

**Legal Profession National Rules
under the
Legal Profession National Law
[CONSULTATION DRAFT]
[FOR CONSIDERATION BY COAG]
Date: 13 April 2010**

Legal Profession National Rules – Solicitors’ Rules 2010

under the

Legal Profession National Law

CONSULTATION DRAFT

14 May 2010

Legal Profession National Law

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PREFACE

1.1 These Rules were developed by the Law Council of Australia and are made pursuant to Part 9.1 of Chapter 9 the Legal Profession National Law. They may be cited as the Legal Profession National Rules - Solicitors’ Rules 2010. These Rules commence on (date).

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

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 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority, but cannot be enforced by a third party.

2.3 In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the rules apply notwithstanding any inconsistency with the common law.

FUNDAMENTAL DUTIES OF SOLICITORS

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.

Other fundamental ethical duties

4.1 A solicitor must also:

- 4.1.1 act in the best interests of a client in any matter on which they represent the client;
- 4.1.2 be honest and courteous in all dealings with clients, other solicitors, and third parties;
- 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.

Dishonest and disreputable conduct

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

Undertakings

- 6.1 A solicitor who has given an undertaking to another solicitor, 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.
- 6.3 A solicitor who has given an undertaking to a third party in the course of providing legal services to a client and for the purposes of the client's business, must honour the undertaking, strictly in accordance with its terms, and within the time promised (if any) or within reasonable time, unless released by the recipient or by a court of competent jurisdiction.

RELATIONS WITH CLIENTS

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 throughout all stages of a matter, consistent with the terms of the engagement.

Client instructions

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

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, proprietor, 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 first 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 offence under the criminal law;
 - 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.

Conflicts concerning former clients

- 10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.
- 10.2 A solicitor or law practice who or which is in possession of confidential information of a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:
- 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or,
 - 10.2.2 an effective information barrier has been established.

Conflict of duties concerning current clients

- 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.
- 11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.
- 11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:
- 11.3.1 is aware that the solicitor or law practice is also acting for another client; and,
 - 11.3.2 has given informed consent to the solicitor or law practice so acting.
 - 11.3.3 For the purposes of Rule 11.3.2, where a client engages a law practice on a non-exclusive basis then that client is taken to have given the informed consent required by Rule 11.3.2
- 11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of confidential information of a client (the first client) which might reasonably be concluded to be

material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as permitted by Rule 11.5 or 11.6.

- 11.5 A solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client.
- 11.6 A law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.
- 11.7 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided that the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

Conflict concerning a solicitor's own interests

- 12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.
- 12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.
- 12.3 A solicitor must not borrow any money, nor assist an associate to borrow money, from:
- 12.3.1 a client of the solicitor or of the solicitor's law practice; or
- 12.3.2 a former client of the solicitor or of the solicitor's law practice who has indicated a continuing reliance upon the advice of the solicitor or of the solicitor's law practice in relation to the investment of money;

UNLESS the client is:

- (i) an Authorised Deposit-taking Institution;
- (ii) a trustee company;
- (iii) a society;
- (iv) the responsible entity of a managed investment scheme registered under chapter 5C of the Corporations Act or a custodian for such a scheme;
- (v) 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
- (vi) the employer of the solicitor.
- 12.4 A solicitor will not have breached this rule merely by:
- 12.4.1 Drawing a Will appointing the solicitor or an associate of the solicitor as executor, provided the solicitor informs the client in writing before the client signs the Will –

- (i) of any entitlement of the solicitor, or the solicitor's law practice or associate, to claim executor's commission;
 - (ii) of the inclusion in the Will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge legal costs in relation to the administration of the estate; and
 - (iii) if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission, that the client could appoint as executor a person who might make no claim for executor's commission.
- 12.4.2 Drawing a Will or other instrument under which the solicitor (or the solicitor's law practice or associate) will or may receive a substantial benefit other than any proper entitlement to executor's commission and proper fees, provided the person instructing the solicitor is either –
- (i) a member of the solicitor's immediate family; or
 - (ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.
- 12.4.3 Receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided that the solicitor advises the client –
- (i) that a commission or benefit may be payable to the solicitor in respect of the dealing or referral; and
 - (ii) that the client may refuse any referral; and
 - (iii) the client has given informed consent.
- 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 to the client.

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.

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 document), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.
- 14.2 A solicitor or solicitor's law practice may destroy or dispose of client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

Lien over essential documents

- 15.1 Notwithstanding Rule 14, when a solicitor claims to exercise a lien for unpaid legal costs over a client's documents which are essential to the client's defence or prosecution of current proceedings:
- 15.1.1 if another solicitor is acting for the client, the first solicitor must surrender the documents to the second solicitor:
- (i) if the second solicitor undertakes to hold the documents subject to the lien and with reasonable security for the unpaid costs; or
- (ii) if the first solicitor agrees to the second solicitor agreeing to pay, or entering into an agreement with the client to procure payment of, the first solicitor's costs upon completion of the relevant proceedings.
- 15.1.2 Alternatively, the first solicitor, upon receiving satisfactory security for the unpaid costs, must deliver the documents to the client.

Charging for document storage

- 16.1 A solicitor must not charge:
- 16.1.1 for the storage of documents, files or other property on behalf of clients or former clients of the solicitor or law practice (or predecessors in practice); or
- 16.1.2 for retrieval from storage of those documents, files or other property;
- UNLESS the client or former client has agreed in writing to such charge being made.

ADVOCACY AND LITIGATION

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 forensic judgments called for during the case independently, after appropriate consideration of the client's and instructing solicitor's wishes.
- 17.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's wishes, simply by choosing, contrary to those wishes, 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 material 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, except where otherwise required by law or a Court.
- 17.4 A solicitor must not become the surety for the client's bail.

Formality before the Court

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

Frankness in court

- 19.1 A solicitor must not knowingly or recklessly mislead the court.
- 19.2 A solicitor must correct a misleading statement 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 and legal matters which:
- 19.4.1 are within the solicitor's knowledge;
 - 19.4.2 are not protected by legal professional privilege; and
 - 19.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

- 19.5 A solicitor who has knowledge of matters which are within Rule 19.4.3 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 and if the court has not yet been so informed, inform the court of:
- 19.6.1 any binding authority;
 - 19.6.2 where there is no binding authority, any other authority decided by an Australian appellate court;
 - 19.6.3 any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved; or
 - 19.6.4 any applicable legislation,
- 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 will not have made a misleading statement to a court simply by failing to disclose facts known to the solicitor concerning the client's character or past, when the solicitor makes other statements concerning those matters to the court, and those statements are not themselves misleading.
- 19.11 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.

19.12 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.

Delinquent or guilty clients

20.1 A solicitor whose client informs the solicitor, before judgment or decision that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered must:

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

20.1.2 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification:

20.1.3 promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so; but

20.1.4 not otherwise inform the court of the lie or falsification.

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

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

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

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

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

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

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

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

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

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

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

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

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.

Responsible use of court process and privilege

- 21.1 A solicitor must take care to ensure that decisions by the solicitor (or on the solicitor's advice) to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:
 - 21.1.1 are reasonably justified by the material then available to the solicitor;
 - 21.1.2 are appropriate for the robust advancement of the client's case on its merits;
 - 21.1.3 are not made principally in order to harass or embarrass the person; and
 - 21.1.4 are not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor (if any) out of court.
- 21.2 A solicitor must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the solicitor believes on reasonable grounds that:
 - 21.2.1 factual material already available to the solicitor provides a proper basis for the allegation;
 - 21.2.2 the evidence by which the allegation is made will be admissible in the case; and
 - 21.2.3 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.
- 21.3 A solicitor must not open as a fact any allegation which the solicitor does not then believe on reasonable grounds will be capable of support by the evidence which will be available to support the client's case.
- 21.4 A solicitor must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:
 - 21.4.1 the solicitor believes on reasonable grounds that the material already available to the solicitor provides a proper basis for the suggestion; and
 - 21.4.2 in cross-examination going to credit alone, the solicitor believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.
- 21.5 A solicitor may regard the opinion of an instructing solicitor that material exists which appears to support a suggestion or allegation to which Rules 21.1, 21.2, 21.3 and 21.4 applies 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.
- 21.6 A solicitor must make reasonable enquiries to the extent which is practicable before the solicitor can have reasonable grounds for holding the belief required by Rules 21.1, 21.2, 21.3 and 21.4, unless the solicitor has received and accepted an opinion from the instructing solicitor within Rule 21.5.
- 21.7 A solicitor must not suggest criminality, fraud or other serious misconduct against any person in the course of the solicitor's address on the evidence unless the solicitor believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.
- 21.8 A solicitor who has instructions which justify submissions for the client in mitigation of the

client's criminality and 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 robust defence of the client.

- 21.9 In proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:
- 21.9.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which tends:
- (i) to mislead or confuse the witness; or
 - (ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and
- 21.9.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

Communication with opponents

- 22.1 A solicitor must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- 22.2 A solicitor must take all necessary steps to correct any false statement unknowingly made by the solicitor to the opponent as soon as possible after the solicitor becomes aware that the statement was false.
- 22.3 A solicitor does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.
- 22.4 A solicitor must not confer or deal directly with the party opposed to the solicitor's client in relation to the case for which the solicitor is instructed, where that party is not represented by a solicitor for the case, unless:
- 22.4.1 the party is not being indemnified by an insurance company which is actively engaged in contesting the proceedings; or
- 22.4.2 the party is being indemnified by an insurance company which is actively engaged in contesting the proceedings and the solicitor:
- (i) has no reasonable grounds to believe that any statements made by the party to the solicitor may harm the party's interests under the insurance policy; or
 - (ii) has reasonable grounds for the belief referred to in (a) but has clearly informed the party beforehand of that possibility; or
- 22.4.3 the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is personally represented but not in the case and the solicitor:
- (i) has notified the party's representative of the solicitor's intention to do so; and
 - (ii) has allowed enough time for the party to be advised by the party's representative.
- 22.5 A solicitor must not, outside an ex parte application or a hearing of which the 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 22.6.
- 22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under Rule 22.6.2, other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

Opposition access to witnesses

- 23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with the opponent or being interviewed by or on behalf of any person involved in the proceedings.
- 23.2 A solicitor will not have breached Rule 23.1 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

Integrity of evidence – influencing evidence

- 24.1 A solicitor must not advise or suggest to a witness that false evidence should be given.
- 24.2 A solicitor must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.
- 24.3 A solicitor will not have breached Rules 24.1 or 24.2 by:
- 24.3.1 expressing a general admonition to tell the truth;
 - 24.3.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or
 - 24.3.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

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, about any issue:
- 25.1.1 as to which there are reasonable grounds for the solicitor to believe it may be contentious at a hearing; or
 - 25.1.2 which could be affected by, or may 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.

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.

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 centrally material to the determination of contested issues before the court:
- 27.1.1 a solicitor may not appear for the client in the hearing;
- 27.1.2 the solicitors' associate, or a law practice of which the solicitor is a member, may act for the client:
- PROVIDED
- (i) exceptional circumstances apply in the solicitor's reasonable opinion; and
 - (ii) the client, having been given an opportunity to obtain independent legal advice concerning the issue, consents.

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.

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, unless:
- 29.5.1 such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person; and
- 29.5.2 the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a solicitor, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other 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 defence of the accused could suffer by reason of such nondisclosure;
- 29.6.2 the charge against the accused to which such material is relevant should be withdrawn; or
- 29.6.3 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 the whole picture;
- 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;
- 29.7.3 whose testimony or statements were used in the course of any committal proceedings; or
- 29.7.4 from whom statements have been obtained in the preparation or conduct of the prosecution's case,
- 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; or
- (iii) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses,

PROVIDED THAT:

- (iv) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within Rules 29.7.1- 29.7.4, if the prosecutor believes on reasonable grounds that the testimony of that witness is plainly unreliable.
 - (v) 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) and (iii) together with the grounds on which the prosecutor has reached that decision.
- 29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:
- 29.8.1 inform the opponent if the prosecutor intends to use the material;
 - 29.8.2 make available to the opponent a copy of the material if it is in documentary form; and
 - 29.8.3 inform the opponent of the grounds for believing that such material was unlawfully or improperly obtained.
- 29.9 A prosecutor must not confer with or interview any of the accused except in the presence of the accused's legal representative.
- 29.10 A prosecutor must not inform the court or the 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 must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:
- 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 appellable 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 appellate authority.

RELATIONS WITH OTHER SOLICITORS

Another solicitor's error

- 30.1 A solicitor must not take unfair advantage of another solicitor's obvious error, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.

Inadvertent disclosure

- 31.1 A solicitor to whom material known or reasonably suspected to be confidential is disclosed by

another solicitor, 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 of the disclosure and the steps taken to prevent inappropriate misuse of the material.
- 31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:
- 31.2.1 notify the opposing solicitor immediately, and
 - 31.2.2 not read any more of the material.
- 31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

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.

Communication with another solicitor's client

- 33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:
- 33.1.1 the other practitioner has previously consented;
 - 33.1.2 the solicitor believes on reasonable grounds that:
 - (i) the circumstances are so urgent as to require the solicitor to do so; and
 - (ii) the dealing would not be unfair to the opponent's client;
 - 33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or
 - 33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

RELATIONS WITH THIRD PARTIES

Dealing with third parties

- 34.1 A solicitor must not in any action or communication associated with representing a client:
- 34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which is calculated to mislead or intimidate the other person;
 - 34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or
 - 34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate a third person.
- 34.2 In the conduct or promotion of a practitioner's practice, the practitioner 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 practitioner at the time when the instructions are sought.

Contracting with third parties

- 35.1 If a solicitor instructs a third party on behalf of the client, and the solicitor is not intending to accept personal liability for payment of the third party's fees, the solicitor must advise the third party in advance.

LAW PRACTICE MANAGEMENT

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 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 an accredited specialist under a Scheme operated by the relevant professional body.

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.

Returning judicial officers

- 38.1 A solicitor who is a former judicial officer must not appear in:
- (i) any Court if the solicitor has been a member thereof or presided therein; or
 - (ii) any Court from which appeals to any Court of which the solicitor was formerly a member may be made or brought
- for a period of two years after ceasing to hold that office unless permitted by the relevant professional body.

Sharing premises

- 39.1 Where a solicitor or law practice shares an office with any other entity or business engaged in another calling, and a client is receiving services concurrently from both the law practice and the other entity, the solicitor, or law practice (as the case requires) must take all reasonable steps to ensure that the client is clearly informed about the nature and the terms of the services being provided to the client by the law practice, including (if applicable) that the services provided by the other entity are not operated by the law practice.

Sharing receipts

- 40.1 A solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from the provision of legal services by the solicitor, with:
- 40.1.1 any disqualified person; or
 - 40.1.2 any person convicted of an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.

Mortgage financing and managed investments

- 41.1 A solicitor must not conduct a managed investment scheme or engage in mortgage financing as part of their law practice, except under a scheme administered by the relevant professional body

Anti-discrimination and harassment

- 42.1 An Australian legal practitioner must not in the course of practice, engage in conduct which constitutes:
- 42.1.1 discrimination; or
 - 42.1.2 sexual harassment; or

42.1.3 workplace bullying.

Dealing with the regulatory authority

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

GLOSSARY OF TERMS

"associate" in reference to a practitioner means

- (a) a partner, employee, or agent of the practitioner or of the practitioner's firm;
- (b) a corporation or partnership in which the practitioner has a material beneficial interest;
- (c) in the case of a solicitor corporation, a director of the corporation or of a subsidiary of the corporation;
- (d) a member of the practitioner's immediate family; or
- (e) a member of the immediate family of a partner of the practitioner's firm or of the immediate family of a director of a solicitor corporation or a subsidiary of the corporation.

"associated entity" an entity that is not part of the law practice but which provides legal or administrative services to a law practice, including but not limited to:

- (a) a service trust or company; or
- (b) a partnerships of law practices operating under the same trading name or a name which includes all or part of the trading name of the law practice.

"Australian-registered foreign lawyer" has the same meaning as set out in legal profession legislation

"case" means

- (a) the court proceedings for which the practitioner is engaged; or
- (b) the dispute in which the practitioner is advising.

"client" with respect to the practitioner or the practitioner's firm means a person (not an instructing practitioner) for whom the practitioner is engaged to provide legal services for a matter.

"client documents" means documents to which a client is entitled. Documents to which the client is entitled may vary from case to case as a matter of law, but will generally include –

- (a) documents prepared by a practitioner for the client, or predominantly for the purposes of the client or the client's matter;
- (b) documents received by a practitioner from a third party for or on behalf of the client or intended for the use or information of the client, for the purposes of the client's matter; and,
- (c) the client's own documents.

"compromise" includes any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.

"Corporations Act" means the *Corporations Act 2001* (Cth)

"costs" includes disbursements.

"court" means

- (a) any body described as such;
- (b) any tribunal exercising judicial, or quasi-judicial, functions;
- (c) a professional disciplinary tribunal;
- (d) an industrial tribunal;
- (e) an administrative tribunal;

- (f) an investigation or inquiry established or conducted under statute or by a Parliament;
- (g) a Royal Commission;
- (h) an arbitration or mediation or any other form of dispute resolution.

"current proceedings" means proceedings which have not been determined, including proceedings in which there is still the real possibility of an appeal or other challenge to a decision being filed, heard or decided.

"discrimination" means discrimination that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.

"disqualified person" means any of the following persons whether the thing that has happened to the person happened before or after the commencement of this definition:

- (a) a person whose name has (whether or not at his or her own request) been removed from an Australian roll and who has not subsequently been admitted or re-admitted to the legal profession under legal professional legislation or a corresponding law, or
- (b) a person whose Australian practising certificate has been suspended or cancelled under legal professional legislation or a corresponding law and who, because of the cancellation, is not an Australian legal practitioner or in relation to whom that suspension has not finished, or
- (c) a person who has been refused a renewal of an Australian practising certificate under legal professional legislation or a corresponding law, and to whom an Australian practising certificate has not been granted at a later time, or
- (d) a person who is the subject of an order under legal professional legislation or a corresponding law prohibiting a law practice from employing or paying the person in connection with the relevant practice, or
- (e) a person who is the subject of an order under legal professional legislation or a corresponding law prohibiting an Australian legal practitioner from being a partner of the person in a business that includes the practitioner's practice, or
- (f) a person who is the subject of any order under legal professional legislation or corresponding law, disqualifying them from managing an incorporated legal practice or from engaging in partnerships with certain partners who are not Australian legal practitioners.

"engagement" means the appointment of the practitioner or of the practitioner's firm to provide legal services for a matter.

"employee", of an entity, means a person who is employed or under a contract of service or contract for services in or by the entity whether or not—

- (a) the person works full-time, part-time, or on a temporary or casual basis; or
- (b) the person is a law clerk or article clerk.

"employer" In relation to a corporate practitioner means a person or body (not being another practitioner or a law practice) who or which employs the practitioner whether or not the person or body pays or contributes to the practitioner's salary.

"firm" in relation to a practitioner means:

- (a) a partnership of which the practitioner is a partner; or
- (b) a practitioner, partnership or corporation which employs the practitioner.

"forensic judgments" means a decision of the practitioner made in the course of a case, but does not include a decision as to:

- (a) the commencement of proceedings;
- (b) the joinder of parties;
- (c) admissions or concessions of fact;
- (d) amendments of pleadings;
- (e) undertakings to a court;
- (f) a plea in criminal proceedings, but does include advice given to assist the client or the instructing practitioner to make such decisions.

"former client" for the purposes of rule 10.1, may include a person or entity that has previously instructed:

- (a) the practitioner;
- (b) the practitioner's current law practice;
- (c) the practitioner's former law practice, while the practitioner was at the former law practice;
- (d) the former law practice of a partner, director or employee of the practitioner, while the partner, director or employee was at the former law practice;

or, has provided confidential information to a practitioner, notwithstanding that the practitioner was not formally retained and did not render an account.

"immediate family" means the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a practitioner.

"instructing solicitor" means a solicitor or firm who engages another practitioner to provide legal services for a client for a matter.

"insurance company" includes any entity, whether statutory or otherwise, which indemnifies persons against civil claims.

"law practice" means:

- (a) an Australian legal practitioner who is a sole practitioner; or
- (b) a law firm; or
- (c) a multi-disciplinary partnership; or
- (d) an incorporated legal practice.

"legal costs" means amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services including disbursements but not including interest.

"legal profession legislation" means a law of a State or Territory that regulates legal practice and the provision of legal services.

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

"matter" means any legal service the subject of an engagement or required to be provided by the practitioner or the practitioner's firm to fulfil an engagement and includes services provided for:

- (a) a case;

- (b) a dealing between parties that may affect, create or be related to a right, entitlement or interest in property of any kind; or
- (c) advice on the law.

“managed investment scheme” has the same meaning as in the *Corporations Act*.

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

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

but does not include:

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

“multi-disciplinary partnership” has the meaning given in the legal profession legislation

“opponent” means:

- (a) the practitioner appearing for a party opposed to the client of the practitioner in question; or
- (b) that party, if the party is unrepresented.

“order” includes a judgment, decision or determination.

“party” includes each one of the persons or corporations who or which is jointly a party to any matter

“practitioner” means a person or corporation entitled to practise the profession of the law.

“principal” means a practitioner who is the holder of a principal practicing certificate, within the meaning of the Act

“professional misconduct” includes:

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

“prosecutor” means a practitioner who appears for the complainant or Crown in criminal proceedings.

“regulatory authority” means an entity identified in a legal profession statute which has responsibility for regulating the activities of solicitors in that jurisdiction.

“serious criminal offence” means an offence that is –

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

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

“**solicitor**” means:

- (a) a local legal practitioner who holds a current local practising certificate to practise as a solicitor and barrister [or as a solicitor, or as a barrister and solicitor]; or
- (b) an interstate legal practitioner who holds a current interstate practising certificate that does not restrict the practitioner to engage in legal practice only as or in the manner of a barrister.

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

“**substantial benefit**” means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

“**trustee company**” is as defined in relevant jurisdictional legislation: the Trustee Companies Act 1964 (NSW), the Trustee Companies Act 1968 (Qld), the Trustee Companies Act 1984 (Vic), the Trustee Companies Act 1988 (SA), the Trustee Companies Act 1953 (Tas)l the Trustee Companies Act 1987 (WA) and the Trustee Companies Act 1947 (ACT).

“**unsatisfactory professional conduct**” includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

“**workplace bullying**” means bullying that is unlawful under the applicable state or territory anti discrimination or human rights legislation. If no such legislative definition exists, it is conduct within the definition relied upon by the Australian Human Rights Commission to mean workplace bullying. In general terms it includes the repeated less favourable treatment of a person by another or others in the workplace, which may be considered unreasonable and inappropriate workplace practice. It includes behaviour that could be expected to intimidate, offend, degrade or humiliate.