complaint, giving the notice, or providing information does not mean the person has violated any professional etiquette or ethical rules, or departed from accepted standards of professional conduct.

Allegations may only be made by a solicitor in good faith and with supporting evidence. This includes allegations that have been formalised as a complaint to the Legal Services Commissioner.[535] Lawyers have been disciplined for making unfounded allegations against another lawyer, generally opposing, without reasonable grounds.[536]

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535 See above page 86 for rule 21.4 commentary about serious allegations during a court process.

536 *McLaren v Legal Practitioners Disciplinary Tribunal* (2010) 26 NTLR 45; *Legal Profession Complaints Committee v in de Braekt* [2011] WASAT 1.

33. Communication with another solicitor's client

33.1 In representing a client, a solicitor shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another practitioner unless:

33.1.1 the other practitioner has previously consented;

33.1.2 the solicitor believes on reasonable grounds that:

(i) the circumstances are so urgent as to require the solicitor to do so; and

(ii) the substance of the communication would not be unfair to the opponent's client;

33.1.3 the communication is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or

33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with the communication.

'No contact' rule

Rule 33 applies where there is:

- another party in a matter (the 'opposing' party or client);
- that party, or another party or witness in the matter, is represented by a solicitor in relation to the matter;
- there is the risk of a solicitor 'dealing' directly with the other party on behalf of the solicitor's client in the absence, or without the permission, of the other party's solicitor.

A solicitor may not communicate with the other party directly in these circumstances, other than where one of the exceptions in Rule 33 applies.

Rule 33 protects the opposing party, as 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'[537]. However, adherence to this Rule may also be of benefit to the solicitor's own client as ensuring the other party is represented can guard against future claims such as those related to undue influence or unconscionability.

In *Re Margetson and Jones,* the Chancery noted that it is

> also highly cognisant with good sense and convenience, because otherwise solicitors cannot really do their duty, and it is impossible for business to be properly conducted unless the solicitors have the full confidence of their clients and are enabled to communicate the one with the other upon that footing.[538]

[537] *Legal Services Commissioner v Bradshaw* [2008] LPT 9, [26].
[538] [1897] 2 Ch 314, 318–9.

The Law Institute of Victoria provides detailed practice guidance to this rule.[539] It is most often invoked when the contact is initiated by the client. If a solicitor is contacted by another solicitor's client, the solicitor must inform the client that they:

- cannot speak to them about the matter,
- cannot listen to what the client has to say,
- can only communicate through the person's own solicitor, and
- the solicitor should immediately terminate the conversation and advise the client's lawyer.

Rationale

The rule is to protect the opposing party. Having made contact, a lawyer could 'secure damaging admissions, or [gain] access to privileged material, or undermine the opponent's client's trust in that person's lawyer'.[540]

Social media

A solicitor may also breach this rule by connecting to another solicitor's client on social media. For example, a solicitor would breach the rule by becoming a 'friend' of another solicitor's client through Facebook with the aim of accessing non-public posts or photographs only available to 'friends'. Connecting with another solicitor's client without disclosing the true purpose of the request may also involve a breach of the duty of honesty set out in rule 4.1.2. As to whether a solicitor's agent (such as an investigator or loss adjustor) may seek to 'friend' another solicitor's client, caution should be exercised.

Dealing with financial institutions when acting for a borrower or debtor

The Law Council of Australia's 2024 Commentary provides the following guidance:[541]

> Situations arise where a solicitor, (usually) from a legal assistance organisation may wish to make direct contact, on behalf of a legally assisted person, with a financial institution rather than the solicitor representing the institution in a debt recovery matter. Nevertheless, the principle expressed by the rule applies in these situations.
>
> It is noted that many businesses now subscribe to industry-specific self-regulatory codes of conduct, or are otherwise required under law, to provide internal dispute resolution processes, which can be availed of to try to settle disputes before the need arises to contact the legal practitioner representing the business. Internal dispute resolution services are not usually staffed by lawyers, and legal assistance service providers acting for a client are not precluded from contacting these internal dispute resolution services.
>
> Given the ethical principle reflected in Rule 33, the appropriate way of resolving these debt payment matters would appear to be through either consumer legislation; through financial services ombudsman schemes; through the internal debt management and dispute resolution processes of the financial institution or in the terms of engagement between the financial institution and their solicitors.

Exceptions

The Law Council of Australia's 2024 Commentary provides a summary of exceptions to rule 33.[542]

> **Second opinions**
>
> Rule 33 as it presently stands, although not expressly dealing with communications relating to the provision of second opinions, would not exclude a client from seeking a second opinion. However, it should be noted that the circumstances in which this occurs, for example outside formally accepting instructions to provide a second opinion on the client's matter, could raise ethical issues.

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539 Law Institute of Victoria, *Communicating with Another Solicitor's Client Guidelines'* (Guideline, 12 October 2022). The equivalent rule here is rule 25 of the *Professional Conduct and Practice Rules 2005* (Vic).

540 *Legal Services Commissioner v Bradshaw* [2008] LPT 9, [26] (a case on the former *Legal Profession (Barristers) Rule 2004* (Qld) r 55).

541 Law Council of Australia 2024 Commentary (n 1) 118.

542 Ibid 119.

Transfer of client files to a new solicitor

Where a client has changed solicitors, it should be noted that Rule 31 would not preclude the former solicitor from contacting the former client at the request of the new solicitor to arrange the orderly transfer of the client's file to the new solicitor.

Serving documents on a client of another solicitor

Where a solicitor serves a document on a client of another solicitor pursuant to a law or contractual obligation, it is considered that such contact with the client of the other solicitor would not amount to a 'dealing' under Rule 33.

Communication between solicitors

It should be noted that, as a matter of professional courtesy, a solicitor, having communicated directly with a client of another solicitor, as permitted under the rule, would notify the other solicitor of that communication.

For Queensland practitioners, see:

- *Guidance Statement No.27 Second opinions*
- *Guidance Statement No. 28 – Applying the 'no contact rule' when the other party is an individual*
- *Guidance Statement No. 29 – Applying the 'no contact rule' when the other party is an organisation*.[543]

[543] Queensland Law Society, *Second opinions* (Guidance Statement No. 27, 13 October 2021); Queensland Law Society, *Applying the 'no contact rule' when the other party is an individual* (Guidance Statement No. 28, 13 October 2021); Queensland Law Society, *Applying the 'no contact rule' when the other party is an organisation* (Guidance Statement No. 29, 13 October 2021).

34. Dealing with other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement to another person:

(i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and

(ii) which misleads or intimidates the other person,

34.1.2 threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

Exceeding the legitimate assertion of rights

A solicitor should bear rule 34.1.1 in mind at the earliest stages of their involvement, such as in preparing a letter of demand. Any early advantage gained by a bold demand must be balanced to ensure the statements do not overstate the client's rights or mislead or intimidate the recipient.

Examples of overstepping the mark may include:

- Claiming that the costs of the letter of demand will be recoverable as costs in any proceedings to recover the debt.[544]
- In *Legal Practice Complaints Committee v Segler*,[545] a solicitor's letter demanded immediate payment of a judgment debt, notwithstanding that the magistrate had allowed seven days for payment. The letter amounted to unprofessional conduct.
- In *Collection House v Taylor*,[546] a debt collection clerk was found guilty of unconscionable conduct for misrepresenting the extent to the right to collect debts. In Queensland, collection of debts barred by the *Limitation of Actions Act 1974* (Qld) must be conducted in a way which does not involve misrepresenting to the debtor the extent of the creditor's right to collect the debt, nor in a manner which amounts to unconscionable conduct in breach of consumer protection legislation.

The rule is directed at conduct which grossly exceeds the true position. As noted by Beech-Jones J in *Provident Capital Ltd v Anderson (No 3)*:

> A legal practitioner does not have to have a subjective belief in the complete accuracy of every assertion they make on a matter of law either in submissions or in correspondence engaged in on behalf of their client. In the ordinary course, it may suffice if the practitioner considers that a relevant assertion on a matter of law is something which is reasonably open on the current state of the law. Of course whether that is so will always depend upon the context.[547]

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[544] *ACCC v Sampson* [2011] FCA 1165.

[545] [2009] WASAT 91.

[546] [2004] VSC 49.

[547] *Provident Capital Ltd v Anderson (No 3)* [2013] NSWSC 705, [36].

The question of whether communication is intimidating or threatening is assessed on the face of the communication. It is not necessary to show that the solicitor intended it to be intimidating or threatening, and it is not necessary to adduce evidence that the person receiving the communication was in fact intimidated or threatened.[548]

Threatening criminal proceedings

Rule 34.1.2 has received judicial consideration in both civil and disciplinary cases. In *Legal Services Commissioner v Sing*,[549] the issue related to the extent to which 'a solicitor may ethically go in raising the prospect of recourse to criminal process with a view to encouraging the discharge of civil liability.' At the time of the disciplinary complaint, this question had not arisen in Queensland 'for more than a century'.[550] It was observed that:

> The threat by the letter of 4 April 2006 should be carefully defined. It was to ask the police to investigate the dishonouring of the cheques, an investigation which, if followed through, may or may not have led to a prosecution. It was not actually a threat to launch criminal proceedings were civil satisfaction not made (cf. Coogan [1914] St R Qd 197), or to institute a prosecution (Swanwick [1883] 1 QLJ 117, Chubb [887] 3 QLJ 35). In those cases (as referred to in G N Williams: Harrison's Law and Conduct of the Legal Profession in Queensland, 2nd ed, Lawyers' Bookshop Press, 1984, p 40) there were direct threats to institute criminal proceedings absent satisfaction of a civil claim.[551]

In *Legal Services Commissioner v Sing*,[552] the respondent solicitor and his wife rented out commercial premises to the complainant's company. Cheques in payment of the bond and first month's rent were dishonoured, but those amounts were later paid. The respondent then wrote to the complainant 'driven by frustration', threatening that if future payments of rent were not made, he would write to the police requesting investigation of the circumstances in which the dishonoured cheques had been issued.[553]

De Jersey CJ held that in the circumstances there had been no breach of the Queensland Criminal Code[554] to the extent that it prohibits soliciting a benefit in return for stifling a prosecution. The letter would therefore have been unobjectionable if written by a non-lawyer.

The solicitor had not made any improper use of his position as a solicitor and the application was dismissed.

The dividing line between legitimate pressure and improper intimidation is difficult to draw, but the following examples may cross this line:

- A threat to institute criminal proceedings if a civil claim is not met.
- Characterisation of a person's conduct as criminal without a proper basis.
- The use of the solicitor's professional position to intimidate the addressee. Pressure is not impermissible by itself provided it is carried out with reasonable restraint and in a measured way.
- Threats to make a report to the police or professional body if a person does not discharge their civil legal obligations. It is suggested that a solicitor should err on the side of caution by avoiding any threat of a report to the police or professional body if a person does not discharge their legal obligations.

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548 *Kazas-Rogaris v Council of the Law Society of New South Wales* [2024] NSWCATOD 166, [47].
549 [2007] LPT 5, [2].
550 Ibid.
551 Ibid [8].
552 [2007] LPT 4, [2].
553 Ibid [4].
554 Section 130.

Tactics to embarrass or frustrate

See above for discussion under rule 28 for conduct that may be of the kind addressed by rule 34.1.3.

The same communication may be found to offend against more than one limb of rule 34.1.[555]

Claim farming

In addition to rule 34.2, solicitors should bear in mind the prohibition against claim farming. Claim farming involves approaching people and pressuring them into making a claim for compensation. It is an offence for legal practitioners to engage in claim farming in Queensland.[556]

555 *Kazas-Rogaris v Council of the Law Society of New South Wales* [2024] NSWCATOD 166, 64.

556 *Personal Injuries Proceedings Act 2002* (Qld); Legal Services Commission, 'Claim farming', *Personal Injury and Proceedings Act 2002 (PIPA)* (Web Page) <https://www.lsc.qld.gov.au/for-the-profession/personal-injury-and-proceedings-act-2002-2/claim-farming>.

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.

Contracting with third parties

When a solicitor engages a third party (such as a search agent, doctor, valuer, engineer, or another solicitor) to assist with a client's matter, the solicitor is responsible for paying the third party's fees unless they have informed the third party in advance that they will not accept personal liability.

A solicitor who has referred a client to another solicitor should not be considered responsible for the payment of that other solicitor's fees except where otherwise agreed.

Law practice management

36. Advertising

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

36.1.1 false;

36.1.2 misleading or deceptive or likely to mislead or deceive;

36.1.3 offensive; or

36.1.4 prohibited by law.

36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words ‘accredited specialist’ or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.

False or offensive advertising

A solicitor may not advertise in a way that is false, likely to mislead or deceive, offensive, or prohibited by law, including in relation to a practice specialisation. Rule 36 is complemented by the *Australian Consumer Law* (‘*ACL’*), while advertising personal injury legal services is further restricted by the *Personal Injuries Proceedings Act 2002* (Qld).

The *ACL* applies to ‘any business or professional activity’.[557] The *ACL* provisions relevant to lawyer advertising include:

- Misleading and deceptive conduct: s 18.
- False or misleading representations about services: s 29.
- Misleading conduct as to the nature etc. of services: s 34.
- Consumer guarantees: ss 60-62.
- Component pricing: s 48.
- Unconscionable conduct: pt 2-2, ss 20-22.
- Unfair terms: ss 23-28.

Practitioners should also be aware of direct marketing legislation such as the *Spam Act 2003* (Cth) and, where applicable, the Australian Privacy Principles under the *Privacy Act 1988* (Cth).

Personal injury advertising

There are restrictions on personal injury advertising for lawyers in the *Personal Injuries Proceedings Act 2002* (Qld) (‘*PIPA*’).[558] Advertising of personal injury services takes place if a person causes to be published a statement likely to encourage or induce a person:

- to make a claim for compensation or damages for a personal injury, or

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557 *Competition and Consumer Act 2010* (Cth) sch 2 s 2 (‘*Australian Consumer Law*’). The *Fair Trading Act 1999* (Qld) s 16 applies the *Australian Consumer Law* in Queensland.

558 *Personal Injuries Proceedings Act 2002* (Qld) ss 63-69.

- to use the services of a named law practice for that claim.[559]

Advertising is allowed in printed publications such as newspapers, magazines, directories and flyers, billboards, signs, and on the internet.[560] It is not allowable on radio; television; recorded telephone messages; or by the public exhibition of photographs, films or other recordings of images or sound (for example, cinema advertising).

The content of personal injuries advertisements is restricted to the name and contact details of the law practice and their areas of practice.[561] Additional statements are permitted on a law practice's own website. For example, statements on the operation of personal injuries law, a person's legal rights under that law, and the conditions under which a law practice is prepared to provide personal injury services.[562] Accordingly, advertising personal injuries services on a 'no win, no fee' or other speculative basis is permitted only on the firm's own website.

Touting at the scene of an incident where a person allegedly suffered personal injury, or afterwards at a hospital, or at any time is prohibited and is a criminal offence,[563] as is the payment or receipt of referral fees.[564]

The Legal Services Commission monitors and enforces the provisions of *PIPA*, and a complaint about breach of *PIPA* can be taken to the Commission. Solicitors should consult the Commission's website on restrictions around claim farming and advertising of personal injuries services.

Accredited specialist

The description 'specialist' in this context means more than someone who only or mostly works in a particular area of law. It implies a level of expertise or recognition of skill in that area.

Accredited specialists are lawyers recognised by a relevant professional body as having specialist expertise in a particular area of law. The term is not defined in the *ASCR*. The QLS has schemes of specialist accreditation and those specialists are entitled to promote themselves through different forms of advertising. The QLS provides marketing guidelines for accredited specialists on its website, including guidelines on the correct usage of the logo and post-nominals on promotional materials. Accreditations attach to the practitioner with the specialisation, not the law practice, so logos must not be placed in close proximity to the name of the practice or a legal practitioner without accreditation. In *Victorian Legal Services Commissioner v Stewart (Review and Regulation)*,[565] the Tribunal ordered the practitioner to remove advertisements relating to her being a 'specialist' as she did not hold specialist accreditation.

If the solicitor is claiming to be a 'specialist' or even to 'specialise' in an area of law for which no QLS accreditation is available, or which does not clearly fall within such an area, the rule does not prohibit this, provided that the description does 'not convey a false, misleading or deceptive impression of specialist expertise'.

To avoid confusion, however, it is not recommended that solicitors use the terms 'specialist' or 'specialise' unless the solicitor is a QLS accredited specialist.

It should also be remembered that the requirement not to engage in conduct which false, misleading or deceptive applies regardless of the description used.

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[559] Ibid s 64.

[560] Ibid s 65.

[561] Ibid s 66(1).

[562] Ibid s 66(2).

[563] Ibid s 67.

[564] Ibid s 68.

[565] [2022] VCAT 806.

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.

Designated responsibility

'Designated responsibility' is defined in the Glossary to mean 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. As a result, if supervision is by way of another employee solicitor, even a senior solicitor, the supervision by that solicitor must ultimately lie with the principal.[566]

Reasonable supervision

'Reasonable supervision' is not defined in the *ASCR*. Guidance from a risk management and professional standards perspective is provided on the QLS website.[567]

The following list provides case examples of where a lack of supervision may amount to professional misconduct or unsatisfactory professional:

- In *Bridges v Law Society of New South Wales*, the solicitor was aware, or ought to have been reasonably aware, of factors that may suggest to a reasonable person that greater supervision is required.[568]
- In *Re Mayes*, the solicitor failed to discharge his personal obligations with respect to the operation of his firm's trust account and to discover his partner's misappropriation of trust funds.[569]
- In *Law Society of New South Wales v McNamara,* a solicitor 'foolishly accepted' assurances that their conveyancing section was adequately dealing with the trust accounts. The acceptance of those assurances is not an immunisation from professional responsibility.[570]
- In *Cheney v Queensland Law Society Incorporated*, the solicitor's trust account had been overdrawn, trust money was paid into the office account without authority, money credited to one client was appropriated to another and there was also a shortfall in the trust account of $9,399.50. All of this was attributable to the solicitor's husband, who had the daily responsibility for maintaining the trust account and who had mismanaged it and had stolen moneys. The solicitor had a suspicion that her husband was not keeping the accounts scrupulously but was not aware of his dishonesty. The Court upheld the Law Society's suspension of the solicitor's practising certificate.[571]

Queensland solicitors should refer to *Guidance Statement No. 16 – Supervision*.

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566 *Legal Services Commissioner v Gould* [2016] QCAT 533.

567 Queensland Law Society, *Appropriate Management Systems Framework* (Guide, March 2024).

568 *Bridges v Law Society of New South Wales* [1983] 2 NSWLR 361.

569 *Re Mayes* [1974] 1 NSWLR 19.

570 *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72. See also *Council of the Queensland Law Society Inc v Cummings* [2004] QCA 138.

571 *Cheney v Queensland Law Society Incorporated* [2001] QSC 338.

All staff

In addition to disciplinary action, solicitors may be vicariously liability for their employees' actions. In *Lloyd v Grace Smith & Co*,[572] a firm of solicitors was held vicariously liable to a client defrauded by the firm's managing clerk, who was acting within the scope of his authority by transacting conveyances on behalf of clients. It was irrelevant that the fraud was perpetrated for the clerk's benefit. These principles were applied by Brennan J in *National Commercial Banking Corp of Australia Ltd v Batty*.[573]

In *Legal Services Commissioner v Mould*, it was noted that

> [p]rincipal legal practitioners responsible for the management of their legal practice must ensure adequate supervision of their administrative personnel and operations, and the adoption of procedures with appropriate procedural safeguards to prevent the improper charging of clients or maintenance of proceedings.[574]

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572 [1912] AC 716.

573 (1986) 160 CLR 251, 276. See also *Crouch and Lyndon (a Firm) v IPG Finance Australia Pty Ltd & Anor* [2013] QCA 220.

574 *Legal Services Commissioner v Mould* [2015] QCAT 440, [122].

38. Returning judicial officers

38.1 A solicitor who is a former judicial officer must not appear in:

38.1.1 any court if the solicitor has been a member thereof or presided therein; or

38.1.2 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.

Judicial officers

This rule makes it clear that within the two-year period whether the solicitor may appear is a matter for the relevant court. It should also be noted that whether a solicitor may appear at all is ultimately a matter for the court in any event, as even after the two-year period ends the rule does not *entitle* the solicitor to appear in any court.

The term ‘court’ has an expended meaning and extends to tribunals and other bodies, including elsewhere in Australia (see the Glossary).

The *QCAT Practice Direction No. 2 of 2013* allows ‘QCAT’s sessional members and adjudicators who are lawyers to nominate a list or lists within QCAT in which they will not sit’.[575] The practice direction is designed to prevent the risk of embarrassment and the appearance of conflicting duties and interests, or the appearance of bias to the lawyers involved.

[575] Queensland Civil and Administrative Tribunal, *Practice Direction No 2 of 2013: Allocating Legal Members to Lists in QCAT,* 15 March 2013, [2].

39. Legal and non-legal services

39.1 Where a solicitor or law practice:

39.1.1 shares an office with or is otherwise affiliated with an any other entity or business engaged in another calling to provide services other than legal services to a client, and

39.1.2 a client is receiving services concurrently from both the law practice and the other entity,

the solicitor, or law practice, as the case requires, (as the case requires) must take all reasonable steps to ensure that the client is clearly informed about the nature and the terms of the services being provided to the client by the solicitor or law practice, including (if applicable) that the services provided by the other entity are not provided by solicitor or the law practice as legal services.

Clarity on services provided

Rule 39 is designed to protect consumers and to manage conflicting duties and interests. It requires a solicitor to explain to a client which of the entities on the same premises provide what services, including non-legal services.[576] This is in addition to the obligation under s 152 of the *Legal Profession Act*, which calls for the legal practice to advise the client:

- the services to be provided,
- whether the services will be provided by an Australian legal practitioner, and
- if not, the status or qualifications of the persons who will provide the services.

The solicitor must also advise the client that the *Legal Profession Act* applies to the provision of legal services but not to the provision of non-legal services.

In addition, the solicitor must ensure that the arrangement does not compromise other duties to the client, such as confidentiality. Information must be secure. There is no exception in rule 9 that would permit another entity sharing premises to access confidential information without the permission of the client even if it had undertaken not to disclose it.

Amendment to Rule 39

Rule 39 was amended as from 27 September 2024 to extend the scope of the rule set out in rule 39.1.1 to any entity or business that not only shares an office but also to any affiliated entity or business of the solicitor or law practice.

The Glossary was also amended to include a definition of 'office' as follows: 'Office … is not limited to physical business premises and includes the media through which a law practice provides legal services to clients away from a central, physical location'.[577]

[576] It is therefore broader than the former *Legal Profession (Solicitors) Rules 2007* (Qld) r 35.

[577] Law Council of Australia 2024 Commentary (n 1) 131.

40. Sharing receipts

40.1 A solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from, or in connection with, the provision of legal services by the solicitor, with:

40.1.1 any disqualified person; or

40.1.2 any person:

(i) who has been found guilty of an indictable offence; or

(ii) who has had a guilty plea accepted in relation to an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.

Sharing receipts

Until rule 40 was introduced, solicitors in unincorporated practices were prohibited from sharing receipts from their practice with unqualified persons. The restriction is now only on sharing receipts with disqualified and certain convicted persons. It is possible now for solicitors who are principals of unincorporated practices to share receipts with legally unqualified persons (other than those disqualified or convicted of a defined offence).

The rationale for the former rule was that profit sharing arrangements amounted to 'the de facto conduct of legal practices by unqualified persons'.[578] In *Legal Services Commissioner v McClelland*,[579] the solicitor arranged with an unqualified conveyancer to divide the work and fee charged for each transaction. The conveyancer would be paid $1,000 for her work with the remaining $1,500 disbursed to the solicitor. The arrangement, 'crafted with some care to avoid a perception of sharing', was found to constitute illegal conveyancing and generated uncertainty about the identity of the purchaser's solicitor at different stages of the conveyance. The solicitor had his practising certificate suspended for four months, was publicly reprimanded, and was ordered to pay the costs of the proceedings. It would appear that, as a result of the introduction of rule 40, *McClelland* does not represent a professional standard applicable to solicitors governed by the *ASCR.*

Incorporated legal practices

Rule 40 represents a significant departure from the rules formerly applicable to law practices that were not incorporated legal practices. Since the *Legal Profession Act* came into force, incorporated legal practices have had no restriction on the identity of shareholders of the practice. In effect, this means that the 'receipts' of incorporated legal practices have been able to be shared with those who were not qualified solicitors. However, the *Legal Profession Act* continues to prohibit the sharing of receipts from the incorporated legal practice with a disqualified person.[580]

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578 *Adamson v Queensland Law Society* [1990] 1 Qd R 498.

579 [2006] LPT 13, [21] (regarding the *Queensland Law Society Rules 1987* r 78).

580 *Legal Profession Act* (n 5) s 129.

Disqualified persons

The rule prohibits the sharing of receipts with people who had been involved in the practice of law, but who have had that involvement curtailed in some way. A disqualified person is defined in *Legal Profession Act* sch 2 as, in summary, a person:

- whose name has been removed from a roll in Australia and who has not been admitted to the legal profession,
- whose Australian practising certificate has been suspended or cancelled,
- who has been refused a renewal of an Australian practising certificate,
- who is the subject of an order prohibiting the person from managing or being a partner in a legal practice or prohibiting a law practice from employing the person.[581]

Indictable offence

An ‘indictable offence’ and offences of dishonesty are defined in ss 3 and 581 of the *Criminal Code Act 1899* (Qld) respectively. There is also a reference to ‘indicatable offence’ under the definition of ‘serious offence’ in schedule 2 to the *Legal Profession Act*. Convictions for *Legal Profession Act* offences include those not recorded on sentence, the acceptance of a guilty plea and a finding of guilt.[582]

Amendment to Rule 40

Rule 40.1.12 was amended to ensure that the scope of the rule encompasses both a formal finding of guilt for an indictable offence and the acceptance of a guilty plea, whether or not a conviction for an indictable offence was recorded.[583]

[581] See also *Legal Profession Act* (n 5) ss 133, 158.

[582] Ibid s 11.

[583] Ibid; Law Council of Australia 2024 Commentary (n 1) 132–3.

41. [Omitted] Mortgage financing and managed investments

Rule 41 was omitted from the Rules with effect from 27 September 2024

The former rule provided that:

> [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.

Legal practitioners cannot conduct a managed investment scheme in an incorporated legal practice.[584] Money 'entrusted to or held by a law practice for a managed investment scheme, or mortgage financing, undertaken by the practice is not trust money under this Act'.[585] Solicitors must advise the clients of that fact.[586] The fidelity fund does not provide compensation for defaults in relation to a managed investment scheme or mortgage financing undertaken by a law practice.[587] This type of lending is regulated by the Australian Investments and Securities Commission under the *Corporations Act 2001* (Cth).

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584 *Legal Profession Act* (n 5) s 112.

585 Ibid s 238(2)-(3).

586 Ibid s 294.

587 Ibid s 373.

42. Anti-discrimination and harassment

42.1 A solicitor must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:

42.1.1 discrimination,

42.1.2 sexual harassment,

42.1.3 any other form of harassment, or

42.1.4 workplace bullying.

Amendment to Rule 42

The Law Council of Australia's 2024 Commentary discusses amendments to rule 42:

> Rule 42 was amended as from 27 September 2024 to:
>
> - clarify that Rule 42 applies to conduct that occurs in any setting connected to the practice of law or the legal profession;
> - ensure that professional disciplinary bodies can appropriately respond to matters concerning sexual harassment as either unsatisfactory professional conduct or professional misconduct; and
> - express the profession's collective view that discrimination and harassment (and, in particular, sexual harassment) are unacceptable conduct when occurring in any situation connected to the practice of law.
>
> In addition, the Glossary definition of 'sexual harassment' was amended from:
>
> - 'sexual harassment' means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation; to
> - 'sexual harassment' means an unwelcome sexual advance, request for sexual favours, or otherwise engaging in other unwelcome conduct of a sexual nature to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[588]

The interaction of the statutory concepts of unsatisfactory professional misconduct and professional misconduct, and professional misconduct at common law was later explored in *Council of the New South Wales Bar Association v EFA,*[589] in the context of what the Tribunal found to be 'unwelcome conduct of a sexual nature' which occurred at a dinner for barristers' clerks. Practitioners should also refer to *Legal Services Commissioner v Nguyen*[590] and *Council of the New South Wales Bar Association v Waterstreet*.[591]

The terms 'harassment', 'sexual harassment' and 'workplace bullying' in the Rule are defined in the Glossary:

- 'harassment' means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.
- 'sexual harassment' means an unwelcome sexual advance, request for sexual favours, or otherwise engaging in other unwelcome conduct of a sexual nature to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

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[588] Law Council of Australia 2024 Commentary (n 1) 135.

[589] [2021] NSWCATOD 21.

[590] [2015] QCAT 211.

[591] [2024] NSWCATOD 47.

- '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.

For Queensland practitioners, see *Guidance Statement 21 – Sexual Harassment in the Workplace*.[592]

[592] Queensland Law Society, *Sexual Harassment in the Workplace* (Guidance Statement No. 21, 20 December 2022).

43. Dealing with the regulatory authority

43.1 Subject only to their duty to the client, a solicitor must be timely, open, and frank in their dealings with a regulatory authority.

43.2 Omitted.

Open and frank

Rule 43.1 reinforces the common law duty of a solicitor to inform and assist the disciplinary process where their 'conduct is the subject of an inquiry whether by the court or the committee'.[593] The duty has received explicit approval from the Queensland Court of Appeal,[594] though not yet from the High Court. Its purpose is to protect the public and the proper administration of justice. The solicitor as an officer of the court has a duty to ensure that the enquiries from the regulatory body are responded to in a timely fashion and with openness and frankness.[595]

Disciplinary proceedings against a solicitor are sui generis or unique.[596] As observed in *Re Veron; ex parte Law Society of New South Wales*:

> They are not conducted as if the Law Society was a prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues at *nisi prius*. The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and to endeavour to meet the charges by mere argument.[597]

Solicitors should be aware of s 491 of the *Legal Profession Act* which enables the solicitor facing a disciplinary charge or complaint to disclose the client's confidential information provided the client is the complainant or consents to the disclosure.[598] Solicitors are reminded that failure to comply with the investigative entity requirements may be dealt with for professional misconduct.[599]

593 *Johns v Law Society of New South Wales* [1982] 2 NSWLR 1; *Malfanti v Legal Profession Disciplinary Tribunal* [1993] 1 LPDR 17, 19.

594 *Council of the Law Society of Queensland v Whitman* (2003) QCA 438.

595 See, eg, *Legal Services Commissioner v Jazayeri* [2024] QCAT 106 and *Legal Services Commissioner v Bui* [2018] QCAT 424 for consequences of non-compliance or failure to respond to notices issued pursuant to s 443 of the *Legal Profession Act 2007* (Qld).

596 *Weaver v Law Society of New South Wales* (1979) 25 ALR 359; *Martin v Medical Complaints Tribunal* [2006] TASSC 73, [21].

597 (1966) 84 WN (Pt 1) (NSW) 136, [141].

598 See above for rule 9.2.2 commentary about the exception to the confidentiality rule where a solicitor is permitted or is compelled by law to disclose information.

599 *Legal Profession Act* (n 5) s 443.

Appendices

Appendix A

Comparing the Australian Solicitors Conduct Rules 2012 to the Legal Profession (Solicitors) Rule 2007

On 1 June 2012, the Legal Profession (Solicitors) Rule 2007 (“Solicitors Rule 2007”) was replaced by the Australian Solicitors Conduct Rules 2012 (“ASCR”). The ASCR maintains much of the language and substance of the Solicitors Rule 2007.

A step in understanding the new Rules is to compare them to the former Rules. The following table compares each rule in the *ASCR* to the comparable rules (if any) in the *Solicitors Rule 2007*.

***ASCR* Rule Title**		***ASCR* Rule**	**Comparable *Solicitors Rule 2007***	**Brief Comment**
Nature and purpose of the rules				
1	Application and Interpretation	1.1	No equivalent Rule (but refer to Object of Rules)	The *ASCR* is intended to apply to all solicitors within Australia (including Australian-registered foreign lawyers). The *Solicitors Rule 2007* applied in part to government legal officers (there is no comparable provision in the *ASCR*). The *Solicitors Rule 2007* also applied to Australian-registered foreign lawyers.
		1.2	No equivalent Rule	The definitions in the *ASCR* are in the Glossary of Terms.
2	Purpose and Effect of the Rules	2.1	No equivalent Rule	The *Solicitors Rule 2007* contained statements of general principle commencing each Chapter. **Rules 2**, **3** and **4** *ASCR* are core duties of ethical behaviour for solicitors.
		2.2	No equivalent Rule (but refer to Object of Rules)	The *ASCR* applies in addition to the common law.
		2.3	No equivalent Rule	A breach of the *ASCR* rules is capable of constituting unsatisfactory professional conduct or professional misconduct, but cannot be enforced by a third party.
Fundamental duties of solicitors				
3	Paramount Duty to the Court and the Administration of Justice	3.1	No equivalent Rule (but refer to Object of Rules)	The paramount duty is the duty to the court and the administration of justice. This is a common law duty.

ASCR Rule Title		*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
4	Other Fundamental Ethical Duties	4.1.1	1 and 12.1	**Rule 1** *Solicitors Rule 2007* required honesty, fairness, competence and diligence. This is comparable to **Rule 4.1.1**, **4.1.2** and **4.1.3** *ASCR*. There is no comparable Rule in the *ASCR* to **Rule 2** *Solicitors Rule 2007* – that rule dealt with agreeing to act for a client; it is in part now dealt with in **Rule 4** *ASCR*.
		4.1.2	21	**Rule 21** *Solicitors Rule 2007* dealt with communications with other solicitors. **Rule 4.1.2** *ASCR* is broader as it relates to “all dealings in the course of legal practice”.
		4.1.3	1, 2 and 12.1	These Rules are reminders that in our service to a client we are to act competently, diligently and promptly.
		4.1.4	Refer to Object of Rules	**Rules 4.1.4**, **4.1.5**, **5.1.1** and **5.1.2** *ASCR* concern the maintenance of high standards of behaviour and professional independence.
		4.1.5	Refer to Object of Rules	
5	Dishonest and Disreputable Conduct	5.1.1	Refer to Object of Rules and 30	
---		5.1.2	Refer to Object of Rules; 28.5 and 30	
6	Undertakings	6.1	22.1, 27.1 and 27.3	**Rules 6.1** and **6.2** *ASCR* are broadly the same as **Rules 22** and **27** *Solicitors Rule 2007*.
		6.2	22.2 and 22.3	
Relations with clients				
7	Communication of Advice	7.1	12.2	Similar – Seeking to assist a client to understand the issues.
		7.2	12.3	Similar – Informing a client as to alternate dispute resolution.
8	Client Instructions	8.1	No equivalent Rule	The Rule requires us to follow lawful, proper and competent instructions.
9	Confidentiality	9.1	3	**Rule 9.1** *ASCR* uses the word “engagement” whilst **Rule 3** *Solicitors Rule 2007* uses the word “retainer”. Both Rules have similar content.
		9.1.1	3	
		9.1.2	No equivalent Rule	Extends the exception to barristers or third parties engaged by a solicitor’s law practice.

ASCR Rule Title		*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
		9.2.1	3.1	**Rule 9.2.1** *ASCR* refers to "express or implicit" authorisation. **Rule 3.1** *Solicitors Rule 2007* does not.
		9.2.2	3.2	Similar
		9.2.3	No equivalent Rule	
		9.2.4	3.4	**Rule 3.4** *Solicitors Rule 2007* refers to belief on reasonable grounds.
		9.2.5	3.7	Similar
		9.2.6	No equivalent Rule	
10	Conflicts Concerning Former Clients	10.1	4	**Rule 10** *ASCR* expressly refers to "informed written consent" and "effective information barriers", whilst **Rule 4** *Solicitors Rule 2007* did not.
		10.2	4	
11	Conflict of Duties Concerning Current Clients	11.1	8.2	**Rule 8** *Solicitors Rule 2007* sets out general and specific conflict issues. **Rule 11** *ASCR* provides a general rule applicable to all concurrent conflicts. There is no equivalent in the *ASCR* to **Rules 8.5** and **8.6** *Solicitors Rule 2007*.
		11.2	8.2	
		11.3	8.3	**Rule 8.3** *Solicitors Rule 2007* is more prescriptive. However, **Rule 11.3** *ASCR* requires "disclosure and informed consent".
		11.4	No equivalent Rule	Additional requirements to **Rule 11.3** *ASCR*.
		11.5	8.3.2 and 8.4	**Rule 8.3.2** *Solicitors Rule 2007* states a general requirement to cease acting. **Rule 11.5** *ASCR* is quite exceptional and of limited utility.
12	Conflict Concerning a Solicitor's Own Interests	12.1	9.1.1 and 9.2	Similar
		12.2	9.1.2	Similar
		12.3	11.1 and 11.2	**Rule 11** *Solicitors Rule 2007* is more prescriptive.
		12.4.1	10.1	Similar
		12.4.2	10.2	Similar
		12.4.3	32.2	**Rule 12.4.3** *ASCR* requires disclosure, advising that a client may refuse any referral and the need for informed consent from the client.

ASCR Rule Title		*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
		12.4.4	32.1.1	Similar but **Rule 12.4.4** *ASCR* requires disclosure of the payment or financial benefit to the client.
13	Completion or Termination of Engagement	13.1.1	6.1.1	Similar
		13.1.2	6.1.2	Similar but **Rule 13.1.3** *ASCR* refers to “engagement” rather than “retainer”.
		13.1.3	6.1.3	Similar but **Rule 13.1.3** *ASCR* refers to “engagement” rather than “retainer”.
		13.1.4	No equivalent Rule	
		13.2	6.2	Similar
		13.3	6.3	Similar
14	Client Documents	14.1	7.3	New terminology in **Rule 14.1** *ASCR*: “designated responsibility”, a reference to electronic document copies and an “effective lien”.
		14.2	No equivalent Rule	**Rules 7.1** and **7.2** *Solicitors Rule 2007* are different in context. **Rule 14.2** *ASCR* does not alter the common law requirement that client authorisation to destroy client documents is required. The civil standard must be observed.
15	Lien over Essential Documents	15.1	7.4 and 23.4	Similar
16	Charging for Document Storage	16.1	No equivalent Rule	
Advocacy and litigation				
17	Independence – Avoidance of Personal Bias	17.1	13.1	Similar
		17.2	13.2	Similar
		17.3	13.3	Similar
		17.4	13.5	Similar
18	Formality Before the Court	18.1	19.2	**Rule 19.2** *Solicitors Rule 2007* refers to courts, referee etc. This is dealt with in the definition of “court” in the Glossary of Terms.
19	Frankness in Court	19.1	14.1	**Rule 19.1** *ASCR* also refers to recklessly misleading.
		19.2	14.2	Similar
		19.3	14.3	Similar
		19.4	14.4	Similar

	ASCR Rule Title	*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
		19.5	14.5	**Rule 19.5** *ASCR* has a wider operation. Note the restriction in **Rule 14.5** *Solicitors Rule 2007* to the matter which is within the parameters of **Rule 14.4.3** *Solicitors Rule 2007*.
		19.6	14.6	Similar
		19.7	14.7	Similar
		19.8	14.8	Similar
		19.9	14.9	Similar
		19.1	14.11	Similar
		19.11	14.12	Similar
		19.12	No equivalent Rule	
20	Delinquent or Guilty Clients	20.1	15.1	Similar
		20.2.1	15.2.1	Similar
		20.2.2	15.2.2	Similar but **Rule 20.2.2(iv)** *ASCR* uses "and" as a conjunctive rather than "or" as used in **Rule 15.2.2(e)** *Solicitors Rule 2007*.
		20.2.3	No equivalent Rule	
		20.3.1	15.3.1	Similar
		20.3.2	15.3.2	Similar
		20.3.3	15.3.3	Similar
21	Responsible Use of Court Process and Privilege	21.1.1	16.1.1	Similar
		21.1.2	16.1.2	Similar
		21.1.3	16.1.3	Similar
		21.1.4	16.1.4	Similar
		21.2	No equivalent Rule	
		21.3	16.3 and 16.4.1	Similar but **Rule 21.3** *ASCR* more extensive.
		21.4	16.2	Similar but **Rule 21.4** *ASCR* does not have an equivalent provision to **Rule 16.2.2** *Solicitors Rule 2007*.
		21.5	16.4.2	Similar
		21.6	16.5	Similar
		21.7	16.8	Similar
		21.8	No equivalent Rule	

ASCR Rule Title		*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
22	Communication with Opponents	22.1	18.1	Similar
		22.2	18.2	Similar
		22.3	18.3	Similar
		22.4	18.5	Similar but **Rule 18.5** *Solicitors Rule 2007* more extensive.
		22.5	18.6	Similar
		22.6	18.7	Similar
		22.7	18.8	Similar
		22.8	No equivalent Rule	
23	Opposition Access to Witnesses	23.1	17.7	Similar
		23.2	17.8	Similar
24	Integrity of Evidence – Influencing Evidence	24.1.1	17.1	Similar
		24.1.2	17.2	Similar but does not cover the same ground as **Rule 24.1.2** *ASCR*.
		24.2	17.3	Similar
25	Integrity of Evidence – Two Witnesses Together	25.1	17.4	Similar
		25.2	17.5	Similar
26	Communication with Witnesses under Cross-Examination	26.1	17.6	Similar
27	Solicitor as Material Witness in Client's Case	27.1	13.4	**Rule 27.1** *ASCR* refers to the solicitor appearing as advocate for the client in the hearing. **Rule 13.4** *Solicitors Rule 2007* was not so limited.
		27.2	No equivalent Rule	
28	Public Comment During Current Proceedings	28.1	19.1	Similar
29	Prosecutor's Duties	29.1	No equivalent Rule	**Rule 20** *Solicitors Rule 2007* incorporated State and Commonwealth prosecution guidelines.
		29.2	No equivalent Rule	
		29.3	No equivalent Rule	
		29.4	No equivalent Rule	
		29.5	No equivalent Rule	

ASCR Rule Title		*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
		29.6	No equivalent Rule	
		29.7	No equivalent Rule	
		29.8	No equivalent Rule	
		29.9	No equivalent Rule	
		29.10	No equivalent Rule	
		29.11	No equivalent Rule	
		29.12	No equivalent Rule	
		29.13	No equivalent Rule	
Relations with other solicitors				
30	Another Solicitor or Other Person's Error	30.1	No equivalent Rule	
31	Inadvertent Disclosure	31.1	No equivalent Rule	
		31.2	No equivalent Rule	
		31.3	No equivalent Rule	
32	Unfounded Allegations	32.1	No equivalent Rule	
33	Communication with Another Solicitor's Client	33.1	18.4 and 25	**Rule 31.1** *ASCR* covers all communication. **Rule 18.4** *Solicitors Rule 2007* dealt with communicating in litigation and **Rule 25** *Solicitors Rule 2007* was non-litigation. **Rule 25.2** *Solicitors Rule 2007* has no equivalent in **Rule 33** *ASCR*.
Relations with other persons				
34	Dealing with Other Persons	34.1.1	28.2	Similar
		34.1.2	28.3	Similar
		34.1.3	No equivalent Rule	
		34.2	32.1.2	Similar
35	Contracting with Third Parties	35.1	26	Similar
Law practice management				
36	Advertising	36.1	36.1, 36.2 and 36.3	Similar
		36.2	36.4	The *ASCR* has no equivalent to **Rule 36.5** *Solicitors Rule 2007*.

ASCR Rule Title		*ASCR* Rule	Comparable *Solicitors Rule 2007*	Brief Comment
37	Supervision of Legal Services	37.1	34 and 37	**Rule 34** *Solicitors Rule 2007* is more widely drawn. Note **Rule 37.1** *ASCR* refers to a solicitor with "designated responsibility".
38	Returning Judicial Officers	38.1	No equivalent Rule	
39	Sharing Premises	39.1	35 and 31	**Rule 39.1** *ASCR* is less prescriptive.
40	Sharing Receipts	40.1	33	**Rule 40.1** *ASCR* does not have a similar sub-rule as in **Rule 33.3** *Solicitors Rule 2007*.
41	Mortgage Financing and Managed Investments	41.1	38	Similar
42	Anti-Discrimination and Harassment	42.1	No equivalent Rule	
43	Dealing with the Regulatory Authority	43.1	No equivalent Rule	
		43.2	No equivalent Rule	

ASCR Term	Comparable *Solicitors Rule 2007*	Brief Comment
Glossary of terms		
"associate"	Different	The definition of "associate" in the *ASCR* is more widely drawn than the definition in the *Solicitors Rule 2007*.
"associated entity"	No equivalent term	
"Australian legal practitioner"	No equivalent term	
"Australian practising certificate"	No equivalent term	
"Australian-registered foreign lawyer"	Similar	
"Australian roll"	No equivalent term	
"Authorised Deposit-taking Institution"	No equivalent term	
"barrister"	No equivalent term	
"case"	Similar	
"client"	Similar	
"client documents"	Different	See **Rule 7.5** Solicitors Rule 2007.
"compromise"	Similar	
"corporate solicitor"	No equivalent term	
"costs"	Similar	Refer to "legal costs" in *Solicitors Rule 2007*.
"court"	Similar	
"current proceedings"	Similar	
"discrimination"	No equivalent term	
"disqualified person"	No equivalent term	
"engagement"	No equivalent term	
"employee"	No equivalent term	
"employer"	No equivalent term	
"former client"	No equivalent term	
"immediate family"	Similar	
"instructing solicitor"	Similar	
"insurance company"	Similar	
"law practice"	No equivalent term	
"legal costs"	No equivalent term	
"legal profession legislation"	No equivalent term	

“legal services”	Different	Different from Solicitors Rule 2007.
“managed investment scheme”	Similar	
“matter”	Similar	Under *Solicitors Rule 2007*, reference is made to “preparation of a document” or “submission”.
“mortgage financing”	Similar	
“multi-disciplinary partnership”	No equivalent term	
“opponent”	Similar	
“order”	Similar	
“party”	No equivalent term	
“practitioner”	No equivalent term	
“principal”	No equivalent term	
“professional misconduct”	No equivalent term	
“prosecutor”	Similar	But in *ASCR* reference is to a “solicitor” not “Australian lawyer”.
“regulatory authority”	No equivalent term	
“serious criminal offence”	No equivalent term	
“sexual harassment”	No equivalent term	
“solicitor”	Different	Under Solicitors Rule 2007 reference was to the Legal Profession Act 2007, Schedule 2.
“solicitor with designated responsibility”	No equivalent term	
“substantial benefit”	Similar	See **Rule 10.3** Solicitors Rule 2007.
“trustee company”	No equivalent term	
“unsatisfactory professional conduct”	No equivalent term	
“workplace bullying”	No equivalent term	

ASCR 2012 tracked changes

Solicitors are referred to the ASCR 2012 tracked changes version for a comparison of the *Australian Solicitors' Conduct Rules 2012* and the *Australian Solicitors' Conduct Rules 2023*.

Appendix B

Information Barrier Guidelines

These Guidelines have been prepared by the Law Society of New South Wales in consultation with the Law Institute of Victoria.

Their aim is to assist law practices guard against the risk of a breach of the duty of confidentiality owed to former clients. By providing guidance on the factors typically taken into account in constructing an effective barrier these guidelines ought to reduce the occurrence of successful challenges in the courts and otherwise to the effectiveness of information barriers.

An information barrier, properly constructed taking into account the issues set out in these Guidelines, is an important element in ensuring that the duty of confidentiality is maintained thereby allowing a law practice to act against a former client without breaching its duty to preserve the confidences of that client. It may also present an effective rebuttal of the presumption of imputed knowledge.

These guidelines are intended to provide a fair and objective basis upon which to assess the adequacy of measures taken by a law practice. It is important to note that whether an information barrier will be effective depends on the facts of each individual case.

An information barrier is of itself no solution to a situation where there is a conflict of interest between one client and another client (or in some cases, former client) of the law practice. An information barrier does not remove the duty of undivided loyalty which a law practice owes to a client. In such situations a law practice may only act with the fully informed consent of both clients.

The Law Society and the Law Institute encourage law practices to employ these steps as minimum standards, adding additional safeguards where appropriate when an information barrier is to be established. They should be read in conjunction with the existing rules and law relating to confidentiality.

Information Barriers, Common Questions, Guidelines, Commentary & Examples

Contents

1. Information Barrier Guidelines

These Guidelines should be read in conjunction with the *Information Barriers, Guidelines, Commentary and Examples* and existing rules and law relating to confidentiality. They do not attempt to be nor should they be regarded as being a definitive exposition of the law in this area but points for guidance only and each case should be considered on the basis of its own facts.

In these guidelines,

"Screened person" means a person who possesses confidential information from one retainer which is relevant to another, current retainer. The screened person may be a partner, employee solicitor or other employee of the law practice.

"Earlier matter" means the retainer in which the confidential information was obtained, access to which the client in the current matter is not entitled.

1.1 The law practice should have documented protocols for setting up and maintaining information barriers. In all matters the law practice should carefully control access to any client information by personnel in the law practice in view of the possible requirement for an information barrier in the future.

1.2 (a) The law practice should nominate a compliance officer to oversee each information barrier.

(b) The compliance officer

(i) should be an experienced practitioner with appropriate knowledge of the rules and law relating to confidentiality, conflict of interest and information barriers;

(ii) will take appropriate steps to monitor compliance and deal with any breach or possible breach of an information barrier;

(iii) will undertake not to disclose any information about the earlier matter to personnel involved with the current matter.

1.3 The law practice should ensure the client in the current matter acknowledges in writing that the law practice's duty of disclosure to that client does not extend to any confidential information which may be held within the law practice as a result of the earlier matter and consents to the law practice acting on that basis.

1.4 All screened persons should be clearly identified and the compliance officer must keep a record of all screened persons.

1.5 (a) Each screened person should provide an undertaking to the law practice and the law practice should where appropriate provide an undertaking to the court confirming that

(i) the screened person will not have during the existence of the current matter any involvement with the client or personnel involved with the current matter for the purposes of that current matter;

(ii) the screened person has not disclosed and will not disclose any confidential information about the earlier matter to any person other than to a person in accordance with the instructions or consent of the client in the earlier matter, a screened person or the compliance officer;

(iii) the screened person will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.

(b) In the event of files and/or information relating to the earlier matter being required to enable the law practice to comply with an obligation at law to provide information or to answer a complaint or defend a claim against the law practice the screened person must not pass the files and/or information to anyone other than the compliance officer who may pass them on to a responsible officer of the legal practice who is not involved in the current matter so that the legal obligation can be honoured. Nothing in these guidelines is intended to restrict a law practice’s rights to access and disclose any information relating to the earlier matter for the purposes of enabling the law practice to comply with any legal obligation.

1.6 Personnel involved with the current matter should not discuss the earlier matter with, or seek any relevant confidential information about the earlier matter from, any screened person. Such personnel should provide undertakings confirming that

(i) no confidential information about the earlier matter has been disclosed to them;

(ii) they will not have during the existence of the current matter any involvement with a screened person for the purposes of the current matter;

(iii) they will not seek or receive any confidential information about the earlier matter from a screened person or in any other way; and

(iv) they will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.

1.7 (a) Contact between personnel involved in the current matter and screened persons should be appropriately limited to ensure that the passage of information or documents between those involved in the current matter and screened persons does not take place.

(b) The law practice should consider whether it is appropriate for such personnel to have contact with the client in other matters during the current matter.

1.8 The law practice should take steps to protect the confidentiality of all correspondence and other communications related to the earlier matter.

1.9 (a) Any files held by the law practice relating to the earlier matter should be stored in secure place where they can only be accessed by screened persons and/or the compliance officer.

(b) Access to any electronic files the law practice holds relating to the earlier matter and other technological communications related to the earlier matter should be restricted to screened persons and/or the compliance officer. The law practice should set up appropriate forms of technological protection to ensure access is restricted.

1.10 The law practice should have an ongoing education program in place, including

(a) education for all personnel about the law practice’s protocol for protecting confidential information and for setting up and maintaining information barriers, including

(i) employment terms for staff;

(ii) standard retainer terms with clients;

(iii) electronic and physical access to documents and files;

(iv) firm culture on such issues as discussion of client matters only on a “need to know” basis”;

(v) sanctions for non-compliance;

and

(b) additional education for individuals involved in matters affected by an information barrier, including the arrangements in place for the particular case and sanctions for non-compliance.

2. Common Questions

2.1 What is an Information Barrier?

In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 W.L.R. 215 Lord Millett noted that information barriers (in decided cases referred to commonly as "Chinese Walls") *"contemplate the existence of established organisational arrangements which preclude the passing of information and the possession of one part of the business to other parts of the business ... good practice requires there to be established institutional arrangements designed to prevent the flow of information between separate departments. Where effective arrangements are in place, they produce a modern equivalent of the circumstances which prevailed in Rakusen's case [1912] 1 Ch831"*.

2.2 When can an Information Barrier be used?

These guidelines deal with the use of information barriers where a law practice acts for a current client against a former client for whom the law practice acted in an earlier matter. They do not address the use of information barriers in concurrent matters.

An unsatisfactory barrier can result in enormous expense, inconvenience and loss of reputation. The information barriers guidelines, together with the Commentary & Examples, are intended to assist firms to ensure that a necessary information barrier will be **effective**.[600]

The threshold question is not whether an information barrier can be set up to prevent a breach of duty arising from a conflict of interest and/or duties but whether there is such a conflict at all which should prevent a law practice from acting against a former client.

2.3 Grounds for intervention – the Court's inherent jurisdiction and the fiduciary duty (confidentiality and loyalty)

The courts have recognised a number of bases for restraining a law practice from acting against a former client. These include the need to uphold the fiduciary duty owed to clients and former clients and the court's inherent jurisdiction to control its own officers to ensure that they act and are seen to act in the interests of justice and to uphold the good repute of the profession.

2.3.1 Fiduciary duty

(a) Confidentiality

The primary element of the fiduciary duty to be considered in relation to acting against a former client is the duty of confidentiality.

It is this issue which may be directly addressed by an effective information barrier.

In New South Wales and Victoria the courts recognize the authority of *Prince Jefri Bolkiah v. KPMG*[601] for the proposition that a basis for restraining a solicitor from acting against a former client is if there is a 'real risk' that the duty of confidentiality owed to the former client will be breached.

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600 For examples of steps implemented by firms successfully establishing Information Barriers ("Chinese Walls"), see – *Bureau International De Vins Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588 (9 May 2002), particularly at paragraph 12 – Corrs Chambers Westgarth.

601 *Prince Jefri Bolkiah v. KPMG* [1999] 2 WLR 215.

In New South Wales this is reflected in Rule 3 of ***the Revised Professional Conduct and Practice Rules 1995*** which provides:

3. Acting against a former client

Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person –

(a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously;

(b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and

that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.

In Victoria, Rule 4 of the Professional Conduct & Practice Rules 2005 provides:

4. Acting against a former client

A practitioner must not accept an engagement to act for another person in matter against, or in opposition to, the interest of a person ("the former client") –

(a) for whom the practitioner (or, in the case of a practitioner not being a firm, the practitioner's current or former firm) or the former firm, of a partner, director or employee of the practitioner or of the practitioner's firm has acted previously and has thereby acquired information personally, confidential to the former client and material to the matter and

(b) if the former client might reasonably conclude that there is a real possibility the information will be used to the former client's detriment.

An ongoing "duty of loyalty"?

In Victoria, the ongoing duty of loyalty surviving the termination of the retainer is another possible ground on which a court may intervene to stop a law practice from acting against a former client. However, in the context of these guidelines it is important to note that the use of an information barrier will be of no assistance. It is discussed at length by Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd and Ors* [2001] VSSCA 248,[602] as a ground for preventing a law practice from acting against a former client in the *same or a related matter*,[603] notwithstanding compliance with these Guidelines or absence of relevant confidential information.

The application of this duty in Australia as a whole is unclear. It has been dismissed in a number of New South Wales decisions.

In *British American Tobacco Australia Services Limited v Blanch* [2004] NSWSC 70 Young CJ in Equity made an order restraining a firm of solicitors from acting against a former client on the hearing of a cross claim for contribution before the Dust Diseases Tribunal of NSW. In doing so his Honour considered submissions

[602] *Spincode Pty Ltd v Look Software Pty Ltd and Ors* [2001] VSSCA 248. His Honour discusses several Canadian and US authorities which support this proposition, as part of a detailed analysis of the case law from Australia and overseas. Those aspects of His Honour's decision relating to a continuing duty of "loyalty" are not as isolated as many papers would have the reader believe. Similar statements had been made in Australia in the 1990s, although with the caveat that this was not an "absolute rule". Within the *Spincode* decision, Ormiston JA said, "I would like to have been able to reach a conclusion also on … the principle of fiduciary "loyalty" and the precise obligations owed by solicitors to former clients. Those aspects do raise, however, issues only touched upon in argument and authorities and papers … If I had had the luxury of further time to consider them, I may have reached agreement with Brooking JA on each of those aspects…" (para 61) Chernov JA also found it unnecessary to decide whether there is an absolute obligation on solicitors not to act against their former clients in the same or substantially the same proceeding, but significantly added, "… if I may say so with respect, the learned judgment of Brooking JA makes a compelling case for such a view." (para 63)

[603] For a brief discussion of what constitutes "the same or a related matter", see Nettle J in *Sent and Primelife Cororation Lted v John Fairfax Publications Pty Ltd and Hills* [2002] VSC 429 (7 October 200) at paragraph 108. Also note that in *Village Roadshow*, Byrne J at paragraph 43 says "This question should not be determined by the taking of fine distinctions."

based on the duty of loyalty argument in *Spincode* and also considered his earlier comments in *Belan v Casey* [2002] NSWSC 58 and Prince Jefri, rejecting the loyalty argument, *saying "it may be that there are some exceptional cases where equity will give relief in favour of a former client where there is no confidential information present. However, almost every judge who has recently given a judgement on the matter has recognised that there is still no rule forbidding a lawyer acting against former client. As Chernov JA points out in Spincode, such a rule would come into play if one adopted a too liberal view as to the basis of the jurisdiction"*.

2.3.2 The Court's inherent jurisdiction to control its own officers

The Court has an inherent jurisdiction to control its own officers, to ensure that justice is done and seen to be done.[604]

Whether or not an information barrier is solid, and whether or not the Courts accept that "loyalty" prohibits acting against a former client even where there is no issue of confidential information, law practices should always be mindful of their duty to act in the interests of justice and to uphold the good repute of the profession. Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd and Ors* [2001] VSSCA 248 said, *"I am not deterred by the suggestion that, once infringement of legal or equitable rights ceases to mark off what may be proscribed, solicitors and their would-be clients will be subject to a great and unfair uncertainty, being unable to say in advance what view the court will take. No experienced solicitor of sound judgment would have done what has been done in this case."* (at paragraph 58).

Other relevant decisions include:-

(a) D & J Constructions Pty Ltd v Head (1987) 9 NSWLR 118 at 123

Bryson J: the appearance which matters is that which is "presented to a reasonable observer who knows and is prepared to understand the facts".

(b) *Sent and Primelife Corporation Ltd v John Fairfax Publications Pty Ltd and Hills* [2002] VSC 429 (7 October 2002) Nettle J endorsed Brooking JA's approach from *Spincode* and found that a "fair minded, reasonably informed member of the public" would conclude that the proper administration of justice prevented Counsel from acting, where Counsel had advised in conference 14 years earlier, possibly on a related matter, and had no recollection of it, notwithstanding the public interest that litigants should not be deprived of their choice of legal advisers without good cause.

(c) Asia Pacific Telecommunications v Optus Networks Pty Limited [2005] NSWSC 550 (20 June 2005): Bergin J "In my view a fair minded reasonably informed member of the public would conclude that the administration of justice is not adversely affected by the processes that have been put in place to protect the confidential information given to Clayton Utz during the Retainer. By reason of the proof that there is no real risk that the information, said to be confidential, will be available to the solicitors for the defendant, I do not accept that the perception that justice must be done and appear to be done is at risk".

[604] See *Asia Pacific Telecommunications –v- Optus Networks Pty Limited* [2005] NSW SC 550 and *Kallinicos & anor v Hunt & ors* [2005] NSWSC 1181 (22 November 2005)

(d) Kallinicos & Anor v Hunt & Ors [2005] NSWSC 1181 (22 November 2005) Brereton J "However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice … The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice…

The jurisdiction is to be regarded as exceptional and is to be exercised with caution".

However, courts also recognize that there are limited circumstances in which exceptions may be justified, provided it does not undermine the solicitor's fundamental duty to act in the best interests of each client and confidential information is protected.

2.4 The presumption of imputed knowledge

The doctrine of imputed knowledge means that all solicitors in a law practice are implied to have the knowledge of all other solicitors in the practice. It is beyond doubt that a solicitor who has personally acquired the relevant, confidential information cannot act against the former client in the new matter.[605] It is assumed that knowledge moves freely within a law practice, and imputed knowledge would then prohibit the law practice as a whole from acting.

This doctrine no longer applies universally. It is still the starting point – there is a "strong inference that lawyers who work together share confidences"[606] – but it is a **rebuttable presumption**. Imputed knowledge is not always justified in the context of some modern firms.[607]

An information barrier may sometimes be used to rebut that presumption.

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605 Sir Robert McGarry in *Spector v Ageda* [1973] Ch 30: "A solicitor must put at his client's disposal not only his skill but also his knowledge so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has."

606 Sopinka J in *MacDonald Estate v Martin* [1990] 3 SCR 1235 (Supreme Court of Canada).

607 See for example *Re a Firm of Solicitors* [1992] QB 959 at 973 per Staughton J, adopted by Ipp J in *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98 at 110-111. In the earlier decision *of Mallesons Stephen Jaques v KPMG Peat Marwick*, Ipp J had held that the knowledge of one partner was to be imputed as the knowledge of all partners. His Honour had relied amongst others on the Canadian decision of *Davey v Woolley Hames Dale & Dingwall* (1982) 133 DLR (3d) 647. The Davey decision was subsequently overruled by the Supreme Court of Canada in *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249 in which Sopinka J (delivering the majority judgment) found a strong but rebuttable inference of shared knowledge. In Unioil, Ipp J confirmed at 108 that this approach was to be preferred.

Similarly in *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 at 316-7, Steytler J of the Supreme Court of WA found that the question of whether a particular individual is in possession of confidential information is a question of fact, and the knowledge will not necessarily be imputed from another lawyer at the firm. Although the danger of inadvertent disclosure must be considered, and the appearance of impropriety avoided, imputation of knowledge is not necessarily sensible in the context of the modern large firm."

Lord Millett in *Prince Jefri Bolkiah v KPMG* [1999] 2 WLR 215 at 235 confirmed that there is no absolute rule that Chinese Walls (Information Barriers) are insufficient, but "the starting point must be that, unless special measures are taken, information moves within a firm.

Per Gillard J in *Yunghanns and Ors v Elfic Lt and Ors* [1998] – "We would have to be satisfied by the defendants and the firm that there is no risk of seepage of information to those conducting the case."

In *Bureau Interprofessionel Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) the doctrine was not limited to partners. At 34, Ryan J expressly referred to "lawyers or employees".

A similar position of "rebuttable presumption" exists in the USA. See for example *Analytica Inc v NPD Research Inc* (1983) 708 F2d 1263 at 1277, where the concept of "Typhoid Marys" was discussed.

2.5 What test is applied to an information barrier?

The “tainted” individual(s) must be **effectively** screened from the new matter so that there is **no real and sensible possibility** of misuse of the confidential information.

The “real and sensible possibility” test is now favoured by the Australian courts in commercial cases (see Ipp J in *Mallesons*, Habersberger J in *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 (14 August 2004); and others). The more lenient test from *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch. 831 is often mistakenly thought to apply here. It does not. In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, Lord Millett (at 236-7) stated the requirement as “no risk”, with the rider that any risk justifying intervention must be

“a real one, and not merely fanciful or theoretical. But it need not be substantial.”

This is often run in conjunction with a test – similar to that preferred in Canada[608] – of whether a reasonable person, aware of the relevant facts, would perceive a real possibility of a breach. (See for example *Murray v Macquarie Bank* (1991) 105 ALR 612 at 51; in the UK, *Re a firm of solicitors* [1992] 1 All ER 353.)

A stricter test tends to be applied in family law cases. See for example *In the Marriage of Thevenaz* (1986) 84 FLR 10 in which Frederico J found intervention was justified even where the risk was “more theoretical than practical”. Similarly in In the Marriage of Magro (1993) 93 FLR 365, citing *Thevenaz* with approval, the husband’s solicitors were disqualified when they employed a solicitor from the wife’s solicitors’ firm.

The burden of establishing that there is no unacceptable risk is upon the law practice.[609]

In Village Roadshow Ltd v Blake Dawson Waldron[610] as to the burden of proof, quoting the Prince Jefri case Byrne J said “once it appears that a solicitor is in receipt of information imparted in confidence, the burden shifts to the solicitor to satisfy the Court on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosures will occur” and “in applying the principle it may not be possible for the client to point to a specific item of confidential information. It may be that such a requirement would defeat the very purpose of the duty of confidentiality by disclosing to the Court and to the other party the information in question and its significance ... it may be that this information comprises no more than the knowledge of the client’s thinking, its attitudes and of the personalities involved ... given the relationship between solicitor and client in the ambit of professional confidence of which professional privilege is a manifestation, the Court should, in my view, not be slow to accept the existence of such confidential information”.

His Honour in this case rejected the submission based on the apprehension of leakage of confidential information – “even accepting that I should approach this aspect of the case generously, I am unable to see or imagine that such confidential information was given to BDW”.

In some jurisdictions, lobbyists have sought recognition of information barriers based on the “reasonableness” of the steps taken to ensure that no disclosure will occur. (See for example Canadian Lobbyists’ Code of Conduct.) In Australia, the courts have made it clear that they will assess the effectiveness rather than the reasonableness of the steps. (See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 237, in which Lord Millett adopted the reasoning of the Supreme Court of Canada in *MacDonald Estate v Martin*, save for the substitution of “effective” for “all reasonable” steps.) If reasonable steps cannot provide security for the information, then in Australia the information barrier must fail.

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[608] See for example *Bank of Nova Scotia v Imperial Developments* (Canada) Ltd and others [1989] 58 Man. R. (2d) 100. In *MacDonald Estate v Martin* [1990] 3 SCR 1235, Sopinka J similarly preferred to ask whether “the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.”

[609] See for example *Newman v Phillips Fox* (1999) 21 WAR 309; *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222

[610] [2003] VSC 505 (23 December 2003)

2.6 Why is the standard so high?

Australian courts are unimpressed with solicitors who act in conflict of duties or interests or otherwise attempt to lower the ethical standards expected of the legal profession and stress the importance of maintaining the good reputation of the profession and confidence that justice is done and seen to be done.

In Village Roadshow Ltd v Blake Dawson Waldron,[611] Byrne J said:

"It is a notorious fact that a good deal of commercial litigation in this state is conducted by a handful of very large firms. How is a client to obtain the services of one of them if the conflict rule is applied too strictly? To my mind, this is the price which the clients of such firms and the firms themselves must pay. The firms have found it commercially convenient to become large. This is but one disadvantage of this trend. It is certainly no reason for the courts to weaken the traditionally high standard of a practitioner's loyalty to the client which have characterized the practice of law in this State."

An effective barrier must prevent not only deliberate disclosure of confidential information but also accidental or inadvertent dissemination.[612]

2.7 What amounts to "relevant confidential information"?

In many cases the answer is obvious. There is a large body of case law relating to confidentiality.

Practitioners should be aware that "getting to know you factors" (as described by Gillard J in *Yunghanns v Elfic Ltd* (Unreported, 3 July 1998) at pages 10-11 may amount to relevant confidential information in some circumstances. These might include a solicitor knowing *"a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure ore tension, his attitude to litigation and settling cases and his tactics… 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."*

Information obtained during an earlier retainer from a source other than the client may also amount to "confidential information".[613]

In some cases, it may be helpful to narrow the scope of the current retainer so that any confidential information is not relevant to the retainer.[614]

2.8 Commercial realism – other factors to consider

The courts will certainly take into account factors such as the inconvenience to a client who is forced to change solicitors mid-case, the ability to instruct a solicitor of choice, and the need for mobility of lawyers. However where a proposed information barrier is found to be ineffective, those other factors cannot alter that fact.

A similar view is taken in other jurisdictions. In England, in Re a firm of solicitors [1992] QB 959, Parker LJ said that the need to avoid "a situation of apparent unfairness and injustice" is "every bit as much a matter of public interest as the public interest in not unnecessarily restructuring parties from retaining the solicitor of their choice." In Canada, Cory J in MacDonald Estate v Martin [1990] 3 SCR 1235 said the "requirements of change imposed on a client is, on balance, a small price to pay for maintaining the integrity of our system of justice… Neither the merger of law firms nor the mobility of lawyers can be permitted to adversely affect the public's confidence in the judicial system." See also Henry J (High Court of New Zealand) in Equiticorp Holdings Ltd.

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[611] [2003] VSC 505 (23 December 2003)

[612] See for example arguments presented to the court in *Bureau Interprofessionel Des Vin De Bourgogne v Red Earth Nominees Pty Ltd*, [2002] FCA 588 (9 May 2002) discussed at paragraph 48.

[613] See for example *Re a firm of solicitors* [1992] 1 All ER 353; *Asia Pacific Telecommunications Ltd v Optus Network Pty Ltd* [2005] NSWSC 550 per Bergin J; *In the Marriage of A and B* (1990) 13 Fam LR 798 per Smithers J.

[614] This was one factor (of many) in *Australian Liquor Marketers*

While other cases have confirmed that it is not desirable to *unnecessarily* restrict the right of a client to instruct their solicitor of choice, whether or not that restraint is necessary will be a question of fact in each case. In *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309.

Steytler J confirmed that the inconvenience – and even the prejudice – of changing lawyers cannot outweigh other "fundamental policy considerations". If the inconvenience is necessary because a proposed information barrier is otherwise found to be inadequate, that is unlikely to change the court's assessment of the barrier.

2.9 Do Information Barriers only apply to successive retainers?

"Information barriers" are most often used when a law practice is instructed to act against a former client of the law practice. For the sake of simplicity, that language is used throughout the Guidelines and Commentary.

Information barriers may also be relevant in other alleged conflict situations. For example, the screened solicitor may have acted for the former client at another law practice, before being employed at the current law practice, as was the case in *Newman v Phillips Fox* [1999] WASC 171. These guidelines apply equally to that situation (and indeed may be simpler to implement in that situation, because of the reduced number of screened individuals).

These guidelines are not intended to apply to "concurrent retainers" as different considerations apply.

2.10 Do the Information Barriers Guidelines apply to small law practices too?

Yes. The information barriers guidelines are intended to apply to all law practices. However, it may be extremely difficult for a small firm to demonstrate compliance with the guidelines as a question of fact, particularly the requirements to keep staff and files physically separate. While the courts acknowledge the hardship this may cause for litigants, particularly in rural areas or in specialized areas of law with limited numbers of practitioners, that hardship is but one factor and it does not outweigh the importance of confidentiality.

The vast majority of decided cases have involved large firms and the courts have approached the doctrine of implied knowledge on the basis that it is not necessarily sensible in the context of the large modern law practice. (See for example *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 per Steytler J at 318.) There are few reported cases involving smaller firms. In *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch. 831, an information barrier was recognized in a 2-partner firm, but the circumstances were unique. In *Freuhauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* [1991] 1 Qd R 558, Lee J found that a firm of 28 partners had erected an effective barrier.

2.11 Can an Information Barrier be used in criminal proceedings?

The standards required will be higher where criminal proceedings are involved. In concurrent matters, practitioners are discouraged from acting for two or more co-accused, even where there is no apparent conflict between the clients' interests at the outset.[615] Even in successive matters, criminal proceedings will influence the court against recognizing an information barrier. In *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 374, Ipp J said: "It cannot be sufficiently emphasised … that litigation involving the prosecution of serious criminal charges calls for the most careful measures to secure not only that justice is done, but also that it is apparent that it is done. More than in any other kind of litigation, the appearance of justice being done would not survive any general impression that a firm of solicitors could readily change sides …".

[615] See LIV guidelines on acting for two or more co-accused.

2.12 Do the Guidelines only apply to cases before the courts?

Confidential relevant information is more likely to arise where parties are in dispute. However there is no reason that conflict rules should be applied less strictly in quasi-judicial settings (expressly considered in *Ontario Hydro v Ontario (Energy Board)* 25 Admin LR (2d) 211, 114 DLR (4th) 341, 71 OAC 227) or indeed in non-litigious matters where clients may still have competing interests.

3. Guidelines, Commentary And Examples

Guideline 1

The law practice should have established, documented protocols for setting up and maintaining information barriers. In all matters the law practice should carefully control access to any client information by personnel in the law practice in view of the possible requirement for an information barrier in the future.

Internal information barrier protocols which incorporate the Guidelines should be part of the law practice's ongoing risk management and complaint prevention process. The rationale is that *ad hoc* barriers, erected for the purpose of specific files, are unlikely to bring about the necessary changes to a law practice's culture and internal communication patterns which will ensure prevention of inadvertent disclosure. For this reason, any law practice which knows or suspects that it will create an information barrier in the future should establish and document appropriate protocols at the earliest opportunity.

In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, Lord Millett said "In my opinion an effective Information Barrier needs to be an established part of the organizational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."

In *Marks & Spencer v Freshfields Bruckhaus Deringer* [2004] EWCA Civ. 741 in which Pill LJ found that undertakings had been given too late, Kay LJ added, "… the obligation was on the defendant to put in place adequate safeguards before acting for the bidders. I view it as far too late in the day for proposed further measures. The reality is that the spread of information within the firm may already have taken place and it is impossible to conclude that if the arrangements were inadequate until now, that fresh arrangements made at this stage will prevent the consequences of the earlier inadequate arrangements."

It is only in exceptional circumstances – coupled with undertakings that information has not yet flowed – that *ad hoc* arrangements will suffice. See for example the decision of Laddie J in *Young and Others v Robson Rhodes (a firm)* [1999] 3 All ER 524 at 539.

The law practice should regularly review its internal protocols and conflict check procedures, including appropriate measures to be taken as part of the interview process for prospective employees.

Guideline 2

(a) The law practice should nominate a compliance officer to oversee each information barrier.

(b) The compliance officer

i. should be an experienced practitioner with appropriate knowledge of the rules and law relating to confidentiality, conflict of interest and information barriers;

ii. will take appropriate steps to monitor compliance and deal with any breach or possible breach of an information barrier;

iii. will undertake not to disclose any information about the earlier matter to personnel involved with the current matter.

A compliance officer should be appointed to supervise the implementation and maintenance of an information barrier. The compliance officer's role should include

- regular evaluation of the effectiveness of the information barrier; and
- responsibility for ensuring the firm meets the educational requirements of Guideline 10.

The compliance officer may be the law practice's designated Ethics partner, a member of the law practice's Conflicts Committee or equivalent, or another lawyer.

The compliance officer should document all steps taken.

Guideline 3

The law practice should ensure the client in the current matter acknowledges in writing that the law practice's duty of disclosure to that client does not extend to any confidential information which may be held within the law practice as a result of the earlier matter and consents to the law practice acting on that basis.

Absence of informed consent can be enough to undermine an information barrier. For example

- In *D&J Constructions*, Bryson J noted at 122 that "the new client would have to join in such an arrangement and give up his right to the information".
- "Informed consent" is mentioned in passing by Byrne J in *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505 (23 December 2003) at paragraph 40, and again in the final paragraph of the judgment. In discussing the duty of loyalty, his Honour notes that Brooking J in *Spincode* had likened it to a fiduciary obligation and *"[a]s such, the solicitor might be permitted so to act, where it establishes that the former client has given an informed consent for it to do so."*
- In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Ptd Ltd* [2002] VSC 324 (14 August 2002), the fact that an intermediary firm was involved in one proceeding was taken into account.

However, "informed consent" is not clearly defined by Australian courts. There is a good argument that "informed consent" does not require independent advice in the case of experienced, commercially savvy clients, particularly where in-house counsel is involved.

By contrast, for an inexperienced client, merely saying that independent advice "could" (rather than "should") be taken may not be enough.[616]

Practitioners should be mindful of the dangers of breaching confidentiality inadvertently, when explaining the purpose of the consent to the current client. For example, the law practice may not provide detail about the nature of the confidential information to be withheld, since to do so would itself be a breach.

Can consent be withdrawn?

The onus is on a practitioner seeking to act to establish that no conflict exists. In theory at least an objection may be raised, or consent withdrawn, at any stage. Injunctions have occasionally been granted in the interests of the administration of justice notwithstanding late objections or even late withdrawal of express consent.[617]

Even where the late objection suggests a tactical ploy, an injunction may be granted. For example in *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505 (23 December 2003) Byrne J said at paragraph 51, *"I was pressed to doubt the bona fides of the application. It was brought late and without convincing explanation and at a time which strongly suggests that it was but a tactical ploy to disadvantage [the current client]. I am inclined to agree. The protestations of [the applicant] of its concerns for the interests of [another party] certainly have a hollow ring."* Despite this, the solicitor was prohibited from acting further. Similarly in *Hudson v Hudson* (1993) 10 Alta LR (3d) 322, 16 CPC (3d) 1 (QB), a firm was disqualified when consent was withdrawn.

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[616] See for example *Mahoney v Purnell* [1996] - UK.

[617] For an example of the latter, see *Carol Ann Hudson v Gilbert David Hudson* 10 Alta LR (3d) 322, 16 CPC (3d), 142 AR 236. In that case there was no question of an effective Chinese Wall on the facts.

However a late objection (or withdrawal of express consent) reduces its credibility and that may be taken into account. For example –

- In *In the Marriage of McGillivray and Mitchell* (1998) 23 Fam LR 238, the Full Family Court said at 245, "[A] failure to take the point initially must also cast doubt on the bona fides of any later complaint concerning the existence of confidential information in the practitioner in question, and on the bona fides of any alleged apprehension regarding the possible misuse of such confidential information."
- In *South Black Water Coal Ltd v McCulloch Robertson* (Unreported, 8 May 1997) Muir J declined to make an order restraining a solicitor from acting, where the former client had been expressly aware of the conflict for some time and had decided not to object.
- In *Bank of Nova Scotia v Imperial Developments (Canada) Ltd and others* [1989] 58 Mann. R. (2d) 100, an injunction was refused where the applicants had "specifically instructed their counsel to withhold the demand for disqualification until after [the solicitor] had in fact moved to the receiver's firm."

Guideline 4

All screened persons should be clearly identified and the compliance officer must keep a record of all screened persons.

Practitioners should carefully read the introductory notes to this Commentary, including the section headed “What test is applied to an Information Barrier?” It is essential that any individual actually in possession of relevant confidential information has no contact at all with the current matter. If such contact occurs, the information barrier must fail.

The “no contact” rule is not limited to partners or legal practitioner directors, as they are not the only staff considered likely to share knowledge. In *Phillips Fox*, Steytler J at 325 expressly considered two articled clerks who were amongst those proposed to be screened by an information barrier. He said they would *“as part of their training, no doubt be exposed to a range of different types of work and, consequently, personnel at [the firm]. They can be expected to mix with other articled clerks and young practitioners at that firm. They can also be expected, as is the case with other young practitioners, to share experiences and to exchange advice.”*

Nor is the “no contact” rule limited to those with legal qualifications. Steytler J also specifically expressed concerns about administrative staff who may have been exposed to confidential information but were not proposed to be screened along with the legally qualified staff. In *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) and other cases, the undertakings offered included an undertaking not to share support staff.

Part-time work

Where the person holding the confidential information is employed part time, that may be taken into account. See for example *Bureau Interprofessional Des Vins De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) and the *Koch Shipping* case. However it is only relevant to the extent that it reduces the interaction between personnel. It certainly does not, of itself, eliminate the risk.

The greater the number of individuals in a law practice who possess the relevant confidential information, the more difficult it will be to establish an effective information barrier. As a simple question of fact, it is more difficult to screen large numbers of people.

In some cases, the fact that only one individual possesses relevant confidential information has been a persuasive factor in refusing to grant an injunction. This is most likely to apply where that person has obtained the information in a different law practice, before transferring to the current law practice. Where the earlier matter was handled by the current firm, an information barrier may therefore be more difficult to establish.

The firm should clearly identify and maintain separate records of all staff who

(a) hold the relevant confidential information; and

(b) have any involvement with the new matter.

These records must be kept up to date, usually by the compliance officer. All identified individuals should be part of the ongoing education program required under Guideline 10.

Guideline 5

(a) Each screened person should provide an undertaking to the law practice and the law practice should where appropriate provide an undertaking to the court confirming that

   i. should be an experienced practitioner with appropriate knowledge of the the screened person will not have during the existence of the current matter any involvement with the client or personnel involved with the current matter for the purposes of that current matter;

   ii. the screened person has not disclosed and will not disclose any confidential information about the earlier matter to any person other than to a person in accordance with the instructions or consent of the client in the earlier matter, a screened person or the compliance officer;

   iii. the screened person will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.

(b) In the event of files and/or information relating to the earlier matter being required to enable the law practice to comply with an obligation at law to provide information or to answer a complaint or defend a claim against the law practice the screened person must not pass the files and/or information to anyone other than the compliance officer who may pass them on to a responsible officer of the legal practice who is not involved in the current matter so that the legal obligation can be honoured. Nothing in these guidelines is intended to restrict a law practice's rights to access and disclose any information relating to the earlier matter for the purposes of enabling the law practice to comply with any legal obligation.

Guideline 6

Personnel involved with the current matter should not discuss the earlier matter with, or seek any relevant confidential information about the earlier matter from, any screened person. Such personnel should provide undertakings confirming that

i. no confidential information about the earlier matter has been disclosed to them;

ii. they will not have during the existence of the current matter any involvement with a screened person for the purposes of the current matter;

iii. they will not seek or receive any confidential information about the earlier matter from a screened person or in any other way; and

iv. they will, immediately upon becoming aware of any breach, or possible breach, of this undertaking, report it to the compliance officer who will take appropriate action.

The law practice should obtain timely, written undertakings from all screened staff, whether legally qualified or not, confirming that

(a) they understand they may possess (or come to possess) confidential information; and

(b) they understand they must not discuss that information or the matter generally with any other person within the law practice; and

(c) they have not previously had such discussions or done anything which would amount to a breach of the information barrier; and

(d) they will inform the designated compliance officer immediately upon becoming aware of any possible breach of the information barrier; and

(e) if they are required to produce documents for example in order to comply with a subpoena or a notice to produce they will forward the relevant material (including the former client's physical or electronic files) to the compliance officer.

The giving of such undertakings must be timely. In *La Salle National Bank v County of Lake* (1983) 703 F2d 252, the entire firm was disqualified because an otherwise effective information barrier was found to be implemented too late.

Undertakings are only one aspect of the wall and will not generally be sufficient on their own. See for example:

- *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 per Steytler J;
- *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002) at paragraph 57;
- Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 530, who said an effective wall should not be "created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."

The law practice should also be ready and willing to offer undertakings directly to the Court, as was done in *Australian Liquor Marketers* at page 27, although it will not always be necessary (see for example *Asia Pacific Telecommunications Ltd v Optus Network Pty Ltd* [2005] NSWSC 550 per Bergin J).

Law practices should specifically be aware of the role of articled clerks and paralegals, and others who may be required to move between departments.

Guideline 7

(a) Contact between personnel involved in the current matter and screened persons should be appropriately limited to ensure that the passage of information or documents between those involved in the current matter and screened persons does not take place.

(b) The law practice should consider whether it is appropriate for such personnel to have contact with the client in other matters during the current matter.

The current matter should only be discussed within the limited, identified group working on the file. Individuals within the group should be aware of the identity of others in the group so that they can confine those discussions appropriately, and should offer undertakings confirming that they have not received, and will not seek, any information about the earlier matter.

Practitioners should note that non-legally qualified staff are not exempt.

The simplest way of complying with this guideline is by physical separation of offices and staff, whether on separate floors, separate buildings, or even different States. It must always be combined with appropriate separation or restriction of access to electronic information.

In *D&J Constructions Pty Ltd v Head* (1987) 9 NSWLR11, Bryson J (at 123) pointed out that *"wordless communication can take place inadvertently"*. Without enforced physical separation, staff may communicate inadvertently "by attitudes, facial expression or even by avoiding people one is accustomed to see". In *MacDonald Estate*, Sopinka J at 269 referred to the likelihood of inadvertent disclosure at *"partners' meetings or committee meetings, at lunches or the office golf tournament, in the boardroom or the washroom"*. In *Newman v Phillips Fox* [1999] WASC 171; 21 WAR 309 at 314, separation of relevant staff on to the 18th and 19th floors – and even an offer to move the screened personnel to separate premises – was insufficient, although that was on the basis that the separation had taken place too late. In *Unioil* 17 WAR 98 at 105, even interstate offices which were not in fact a partnership at law had sufficient "identity of interest" to warrant a finding of conflict.

By contrast, in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 the court found there was no "real risk" of disclosure, despite evidence that screened solicitors "bounced" matters off each other and attended litigation seminars with other staff.

Where geographic separation is not possible, offices containing relevant files should be locked and/or signs should be placed on doors limiting access. In any event, all files should be clearly labeled indicating restricted access.

The law practice should implement an appropriate system for the use of facsimile machines, photocopiers and printers. For example, the law practice may offer undertakings that separate machines will be used for the current matter; that documents relating to the current matter will not be left unattended on those machines; and that any unwanted copies of documents will be appropriately destroyed.

Guidelines 8 and 9

8 The law practice should take steps to protect the confidentiality of all correspondence and other communications related to the earlier matter.

9 (a) Any files held by the law practice relating to the earlier matter should be stored in a secure place where they can only be accessed by screened persons and/or the compliance officer.

(b) Access to any electronic files the law practice holds relating to the earlier matter and other technological communications related to the earlier matter should be restricted to screened persons and/or the compliance officer. The law practice should set up appropriate forms of technological protection to ensure access is restricted.

The law practice should implement a system for the receipt, opening and distribution of post, facsimiles, e-mails and other technological communications such as by mobile phone or personal digital assistant to ensure that confidential information is not disclosed to any unscreened person.

This might include arrangements for all incoming correspondence in the current matter to be marked “confidential”, addressed personally to the designated compliance officer, and to be opened personally by the designated compliance officer and the setting up of technological protection including the computer firewall.[618] Alternative arrangements may be appropriate for the circumstances of a particular case. As with all aspects of an information barrier, the onus is on the law practice to demonstrate that the steps taken are adequate to ensure protection of confidential information.

Modern communication techniques mean that geographic separation will often be inadequate to prevent a flow of information.

Computer access to relevant files should be restricted, by the use of passwords or varying access levels for different personnel, and the locking down of computers when a staff member is away from their desk.

Some law practices have found it helpful to introduce a new layer to their electronic conflict check systems, which allow partners to restrict access to all information about a new matter immediately the file is opened.

[618] This was one of the steps taken by the firm which successfully created a Chinese Wall in *Bureau Interprofessional Des Vin De Bourgogne v Red Earth Nominees Pty Ltd* [2002] FCA 588 (9 May 2002).

Guideline 10

10 The law practice should have an ongoing education program in place, including:-

(a) education for all personnel about the law practice’s protocol for protecting confidential information and for setting up and maintaining information barriers, including

i. employment terms for staff;

ii. standard retainer terms with clients;

iii. electronic and physical access to documents and files;

iv. firm culture on such issues as discussion of client matters only on a “need to know” basis”;

v. sanctions for non-compliance;

and

(b) additional education for individuals involved in matters affected by an information barrier, including the arrangements in place for the particular case and sanctions for non-compliance.

The education program should be in place before the information barrier is established. For that reason, **all** law practices are encouraged to implement an education program.

The program should ensure that all affected practitioners and staff (including both lawyers and support staff non-legally qualified staff) are made aware of the law practice’s protocol on information barriers. It should consist of formal and regular training on duties of confidentiality and responsibilities under information barriers, including the dangers of inadvertent disclosure. These general sessions may (if they meet the criteria set out in the *Continuing Legal Education Scheme Rules 2004* and **Rule 42** of the *NSW Revised Professional Conduct and Practice Rules 1995* (MCLE), accrue points towards the compulsory ethics component of the Victorian CLE scheme and the NSW requirements for mandatory CLE.

The law practice should always ensure that new staff are aware of the protocol and their obligations. In addition to educational sessions, these should therefore be included in the law practice’s policy manual.

Where an information barrier has been established, there should be additional ongoing education for all staff directly affected. Separate sessions should be conducted for staff involved with the earlier matter and staff involved with the current matter, to limit their interaction with each other. These may appropriately be conducted by the designated compliance officer. Targeted sessions relating to a particular matter will not normally accrue CLE scheme points.

Appendix C

Ownership of file documents – rule 14

Category	Types	Examples may include
Client's property	Solicitor prepared for client's benefit Solicitor has been paid for these documents Third party documents sent to solicitor	Instructions to counsel by solicitor Briefs Draft documents Originals of all documents and advices prepared for client Witness proofs / statements of evidence / notes of conversations with witnesses Documents received by solicitor from third parties Receipts for disbursements made by solicitor for client Expert report Discovery and trial transcripts
Solicitor's property	Prepared by solicitor for own benefit Client has not been billed Client has sent to solicitor Ownership intended to pass to solicitor	Entries of attendance Working notes, summaries of evidence, submissions to court (not paid for by client) Diary entries, time sheets Books of account Notes and documents prepared for solicitor's own benefit or protection (unless paid for by client) Instructions from clients to solicitor Authorisation sent by client to solicitor Documents sent by client to solicitor with intention that document becomes the solicitor's property