Law Council of Australia

Review of the Australian Solicitors' Conduct Rules

Report to Legal Services Council

5 May 2021

Legal Profession Uniform Law, Section 427

Law Council
OF AUSTRALIA

Contents

PART A - REPORT UNDER SECTION 427(5)

Subsection 427(2) of the *Legal Profession Uniform Law* provides that the Law Council of Australia may develop proposed Uniform Rules designated as Legal Practice Rules, Legal Profession Conduct Rules and Continuing Professional Development Rules so far as they apply or relate to solicitors. Subsection 427(4) provides that the Law Council of Australia and the Australian Bar Association may develop Uniform Rules of these kinds as they apply or relate to Australian-registered foreign lawyers.

Subsection 427(5) of the Uniform Law provides that in developing proposed Rules, the Law Council of Australia:

(a) must consult with the Legal Services Council, the Commissioner, and such of the Legal Services Council's advisory committees and local regulatory authorities as the Legal Services Council considers appropriate, for a minimum period of 30 days; and

(b) must, with the approval of the Legal Services Council, release a draft of the proposed Uniform Rules for public consultation and invite written submissions about the draft to be made to the Law Council or Australian Bar Association or both (as the case requires) during a specified period of at least 30 days; and

(c) must consider all reasonable submissions duly made and received and provide the Legal Services Council with a copy of all submissions received; and

(d) must, after considering the submissions and making any amendments to the draft, submit a final draft to the Legal Services Council, together with a report demonstrating compliance with the requirements of this subsection.

This Report is lodged pursuant to paragraph 427(5)(d), demonstrating compliance with subsection 427(5) as follows.

Paragraph 427(5)(a)

- The development of proposed professional conduct rules, for application to all solicitors and Australian-registered foreign lawyers - the *Australian Solicitors' Conduct Rules* (**ASCR**), is undertaken by the Law Council with the advice of the Professional Ethics Committee (**PEC**). The PEC is comprised on one member nominated by each State and Territory law society and a member nominated by Law Firms Australia.
- On 26 November 2016, the Law Council endorsed the Consultation Discussion Paper (**Consultation Paper**) for the Review of the ASCR developed by the PEC.
- By letter dated 16 December 2016, the Law Council lodged the draft Consultation Paper with the Legal Services Counsel.
- By letter dated 9 January 2017, the Legal Services requested the Law Council to consult with designated regulatory authorities for a minimum of 30 days.

Paragraph 427(5)(b)

- By letter dated 25 August 2017 the Law Council advised that consultations with designated regulatory authorities had been completed and sought approval to release the revised Consultation Paper for public consultation.
- By letter dated 1 Sept 2017 the Commissioner for Uniform Legal Services Regulation requested further consultations with the Commissioner's staff and designated regulatory authorities and, subject to that, approval to publicly release the Consultation Paper would be forthcoming in late September 2017.
- By letter dated 25 October 2017 the Law Council submitted a revised Consultation Paper for approval to release for public consultation.
- The Law Council was notified on 3 November 2017 of the approval to release the Consultation Paper for public consultation.
- The Consultation Paper was released on 1 February 2018 by publication on the Law Council of Australia website and notifications on law society websites. In addition, copies of the Consultation Paper were sent directly to key stakeholders.
- The Law Council sought submissions within 90 days (i.e. until 31 May 2018) and also accepted submissions after that date.
- The Consultation Paper invited submissions on 111 matters, touching upon 37 of the 43 current Rules; together with 4 of the definitions in the Glossary and 5 potential new Rules.

Paragraph 427(5)(c)

- The Law Council received 45 written submissions and responses to the Consultation Paper. These were transmitted to the Legal Services Council of 6 May 2020.
- In addition to the 111 matters canvassed in the Consultation Paper, an additional 35 matters were raised in submissions and during the deliberations of the PEC.

Paragraph 427(5)(d)

- The PEC met on 10 separate occasions to consider the submissions received. In addition the PEC held a round-table consultation on 7 February 2019 with representatives of Legal Aid, community legal centres and other legal assistance sector organisations to discuss options for a new Rule – designated as Rule 11A - to address submissions that called for clarity about the application of the conflict of interest rules (Rules 10 and 11) when delivering legal assistance.
- The Chair of the PEC also met with the Australian Bar Association and the Australian Competition and Consumer Commission.
- In considering the submissions received, the PEC also engaged extensively with the Law Council's constituent bodies to ensure that the matters raised in the submissions were carefully considered and that issues raised in addition to those contained in the Consultation Paper were fully addressed.

- The PEC also consulted with Professor Gino Dal Pont, University of Tasmania, particularly in relation to the conduct rules concerning conflicts of interest.
- On 7 March 2020, the Law Council endorsed the recommendations of the PEC arising out of the review.
- Although not required by the Uniform Law, the Law Council and Legal Services Council agreed that in view of the large number of matters considered in the Review, it would be appropriate for the Law Council to lodge a draft of this section 427(5) Report, as a basis for dialogue and clarification with the Legal Services Council about the Law Council's proposed Rules. The draft Report was lodged on 1 May 2020.
- Following discussions between representatives of the Law Council and the Legal Services Council, the Legal Services Council wrote to the Law Council on 3 August 2020 setting out a number of comments and suggestions, including comments and suggestions from the Parliamentary Counsel's Office (NSW) about definitions in the Glossary to the ASCR that had a corresponding definition in the Uniform Law.
- The Law Council responded by letter dated 17 September 2020 and on 1 October 2020 the Legal Services Council advised that it approved of all the amendments to the ASCR proposed by the Law Council, other than proposed Rule 11A.
- In relation to proposed Rule 11A, the Law Council agreed to undertake a separate public consultation to ensure that the requirements of section 427(5)(b) of the Uniform Law were fully satisfied.
- A Consultation Paper was released by the Law Council on 6 November 2020, for a consultation period of 30 days, ending on 7 December 2020.
- The Law Council received 25 submissions and, after considering those submissions, included a final draft of Rule 11A in a formal Report to the Legal Services on 23 December 2020.
- On 26 February 2021, the Legal Services Council provided comments and recommended amendments to proposed Rule 11A, which the Law Council agreed to subject to minor amendments.
- On 3 May 2021, the Legal Services Council advised the minor amendments suggested by the Law Council had been approved, thus completing the statutory requirements of subsection 427(5) of the Uniform Law.

Conclusion

The Law Council acknowledges the high degree of collaboration with the Legal Services Council, the Commissioner and designated regulatory authorities throughout this Review of the Australian Solicitors' Conduct Rules. The Law Council also appreciates the advice and suggestions of the NSW Parliamentary Counsel's Office in finalising the Rules. The conduct of the review has respected the statutory roles and responsibilities of the Law Council and the Legal Services Council under the Uniform Law, and has been undertaken in the collaborative spirit of the co-regulatory model of legal profession regulation in Australia.

PART B - DISCUSSION AND PROPOSED AMENDMENTS

Introduction

This Part of the Report summarises the issues canvassed by the Review, the key aspects of submissions and other comments received, and the basis of the Law Council's response.

Cultural awareness

Issues canvassed

An issue raised in consultations on the Review was that the ASCR should include an introduction that highlights the need for cultural competency when advising and representing clients.

Responses and considerations

It was submitted that cultural differences and barriers can impact the client's understanding of the advice given, particularly when indigenous interpreters are not utilised or available. Cultural barriers and differences, and distrust of the legal system and/or practitioners can also impact the client's communication of relevant information and instructions to the solicitor for the giving of full and proper advice or representation.

It was recommended that the Rules draw attention to these barriers and considerations so that solicitors can ensure that their clients can understand the advice given and can then make informed choices, as required by Rule 7. The requirement in Rule 7 to put clients in a position where they can make informed choices requires that when interacting with clients, solicitors must be aware of any cultural contexts, language barriers and other issues that may impact the client's access to, and understanding of, the legal system. Barriers preventing the provision of full instructions, or to understanding advice and providing fully informed consent, are an additional access to justice issue for such clients.

It was also submitted that cultural competency is relevant to the application of all the Rules and that a more thorough consultation should be undertaken in respect of the application of the Rules to indigenous clients.

Given that these issues were raised just prior to completion of the Review, the Law Council concluded that the most appropriate way to address this issue, at this juncture, was to raise these issues in the *Commentary* and to undertake a more substantial consultation at the next Review of the Rules.

Conclusions

1. The Commentary will be expanded to address the importance of cultural awareness, language barriers and other issues that may impact a client's access to, and understanding of, the legal system.
2. This matter will be reconsidered during the next review of the Rules.

NATURE AND PURPOSE OF THE RULES

Rule 1 (Application and interpretation)

Current rule

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

1.2 The definitions that apply in these Rules are set out in the glossary.

Issues canvassed

1. Does a separate set of rules need to be promulgated for Australian-registered foreign lawyers acting in the manner of a solicitor?
2. Should a generic definition of *community legal service* be inserted in the Glossary?
3. Does there need to be a combined set of rules for solicitors and barristers in fused profession jurisdictions?
4. The expression "These Rules apply to all solicitors in Australia" is incorrect as the rules have not been adopted in WA, Tasmania or the NT, and the Uniform Law version is different to the other versions adopted. The statement is considered misleading to consumers.
5. The rules should be revised and written in plain English "so that consumers also understand what obligations are (and by their absence are not) imposed on their solicitor."

Responses and considerations

Issue 1 – Separate rules for Australian-registered foreign lawyers

The proposal raised with the Law Council was that there should be a separate set of Rules for Australian-registered foreign lawyers, because they practice a different form of legal practice to Australian solicitors.

No responses were received in support of a separate set of rules.

Whether, and if so, the extent to which a particular rule or rules will apply, will depend upon the individual circumstances as they arise during the course of legal practice for the practitioner providing the legal services and the client. Depending upon the particular context and circumstances, the situations addressed in some rules may arise frequently, whereas others may arise only infrequently.

The longstanding practice has been to develop a single set of rules for application to those who engage in legal practice *in the manner of a solicitor*, rather than on the basis of the area of law practised.

The Law Council concluded:

- it would be preferable to maintain a single set of principles-based (**ASCR**) that will apply to practitioners acting in the manner of a solicitor, according to the

circumstances and the judgment of the practitioner involved. The alternative would be to devise multiple sets of rules and create a multi-tiered ethical rule framework, each of which is dedicated solely to a particular context or area of law in which legal services are provided.

- nuances in the application of rules in specific legal practice contexts are more appropriately dealt with either in the *Commentary* or in legal practice rules.

Issue 2 – Definitions of *community legal service* and *law practice*

Numerous requests had been made to clarify that the ASCR apply to community legal services. This was supported by the Law Council and we consulted on a proposed definition of *community legal service* to be added to the Glossary to the Rules, as well as a consequential amendment to the definition of *law practice*.

Submissions received all supported the proposal to include a definition of *community legal service*; however there was some hesitancy expressed in one submission about amending the definition of *law practice* to include a *community legal service*, if that could lead to an extension of the Uniform Law generally to community legal services in a jurisdiction that subsequently joins the Uniform Law scheme.

The Law Council noted that there are variations in the legal profession legislation across jurisdictions as to the extent to which local legislation applies (or does not apply) to a community legal centre/service. Further, legal profession legislation typically provides for the making of rules or regulations setting out the application of that legislation to a community legal centre/service. In particular, section 118 of the Uniform Law provides for Uniform Rules to be made "with respect to any aspect of community legal services, so far as concerns the provision of legal services or matters that affect or may affect the provision of legal services".

The Law Council view is that it would be undesirable and inappropriate for the ASCR to provide "carve-outs" for particular kinds of law practices; and any variations to the general application of legal profession legislation to community legal services is a matter for local legislation rather than the ASCR. Accordingly, the Law Council did not support excluding a community legal service from the Glossary definition of *law practice* for the purposes of the ASCR.

It was also agreed that the Glossary definition should include reference to both a "multi-disciplinary partnership" and an "unincorporated legal practice", with the Commentary drawing attention to the different definitions found in the Uniform Law and non-uniform law jurisdictions.

Issue 3 – Combined solicitors' and barristers' rules in fused jurisdictions

It had been suggested that a combined set of rules be developed, to address uncertainty in some fused jurisdictions about the correct or appropriate application of the Australian Solicitors' Conduct Rules or the applicable *Legal Profession Uniform Conduct (Barristers) Rules 2015* (the **Barristers' Rules**) to practitioners who practice in both the manner of a solicitor and a barrister.

This issue sits against the background – but is independent of - the ongoing collaboration between the Law Council and Australian Bar Association on harmonisation of the rules

relating to advocacy and litigation. In this area of legal practice, barristers and solicitors are often in much the same position, and there is a commonality of ethical principles appropriate to advocacy and litigation before the courts and tribunals.

One view expressed in submissions was that there should be a combined set of rules in fused jurisdictions. It was said that distinguishing between conduct as being in the capacity of a solicitor or as a barrister is not simply resolved by determining whether the practitioner has elected to practice only in the manner of a barrister, because a practitioner's course of conduct in a particular manner may cross over each set of rules, causing difficulty in distinguishing which rules(s) apply.

Other submissions and responses did not support a combined set of rules in fused jurisdictions.

While it will be the case that there is a convergence of ethical principles applying to solicitors and to barristers in some areas (for example, in advocacy and litigation) there is equally divergence in other areas. The cab-rank rule was cited as an example where the independent bar has different considerations compared with solicitors, who have broader practices and may need to exercise judgment in different ways.

Also, as noted in relation to the suggestion that there be separate rules for Australian-registered foreign lawyers, adopting the proposal for a combined set of rules for solicitors and barristers in a fused profession jurisdiction would still require separate sets of rules in non-fused jurisdictions.

The Law Council concluded there should not be a combined set of rules in a fused jurisdiction and that it would be more appropriate for the jurisdiction to set out its view of when a barrister's rule or a solicitor's rule would apply in a particular circumstance.[1]

Issue 4 – Rule 1 is incorrect - the ASCR do not apply to all Australian solicitors

One response to the Review noted that because the ASCR have not been adopted in all States and Territories, it was incorrect and misleading to consumers to state in Rule 1.1 that the rules "apply to all solicitors in Australia".

The Law Council agreed Rule 1.1 needed to be modified to avoid this problem, and concluded that the expression "apply to all solicitors within Australia" in Rule 1.1 should be replaced with "apply to all solicitors in this jurisdiction".

Issue 5 – Rewrite the ASCR in plain English

It was suggested that revising and writing the ASCR in plain English would assist consumer understanding of which obligations are (and by their absence, are not) imposed on their solicitor. Another submission suggested that accessible language should be preferred in any future work on the ASCR or Commentary.

While the Law Council did not consider it necessary to attempt to rewrite the ASCR in plain English, as they are primarily directed toward solicitors; it was agreed that when revising

[1] For example, the preface to the current Law Society Northern Territory Rules of Professional Conduct and Practice states:

> The Rules which follow apply to all legal practitioners save for those practising solely as barristers. Annexure "A" hereto contains the Australian Bar Association Rules as adopted by the Northern Territory Bar Association. The rules contained within annexure "A" apply to the conduct of legal practitioners practising solely as barristers.

the *Commentary*, the drafters need to be mindful that the audience is broader than legal practitioners and that the use of accessible (plain English) language is to be preferred.

Conclusions

1. A separate set of conduct rules for Australian-registered foreign lawyers is not required.

2. (a) A generic definition of *community legal service* be added to the Glossary, as follows:

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

   (b) The definition of *law practice* in the Glossary be amended as follows:

   "law practice" means:

   (a) an Australian legal practitioner who is a sole solicitor;

   (b) a partnership of which the solicitor is a partner;

   (c) a multi-disciplinary partnership;

   (d) a community legal service;

   (e) an unincorporated legal practice;

   (f) an incorporated legal practice.

3. There does not need to be a combined set of rules for solicitors and barristers in fused jurisdictions.

4. The words *within Australia* in Rule 1.1 be replaced with *in this jurisdiction* in recognition that the ASCR have not been adopted as the professional conduct rules for solicitors by all States and Territories.

5. The rules should not be rewritten in plain English, but the approach taken to revised *Commentary* will recognise that accessible (plain English) language is to be preferred.

Proposed rule

Rule 1 Application and interpretation

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

Rule 2 (Purpose and effect of the rules)

Current rule

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

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

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

Issues canvassed

1. That the rules do not require inclusion of references to legislative rules. These professional conduct rules are statements of ethical principles and professional duties of solicitors, not statute.
2. That Rule 2.3 should be retained and continue to use the word “breach” rather than “contravene”, reflecting the position that the rules are not legislative in nature.
3. That the *Commentary* should explain that while the rules are not directly enforceable by a third-party, the circumstances surrounding an alleged breach of a rule(s) can form part of the evidence in a complaint or civil matter.
4. The Discussion Paper does not provide any substantive discussion of the important role of legal profession regulators in maintaining and enforcing ethical standards – an exclusion which limits the clarity of the Discussion Paper in accurately describing the regulation of solicitors’ professional conduct.

Responses and considerations

Issue 1 – Include reference to legislated rules

It had been suggested that legal profession legislation also sets “standards” to which practitioners must adhere, and therefore Rule 2.1 should also refer to “relevant provisions” in legislation. That the ASCR are promulgated as subordinate legislation lends support to the view that Rule 2.1 should state that the principles of professional conduct are also established by the Uniform Law.

The Law Council has consistently taken the contrary view - that the ASCR are statements of core principles of ethical conduct developed by and expected of members of the profession, and by the courts in exercising their inherent supervisory jurisdiction over the legal profession. Also, the Law Council view has been that the ASCR are an example of professional self-regulation, and as such should repeat legislated prescriptions and proscription, nor should they be regarded as statute.

One of the submissions that responded to this issue agreed that Rule 2.1 does not require inclusion of references to legislative rules, while another submission disagreed with categorisation of the conduct rules as professional self-regulation. It was said this fails to acknowledge that the judgment [of the profession as to the ethical principles required of its members] is codified by legislative backing in several jurisdictions, including the Uniform Law jurisdictions and that "(f)ailure to acknowledge this relationship does not provide sufficient clarity for solicitors or consumers of legal services regarding the functionality and enforcement of these rules."

The point of distinction between the rules and legislation is perhaps best illustrated by the fact that a breach of a conduct rule does not of itself constitute a contravention of legal profession legislation which attracts a legislative sanction. Instead a breach of a rule is conduct *capable* of being unsatisfactory professional conduct or professional misconduct, but is not a contravention. On the other hand, a contravention of legal profession legislation can attract both a statutory sanction and disciplinary consequence as conduct capable of being unsatisfactory professional conduct or professional misconduct attracting a disciplinary sanction.

The Law Council concluded that the relationship between the ASCR, the various State and Territory statutes and the common law should be explained in the *Commentary*. The Law Council also considers the *Commentary* could usefully explain the relationship between the ASCR and making of complaints under legal profession legislation.

Issue 2 – "breach" rather than "contravention"

No responses were received to the question about whether the word *breach* in Rule 2.3 should be replaced with *contravention*. The Law Council considers the word *breach* should not be replaced because this word is a better descriptor of the failure to fulfil an ethical duty and is commonly used in disciplinary proceedings, whereas *contravention* is a term more commonly associated with the failure to discharge a statutory obligation.

Issue 3 – Enforceability of the ASCR by a third-party

The accuracy of the phrase *but cannot be enforced by a third party* in Rule 2.3 had been raised with the Law Council. The Consultation Paper explained that although the legal profession rules are not directly enforceable at the suit of a litigant, they do illustrate appropriate professional conduct that the court may enforce through its supervisory jurisdiction - for example, to restrain one of its officers from representing a party where a conflict of duties is involved. The Consultation Paper also noted that a breach of a rule can become part of the evidence led by a complainant or party to a complaint or other matter, and can be used in evidence during a civil claim for negligence and, therefore, could result in a civil liability.

Some submissions that responded to this issue noted that the phrase *cannot be enforced by a third party* may give a misleading impression to consumers of legal services and that it would be helpful if the *Commentary* to the ASCR was expanded to better explain what is meant by the phrase. Another submission noted that in South Australia the legislative provisions applying to the Legal Profession Conduct Commissioner permit the investigation of complaints by third parties in certain circumstances.

The Law Council concluded that because the phrase *cannot be enforced by a third party* is not entirely accurate, and potentially ambiguous, it should be omitted from the Rule, and the Commentary expanded to explain the avenues available to third parties who are affected by a breach of a Rule.

Issue 4- The role of regulators in maintaining and enforcing ethical standards

It was commented that the clarity of the Consultation Paper was limited by the exclusion of a substantive discussion about of the important role of legal profession regulators in maintaining and enforcing ethical standards.

The Law Council agrees that it would be useful for the *Commentary* to the ASCR to be expanded to provide information about the complaints and discipline processes.

Conclusions

1. The Rules do not require inclusion of references to legislative rules, but an explanation in the *Commentary* of the relationship between the Rules, statutes and the common law in the regulatory framework would be useful.
2. The word *breach* in Rule 2.3 should not be replaced with the word *contravention*.
3. (a) The words *but cannot be enforced by a third party* be deleted from Rule 2.3 to remove ambiguity.

   (b) The *Commentary* will be reviewed to provide an explanation about the ways in which complaints about alleged breaches of the Rules may be made.
4. The *Commentary* should also provide a brief explanation of the complaints and discipline processes, and the roles of regulators.
5. That Rule 2 be amended as follows:

Proposed rule

Rule 2 Purpose and effect of the rules

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

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

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

FUNDAMENTAL DUTIES OF SOLICITORS

Rule 3 (Paramount duty to the court and the administration of justice)

Current rule

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.

Issues canvassed

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

Responses and considerations

Issue – Reference to the rule of law

One submission considered it a particularly important principle that everyone should have access to competent and independent legal advice as something that is critical for access to justice, which is recognised as a fundamental human right in core international human rights treaties. Further, they also regard other key components of the rule of law, such as the presumption of innocence, the right to an impartial hearing and the independence of the judiciary as important legal principles. Their view is that inclusion of a specific reference to the rule of law, as a fundamental duty of all solicitors, promotes and protects these principles in the work of solicitors.

The Consultation Paper (page 22) referred to the Law Council's *Policy Statement: Rule of Law Principles* which states that the expression *rule of law* embraces a number of principles which seek to promote and reconcile public policy aspirations and objectives. These principles include that the law must be both readily known and available, certain and clear; that everyone should have access to competent and independent legal advice; that all people are entitled to the presumption of innocence and to a fair and public trial; and that the Judiciary should be independent of the Executive and Legislature.

Rule 3 on the other hand, relates primarily to the relationship between the solicitor and the court in the administration of justice – that is, the rule primarily focuses on the management and conduct of matters to promote efficient and effective processes of the court in the exercise of judicial functions. From this flow specific duties of a solicitor as an officer of the court.

Other responses supported the Law Council view that Rule 3 did not need to be modified, because the Rule is directed to a different purpose than to *rule of law* principles, which are part of the overall context in which Rule 3, and other rules are applied.

Conclusions

1. No change to Rule 3.1 or the *Commentary*.

Rule 4 (Other fundamental duties)

Current rule

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.

Issues canvassed

1. Should this rule explicitly refer to the duty of candour?
2. The *Commentary* should confirm that 'offensive or provocative language or conduct' falls within the broader concept of courtesy referred to in rule 4.1.2, having regard to *Alan James McDonald v Legal Services Commissioner* (No 2) [2017] VSC 89 and *Victorian Legal Services Commissioner v McDonal*d [2019] VSCA 18.

Responses and considerations

Issue 1 – Duty of candour

The Consultation Paper noted that Rules 4-6 set out fundamental ethical duties, and are the foundation for subsequent, more specific rules. The concept of "candour", which is defined to mean "frankness, as of speech; sincerity; honesty"[2]; and "freedom from bias; fairness; impartiality" is embodied in the underlying principles of a number of rules, such as for example Rule 4.1.2 – the duty to be honest and courteous in all dealings in the course of legal practice. The Law Council therefore did not consider it was necessary to amend Rule 4 to specifically refer to a duty of candour.

Two responses were received in respect of this matter. One response agreed that the Rule does not need to refer to a duty of candour, while the other response submitted that the *Commentary* should include a discussion on how the concept of candour underpins the ASCR.

The Law Council proposes to expand the *Commentary* to discuss the duty of candour.

Issue 2 – Offensive or provocative language

The Law Council's attention was drawn to the judgment in *Alan James McDonald v Legal Services Commissioner* (No 2) [2017] VSC 89, which considered whether a solicitor who made accusations that an opposing solicitor was being untruthful, and was 'fundamentally

[2] Macquarie Dictionary.

dishonest' had breached former Victorian Rule 21 by using *offensive or provocative language*.[3]

On appeal, the Supreme Court of Victoria Court of Appeal[4] agreed that the (former) Rule is directed toward co-operation between practitioners, which is important to promote the efficient operation of the justice system, and the conduct of legal business. The Court held that considering whether there had been a breach of the rule involved inter-related questions about whether the conduct in question was undertaken in pursuit of the legitimate interest of the client, whether the accusations had a reasonable basis and whether the conduct had the potential to undermine the integrity and reputation of the legal profession.

The Law Council view is that the principles in (former) Victorian Rule 21 have been integrated into Rules 4.1.1, 4.1.2 and Rule 5 of the ASCR, and therefore it would not be appropriate to consider a new Rule. The Law Council will, however, expand the *Commentary* to include discussion of the *McDonald* cases.

Conclusions

1. (a) No change to Rule 4.

   (b) The Commentary be expanded to include discussion of the duty of candour.

2. That the *Commentary* to Rules 4 and 5 include discussion of the decisions leading to and including *Victorian Legal Services Commissioner v McDonal*d [2019] VSCA 18.

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[3] The former Victorian Rule was as follows:

> 21. **Communications**
> A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct.

[4] *Victorian Legal Services Commissioner v McDonal*d [2019] VSCA 18

Rule 5 (Dishonest and disreputable conduct)

Current rule

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

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

5.1.2 bring the profession into disrepute.

Issues canvassed

1. The heading could be amended to "Standard of conduct".
2. The rule does not address "dishonest conduct" – would any additional *Commentary* on this point be useful?
3. Should "in the course of practice" be "in the course of legal practice"?
4. In rule 5.1 the phrase "which demonstrates that the solicitor is not a fit and proper person to practise law" should be deleted.
5. The word "or" should be deleted as a conjunction between Rules 5.1.1 and 5.1.2.
6. Rule 5.1 should be re-drafted for clarity:

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.

Responses and considerations

Issue 1 – Rule title - Standard of conduct – dishonest or disreputable conduct

Descriptive headings have been used for a number of rules, and are intended to capture the main matters that are dealt with by the particular rule. The Consultation Paper suggested that the heading to Rule 5 might be amended to "Standard of conduct – dishonest or disreputable conduct" for greater clarity.

One response supported the proposal, while another recommended the heading to the Rule only make reference to "Standard of conduct". The Law Council considers the amended heading proposed in the Consultation is preferable.

Issue 2 – Commentary on "dishonest conduct"

"Dishonesty" is embraced within the concept of what amounts to a person being a "fit and proper" person and the existing *Commentary* contains a discussion of factors relevant to that issue. The Consultation Paper sought comments on whether additional *Commentary* might be useful; however, no responses were received.

The Law Council considers the existing *Commentary* should be retained.

Issue 3 – Phrase "in the course of legal practice"

The suggestion raised with the Law Council was that the phrase *in the course of practice or otherwise* should be amended to *in the course of legal practice or otherwise* for clarity in Rule 5.1.

One response was received supporting the proposal, and the Law Council agreed this would be a worthwhile amendment.

Issue 4 – Reference to a solicitor not a fit and proper person to practise law

This issue was included in the Review in response to previous comments that the phrase *which demonstrates that the solicitor is not a fit and proper person to practise law* should be deleted from Rule 5.1, on the basis that fitness and propriety are addressed in legal profession legislation.

The Consultation Paper noted that the concept of *fit and proper* derives not only from statutorily described indicia, but also from the common law as developed and applied by the court in disciplinary matters. Therefore, the Law Council suggested the rule should remain unchanged.

No responses were received, and the Law Council concluded that the phrase *which demonstrates that the solicitor is not a fit and proper person to practise law* should remain in Rule 5.1.

Issue 5 – using the word "or"

Rule 5 states that a solicitor must not engage in conduct which is likely, to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice (Rule 5.1.1) ***or*** is conduct which brings the profession into disrepute (Rule 5.1.2). It had been suggested that the two issues should be joined by replacing the "or" which separates these into separate rules with "and".

The Consultation Paper noted that if the Rule were changed as suggested, it would be open to interpretation that a breach of the ethical principles relating to disreputable and dishonest conduct would only arise where the impugned conduct was both prejudicial to the administration of justice **and** would bring the profession into dispute. The Law Council view is that these are separate principles, and the Rule should not be amended as suggested.

Issue 6 – Redraft the Rule for clarity

The Consultation Paper proposed a redrafting of Rule 5.1 for greater clarity, without changing the substance of the Rule. The only response received supported this proposal.

The Law Council concluded that Rule 5 be redrafted as proposed in the Consultation Paper.

Conclusions

1. The heading to Rule 5 be changed to *Standard of conduct – dishonest or disreputable conduct.*
2. The *Commentary* on dishonest conduct and fit and proper not be expanded.
3. The words *in the course of practice* be replaced with *in the course of legal practice.*
4. The phrase *which demonstrates that the solicitor is not a fit and proper person to practise law* be retained in the rule.
5. That the word "or" between Rules 5.1.1 and 5.1.2 remains in the rule.
6. Rule 5 be redrafted for greater clarity.

Proposed rule

Rule 5 Standard of conduct – dishonest or disreputable conduct

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

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

5.1.2 is likely, to a material degree to:

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

5.1.2.2 bring the profession into disrepute.

Rule 6 (Undertakings)

Current rule

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.

Issues canvassed

1. That Rule 6 relates only to undertakings given or sought in the course of legal practice - the principle that undertakings given outside of legal practice must be honoured is within the principles underpinning Rule 5 (Dishonest and disreputable conduct).
2. That the *Commentary* be revised to clarify the application of the rules relating to undertakings.
3. That Rule 6.2 does not need to refer to *giving* undertakings that would require the co-operation of a third party – this matter is addressed in the *Commentary*.
4. Would it be ethically sound for a solicitor to no longer be required to honour an undertaking given in the course of legal practice where the value of the subject matter of the undertaking is small and the recipient of the undertaking cannot be found or unreasonably does not provide instructions?

Responses and considerations

Issue 1 – Rule 6 only applies to undertakings in course of legal practice

The Consultation Paper referred to comments made to the Law Council that the rules relating to undertakings are particularly important because of the common use of undertakings by lawyers. It was also noted that Rule 6 should not be confined solely to undertakings given by a solicitor to another solicitor, but should also expressly deal with undertakings given to a court or regulator, as well as undertakings given by an employee or agent of a solicitor.

There is a considerable body of common law about the scope of undertakings given by solicitors to other solicitors "in the course of legal practice" (which are the words used in Rule 6) as being fundamental to the effective operation of the legal system and the administration of justice.

Where a solicitor, having attached his or her professional reputation to an undertaking given otherwise than in the course of legal practice, fails to honour that undertaking, such a breach has the effect of diminishing public confidence in legal practitioners and the court system; but the authorities have not gone so far as to regard such a breach as falling within the scope of Rule 6.

The Law Council view is that Rule 6 should address actions taken by a practitioner in the course of legal practice, and that the behaviour of practitioners otherwise than in the course of legal practice is addressed by the preceding Rule. A breach of an undertaking given otherwise than in the course of legal practice is a breach of Rule 5 – disreputable conduct – rather than Rule 6.

One response agreed that the two circumstances relating to undertakings should not be joined under Rule 6. Another response recommended that Rule 6 cover all undertakings given by a solicitor, whether or not given in the course of legal practice. The view, in essence, is that solicitors should be held to the same standards regardless of the context in which an undertaking is given, and that consumers cannot reasonably be expected to clarify the capacity in which an undertaking by a solicitor is given.

The Law Council concluded that no change is needed to Rule 6 in this respect, but the heading to the Rule should be amended to make clear the Rule relates to undertakings given in the course of legal practice, and the *Commentary* on undertakings will be expanded (see following).

Issue 2 – *Commentary* about undertakings

The Consultation Paper suggested the *Commentary* should be expanded to discuss the principles relating to undertakings given during the course of legal practice (Rule 6) and undertakings given otherwise than in the course of legal practice (Rule 5).

One of the responses to this issue agreed that the *Commentary* ought to be revised as proposed.

Other responses noted that Rule 6 deals with undertakings in the course of legal practice, but there does not appear to be any distinction drawn between undertakings to other members of the profession and undertakings to the Court, and that *Commentary* should note this distinction and emphasise the importance of only giving undertakings to the Court on the clear instructions of a client.

The Law Council agreed that the *Commentary* should be expanded to clarify the application of the principles in the circumstances in which Rule 6, or other rules apply to undertakings by solicitors.

Issue 3 – Giving undertakings requiring cooperation of a third party

It had been suggested that Rule 6.2 should also refer to solicitors not *giving* undertakings that would require the co-operation of a third party, in addition to not *seeking* an undertaking that would require the co-operation of a third party.

Two responses were received in respect of this issue.

One response agreed that Rule 6.2 does not need to refer to *giving* undertakings that would require the co-operation of a third party, because this matter is addressed in the *Commentary*.

The second response also recommended against including a reference to *giving* an undertaking in Rule 6.2, on the basis that the expression “co-operation of a third party” is capable of being read as including the co-operation of a client. Some undertakings given by a solicitor to another solicitor would require some action or confirmation by the client

(including for instance, the signing or completion of a document that is required to complete a settlement). A solicitor who gives an undertaking that requires their client to do something in ordinarily transacting legal business should not be exposed to potential misconduct proceedings under Rule 6.2.

The Law Council concluded that Rule 6.2 should not refer to the 'giving' of an undertaking requiring the cooperation of a third-party as this is implicit in Rule 6.1, and is already addressed in the *Commentary*.

Issue 4 – Undertakings of small value where third party does not assist

The Consultation Paper recommended against adopting the suggestion that it would be unfair to hold a solicitor to an undertaking where a third party either no longer exists or otherwise cannot provide the cooperation necessary for the undertaking to be performed.

The two responses received on this issue submitted that it would not be ethically sound for a solicitor to no longer be required to honour an undertaking, where the value of the subject matter of the undertaking is small and the recipient of the undertaking cannot be found or unreasonably does not provide instructions.

The Law Council agreed with the view that a lawyer should only be freed from the obligation to honour an undertaking by the person or entity to whom it is given, or the Court via its inherent jurisdiction to control its officers. The Law Council also agreed that it is inappropriate to use value as a measure of importance, and that it would in any event, be difficult to determine how value is to be calculated in these circumstances.

Conclusions

1. The heading to Rule 6 be amended to "Undertakings in the course of legal practice".
2. The *Commentary* be revised to note the distinction between undertakings given in the course of legal practice and undertakings given to the court.
3. Rule 6 not be amended to refer to a solicitor not *giving* an undertaking that would require the co-operation of a third party unless the third party is also a party to the undertaking.
4. Rule 6 should not provide an exception to being released from an undertaking by a court or by the relevant party where the value of the subject matter of the undertaking is small and the recipient of the undertaking cannot be found or unreasonably does not provide instructions.

RELATIONS WITH CLIENTS

Rule 7 (Communication of advice)

Current rule

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.

Issues canvassed

1. That Rule 7 does not need to include a reference to a duty to inform clients about the availability of legal aid, but the *Commentary* to Rule 4 (Other fundamental ethical duties) could be expanded to mention other forms of legal assistance in addition to legal aid.
2. That Rule 7 should not include a duty on all solicitors in all circumstances to assist a client make an application for legal aid.
3. The *Commentary* also promote the responsibility of solicitors to advise clients of their costs up-front, so that clients can make an informed decision as to whether to first follow up the availability of legal aid or other legal assistance services before signing a retainer with the fee-charging solicitor.
4. Rules 45 and 46 of the former *NSW Professional Conduct & Practice Rules 2013*, which dealt specifically with legal aid applications in relation to criminal trials and criminal appeals, should be incorporated into the ASCR.

Responses and considerations

Issue 1 – Informing clients about the availability of legal aid

The Consultation Paper noted that Rule 7.1 states the general principle that a client should be provided with clear and timely advice so as to be able to make informed choices about any actions to be taken during the course of a matter. Advice about the possible availability of legal aid is but one of a number of matters a solicitor may, depending upon the circumstances, be expected to raise with a client. The concern about amending Rule 7.1 to include a specific reference to legal aid is that it might be seen to be limiting the scope of the rule when other forms of legal assistance might also be available (for example, access to pro bono legal assistance from a private law firm). It would, therefore, be more appropriate to address this issue in *Commentary*.

Three submissions did not consider that Rule 7 needs to specifically refer to an ethical duty to inform clients about the availability of legal aid, but that the *Commentary* could be expanded:

- to clarify that the duty to provide clear and timely advice requires solicitors to communicate with clients in a language and manner that the client understands, including by having regard to any access requirements the client may have.
- to give examples of what may be considered to be in the client's best interests other than issuing proceedings, and that this could include legal aid as well as other avenues that may enhance access to justice, such as ombudsman, alternative dispute resolution (ADR), regulator services, and statutory bodies such as the Australian Financial Complaints Authority.
- this issue would be better dealt with in Commentary to Rule 4.1.1 (to act in the best interests of a client in any matter in which the solicitor represents the client).

A variety of views were expressed in submissions recommending that Rule 7 be amended to include the duty to inform clients of the availability of legal aid and other legal assistance services, and not just mentioned in the *Commentary*:

- Rule 16A (South Australia) provides that "A solicitor must inform a client about the client's eligibility under any scheme for delivering legal aid or legal assistance to members of the community where the solicitor has reason to believe that the client may be so eligible."
- a modified version of the South Australian Rule should be adopted:

  > *A practitioner has an obligation to inform clients as to their possible eligibility for legal aid or the existence of other free legal assistance services including community legal services, where that practitioner has reason to believe that such a client may be eligible to access such services.*

- while the Commentary for Rule 4 currently recommends that solicitors advise clients of the availability of legal aid "…this is not a prescribed course of action, and permits the possibility that a client may not be appropriately informed of all potential legal avenues to resolve a dispute."
- the duty should only arise where a solicitor reasonably believes that a client may be unable to afford the costs associated with private representation for a matter.

Calls for Rule 7 to include a specific duty to inform clients of the possible availability of legal aid or other forms of low-cost or pro bono legal assistance reflect the present-day access to justice problems faced by particular cohorts of the community in being able to afford the cost of private legal services.

The Law Council agrees that clients should be informed about the availability of legal aid or other forms of legal assistance where relevant, but views this as a procedural advice issue rather than an ethics issue. The Law Council also noted the potential ethical conflict that might arise between an amended Rule 7 and Rule 12 (to avoid conflicts between the solicitor's interests and the client's interests).

The Law Council concluded this issue would be better dealt with in a Legal Practice Rule rather than an ethical rule and that the *Commentary* to Rule 4.1.1 (acting in the client's best interests), Rule 7 (communication of advice) and Rule 12 (conflicts with solicitor's own interests) should cross-reference the Legal Practice Rule. In jurisdictions which do not use

Legal Practice Rules, this issue could be addressed in locally developed Commentary and guidance.

Issue 2 – Assisting clients to make application for legal aid

Three responses agreed that Rule 7 should not include a duty on all solicitors in all circumstances to assist a client make an application for legal aid. It was recommended that the *Commentary* include a provision that a solicitor should provide reasonable assistance to a person in relation to their application for legal aid.

The Law Council (noting its conclusion above about a Legal Practice Rule) considers this issue should not be included in Rule 7 but should be dealt with in *Commentary*.

Issue 3 – Advising up-front costs as well as availability of legal aid

It was recommended in one submission received that the *Commentary* to Rule 7 promote the responsibility of solicitors to advise clients of their costs up-front, even where the costs are likely to be relatively low (e.g. less than $750), so that clients can make an informed decision as to whether to first follow up the availability of legal aid or other legal assistance services before signing a retainer with the fee-charging solicitor.

The Law Council considers that costs disclosure is more than adequately dealt with in other ways, such as legislation and cost-disclosure guidelines and does not need to be dealt with in *Commentary*, particularly as the Law Council has concluded that a Legal Practice Rule should be developed about advising clients about the availability of legal aid and other forms of legal assistance.

Issue 4 – Legal aid applications for criminal trials and appeals

One submission drew attention to Rules 45 and 46 of the former *NSW Professional Conduct & Practice Rules 2013*, which deals specifically with legal aid applications in relation to criminal trials and criminal appeals. Its was noted that these rules worked in conjunction with Court Practice Notes and Legal Aid policy, and ensured that private lawyers were made aware that applications for legal aid in relation to criminal indictable trials and appeals must be made prior to the cut-off timeframe.

It was recommended that these rules could be adopted across all Australian States and Territories.

The Law Council concluded that this issue is a matter more appropriate for a Legal Practice Rule or court practice rules in each jurisdiction (noting for example, that such a rule is part of the Queensland criminal law practice rules) as they consider appropriate, rather than an ethical rule.

Conclusions

1. A duty to inform clients about the availability of legal aid or other forms of legal assistance should be considered by each jurisdiction for a Legal Practice Rule. The Law Council suggests a modified version of the current South Australian conduct rule 16A:

    A solicitor has an obligation to inform a client as to the client's possible eligibility for legal aid or the existence of other legal assistance services including community

legal services, where the solicitor has reason to believe the client may be eligible to access such services.

2. A duty to assist a client make an application for legal aid or other forms of legal assistance should be considered by each jurisdiction for a Legal Practice Rule.
3. A duty to promote the responsibility of solicitors to advise clients of their costs up-front, even, where the costs are likely to be relatively low (e.g. less than $750) should be considered by each jurisdiction for a Legal Practice Rule or costs disclosure guidelines. This is so that clients can make an informed decision as to whether to first follow up the availability of legal aid or other legal assistance services, before signing a retainer with the fee-charging solicitor.
4. Requirements for timely lodgment of applications for legal aid in criminal trials and criminal appeals should be considered by each jurisdiction for a Legal Practice Rule or a court procedure rule as appropriate.

Rule 8 (Client instructions)

Current rule

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

Issues canvassed

1. That Rule 8 (and Rule 9) does not need be amended to specifically include an exception to the duty of confidentiality where there is some doubt about the client's capacity to give competent instructions, and that *Commentary* should include more guidance on this issue.
2. That it is not appropriate that Rule 8 set out procedures a solicitor might follow in dealing with a client who gives instructions the solicitor considers to be unreasonable.
3. That Rule 8 does not need to be prefaced by the phrase "Subject to these rules and the law" or be qualified by a reference to the solicitor's duty to the court.
4. The *Commentary* to Rule 8 should expand on what is meant by "competent", including drawing from material in the Discussion Paper about the decision in *Goddard Elliot v Fritsch* and the Australian Law Reform Commission (**ALRC**) Report No 124.

Responses and considerations

Issue 1 – Rule or *Commentary* approach where capacity to instruct is in doubt

This issue generated a number of considered and detailed submissions. Some of the submissions favoured greater guidance rather than amendments to Rule 8, whereas others supported a change to Rule 8 and/or Rule 9 (client confidentiality) together with an expanded *Commentary*.

Submissions were received recommending that Rule 8 be amended to provide an exception, in circumstances where a solicitor reasonably believes the client is unable to give competent instructions, that will enable a solicitor to act (and disclose confidential information) for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or, as a last resort, seeking the appointment of a substitute decision maker. It was further submitted that the *Commentary* should emphasise that, to the greatest extent possible, the wishes and interests of the client should still be identified and followed.

Another submission recommended that Rule 8 remind solicitors that it is necessary, when taking instructions from a substitute decision-maker, that the rule requires them to act in the best interests of the client. The submission raised the following issues for consideration:

- their experience is that many solicitors, when faced with a client with diminished capacity, immediately terminate the retainer in order to prevent a breach of Rule 8. The duty to act in the best interests of the client and the duty to the court are often not considered. This often leaves disadvantaged clients in a more vulnerable situation and clearly can lead to injustice and abuse;
- without clearer guidance, solicitors are unlikely to act in matters where there is a concern about capacity and therefore are unlikely to develop "mature judgment",

and that practitioners who are early into their career will need more robust guidance in the form of rules to develop the required judgment.

- guidance should draw attention to the following factors outlined by the ALRC in relation to enduring powers of attorney:
    - principals with diminished decision-making ability may have limited ability to monitor the activities of their attorney;
    - family members are most commonly appointed as attorneys and this relationship of trust makes it less likely the principal and third parties will question their actions; and
    - there is generally a limited understanding in the community of the powers and duties of the attorney.

A further recommendation in submissions received was that a Rule similar to the American Bar Association's Model Rule 1.14 might be adopted, with an additional element as underlined:

a. *When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client- lawyer relationship with the client.*

b. *When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.*

c. *Information relating to the representation of a client with diminished capacity is protected by rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.*

d. *<u>The disclosure is for the purpose of assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative.</u>*

Another submission also recommended changing to Rule 9 - or alternatively Rule 8 - with the aim of providing greater clarity to solicitors and avoiding the situation where a vulnerable person with diminished capacity is left without legal representation. Given both the increasing life expectancy and incidence of psychological ill health, an exemption to Rule 9 in the terms suggested by the ALRC in its Report No.124 *(Equality, Capacity and Disability in Commonwealth Law*) was recommended. The ALRC recommended that the rules should provide a new exception to the duty of confidentiality (Rule 9) where a solicitor reasonably

believes the client is not capable of giving lawful, proper and competent instructions and "the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative".

There was also support for an exemption from Rule 9 reflecting the wording used in the New Zealand rules. Rules 8.4(c) and 8.5 of the *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) provide that a lawyer may disclose confidential information to a third party where it is necessary to protect the interests of the client in circumstances where, due to incapacity, the client is unable effectively to protect his or her own interests, and where disclosure is made it should be only to the appropriate person or entity, and only to the extent reasonably necessary for the permitted purpose.

A further submission recommended Rule 9 should provide a new exception to the duty of confidentiality, which could be worded as follows:

> 9.2 A solicitor may disclose information which is confidential to a client if:
>
> - the solicitor discloses the information for the purpose of taking reasonably necessary protective action where a client is at risk of substantial financial or other harm and due to diminished capacity is unable to provide instructions or protect their own interests.

It was submitted that such a rule would require a solicitor not only to form a view that the client has diminished capacity, but also that the client is unable to look after their own interests and is unable to provide instructions before the solicitor would be able to take reasonably necessary protective action. What that action might include could be discussed in Commentary and Client Capacity Guidelines, but might include disclosure of confidential information for the purpose of assessing a client's capacity, seeking assistance for the client from support persons to help with decision making or, when all other avenues have failed, for seeking a substitute decision maker. The *Commentary* could also emphasise the principle of taking the least restrictive options.

Not all submissions supported amendments to the Rules. One submission said that there is a significant need for greater legal education of solicitors in dealing with capacity issues, and that simply including an exception in the rules:

- would be relied on without proper regard for a client's autonomy and without first providing the necessary supports; and
- would not adequately protect the rights and freedoms of clients to make their own decisions about whether or not to undergo further capacity assessment processes.

In a submission supporting the Consultation Paper recommendation that more guidance be provided in the *Commentary* when there is some doubt about whether the client can give competent instructions, it was noted:

> Some of our solicitors have had difficulty reconciling their obligations under the relevant legislation to act on their client's instructions with the combined effect of Rule 4.1.1 (to act in the client's best interests) and their obligation under Rule 8, which would appear to suggest that if a client cannot provide competent instructions, the solicitor should act in the client's best interests.

The Consultation Paper suggested it would be difficult and perhaps too limiting to devise specific exceptions where such an exception is predicated on a solicitor "forming a reasonable belief" that the client is incapable of giving competent instructions. The view expressed that such an attempt could lead to a lengthy and highly prescriptive rule that attempts to guide solicitors through a highly complex, fact and circumstance sensitive decision-making process requiring the solicitor, ultimately, to exercise mature judgment.

The relative nature of capacity was in *Gibbons v Wright*[5] where the High Court said that "the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained." The High Court also cited with approval remarks by Hodson L.J. in *Estate of Park* that "one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case".[6]

The complexities involved in matters where capacity is in question are well illustrated in *Legal Services Commissioner v Ford*[7] where the Legal Practice Tribunal referred, in the context of preparing a Will and a Power of the Attorney for an elderly person, to the need to carry out steps required by legislation and in accordance with guidelines issued by the Law Society and the common law, while being as alert as a reasonable person in the circumstances, to the capacity of the client to give competent instructions.

The Law Council concluded that Rule 8 (and Rule 9) should not be amended to specify an exception to the duty of confidentiality where there is some doubt about the client's capacity to give competent instructions. The ethical principal is to give effect to a client's lawful, proper and competent instructions; however, as noted above, competence and capacity will involve the application of multiple factors - statutory, common law and professional guidelines as well as the judgment of the solicitor given the particular facts and circumstances of the client.

The Law Council concluded that the considerations involved are matters for *Commentary*, *Client Capacity Guidelines* and other resources available to solicitors through their professional associations. Submissions made in response to this issue highlighted considerable uncertainty among practitioners, and it would be appropriate to review these resources.

Issue 2 – When a client's instructions become unreasonable

The two responses to this issue agreed with the view in the Consultation Paper that it would not be appropriate for Rule 8 to set out *procedures* a solicitor might follow in dealing with a client who gives instructions the solicitor considers to be unreasonable.

Issue 3 - Preface the Rule with the phrase "Subject to these rules and the law"

The three responses to this issue agreed with the recommendation in the Consultation Paper that Rule 8 does not need to be prefaced by the phrase "Subject to these rules and the law" or be qualified by a reference to the solicitor's duty to the court. It was recommended in one submission that the *Commentary* be expanded "to address

[5] [1954] HCA 17 at [7].
[6] [1954] P 112 at [136]
[7] [2008] QLPT 122

circumstances in which a solicitor's legal obligations or duty to the court are contrary to a client's instructions".

Issue 4 – *Commentary* on the meaning of "competent"

Support was received for the proposal that the *Commentary* to Rule 8 be expanded to include what is meant by "competent", including drawing from material in the Consultation Paper about the decision in *Goddard Elliot v Fritsch* and the ALRC's Report No 124.

Conclusions

1. (a) Rule 8 (and Rule 9) should not be amended to include an exemption from the duty to disclose where a solicitor has doubts about a client's capacity to give competent instructions.

   (b) Further consultations should be undertaken with a view to revising the *Commentary* and the *Client Capacity Guidelines* in light of the issues raised in Submissions to the Consultation Paper.

2. Rule 8 should not be amended to set out procedures to follow when a client's instructions become unreasonable.

3. (a) Rule 8 does not need to be prefaced by the phrase "Subject to these rules and the law".

   (b) The *Commentary* be expanded to address circumstances in which a solicitor's legal obligations or duty to the court are contrary to a client's instructions

3. The *Commentary* should be expanded to include a fuller discussion of the meaning of "competent".

Rule 9 (Confidentiality)

Current rule

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

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

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

EXCEPT as permitted in Rule 9.2.

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

9.2.1 the client expressly or impliedly authorises disclosure;

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

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

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

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

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

Issues canvassed

1. That Rule 9 does not need be amended to specifically exempt the use of de-personalised information by legal assistance bodies in case studies.
2. That Rule 9.2 should not contain a specific exemption from disclosure of client confidential information by legal assistance bodies when managing funding agreements and that client consent should be obtained.
3. Is disclosure of client confidential information for the purposes of a risk management audit within the scope of Rule 9.1.2?
4. That it would not be appropriate to include in the rules a definition of what is and what is not "client confidential information".
5. That *Commentary* to Rule 9 be revised to draw attention to the availability of resources and guidance on managing risks to maintaining client confidentiality from the use of cloud-based computing and other technology-based communication solutions.
6. To what extent have there been instances where a client or another person has suffered serious financial or psychological harm that may have been prevented had it been permissible for the solicitor to disclose client confidential information?

7. How might “imminent serious financial harm” and “imminent serious psychological harm” be defined or explained, and what circumstances and factors might be relevant in determining whether the client or a third party is at risk?
8. Would it be ethically appropriate for a solicitor to disclose confidential information about a Will if questions are raised about the circumstances surrounding the preparation of that Will? If so, what information might be disclosed? Would the solicitor require a belief on reasonable grounds that the disclosure would avoid the need for contested proceedings? If such conduct were to be considered ethically appropriate, what factors might be relevant to the solicitor’s consideration of reasonable grounds?
9. That Rule 9.2 should be amended to read that “A solicitor may **only** disclose information which is confidential to a client if…”. Also, the *Commentary* should contain further guidance relating to the limited circumstances in which disclosure in breach of the confidentiality obligation would be permitted, and address that any such disclosure should only be to the limited extent necessary to ensure compliance with the relevant exception.
10. Rule 9 should also provide an exception where the solicitor discloses information confidential to a client for the purpose of taking reasonably necessary protective action where a client is at risk of substantial financial or other harm and due to diminished capacity is unable to provide instructions to protect their own interests.

Responses and considerations

Issue 1 – Exempt the use of de-personalised information by legal assistance bodies

The submissions received supported this issue being dealt with in the *Commentary* rather than by way of an amendment to Rule 9, although one submission suggested a rule might be useful because community legal centres take a particularly conservative approach to complying with the rules.

One submission noted that the use of case studies in a way that ensures no possibility of disclosing a client’s confidential information is possible, appropriate and consistent with Rule 9; however, it should also be clarified that in all other cases full and informed consent of the client to any disclosure is required - even for de-identified or partial disclosure .

The Submissions recommended the *Commentary* provide clear guidance about how solicitors can protect clients’ confidentiality when describing case studies or other de-identified information, and clarify that the obligation of confidentiality extends to both disclosure and use of information.

Issue 2 – Funding agreements, client confidential information and client consent

The submissions received agreed that Rule 9.2 should not be amended to specifically exempt from the requirement for client consent of the disclosure of client confidential information where the disclosure is to be made by a legal assistance body pursuant to a funding agreement. As one submission noted:

> *Confidentiality in the solicitor-client relationship is critical as it encourages full disclosure by a client to the solicitor, promoting the public interest through the effective administration of justice. Exceptions to confidentiality in the relationship should necessarily be kept limited.*

Submissions supported an expansion of the *Commentary* to address this issue. As one submission noted, each client usually impliedly authorises (under Rule 9.2.1) many disclosures that are necessary or desirable for the ordinary operation of legal practice, and therefore the *Commentary* should also address disclosure and imposition of confidentiality obligations on third-parties such as auditors, risk management audits, and the use of cloud storage.

Issue 3 – Risk management audits and client confidential information

Five submissions responded to the request for feedback on whether client consent is required to disclose confidential information as part of a risk management audit. The majority of submissions agreed with the view that disclosure of client confidential information would be within the scope of the exemption in Rule 9.1.2 if the auditor is "properly engaged" by the legal service provider for the purpose of "administering legal services in relation to the client."

The majority of the submissions recommended that the *Commentary* address this issue, with one submission proposing the inclusion of "a warning regarding disclosure of client material to a third party with regard to risk management or assessment unless they have express client consent."

Issue 4 – Should "client confidential information" be defined?

The three responses to this issue agreed there is no need for an exhaustive definition of "client confidential information". One of these submissions suggested might be prudent in the *Commentary* to:

- remind lawyers that meta data can contain client confidential information; and
- consider whether client confidential information is acquired outside a formal "engagement" e.g. from prospective clients.

Issue 5 - Client confidentiality and cloud-based technologies

The two submissions that responded to this issue agreed with the recommendation in the Consultation Paper that the *Commentary* to Rule 9 be revised to draw attention to the availability of resources and guidance on managing risks to maintaining client confidentiality, arising from the use of cloud-based computing and other technology-based communication solutions, and that outsourcing processes and systems does not relieve a solicitor of the duty of confidentiality.

Issue 6 – Prevalence of serious financial or psychological harm

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

Only one response was received, which cited the proliferation of "revenge pornography" through social media as an example of an invasion of privacy that serves as a compelling policy driver for enabling lawyers to disclose confidential information for the purpose of preventing the psychological and emotional harm associated with revenge porn.

Issue 7 - Financial and psychological harm

The Consultation Paper sought feedback about whether the exceptions in Rule 9.2 to a solicitor not disclosing client confidential information should be extended to include *imminent serious financial harm* and *imminent psychological harm*.

There was support in submissions for a protective exemption to disclosure of client confidential information, where the client is at risk of serious financial harm, and it was also recommended further consideration be given to the issues involved where a solicitor's client appears to be financially exploiting others, such as members of their own family, particularly in the context of elder abuse.

One of the submissions noted that modern approaches in, for example, the criminal code do not separately distinguish physical harm from psychological harm, and that the two often overlap – thus psychological harm might now be thought of as within the scope of the existing exception. This submission also recommended more thought be given to what constitutes "serious" or "significant" in the context of physical harm leading to psychological harm, and whether there would be some overlap with Rule 9.2.4 – disclosure to prevent the commission of a serious criminal offence.

Another submission considered that it would be sensible to extend Rule 9.2.5 to include psychological and financial harm and for the *Commentary* to provide guidance on how lawyers are to assess whether the exception will apply. However, rather than adding the words "psychological or financial harm", it was suggested that Rule 9.2.5 should be amended to remove the word "physical", so as to read:

> "The solicitor discloses the information for the purpose of preventing imminent serious harm to the client or to another person."

The following points were put forward:

- in operation, Rule 9.2.5 will only apply where the harm is imminent and serious such that the circumstances will permit disclosure;
- the suggested expansion of Rule 9.2.5 reflects the obligations for the lawyer to act in the best interests of the client and to weigh the effect of a breach of one obligation against the effect of breaching another obligation;
- this requires a judgment call by the lawyer, who must decide whether there is a reasonable basis on which to believe that the person is at risk of imminent, serious harm; and
- given the centrality of the obligation of confidentiality to the fiduciary relationship, any exceptions to the rule should be expressed in terms that ensure that the exception can only be relied on where there is objective evidence, and the lawyer makes a reasonable judgment call in the circumstances.

The Law Council considered the following:

- while there is support for an additional exception in Rule 9.2 for psychological harm, the concept of *psychological harm* as an element of *physical harm* or of *harm* generally, is developing in the law, as can be seen from the various definitions or descriptions referred to in the Consultation Paper;

- for Rule 9.2.4, the current exception is based on a solicitor forming a view that the client intends to commit a serious criminal offence, an outcome that would be perhaps relatively easy for a solicitor to predict (and strongly counsel the client against committing) – however, not all forms of psychological harm would necessarily amount to a serious criminal offence;
- for Rule 9.2.5 the current exception is based on a solicitor forming a view that disclosure may prevent imminent physical harm, an outcome that is also perhaps relatively easy to predict – however, psychological harm would require some degree of insight by a solicitor into the likely or probable effect on the intended victim, which is an insight a solicitor may not be able to easily acquire;
- the absence of a settled and adopted statutory definition of *psychological harm* implies a bar that perhaps parliaments have not crossed in sanctioning psychological harm, except where it has been statutorily defined and declared as a civil or criminal wrong – by way of example, sections 394-395 of the *Criminal Code Act 1995* (Cth) defines harm to include "harm to a person's mental health" (whether temporary or permanent). "Harm to a person's mental health" is then defined to include significant psychological harm, but not mere ordinary emotional reactions such as those of only distress, grief, fear or anger; and
- somewhat similar definitional and practical considerations arise in relation to framing an exception for serious financial harm - for Rule 9.2.4 the test would be that the inflicting of the financial harm would constitute a serious criminal offence, and for Rule 9.2.5 the test would be prevention of imminent financial harm to the client or another person.

The Law council concluded that while unlawful, unjust or improper infliction of psychological and financial harm are significant issues and will be become more so as elements of elder abuse, further consultations will be necessary before a view can be formed about whether a solicitor should have an ethical duty to take some form of action, and if so, what standards or boundaries (both definitional and the degree of judgment required) should apply.

Issue 8 - Disclosure of circumstances surrounding the preparation of a Will

The Consultation Paper sought comments on whether it would be ethically appropriate, when questions are asked about the circumstances surrounding the preparation of a Will, for a solicitor to disclose certain confidential information about the Will before proceedings have been commenced. The Consultation Paper also sought comments on whether there might be a basis for assuming implied consent from a testator to disclosure of the circumstances surrounding the preparation of the Will.

One of the responses supporting disclosure of client confidential information when questions are asked about the circumstances surrounding preparation of a Will said that such a disclosure would be appropriate where the enquirer sets out the basis of their concerns and the persons whose interest might be affected by the disclosure give their consent. The circumstances where a disclosure would be ethically appropriate should be set out in the rule, but there should be no requirement for the solicitor to hold a belief on reasonable grounds that the disclosure would avoid the need for contested proceedings.

A legal profession regulatory authority said that it is becoming increasingly common to receive complaints from relatives of testators to the effect that the practitioner who prepared the Will did not test, either appropriately or at all, to see if the testator had capacity. In their view there is no doubt that early disclosure of the circumstances of the making of a Will could in many cases be necessary for the proper administration of the estate to avoid expensive litigation. The alternative approach of only producing the Will file under subpoena is not in keeping with the modern realisation that litigation should be avoided if possible.

In response to the request for comments about implied consent, the regulatory authority did not think it safe to base an exception on implied consent of the testator – a testator of sound mind would not normally think that their testamentary capacity was in doubt and so would not normally consider the issue, whereas a testator not of sound mind cannot rationally consider the issue. The proper administration of the estate should be an important consideration and is an appropriate legal basis for the exception:

> *As to the ethical principle that should underpin the exercise of the discretion, in my view the solicitor should form a belief on reasonable grounds that disclosure would, or would be likely to, avoid the need for contested proceedings. That is, a solicitor can make disclosure if he or she has reasonable grounds to believe that the disclosure:*
>
> - *is in the best interests of the administration of the estate;*
> - *is in the interests of justice; and*
> - *would be likely to avoid contested proceedings.*

A second legal profession regulatory authority also supported the introduction of an exemption for solicitors to disclose confidential information about the preparation of a Will, should that come into question, before the grant of probate, noting that it is an issue that attracts many complaints from beneficiaries, but solicitors in this position have insufficient guidance. This submission supported both points raised in the Consultation Paper - that the solicitor would be giving practical and efficient effect to the testator's will (implied consent to disclose), and that the proposed exemption only pre-empts the likely course that the documents would be compelled to be disclosed anyway when the proceedings are issued.

Another submission took the contrary view - that a testator can provide information to their solicitors to enable a Will to be prepared, which the testator may wish never to be disclosed "due to the negative emotional effect this would have on their family." They recommend:

- it would be more appropriate for the question of consent to be addressed at the time the Will is made, which can detail specifically which information may be disclosed; and
- this issue should be addressed by way of a guidance note to give direction as to the form of and process for obtaining a testator's consent to the disclosure of confidential information in *any* future dispute concerning the validity of the testator's Will.

A further submission noted that Rule 9 only deals with information that is merely confidential and does not deal with the question of privilege, and that the *Commentary* should include a discussion about privileged information.

The Law Council agreed that the general concept of disclosure of client confidential information about the circumstances surrounding preparation of a Will is in keeping with the 'modern realisation that litigation should be avoided if possible'; however, it would be difficult to clearly define the circumstances where such a disclosure would be ethically appropriate.

Also, such a rule would not be a rule of general application, but one that deals only with a discrete set of circumstances. The Law Council concluded it would be better to undertake further consultations with a view to the issues being addressed in a Legal Practice Rule and/or guidance from professional associations.

Issue 9 – Should Rule 9.2 be amended

One of the submissions received noted that the opening statement in Rule 9.2 that "*A solicitor may disclose information which is confidential to a client if…*" is not consistent with the common law requirement that confidentiality can be breached *only* in certain exceptional circumstances. It was suggested that Rule 9.2 should be amended to read that "*A solicitor may only disclose information which is confidential to a client if…*" and that further guidance relating to the limited circumstances in which disclosure in breach of the general confidentiality obligation would be permitted, should be included within the *Commentary* to the Rules. Furthermore, the *Commentary* should also address that any such disclosure should only be to the limited extent necessary to ensure compliance with the relevant exception.

The Law Council did not consider the suggested amendment to Rule 9.2 is necessary but agrees that the *Commentary* should be expanded to place emphasis on the limited nature of the exceptions set out in Rules 9.2.1 to 9.2.6.

Issue 10 - Risk of harm because of an intellectual disability or mental illness

This issue concerns disclosure of client confidential information where a client, who lacks capacity to give instructions or look after their own interest, is at risk of harm.

A submission to the Review recommended Rule 9.2 be expanded to clarify a solicitor's ethical position regarding the duty of confidentiality when a solicitor reasonably believes that a client is at risk of harm, and lacks capacity to give instructions or look after their own interests. It was noted that Rule 8 of the *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) provides a simple and clear formulation of the principle; (however, it does not expressly refer to an inability to provide instructions):

> 8.4 A lawyer may disclose confidential information relating to the business or affairs of a client to a third party where- (c) it is necessary to protect the interests of the client in circumstances where, due to incapacity, the client is unable effectively to protect his or her own interests….

The submission considered that the recommendation by the Australian Law Reform Commission in its Report No.124 *(Equality, Capacity and Disability in Commonwealth Law*) by would "set the bar too low":

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

The Submission said that Rule 8 and Rule 9 do not adequately set out ethical principles to be applied where a solicitor reasonably believes that, due to diminished capacity (which might include a temporary intellectual or mental impairment), the client is unable to give lawful, proper or competent instructions and, because of that, is unable to protect his or her interests. The *Commentary* to a new rule could, they submit, then provide comment as to when it may be appropriate to seek, for example, a financial management order on behalf of the client in order to prevent harm to the client.

Another submission similarly submitted that Rule 9 should be amended to include two exceptions:

- where a solicitor reasonably believes that the client is not capable of giving lawful, proper and informed consent, and the disclose is for the purpose of:
    - assessing the client's ability to give instructions;
    - obtaining assistance for the client in giving instructions;
    - informing the court about the client's ability to instruct; or
- seeking the appointment of a litigation representative or other appropriate substituted decision maker; and an exception where the solicitor discloses the information in a de-identified way in a confidential setting, for the sole purpose of seeking professional care for mental health and wellbeing.

A considerable amount of discussion and views were put forward in the Review about the reach of both Rule 8 and Rule 9. The issues and concerns raised highlight the complexity of what solicitors need to grapple with when issue arise about capacity, confidentiality, client autonomy, mental illness, intellectual disability and the various kinds of harm that might befall a client.

The Law Council considers that more consultations and discussions are needed among professional associations, legal assistance organisations, independent regulators and others before an appropriate balance can be struck between what ethical courses of action are open to a solicitor (and should be expressed in the rules) and the practical steps that can be taken by a solicitor (as set out in *Client Capacity Guidelines* and other forms of professional guidance). Such consultations are required about proposals which have been raised late in the current consultation process, which were not fully canvassed in the Consultation Paper, and are beyond the timeline for completing the current review.

The Law Council concluded that the question of further amendments to the Rules to address these issues be held over for consultation at the next review of the Rules.

Conclusions

1. Rule 9 does not need be amended to specifically exempt the disclosure and use of de-personalised information by legal assistance bodies in case studies - this issue can be addressed in *Commentary*.
2. Rule 9 does not need be amended to specifically exempt the disclosure of client confidential information for the purposes of a legal assistance body complying with its funding agreement - this issue can be addressed in *Commentary*.

3. Rule 9 does not need be amended to specifically exempt the disclosure of client confidential information as part of a risk management audit - this issue can be addressed in *Commentary*
4. The expression “client confidential information” should not be defined in the rules, but the *Commentary* be revised to also include discussion of meta data containing client confidential information, and whether client confidential information is acquired outside a formal “engagement” e.g. from prospective clients.
5. The *Commentary* to Rule 9 be revised to draw attention to the availability of resources and guidance on managing risks to maintaining client confidentiality from the use of cloud-based computing and other technology-based communication solutions, and that the fact that outsourcing does not relieve a solicitor of the duty of confidentiality.
6. No issue arising for recommendation.
7. Further consultations will be necessary before a view can be formed about whether the Rule 9 exceptions should apply to psychological and financial harm and, if so, what standards (both definitional and the degree of judgment required) should apply.
8. There should not be a specific exemption in Rule 9 for disclosure of client confidential information about the circumstances surrounding the preparation of a Will - the issue would be better addressed in a Legal Practice Rule and/or guidance from professional associations, reflecting the development of the common law.
9. The opening to Rule 9 does not need to be amended to read “A solicitor may <u>only</u> disclose information which is confidential to a client if…” but the *Commentary* should be expanded to place emphasis on the limited nature of the exceptions set out in Rules 9.2.1 to 9.2.6.
10. The issue of disclosure of client confidential information to avoid a risk of harm because of an intellectual disability or mental illness be held over until the next review of the ASCR.

Rule 10 (Conflicts concerning former clients)

Current rule

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

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

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

10.2.2 an effective information barrier has been established.

Issues canvassed

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

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

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

4. That a definition of *information barrier* is not included in the rules, but the existing materials in the *Commentary* be updated and expanded.

5. That Rule 10 be reformulated as follows:

Rule 10 (Conflicts concerning former clients)

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

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

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

10.2.2 an effective information barrier has been established.

6. The expression *might reasonably be concluded* in Rule 10.2 needs to be amended to *might reasonably be concluded by the former client*.

7. Legal aid commissions are seeking amendments so that Rules 10 and 11 in relation to conflicts involving former client and current clients continue to apply to individual lawyers but exempt legal assistance organisations that provide bulk legal services or duty lawyer services.

8. Clarification of the meaning of "detrimental" in Rule 10.2 would be of assistance.

Responses and considerations

Issue 1 – Does the obiter in the *Spincode* case still apply under State law in Victoria

This issue concerns the nature of the duties owed by a solicitor or law practice to a former client, and the conflicts that can arise when a solicitor or law practice is in possession of confidential information of a former client that would be material to the matter of a current client but detrimental to the interests of the former client if disclosed.

The Consultation Paper concluded that the weight of recent authority, including by the Federal Court, is that following completion of termination of a retainer a solicitor's fiduciary duty of single-minded undivided loyalty to the client comes to an end, but a solicitor's duty of confidentiality remains.

From this flows the proposal (Issue 5) that Rule 10 should be amended to clarify that the conflict which can arise between the interests of a former client and the interests of a current client relates to the disclosure and use of the former client's confidential information. In this situation, the conflict can be avoided either by the former client giving consent to the disclosure and use of the information, or by the establishment of an effective information barrier to protect that information from disclosure and use.

There has, however, been a long-standing position that so far as the law of Victoria is concerned, a solicitor has on ongoing equitable duty of loyalty following the completion or termination of the retainer, per the obiter of Brooking J in *Spincode*[8]. This situation raises different considerations about the scope and application of Rule 10 in Victoria, compared to other jurisdictions.

The position under the law of Victoria is that the conflict which can arise between the interests of a former client and the interests of a current client is a conflict of fiduciary duties, (involving also confidential information) and a solicitor or law practice would only be permitted to act for the current client where:

(a) the former client has given informed consent to the solicitor or law practice acting for the current client; and

(b) the former client has given informed consent to the use of their confidential information; and

(c) an effective information barrier is in place to ensure that any confidential information not subject to consent is protected.

[8] *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248.

The Consultation Paper sought comments on whether *Spincode* still applies to govern a solicitor's ethical obligations in a former client confidential information matter under State law in Victoria, and if so, in what ways.

One submission supported the view that the position in Victoria is that informed consent of the former client to the solicitor or law practice acting for the current client and an effective information barrier must both be satisfied in order to ensure that the continuing duty to preserve confidentiality of information is maintained.

The submission noted that the obiter in *Spincode* and the body of case law in Victoria support the existence of an ongoing equitable duty of loyalty to former clients. This supports a general proposition that (under the law in Victoria) a solicitor or law firm must not act for a current client where the interests of a former client are adverse to those of the new client unless both limbs of Rule 10 are satisfied. The amendment proposed to Rule 10 (see Issue 5 below) would deviate even further from the position in Victoria.

Another submission considered that it would be potentially misleading for Victorian practitioners if the *Commentary* were to be revised to argue against an ongoing duty of loyalty. The *Commentary* should, therefore, be neutral and state the apparent law in Victoria and elsewhere, rather than advocating a position.

Concern was expressed in a supplementary submission from another jurisdiction about the existence and enforceability of a common law duty of loyalty that continues after the cessation of the retainer, and that if the ASCR is to suggest that a such a duty does exist, there needs to be a clear and detailed commentary on its basis and application.

Rule 2.2 of the ASCR clarifies that the Rules apply in addition to the common law – that is, the Rules do not displace or over-ride the common law. Thus, in relation to Rule 10, Victorian solicitors have to have regard to the ongoing nature of the duty of loyalty beyond the termination of a retainer, as per Brooking J's *obite*r in *Spincode*.

The Law Council concluded that the *Commentary* should continue to draw the attention of practitioners in Victoria to the position in that jurisdiction, and that *Commentary* be expanded to:

- make clear that this is a peculiarly Victorian issue; and
- include the material in the Consultation Paper about the developments in the law and opinion elsewhere.

Issue 2 – Discrete, unbundled, short-term or limited representation legal services

This issue is dealt with in the proposal for a new rule – Rule 11A – to clarify the application of the rules dealing with conflicts where short-term legal assistance services are being provided - see page 76.

Issue 3 – Rule 10.2.1 - Informed consent rather than informed written consent

The Consultation Paper sought comments on whether the requirement in Rule 10.2.1 for a former client to give *informed written consent* should be amended to *informed consent*, given the common law recognises that the disclosure necessary for informed consent can occur in different ways (and at different times) and can vary depending upon the sophistication of the recipient.

In *Spellson v George*, Handley JA said[9]

> *Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. However, consent means something more than a state of mind.*

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court held that whether there has (in fact) been informed consent is "*a question of fact in all the circumstances of each case*"[10].

Submissions received in response to the Review generally supported the proposal to omit the requirement in Rule 10 that informed consent must always be obtained in writing.

A legal profession regulator described a complaint investigated by his office concerning a sophisticated client who did not object to his former solicitors acting against him or his family's interests and instructed a new firm of solicitors. Subsequently his former solicitors again acted against the complainant and then at that time an objection on the ground of a conflict of interest was raised:

> *No written consent was obtained in those cases and, in my view rightly, the courts considered that that was not necessary, due to the clients being aware of the situation of the conflict, namely they were aware that the solicitors were acting for parties that had interests [which were] contrary to the clients. These cases show that the courts will not allow tactical objections regarding conflict of interests to succeed.*

Other submissions noted that the requirement to document informed consent brings a degree of certainty to Rule 10.2.1 which is valuable. For former clients, uncertainty arises if informed consent can be implied, and that for lawyers – and their current clients – uncertainty arises if undocumented consent is denied after a lawyer relies on that exchange to accept new instructions. It was stressed that the *Commentary* should highlight that it is prudent to obtain consent in writing where practicable.

However, another response to the Review submitted that the reference to *written* consent be retained, on the basis that the removal of this requirement dilutes the burden of Rule 10.2.1 for no apparent compelling reason and creates the possibility of disputes about how consent was obtained.

In subsequent consultations the question was raised about what mischief might be being addressed by replacing *informed written consent* in the present Rule 10 with *informed consent* in the proposed Rule 10. The Law Council considers that the reference to informed written consent in Rule 10.2 does not addresses any "mischief" in particular, nor does the Law Council discern any ethical rationale for the different approaches to evidencing informed consent in Rule 10 in contrast to other Rules and statutory provisions where consent, authorisation or informed consent is required.

[9] [1992] NSWCA 254 (Unreported) [40]
[10] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [107], [108] (citing *Maguire v Makaronis* (1997) 188 CLR 449 at 466 per Brennan CJ, Gaudron, McHugh and Gummow JJ).

A number of current rules contain references to “consent”, “informed consent” or “authorised”; however, Rule 10.2.1 is the only rule that refers to “informed written consent”. For example:

- Rule 9.2.1 (Confidentiality) provides that a solicitor may only disclose information which is confidential to a client if, among other circumstances, the client expressly or impliedly authorises disclosure.
- Rule 10.2.1 (Conflicts concerning former clients) presently provides that a solicitor or law practice must not act for the current client in a matter unless the former client has given informed written consent to the solicitor or law practice so acting.
- Rule 11.3.2 (Conflicts of duties concerning current clients) presently provides that a solicitor or law practice may only act for two or more clients with adverse interests in a current matter if, among other requirements, each client has given *informed consent* to the solicitor or law practice so acting; none of which require or specify that such authorisation must be in writing.
- Rule 11.3.4 (Conflicts of duties concerning current clients) presently provides that where a conflict arises between the duties owed to two or more current clients because of the possession of confidential information, the solicitor or law practice can only act where, among other requirements, each client has given *informed consent* to the solicitor acting for the other client.
- Rule 12.4.3 presently provides that a solicitor may only receive a financial benefit from a third party where, among other requirements, the client has given informed consent.
- Rule 22.5 (Communication with opponents) presently provides that in an ex parte application a solicitor must not communicate in the opponent’s absence with the court concerning any matter of substance in connection with current proceedings unless, among other requirements, the opponent has *consented* beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.
- Rule 33.1 (Communication with another solicitor’s client) presently provides that a practitioner must not deal directly or indirectly with the client of another practitioner unless the other practitioner has *consented*.

Other matters considered by the Law Council included:

- the practical difficulties which will arise for solicitors (and current clients) where a former client is deceased or cannot be located to give written consent.
- where the informed consent of a former client cannot be obtained, a law practice can utilise information barriers to ensure no disclosure or use of the former client’s confidential information.
- there are 17 references to “consent” in the Barristers’ Rules, of which 7 refer to the consent of a client, while the other rules refer to the consent of an opponent or of another legal practitioner). There are also 4 references to a client “authorising” a barrister to make particular disclosures, or to take particular actions. None of the

references to “consent” or ‘authorisation’ are limited to consent or authorisation in writing.

The Law Council view is that there is no apparent ethical basis for either retaining a requirement for informed *written* consent in only one of the Rules, or for extending such a requirement to every other Rule requiring consent.

Even though informed consent might be established in ways other than in writing, a prudent solicitor should nevertheless always seek written consent where possible. As a regulatory authority noted:

> *In relation to the second matter….we wish to suggest additions be made to the commentary highlighting that the onus is on the solicitor to demonstrate informed consent and noting that committing that advice to writing is the surest way to achieve this.*
>
> *We note that throughout the discussion paper and in relation to several rules there has been a lessening of emphasis on obtaining written consent. We acknowledge the courts have indicated there are other ways of ensuring informed consent. However, we must emphasise that as a regulator it is in both the client's and the solicitor's interests that consent be evidenced in writing. It is only in the absence of written consent that the issue of consent must be determined by a court.*

The Law Council agrees with these views and resolved to expand the *Commentary* to the ASCR to highlight the onus that is on practitioners to obtain irrefutable evidence of the consent of clients under Rules 10 and 11, and that a prudent practitioner should obtain such consent in writing. Also, the Law Council agreed with the suggestion that either a Legal Practice Rule or an ethical rule might be developed.

Further, the fundamental purpose of obtaining informed consent pursuant to Rule 10 (and Rules 9, 11 and 12) of the ASCR is not simply to inform and obtain the client's acquiescence to every action a solicitor might undertake to efficiently transact legal business, but to also negate what would otherwise be a breach of a fiduciary or other duty owed to the client.

In *Maguire v Makaronis* the plurality observed[11]:

> *Thirdly, in the circumstances disclosed above, 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…contrary to what appeared to be suggested by the respondent 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."*

The Law Council concluded that Rule 10.2 should be amended to omit the requirement for *written* consent, as this reflects the current law, and that the current *Commentary* should continue to highlight the prudence of obtaining consent in writing wherever possible, and where that is not possible the importance of clearly documenting the basis on which informed consent is considered to have been established.

[11] [1997] HCA 23 at [43]

Issue 4 – Whether a definition of "information barrier" is necessary

The Consultation Paper referred to suggestions that a definition of "information barrier" (either in the rules or in *Commentary*) would provide guidance to practitioners as to how to comply with the requirement in Rule 10 to establish an effective information barrier.

The two submissions that responded to this issue both agreed that a definition of "information barrier" not be included in the rules, but the existing materials in the *Commentary* be updated and expanded in light of developments in the law and the range of information and guidance available on this subject through professional associations.

Issue 5 – Reformulating Rule 10 for greater clarity

The Consultation Paper noted the PEC's view that the issue which animates Rule 10 is the possession of information that is confidential to the former client, which would be detrimental to the interests of that former client if, consistent with the solicitor's duty to the current client, that information is disclosed and used for the benefit of the current client.

Presently Rule 10.2.1 refers to a former client giving informed written consent "to the solicitor or law practice so acting". The Law Council view is that:

- apart from the situation in Victoria with the *Spincode* matter (see Issue 1 above) the law elsewhere in Australia (including federally) is that there is no ongoing fiduciary duty of undivided loyalty to a client once the retainer has been completed or terminated (and therefore no duty to obtain the former client's consent to providing legal services to another client) but;

- there is an ongoing contractual and/or other common law duty to protect the confidential information of a former client unless the former client has given informed consent to the disclosure and use of their confidential information; and

- any confidential information not subject to the consent of the former client must be protected from disclosure by an effective information barrier.

Thus, the Consultation Paper suggested the focus of Rule 10.2 should be on consent to the use of confidential information or, in the absence of consent, the protection of the confidential information of the former client, and not on consent or otherwise by the former client to the solicitor of law practice acting for the current client.

One of the submissions that responded to this issue agreed with the recommended reformulation, subject to the comments it made about documenting informed consent see (Issue 3 above).

However, another submission opposed to the suggested reformulation of Rule 10 on the following grounds:

- they do not agree with the change from consent *to act for the new client* to consent to the *disclosure and use of confidential information*; and

- that Rule 10.2 should require <u>both:</u> informed consent to act for the new client <u>and</u> an effective information barrier being in place – i.e. the conjunction should be "and", not "or".

In relation to the first point, it was submitted that the former client must first agree to the lawyer acting and if they do agree, then the lawyer must have effective information barriers in place to protect the confidentiality of the information they hold. It may arguably form part of the agreement to act that none of the former client's confidential information is to be disclosed or alternatively as part of the agreement, the former client may agree to some of that information being used in the current matter. If the revised rule were to be adopted, it would remove the client's capacity to refuse to agree to the legal practitioner acting for the new client.

A further response generally agreed that the Rule should be reformulated, but noted that in Victoria the existence of the duty of loyalty [per *Spincode*] could mean that an information barrier is insufficient of itself and specific client consent may still be required. In other words, if the word "or" is retained as the conjunction between Rules 10.2.1 and 10.2.2 (in either their current or proposed formulation) then the Rules will, on their face, be misleading to practitioners in Victoria.

As noted under Issue 1, Rule 2.2 requires Victorian practitioners to observe the common law in Victoria. The Law Council will consider whether an addition to Rule 10 might be devised to address the position in Victoria when the ASCR are next reviewed; however, at this stage it would be preferable to continue to specifically draw attention in the *Commentary* to the need for practitioners in Victoria to consider the *Spincode* matter, particularly in light of more recent cases in Victoria such as *ACN 092 675 164 Pty Ltd v Suckling* (2018) 56 VR 448; [2018] VSC 620..

A second issue raised in responses to the Consultation Paper is whether the informed consent of the former client (Rule 10.2.1) and an effective information barrier (Rule 10.2.2) are both required.

One of the responses to the Review submitted that Rules 10.2.1 and 10.2.2 should be conjunctive. Their view is that by being disjunctive (the rules are currently separated with "or") a solicitor is presented with a choice to either obtain the informed consent of the former client, or alternatively a disincentive to seeking informed consent by establishing an information barrier.

Submissions from legal assistance sector organisations supported the view that use of the word "or" is appropriate to separate the requirements of Rules 10.2.1 and 10.2.2:

> *The use of the word 'and' in this context would further restrict the ability of a law practice or a CLC from delivering unbundled legal assistance…In the context of unbundled legal assistance, there is no ongoing fiduciary [duty] of undivided loyalty owed to former clients, and therefore, no requirement to obtain informed consent of the former client.*
>
> *[we welcome] the Commentary on information barriers which makes it clear that where an effective information barrier is in place, a solicitor or law practice can act for two clients or against a former client in circumstances where there would otherwise be a conflict. [We suggest] that any Commentary to the rules could specifically refer to the fact that advice only services, due to their limited nature, are particularly suitable for the establishment of effective information barriers allowing a service provider to provide legal advice services to a greater number of clients,*

thereby providing socially and economically disadvantaged members of the community with greater access to justice.

The Law Council view remains that a confidential information conflict between a former client and current client can be avoided either by the informed consent of the former client to the disclosure and use of confidential information, or by the establishment of an effective information barrier where that consent is not (either in whole or in part) forthcoming, or cannot be obtained.

It was also noted in a response to the Review that the equivalent rule in Western Australia refers to a "real possibility" of disclosing confidential information, whereas the ASCR provides that a practitioner should not act if it "might reasonably" be concluded there will be disclosure of confidential information. WA Rule 13 provides:

> (2) A practitioner must not provide, or agree to provide, legal services to a person if there is a real possibility that the practitioner would be required, in order to act in the best interests of the person —
>
> (a to use confidential information obtained from a former client to the detriment of the former client; or
>
> (b) to disclose to the person confidential information obtained from a former client.

The Law Council concluded that there was not so substantive a difference between the two formulations as to require a change.

Issue 6 –Reference to "might reasonably be concluded"

Rule 10.2 currently states:

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

It was submitted that the expression *might reasonably be concluded* in Rule 10.2 needs to be amended to *might reasonably be concluded by the former client*…on the basis that the rule is unclear as to who is doing the concluding – the former client, the practitioner or a reasonable person – whereas the former Victorian rule provided that the former client was the person who might reasonably conclude.

The Law Council did not support this recommendation on the basis that the rule is an objective test about materiality, and the proposal, if adopted, would introduce a subjective element based on the former client's opinion, which might or might not be a reasonable conclusion that the information is "material" (which is a question of law).

Issue 7 – Exempt organisations providing bulk legal services or duty lawyer services

One of the responses to the Review noted that legal aid commissions are seeking amendments to Rules 10 and 11 that would ensure that the rules relating to conflicts involving former clients and current clients continue to apply to individual lawyers, but exempt legal assistance organisations that provide bulk legal services or duty lawyer services.

The Law Council view is that ethical rules should not deal with specific exceptions for specific problems. To do so would create a two-tiered system in which an ethical principle would and would not apply depending on the practical problem being dealt with, or the characteristics of the solicitor or law practice, or the characteristics of the client concerned.

This problem was dealt with in *R v Pham*[12] where McMurdo P noted that the longstanding, reasonably common practice for a solicitor's firm or a legal practitioner to act for one or more co-defendants in criminal matters is a practice fraught with the danger of many potential conflicts of duties, as Rule 11 of the ASCR recognises. Her Honour said[13]

> 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 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.

In light of these judicial observations, the Law Council did not conclude that the ethical responsibilities articulated in Rules 10 and 11 should continue to apply to individual solicitors, but not apply to legal assistance organisations providing bulk legal services or duty lawyer services. However, the Law Council has considered this issue during consultations on proposed Rule 11A (Short-term legal assistance services).

Issue 8 – Clarify the meaning of "detrimental" in Rule 10.2

It was also recommended in one of the responses to the Review that clarification of the meaning of "detrimental" would be of assistance.

The Consultation Paper noted that the considerable body of common law on confidential information conflicts is premised upon the claim that the disclosure of information confidential to one client would be *detrimental* to the interests of that client were it disclosed to another client. The Consultation Paper also noted Dal Pont's analysis:

> *The requirement that the real possibility of misuse of confidential information be to the detriment of the former client serves several important functions. It protects lawyers from frivolous applications to disqualify. It guards the public interest that services of lawyers be freely available, which it has been observed "will be unnecessarily intruded upon unless it is shown that disclosure by the solicitor of confidential information will disadvantage the confiding client". It also emphasises the appearance of justice, for it is difficult to see injustice in permitting representation that will not disadvantage the former client.*[14]

Whether disclosure of confidential would be detrimental is a fact and circumstances matter, and the nature of the detriment may take many forms, for example, exposure to financial or commercial loss, exposure of past civil or criminal matters, exposure of family disputes and confidences, etc. The Law Council agreed that it would be helpful to expand the *Commentary* on this aspect of Rules 10 and 11.

[12] [2017] QCA 43
[13] ibid [60]
[14] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017 [8.100]

Conclusions

1. The present *Commentary* to Rule 10, which alerts solicitors in Victoria to the need to observe the common law of Victoria and consider *Spincode*, should be expanded to include the material in the Discussion Paper about the developments in the law and opinion elsewhere.
2. A proposed Rule 11A dealing with short-term legal assistance services is canvassed at pages 76-85 of this Report.
3. The phrase "informed written consent" in Rule 10 be replaced with "informed consent" to reflect developments in the law relating to how consent may be signified, and the *Commentary* expanded.
4. A definition of "information barrier" is not required in the rules.
5. (a) Rule 10.2 be reformulated as proposed in the Consultation Paper to make clear that the informed consent of the former client relates to confidential information of the former client, and not consent to the solicitor or law practice acting for a new client.

   (b) The proposal to add a new clause to Rule 10.2 be considered when the Rules are next reviewed.
6. The rule does not need to be amended to change the expression *might reasonably be concluded* to *might reasonably be concluded by the former client*.
7. This issue is considered under proposed Rule 11A.
8. That the *Commentary* be expanded to discuss the concept of 'detriment'.

Proposed rule

Rule 10 Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients. ~~except as permitted by Rule 10.2.~~

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

10.2.1 the former client has given informed ~~written~~ consent to the ~~solicitor or law practice so acting~~ disclosure and use of that information; or

10.2.2 an effective information barrier has been established.

Rule 11 (Conflict of duties concerning current clients)

Current rule

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

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

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

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

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

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to a client (the first client) which might reasonably be concluded to be material to another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:

11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client; and

11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

Issues canvassed

1. That an exemption from Rule 11, where legal services are provided on a "discrete" or "unbundled" or "limited representation" basis, would be inappropriate and unnecessary.

2. That Rule 11.3.2 should not require that informed consent only be given in writing.

3. That the reference to "informed consent" in Rule 11.3 be retained, noting that it is recommended that Rule 10.2.1 be amended to provide for "informed consent".

4. That additional commentary be developed to further explain the concept of "detriment to the interests of a client" and how the court approaches the exercise of the power of restraint pursuant to its inherent jurisdiction to determine which of its officers appear before it.

5. That Rule 11 be revised as follows:

Rule 11 (Conflict of duties concerning current clients)

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

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

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

11.2 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice must not continue to act for one of the clients (or a group of clients between whom there is no conflict) unless the duty of confidentiality to the other client(s) is not put at risk and the parties to the conflict have given informed consent to the solicitor or law practice continuing to act for that client (or group of clients).

6. The proposed redraft of Rule 11 might possibly have unintended consequences where a solicitor acts for two or more beneficiaries in an estate matter.

Responses and considerations

Issue 1 – An exemption for discrete, unbundled or limited scope representation

A number of submissions recommended the adoption of specific exceptions for unbundled or limited-scope legal services when provided by legal assistance organisations. The Law Council has developed a new Rule 11A (see pages 76-85) relating to short-term legal assistance services (as distinct from unbundled services generally) such as those provided by legal aid organisations and community legal centres, clarifying the application of the Rules in dealing with conflicts where legal assistance services are being provided.

Issue 2 – Informed consent should not have to always be given in writing

The background, context and Law Council conclusions on this issue are set in this Report at pages 52-55 above.

Issue 3 - The reference to "informed consent" in Rule 11.3 be retained

The Consultation Paper noted that the meaning of the expression "informed consent" has been settled at common law and recommended that a specific definition did not need to be adopted in the Rules.

The Law Council received one submission on this issue, supporting the conclusion that a definition of :informed consent" is not necessary. As noted in relation to Rule 10, the *Commentary* on this issue will be expanded.

Issue 4 - Commentary about "detrimental to the interests of a client"

The Consultation Paper discussed the suggestion that the phrase "and detrimental to the interests of the first client if disclosed" should be deleted, on the basis that, regardless of the effect of the information (i.e. being detrimental or otherwise), a conflict of duties has arisen (simply because the law practice is in possession of confidential information) and the steps that a solicitor or law practice should take are those outlined in the rule. In other words, the conflict of duties per se is said to trigger the steps to be taken, rather than the effect of the conflict. The Law Council remains of the view that this suggestion is not consistent with the considerable body of common law.

There were no responses to this issue in submissions received, although one submission suggested that clarification of the meaning of "detrimental" would be of assistance.

The Law Council concluded that the phrase "and detrimental to the interests of the first client if disclosed" should be retained, and that the *Commentary* be expanded.

Issue 5 – Reformulation of Rule 11

The Consultation Paper noted criticisms that Rule 11 is too lengthy and cumbersome, and suggested the Rule could be simplified in the way it expresses the scope of the duties in contemplation and the ethical principles involved. The following reformulation was proposed:

Rule 11 (Conflict of duties concerning current clients)

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

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

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

11.2 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice must not continue to act for one of the clients (or a group of clients between whom there is no conflict) unless the duty of confidentiality to the other client(s) is not put at risk and the parties to the conflict have given

informed consent to the solicitor or law practice continuing to act for that client (or group of clients).

The reformulation of Rule 11 proved to be one of the more complex aspects of the Review of the ASCR, revealing questions about the nature of the duties that can come into conflict in a concurrent representation, the role of information barriers and the elements of informed consent. These issues sit against the background of the different circumstances which may give rise to conflicts of interest and what might be done to avoid them:

- where the clients are on opposing sides in the same or related matters and their interests are clearly adverse.
- where the clients are not involved in the same or a related matter, but the solicitor or law practice is in possession of client confidential information that is material to one client's matter but would be detrimental to the interests of the other client if disclosed.
- where a concurrent representation begins without any adverse interests between clients on the same side of the matter, but during the course of the representation those interests diverge and become adverse.

The issues and circumstances considered by the Review were:

- the nature of the duty of loyalty.
- the nature of the duty of confidentiality.
- the contractual duties that arise from the retainer agreement.
- developments in the common law of information barriers and their application in concurrent client conflicts.
- the doctrine of imputed knowledge.
- the role informed consent.
- policy choices about solicitors, law practices and concurrent clients with adverse interests per se.
- potential conflicts when approached by a new client.
- concurrent clients whose interest subsequently become adverse.
- concurrent clients in unrelated matters, but whose interests in confidential information are adverse.

Legal assistance services

In the legal assistance context, there was support both for and against the proposed reformulation, but agreement that a more expansive *Commentary* on information barriers is needed to clarify the circumstances in which their use by community legal services and legal aid organisations can allow a solicitor or law practice to act in circumstances where there would otherwise be a concurrent client conflict.

There is a public policy benefit in legal assistance service providers utilising a combination of information barriers, client consent, and internal policies, business processes and structural arrangements, to facilitate concurrent representation of clients with adverse

interests by these organisations, whilst maintaining at all times observance of, and compliance with, the ethical obligations applying to solicitors.

The proposed Rule 11A (see pages 74-85 of this Report) provides guidance on navigating an ethically responsible path to providing one-off, short-term legal assistance in circumstances where it is not reasonably practical to systematically 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.

In situations where legal assistance service providers are undertaking further or full representation, the principles in Rule 11 (and Rule 10) will apply as they would to other law practices and solicitors.

Inter-connected duties

To act in the best interests of a client

The Consultation Paper stated that the core of the ethical standard underpinning Rule 11 is a solicitor's duty of undivided loyalty. The solicitor-client relationship is one of the settled categories of fiduciary relationships recognised by equity and, as such, a client is entitled to the single-minded loyalty of their solicitor throughout the course of the matter. This principle is set out in Rule 4.1.1 – a solicitor must act in the best interests of a client in any matter in which the solicitor represents the client – and is reflected in (current) Rule 11.3 – the consent given to a solicitor or law practice to act for two or more concurrent clients with adverse interests is "subject always to each solicitor discharging their duty to act in the best interests of their client."

Any client or public perception that a lawyer or law practice is not acting in the best interest of their clients[15] is harmful to the administration of justice, as explained in the Supreme Court of Canada case *R v Neil*[16]:

> *Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies… Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests.*

To disclose knowledge and to protect confidences

Although not expressed in any rule, a solicitor has a duty to put to use any knowledge in his or her possession that is material to the client's matter, including knowledge related to another client. As Dal Pont explains[17]:

> *That a client is entitled to the full benefit of the lawyer's exertions requires the lawyer to "put at his client's disposal not only his skills but also his knowledge, so far as that is relevant"[18]. A lawyer cannot act for a client and at the same time withhold*

[15] Subject to the paramount obligations to the court and the administration of justice.
[16] *R v Neil* [2002] 3 SCR 631 at [12-13]; GE Dal Pont, *Lawyers' Professional Responsibility*, 2017 (6th ed), Thomson Reuters, 264.
[17] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017, [5.80].
[18] Citation omitted

knowledge he or she possesses germane to the subject matter of the representation.

Confidentiality is also a fundamental aspect of the relationship between a lawyer and client which "translates into a duty on the lawyer to maintain inviolate clients' confidences."[19] Thus, Rule 9.1 provides that a solicitor must not disclose client confidential information acquired during the course of the engagement except in limited circumstances, including where (per Rule 9.2.1) the client expressly or impliedly authorises disclosure. In *Prince Jefri Bolkiah v KPMG* Lord Millett explained: [20]

It is of overriding importance to the administration of justice that a client be able to have complete confidence that what he/she tells his/her lawyer will remain secret. This is a matter of perception and of substance. It is of the utmost importance to the administration of justice that a solicitor in possession of confidential information not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

Conflicts of duties

The duty of undivided loyalty comes into conflict when a solicitor or law practice acts for two or more clients whose interests are adverse. The duty of confidentiality comes into conflict with the duty to disclose when a solicitor or law practice is in possession of confidential information of one client that may be material to the matter of another client, but detrimental to the interests of the first client if disclosed.

The relationship between these two duties in a concurrent client conflict was highlighted by Habersberger J in *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*: [21]

The court cannot conclude that there has been a breach of duty of loyalty by a solicitor acting for two clients without examining the extent to which, if at all, the interests of the two clients are adverse to each other. The more removed the interests of the two clients are from being adverse to each other, the lower the possibility of any misuse of confidential information.

Contractual duties

The retainer agreement is also a basis for determining the duties owed by a solicitor or law practice to a client, and will impliedly or explicitly express in contractual form the duties of undivided loyalty, disclosure and confidentiality. Importantly, the retainer agreement is a basis upon which a client may modify or qualify the duties that underpin the lawyer-client relationship.

A conflict can arise between the contractual duties owed to two or more clients. This was considered in *Hilton v Barker Booth & Eastwood*[22] where a law practice did not disclose one

[19] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017, [4.70].
[20] Per Lord Millett in Prince Jefri Bolkiah v. KPMG (A Firm) [1999] 2 AC 222 at 236, cited by the Full Court in *Osferatu v Osferatu* [2015] FamCAFC 177 at [32]. Dal Pont notes that in the absence of a High Court authority on this issue, Lord Millet's focus on confidentiality has proven persuasive for most Australian Courts: GE Dal Pont, *Lawyers' Professional Responsibility*, 2017 (6th ed), Thomson Reuters, 280.
[21] [*2002] VSC 324* [25]
[22] [2002] Lloyd's Rep PN 500.

client's previous fraudulent activities to their other client, while representing both as purchaser and seller in the same property transaction, with the court observing:[23]

> *The reasoning in Moody v Cox[24] did not depend on the circumstance that actual misrepresentations might have been made by the solicitors to their client. It depended on the failure by the solicitors to disclose to their client information that it was their contractual duty to him to disclose. The fact that the disclosure of the information would, or might, have placed the solicitors in breach of duties they owed to others did not relieve them of the contractual duties they had undertaken or of the legal consequences of their breach of those contractual duties.*

Information barriers

A criticism of the current Rule 11 is that Rule 11.4.2 appears to permit a solicitor or law practice to 'cure' a conflict arising from the possession of confidential information in a concurrent client conflict simply by putting in place an effective information barrier. However, this was not the intention of Rule 11.4.2 and not a view supported in the submissions received or by the Law Council.

At one level, settling the question of whether the duty of confidentiality (and disclosure) is an element of, or is distinct from, the duty of undivided loyalty is not essential to the ethics of concurrent client representation. However, the distinction is important at a practical level. The acceptance by the common law of the use of effective information barriers reflects and facilitates their usefulness in managing the confidential information aspects of conflicts of interest between concurrent clients. Information barriers aim to resolve the conflict between the duties to keep client information confidential. Informed client consent aims to resolve a conflict between the duties of loyalty to clients with adverse interests.[25]

Informed consent

Two or more concurrent clients whose interests are adverse may give informed consent to the solicitor or law practice acting for each of the clients. Prior to the advent of effective information barriers, informed consent to acting for each of the clients necessarily included informed consent to the disclosure and use of the confidential information of each client. In the absence of informed consent by all concurrent clients neither a solicitor nor a law practice could act.

The advent of effective information barriers has enabled informed consent to address – as a secondary step – the treatment of confidential information. In other words, while a client may give informed consent to a solicitor or law practice acting for another concurrent client with adverse interests, the client may or may not give informed consent to the disclosure and use of confidential information. In *Prince Jefri Bolkiah v KPMG* Lord Millet noted in obiter that informed consent can vary or modify the fiduciary duty. [26]

Not all submissions received in response to the Consultation Paper and further discussions supported this view. One response said that the various proposed revisions of Rule 11

[23] [2005] 1 WLR 567 [5].
[24] *Moody v Cox* [1917] 2 Ch. 71.
[25] See *Clark Boyce v Mouat* [1993] 3 NZLR 641 at 647, where the Privy Council found there was not a breach of duty on behalf of a solicitor who obtained informed consent of both parties in a concurrent client conflict.
[26] In *Prince Jefri Bolkiah v KPMG* (A Firm) [1999] 2 AC 222

attempted to comingle issues concerning both the duty of loyalty and the duty of confidence, when they should be clearly segregated. These issues include:

a. concurrent clients in same and related matters with adverse interests;

b. concurrent clients in unrelated matters but where there is relevant confidential information to one or both of those clients; and

c. where an actual conflict arises during the course of the matter.

The response submitted that when an actual conflict arises between concurrent clients in the same or related matters:

- the solicitor should withdraw from all representation and:
- neither client consent, nor information barriers, can overcome the duty of loyalty where the law practice seeks to continue to represent all clients.

It was further submitted that there should be a separate rule for concurrent conflicts concerning the same and related matters, as distinct from a rule for unrelated matters. In the former scenario, concurrent representation must be prohibited. However, in respect of unrelated matters (which pertain to the duty of confidence only) concurrent representation could be allowed but only on the basis that each client:

a. provided informed consent to either the sharing of confidential information; or

b. the establishment of an effective information barrier to protect the confidential information of each client.

While the Law Council agrees that information barriers cannot cure a conflict in fiduciary duties owed to current clients, it does not agree with the proposition that the conflicting duties to concurrent clients can never be addressed. The Law Council's view is that, as recognised under the current Rule 11, by Australian case law and in many other common law jurisdictions (such as the United Kingdom and Canada) the informed consent of clients may, by the joint agreement of clients, modify the fiduciary duty of loyalty to enable joint representation to occur.

<u>Scope of Rule 11</u>

Some of the circumstances that a reformulation of the Rule can address are where:

- the clients have adverse interests in the same or related matters, and consent to both the concurrent representation and the disclosure and use of confidential information.
- the clients have adverse interests in the same or related matters, and consent to the concurrent representation but not to the disclosure and use of confidential information.
- the clients are not involved in the same or a related matter, but the solicitor or law practice is in possession of client confidential information of one client that is material to another client's matter but would be detrimental to the interests of the first client if disclosed – each client may or may not consent to the disclosure and use of their confidential information.

- a concurrent representation has begun without any adverse interests between the clients, but during the course of the representation those interests diverge and become adverse.

Other considerations

During the review, there was criticism that small law practices would not have the means to establish effective information barriers, and they would not be able act for concurrent clients with adverse interests in the same or related matters without the consent of all the clients. This was seen as conferring a competitive advantage on larger or geographically separated law practices.

However, competing considerations include:

- the preference to allow clients to retain the solicitor or law practice of their choice,[27] particularly in regions where there are few solicitors to choose from,[28] noting that this choice may relate to any number of reasons including a firm's expertise in a particular area;[29]
- changes in legal practice, particularly among larger and geographically separated law firms, which have enabled them to put in place effective measures to protect against the disclosure or sharing of client confidential information within the firm; and
- access to justice, noting the limited access to legal aid and community legal centre representation, particularly in regional areas.

With regard to the latter point, one of the submissions received stated that in remote areas there is a very real risk that too stringent an interpretation of Rule 11 could 'conflict out' significant proportions of those communities and leave them without any access to representation. This could cause particular difficulties in time-sensitive situations such as bail applications. While this issue is dealt with in more detail in relation to proposed Rule 11A (see pages 76-85), it is nonetheless relevant here.

Restricting the use of information barriers

One of the responses to the Review also raised a long-held concern about information barriers and Rule 11, noting:

- information barriers are put in place where there is a consecutive client conflict (i.e. in the circumstances where Rule 10 is engaged) when the original client has not consented to the solicitor or law practice acting for the second client;
- the Information Barrier Guidelines published by the Law Society of New South Wales and the Law Institute of Victoria (and adopted in Queensland) themselves indicate that they do not apply to concurrent conflicts;

[27] See *Moffat v Wetstein* (1996) 135 DLR (4th) 298 at 332 per Granger J.
[28] *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch 831; *Seidler v Seidler* [2010] FMCAfam 1394 at [59] per Willis FM; GE Dal Pont, *Lawyers' Professional Responsibility*, 2017 (6th ed), Thomson Reuters, 284.
[29] GE Dal Pont, *Lawyers' Professional Responsibility*, 2017 (6th ed), Thomson Reuters, 284.

- further, Lord Millett in *Prince Jefri Bolkiah*[30] was adamant (at 224) that Information Barriers had no place in the law of concurrent conflicts; and

- the Queensland Court of Appeal case of *R v Pham*[31] was critical of the use of information barriers in concurrent client conflicts involving adverse interests.

Pham concerned a defendant in criminal proceedings, who was one of four defendants who were all represented by the same firm. Two solicitors at the firm represented two defendants each, in circumstances where the interests of each client were not aligned. In this context, President Margaret McMurdo was critical of the concurrent representation and highlighted the dangers of criminal defendants in related proceedings being represented by the same solicitors and law firms.[32] President McMurdo specifically referred to ASCR Rules 11.1, 11.3 and 11.4. In particular, she said at para [58]:

> *This ground of appeal raises the very real danger of a conflict of duties where a firm of solicitors or a legal practitioner acts for two or more clients in the same or related criminal matters. 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.*

This case does not consider the use of information barriers in detail. To the extent that information barriers were addressed, McMurdo P suggested that information barriers may have alleviated some of the confidentiality issues, had they been considered by the practitioners:[33]

> *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 appellant certainly knew Bosscher Lawyers were also acting for his co-defendants, although the nature and extent of shared instructions and the possibility of effective information barriers do not seem to have been considered. But, unlike in Szabo, it is not clear how this disadvantaged the appellant in the conduct of his trial…*

Similarly, McMurdo P also found that:[34]

> *As the strategy in the trial was for the appellant to rely on Mr Tran's evidence, the appellant's solicitor and counsel must have been informed of the evidence Mr Tran was to give. It followed that there could not have been an effective information barrier between Mr Meehan and Mr Jones. If there were such an arrangement, the appellant was not told of it and did not consent to it. As it transpired, Mr Tran's*

[30] *Bolkiah v KPMG* [1999] 2 WLR 215; (1999) 1 All ER 517
[31] [2017] QCA 43.
[32] *R v Pham* [2017] QCA 43 [59].
[33] *R v Pham* [2017] QCA 43 [60] – [61]
[34] *R v Pham* [2017] QCA 43 [54].

evidence in some ways assisted the prosecution case against the appellant and others for whom Bosscher Lawyers acted.

It is relevant that *Pham* concerned a small firm where two practitioners represented four criminal defendants between them. Practitioners must, regardless of the circumstances, exercise professional judgment as to whether they can act in the best interests of their client. This is required in current Rules 11.2 and 11.3, is required as an overarching obligation in Rule 4, and is an established fiduciary duty.[35]

There will be circumstances where an effective information barrier will never be appropriate or ethical. This may be because, as addressed in *Stewart v Layton,*[36] an individual solicitor cannot act in the best interests of client 'A' while not revealing pertinent information about client B's dire financial situation, and where revealing such information would also be acting against the best interests (and breach of the duty of confidentiality) of client 'B'.[37] The Law Council does not anticipate any situation where the concurrent representation of clients with adverse interests – but without consent to the disclosure and use of confidential information - will ever be appropriate for an individual solicitor, as an individual cannot erect an effective information barrier in his or her own mind. Further, even if such informed consent was given, it would be difficult for a solicitor to act in the best interests of both clients.

Similarly, circumstances may arise where it would be inappropriate for a firm to act for concurrent clients. In *Hilton v Barker Booth & Eastwood,* a law firm acted for both sides of a transaction involving development and sale of properties. In doing so, the law firm failed to disclose to the seller both the buyer's criminal history and that the law firm had advanced the deposit money to the buyer.[38] As such, the firm could not act in the best interests of both clients regardless of informed consent and such consent did not exonerate the firm from any breach of duty.[39]

This approach of seeking consent to concurrent representation is consistent with the views expressed by Lord Millet in the *Prince Jefri Bolkiah*:

> *…the protection of confidential information [is] the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation…This is not to say that such consent is not sometimes forthcoming, or that in some situations it may not be inferred.*[40]

The Law Council considers that, rather than the cases of *Pham*, *Hilton* and *Prince Jefri* constituting decisions prohibiting the use of information barriers in concurrent client conflicts, they rather demonstrate the need for greater guidance on the issue. Over-

[35] GE Dal Pont, *Lawyers' Professional Responsibility*, 2017 (6th ed), Thomson Reuters, 248; also see *Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep PN 500.
[36] (1992) 111 ALR 687.
[37] *Stewart v Layton* (1992) 111 ALR 687 at [79]- [81].
[38] *Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep PN 500.
[39] *Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep PN 500 at [31] per Lord Walker of Gestingthorpe.
[40] *Prince Jefri Bolkiah* v KPMG (A Firm) [1999] 2 AC 222.

simplifying the Rule, or even removing references to long-standing concepts (such as information barriers) within the rule, risks both confusion and that solicitors will not be provided with the appropriate level of guidance. Appropriately guided practitioners will, in turn, provide better representation to their clients and promote the highest standards of the legal profession.

In consideration of the above issues, the Law Council resolved to adopt the following formulation:

Rule 11 (Conflict of duties concerning current clients)

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

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 or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

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

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

Duty of Confidentiality

11.4 In addition to Rule 11.3, where a solicitor or a law practice acts for two or more clients in the same or related matters and the solicitor or law practice is in, or comes into, possession of information which is confidential to one client (the first client) which might reasonably be concluded to be material to the other 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 or continue to act for the other client(s) unless each clients' informed consent:

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

11.4.2 requires the establishment and maintenance at all times of 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 those clients (or for two or more of those clients between whom there is no conflict) in the following 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 client(s); 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.

Subsequent to the lodgment of the draft of this Report on 1 May 2020, the Legal Services Council and Law Council settled some minor drafting amendments, which did not affect the substance of Rule 11.

Issue 6 – Estate matters

This issue was raised after submissions to the Consultation Paper had closed, and the Law Council did not receive sufficient details to consider the matter as part of the current review.

Conclusions

1. A new rule (Rule 11A) will address management of conflicts where legal services are provided as short-term legal assistance.
2. The expression *informed written consent* should be amended to *informed consent*, to align with common law, and the Commentary should be expanded.
3. The reference to "informed consent" in Rule 11.3 be retained.
4. The expression "detrimental to the interests of a client" be retained, and the Commentary be expanded to provide more information about the meaning of "detriment".
5. That Rule 11 be reformulated.
6. That issue about a solicitor acting for two or more beneficiaries in an estate matters be held over until the next review of the Rules.

Proposed rule

Rule 11 (Conflict of duties concerning current clients)

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

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 or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

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

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

Duty of Confidentiality

11.4 In addition to Rule 11.3, where a solicitor or a law practice acts for two or more clients in the same or related matters and the solicitor or law practice is in, or comes into, possession of information which is confidential to one client (the first client) which might reasonably be concluded to be material to the other client's or clients' matter and detrimental to the interests of the first client if disclosed, the solicitor and the solicitor's law practice may not act or continue to 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 times of 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 those 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.

Proposed Rule 11A (Short-term legal assistance services)

Context

The Consultation Paper canvassed a number of matters raised with the Law Council about the application of the conflict of interest rules – Rules 10 and 11 – to solicitors and law practices providing legal services variously described as "short-term", "unbundled", "discrete", "targeted", "limited scope" or "limited representation" legal services.

It became clear during consideration of the submissions received, and in further consultations, that an important distinction must be made between "unbundled" legal services (which are not the focus of the proposed Rule) and "limited scope legal services", which are short-term legal assistance services offered by government funded bodies such as legal aid commissions and community legal services, including funded legal aid services provided through private legal practitioners, or by the private profession on a pro bono basis, in exceptional circumstances, particularly where 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.

"Unbundled" services are described as the representation of a client without expectation of the traditional full coverage of a given legal matter by the lawyer. This is generally seen as the lawyer assisting their client with specific issues or tasks, at a lower cost than full representation, without the expectation that the particular lawyer will be the party's personal lawyer, 'on call' or assisting in future matters.[41] Professional associations already provide guidance on unbundled legal services. For example, the Law Society of Western Australia published detailed Guidelines on unbundling of legal services in August 2017.[42] Those Guidelines noted there are a variety of reasons why clients may require unbundled legal services, including:

- *A client may want a practitioner to deal with only an aspect of a matter because the client cannot afford the cost of full legal representation.*
- *A client may want a practitioner to act on a particular aspect of a matter because the practitioner is an acknowledged expert in a particular area of law, or the client lacks the confidence to act personally.*
- *A client may be seeking a second opinion on a matter (or aspect of a matter), where lawyers are already acting in relation to the entire matter.*
- *A client's existing lawyers may have a conflict of interest preventing them from acting on a particular aspect (or aspects) of a matter, necessitating a limited retainer in relation to that aspect.*

In relation to when unbundling might be appropriate, the Law Society of Western Australia Guidelines state:

[41] Forrest Mosten, 'Unbundling of Legal Services and the Family Lawyer' 28 FAM. L.Q. 421 (1994).
[42] https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017AUG09_Unbundling_Guidelines.pdf. See also QLS EthicsCentre *Guidance Statement No. 7 – Limited scope representation in dispute resolution (Published 8 June 2017)* at URL https://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_7_-_Limited_scope_representation_in_dispute_resolution

> *In areas of law where clients generally may have modest means or limited resources, e.g. personal injury, criminal law, family law, the collection of small claims and generally in relation to small business, a limited retainer may be in the client's best interests. It may serve the client's interests by limiting costs and providing access to justice, which they might otherwise be unable to achieve.*

Further, the Guidelines emphasise that providing unbundled legal services does not relieve practitioners from their professional or legal obligations:

> *Whether or not there is a limited retainer, the practitioner must discharge all applicable professional and legal duties. These encompass not only the professional conduct rules, but contractual, tortious and fiduciary duties arising from the solicitor client relationship. It follows that practitioners who undertake limited retainers must take care to ensure they discharge their duty of care to their clients.*

Submissions to the Review from organisations providing legal assistance services highlighted concerns that aspects of the present conflict of interest rules relating to obtaining informed consent, conflict checking, and erecting information barriers constrain the ability of legal assistance providers to meet demand for their services, which most often come from vulnerable and disadvantaged members of the community.

The constraints have been said to arise from a conflation of factors such as: high volumes of services falling short of full representation; a preponderance of matters dealt with on a discrete or limited basis; the lack of resources to build complex information barriers and conflict checking systems; a need for immediacy in settings such as duty services at courts; the common occurrence of a lack of actual knowledge by the solicitor providing a service of the likely existence of another client or former client where a conflict of interest or duty might arise, and the practical difficulties of obtaining informed consent, especially from former clients who may have only had one or a limited number of contacts with the organisation or who cannot be located. The extent to which a particular organisation is "constrained" varies, depending on its size, location, operational arrangements and resourcing.

The Law Council recognises that while the constraints most commonly arise in the context of government-funded legal assistance services, some of the factors mentioned above can also arise for the private legal profession when contributing pro bono services, for individual solicitors or law practices, and whether providing the services directly or through a community legal assistance organisation.

It has also been said that Rules 10 and 11 are open to abuse where one party to a dispute systematically seeks free advice from as many legal assistance providing organisations as possible, simply to ensure those organisations are thereby 'conflicted out' of advising or aiding the other party to the dispute.

The Law Council is also mindful of the increasing focus of the profession, legal scholars, commentators and others on the "missing middle", that is, the large group of people in the community who do not qualify for legal aid but are unable to afford the costs of full legal representation, or would be disadvantaged if they were left to self-represent. Further, access to justice is a significant problem in rural, regional and remote communities where there are shortages of both private legal practitioners and legal assistance organisations.

The submission by a legal profession association said it is very conscious of the difficulties in applying the requirements of Rules 10 and 11 with respect to conflicts that are experienced by practitioners in remote communities and:

> *…it is essential that the ASCR provide guidance to these practitioners, not with a view to dilute or relax the common law position, but on how to structure the provision of legal services to both ensure compliance with the law in relation to conflict and maximise access to justice; and suggests that the Law Council liaise with lawyers who work in remote communities and academics in this area.*

The Productivity Commission's 2014 Report, *Access to Justice Arrangements*[43], noted that unbundling of legal services is not "new", that unbundled legal services can mean the difference between some level of legal assistance, or none at all, and that the experience of unbundled legal services has been positive in the United States and Canada.

One of the barriers to greater use of unbundled legal services identified by the Productivity Commission is that "overly strict application of the rules can affect access to important legal advice where there is only a perceived conflict". The Commission proceeded to note that it "does not consider the risk posed by unbundling to be insurmountable, as evidenced by the fact that some Australian law firms are currently providing discrete task assistance. The Commission set out what it considers are the barriers to, and risks to be mindful of, in greater use of unbundled legal services in Australia, as including:

- without leave being granted, the duty owed by the practitioners to the court can demand that they continue to perform certain functions — beyond the limited scope that the client agreed to — in order to ensure the proper administration of justice;
- exposure to liability for costs where a practitioner is not privy to all information in the matter and is therefore unable to judge the true prospects of success;
- a practitioner properly discerning which specific aspects of a matter would be suitable for discrete assistance given the majority of legal matters are, by their nature, complex;
- potential complaints and insurance claims arising from disagreements between consumers and practitioners about the extent of the advice that should have been given, and the client's understanding of the limitations on representation set out in the retainer agreement; and
- an overly strict application of the conflict of interest rules were there is only a *perceived* conflict but not an *actual* conflict, including where a practitioner has no *actual* knowledge of confidential information about a former or another current client.

The Law Council's previous view was that developments in law and practice touching upon the ethical principles embodied in Rule 10 and Rule 11 require a solicitor or law practice to *avoid* conflicts – and that avoiding conflicts involves a prudent combination of: accurately defining the scope of the retainer agreement; obtaining the informed consent of the clients (recognising that in some situations this will not be possible for former clients); establishing

[43] Inquiry Report No 72, 5 September 2014, Vol2, Chpt. 19 *Bridging the Gap*

effective information barriers to maintain confidentiality of client information where consent to its use has not been given, and establishing appropriate internal arrangements within the law practice to protect confidentiality. Therefore, specific exemptions under Rule 10 and Rule 11 are not strictly necessary, because the principles embodied in the rules already provide a basis for managing conflicts that might arise in the provision of discrete, unbundled, short-term or limited representation legal services.

The Consultation Paper sought comments on the following issues:

> Issue 32 - Would it be appropriate and necessary to provide an exemption in Rule 10 from confidentiality and other duties where legal services are provided on a "discrete" or "unbundled" or "limited representation" basis?
>
> Issue 36. That an exemption from Rule 11 would be inappropriate and unnecessary where legal services are provided on a "discrete" or "unbundled" or "limited representation" basis.

The majority of submissions received favoured some kind of "exemption" from confidentiality and other duties where legal services are provided on a "discrete" or "unbundled" or "limited representation" basis.

A submission that did not support exemptions stated that the provision of legal services in this way is already covered by the rules. However, they recommended that the *Commentary* be clarified given the particular difficulties experienced by community legal centres in delivering legal assistance to disadvantaged clients and/or in regional or remote areas with limited availability of legal services providers.

A regulatory authority emphasised in its submission the need to continue protecting the confidential information of former clients where there are material and detrimental conflicts of interest, but also acknowledged that the risk of this occurring in the provision of unbundled legal services is likely to be low. They observed:

> *…that rule 10 already sets a high threshold as there must exist firstly confidential information relating to the former client that is material to the matter of another client and secondly the disclosure of that information would be detrimental to the interests of that former client. Given this context, we agree that a key test is whether the information provided by a former client has the necessary degree of confidentiality and materiality to attract the operation of rule 10. The courts are acknowledging modern practice by being more pragmatic about the doctrine of imputed knowledge, instead focusing on 'actual' knowledge.*

The submission also noted that the separate rules of the Law Society of Upper Canada applicable to organisations such as community legal centres

> *…acknowledges that a solicitor providing these services may continue to act unless they have actual knowledge of a conflict. The focus of enquiry is less on the law practice as a whole and more upon the individual practitioner and the retainer itself*.

Attention was also drawn Recommendation 7.4 of the Victorian *Access to Justice Review* [2016], which has the support of the Victorian government:

The Standing Committee of the Legal Profession Uniform Law (comprising the Attorneys-General of Victoria and New South Wales) should seek an amendment to the Professional Conduct Rules to support the provision of unbundled pro bono legal services. Question/recommendations to have regard to include:

- *practitioner liability;*
- *inclusion and removal of practitioners from the court record; and*
- *adequate disclosure and communication with clients and with opposing parties.*

Submissions from legal assistance service providers supported a new rule that provides a limited exception to Rules 10 and 11 for unbundled, discrete legal assistance services provided to individual clients by community legal centres, and (if they agree, subject to consultation with the relevant agencies) other publicly-funded legal assistance providers including, Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Service. It was suggested in one submission that a new rule and *Commentary* might be based on new Canadian exceptions but should be developed in close consultation with the legal assistance and pro bono sector. Their proposal for a new rule is as follows:

1. A solicitor may provide discrete legal assistance services without taking steps to determine whether there is a conflict of interest.

2. Except with consent of the clients as provided for in Rules 10 and 11, a solicitor must not provide, or must cease providing discrete legal assistance services to a client where the solicitor knows or becomes aware that there is a conflict of interest.

3. A solicitor who provides discrete legal assistance services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to other solicitors in the solicitor's law practice.

"Legal assistance provider" is defined as a community legal service, Aboriginal or Torres Strait Islander Legal Service, Family Violence Prevention Legal Service, legal aid commissions and any other publicly funded or pro bono legal service providers.

"Discrete legal assistance services" means advice, legal tasks or other limited legal assistance to a client by a legal assistance provider with the expectation by the solicitor and the client that the solicitor will not provide continuing legal services in the matter, nor take carriage of the matter in an ongoing, representative capacity.

Legal Aid Commissions were also of the view that it would be appropriate to relax Rule 10 in relation to the provision of discrete assistance services, noting that a significant volume of discrete 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. In this context, it was questioned why both informed written consent and an effective information barrier should be necessary.

Notwithstanding the Consultation Paper position that a specific rule on limited scope representation would appear to not add any new scope for practitioners to provide unbundled services, but merely draw attention to the existing ability legal practitioners and law practices have to provide unbundled services, it was respectfully suggested that in the

interests of ensuring access to justice to disadvantaged people, it would be appropriate for there to be a specific rule to confirm that lawyers are able to provide unbundled services:

> *Legal assistance services take a conscientious but conservative approach to the interpretation of the Rules, and a specific rule would deliver reassurance about providing the unbundled services that everyone agrees are a vital element in improving access to justice.*

In devising a rule, to provide greater certainty and reassurance, it was suggested that there might be an expansion of the exceptions at Rule 10.2.2, such that an effective information barrier for discrete assistance services is established if the solicitor providing the service does not have actual knowledge of any relevant confidential information. This qualification would be aimed at protecting a lawyer who acts in good faith and has no reasonable grounds for believing a conflict exists based on their actual knowledge of a matter, and extends help to people unable to access it from anywhere else. However, and in line with the American and Canadian rules, if the solicitor does have actual knowledge of a conflict, then the qualification would not apply, and the current client could not be assisted by that solicitor.

For legal assistance service providers, there is the potential that more than one party to a dispute may need to receive discrete assistance services at the same time, or alternatively, one party may already be in receipt of a grant of legal assistance for a matter and the other party seeks discrete assistance in either a related or unrelated matter. In these circumstances, to be able to readily provide discrete assistance to the second person, including where the matter is unrelated, a qualification to Rule 11 would be required. It was noted that under current Rule 11.4, the existence of confidential information and the fact that it is in the possession of the law practice appear to be enough for Rule 11.4 to be engaged and would conflict out an entire legal assistance service unless the exceptions of informed consent **and** an effective information barrier have been established. To ensure limited scope arrangements can be used to their full potential to reduce the justice gap in Australia, an additional qualification to Rule 11.2 along the following lines was suggested:

> *Where a solicitor is providing legal assistance in accordance with a discrete/limited scope arrangement unless the solicitor knows, or becomes aware, of an actual conflict of interest in the same or a related matter.*

In light of the submissions received, the Law Council concluded the best response to the numerous calls for greater clarity would be to develop an appropriate rule (not intended to abrogate ethical duties to avoid conflicts) as a basis for further consultation on providing the requested clarity about conflicts in a limited scope legal services context. A suggested rule (nominated as Rule 11A and modelled on comparable American Bar Association and Law Society of Ontario Conduct Rules) was drafted, considered in consultation with organisations that responded to this issue, and the Law Council's constituent bodies prior to being endorsed by the Law Council.

The Law Council submitted the proposed Rule 11A to the Legal Services Council on 1 May 2020 as part of its draft of the Report under section 427(5)(d) of the Uniform Law. The Law Council agreed with the 1 October 2020 request by the Legal Services Council to undertake a public consultation on the proposed Rule 11A, as the text of the proposed Rule was not

included in the 1 February 2018 Consultation Paper. The Law Council also agreed with a number of amendments to the proposed Rule suggested by the Legal Services Council.

Issues canvassed

A Consultation Paper was released by the Law Council on 6 November 2020 for a 30-days public consultation on the following proposed Rule 11A.

11A (Short-term legal assistance services)

11A.1 In this rule:

"short-term legal assistance services" means discrete short-term legal assistance services offered by a solicitor to a client by or 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, and in circumstances where it is not reasonably practical to systematically 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.

11A.2 Before providing short-term legal assistance services, a solicitor must, to the extent that it is reasonably practicable, ensure:

(a) that the appropriate disclosure of the nature of the short-term legal assistance services has been made to the client; and

(b) there is no conflict, actual or potential, between the duties owed to the client and one or more other clients;

and must obtain the client's informed consent to the provision of such services.

11A.3 A solicitor may not provide or continue to provide short-term legal assistance services to a client if:

(a) the solicitor knows or becomes aware that the interests of the client are adverse to the interests of another current client of the solicitor or the solicitor's law practice; or

(b) the solicitor has, or while providing the short-term legal assistance obtains, confidential information of a current or former client of the solicitor or the solicitor's law practice that might reasonably be concluded to be material to the client's matter and detrimental to the interests of the other current client or the former client if disclosed.

11A.4 A solicitor who becomes unable to provide short-term legal assistance services to a client because of the operation of rule 11A.3 (a) or (b) shall immediately cease to provide those services to the client.

11A.5 A solicitor who is a partner, an associate, an employee or an employer of a solicitor providing short-term legal assistance services to a client may act for other clients of the law practice whose interests are adverse to the client so long as each client has given informed consent and adequate and timely

measures are in place to ensure that no disclosure of the confidential information of each client will occur.

The Consultation Paper invited responses to the following questions:

1. Does the proposed Rule adequately address the issues?
2. The difficulties in undertaking systematic conflict checks often arise when a solicitor is providing legal assistance as a duty lawyer service. In what other situations do the same issues arise when providing a legal assistance service.?
3. Does the same issue arise in providing legal assistance services other than duty lawyer services?
4. Should the proposed Rule be limited only to duty lawyer services provided by or through a Legal Aid Commission or Community Legal Centre?
5. Are there any circumstances related to the application of proposed Rule 11A in practice that might be usefully addressed in Commentary to the proposed Rule?

Responses and considerations

The Law Council received 25 submissions and responses to the Consultation Paper. The respondents included five Chief Justices, legal aid commissions and their national peak body, community legal centres and their national peak body, Aboriginal and Torres Strait Islander legal services, legal profession regulatory bodies and academics.

There was overwhelming support (including from Chief Justices) for the introduction of the proposed Rule, with many submissions from the legal assistance sector of the profession noting the direction of the proposed Rule is “an important step forward” in addressing one of the problematic issues faced by the legal assistance sector in meeting the need for immediate legal assistance (Question 1). In this latter context, the theme of many of the responses was that while the Rule was welcomed, it “does not go far enough to remove the barriers that community legal services face in providing access to justice for vulnerable clients.”

Only three (3) submissions opposed the introduction of the Rule, or considered that the case for a new Rule had not been made out and that the Rule was unnecessary, with one of those submissions suggesting that the “narrow” circumstances to which the Rule applied might create more problems than it solves. One of these submissions contended that the Rule would limit the growth and diversity of community legal centres, would not bring about equality of treatment between marginalised and fee-paying clients, and would consume more time and resources because of inadequate conflict checks.

Among the submissions supporting the Rule, many submissions addressed the consultation questions by recommending that the Rule should apply more broadly to short-term legal assistance services than such services provided in duty-lawyer circumstances (Questions 2, 3 and 4). A number identified matters that require further clarification, either by changes to the text of the proposed Rule or by way of guidance about the scope and application of

the Rule (Question 5). Other submissions noted that community legal centres, for example, lack sufficient resources to establish adequate and timely measures to protect confidential information where legal assistance has, or is being provided to both parties. Attention was also drawn to the fact that in some situations (for example, where family violence is involved) it would not be appropriate to attempt to obtain informed consent.

Many of the issues raised in submissions both supporting and not supporting the Rule are beyond the scope of a Rule dealing with ethical conduct (for example, difficulties arising from insufficient funding of community legal services). Some issues had already been canvased in submissions responding to the 1 February 2018 Consultation Paper and subsequent consultations as the proposed Rule was developed, while many of the suggestions for clarification can be addressed in the *Commentary* rather than the text of the Rule itself – for example, to explain that the Rule is not intended to be limited, and does not explicitly limit its application, only to duty-lawyer services at court.

Conclusions

After considering the submissions and responses received, the Law Council concluded:

- the Rule should be adopted in the form consulted on;
- the Rule is a step forward in dealing with one aspect of the complexities of delivering legal assistance, and further amendments to the Rule at this time could risk the high level of support already received for the Rule as proposed;
- proposals for amendments or expansion of the scope of the Rule would be better examined when the ASCR are next reviewed, informed by the actual experience of the Rule operating in practice;
- matters identified by the submissions as requiring further clarification will be addressed in the *Commentary*.

Subsequent to the lodgment of the Report of the consultations and draft Rule 11A with the Legal Services Counsel on 23 December 2020 the Legal Services Council and Law Council settled a further revision of proposed Rule 11A to improve its clarity, without affecting the substance of the Rule.

Proposed Rule

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 as the time required to do so may result in a real risk of the client being denied access to legal assistance, 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.

Rule 12 (Conflict concerning a solicitor's own interests)

Current rule

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

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

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

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

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

UNLESS the client is:

(i) an Authorised Deposit-taking Institution;

(ii) a trustee company;

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

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

(v) the employer of the solicitor.

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

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

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

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

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

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

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

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

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

(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;

(ii) that the client may refuse any referral, and

the client has given informed consent to the commission or benefit received or which may be received.

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

Issues canvassed

1. Should Rule 12.2 be reformulated as follows?

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

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

3. That Rule 12.4.1 be amended as follows:

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

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

4. That greater emphasis be placed in *Commentary* on the vulnerability of the client when considering conflicts of interest under Rule 12, especially in relation to high-risk areas such as administration of estates, debt collection and financial planning/mortgage and finance broking.

5. That additional information might be added to the *Commentary* regarding personal conflicts where a solicitor briefs another family member, such as a spouse, for example, as the barrister in a client's family law related matters.

6. That Rule 12.4.2 be amended to allow for a child, grandchild, sibling, parent or grandparent of the spouse of the solicitor to be added to the class of persons captured by the exemption from breaching the rule.

7. That Rule 12.1 should be clarified in a situation where acting in the best interests of a client would be detrimental to the interests of another partner of the law firm.

Responses and considerations

Issue 1 – Influencing a third-party

The Consultation Paper noted that Rule 12.2 prohibits an attempt by a solicitor to exercise undue influence on any person which is intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration. For example, it would be highly unethical for a solicitor to attempt to influence family members to, in turn, influence the client toward benefiting the solicitor in excess of the solicitor's fair remuneration.

The Consultation Paper suggested that adopting the words "A solicitor must not exercise any undue influence *on the client*…" would inappropriately narrow the scope of the rule, but that a change to insert *on the client or a third-party* would make clear the underlying principle of the rule. Two submissions received supported this suggestion.

The Law Council considers that while extending the rule to include unduly influencing a third party to confer a benefit on the solicitor is appropriate, different considerations need to be anticipated where a solicitor attempts to influence a third-party with a view to that third-party, in turn, influencing the client. The Law Council also considered that the word "intended" should be replaced with "calculated" to better express the impugned influence.

An alternative wording considered was:

> 12.2 A solicitor must not do anything that the solicitor knows, or ought reasonably to know, is likely to influence a client or 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.

The Law Council concluded that Rule 12.2 should be revised as follows:

> 12.2 A solicitor must not do anything:
>
> (a) calculated to dispose 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 reasonably 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.

Subsequent to the lodgment of the draft of this Report on 1 May 2020, the Legal Services Council and Law Council settled some minor drafting amendments, which did not affect the substance of the proposed amendments to Rule 12.

Issue 2 – Referral fees and Executor's commissions

The Consultation Paper noted the basic position that fiduciaries may not use that position to gain a profit or advantage for themselves, nor to obtain a benefit by entering into a transaction in conflict with their fiduciary duty, without the informed consent of the person to whom the duty is owed. Also, the nature of the fiduciary relationship between a client

and solicitor can be moulded by the terms of their contractual relationship – i.e. the retainer agreement – and include provisions related to referral fees.

The Consultation Paper also noted that referral fees are a normal aspect of the modern commercial reality of legal practice, where clients often engage a law practice to facilitate an entire transaction. It is thus quite appropriate for a law practice to have business arrangements involving referral fees with providers of other services that are necessary to transact the business for which the solicitor has been engaged. The Law Council does not discern any particular ethical justification for a ban on referral fees per se; but solicitors must approach the topic mindful of their fiduciary and contractual duties, as well as other professional responsibilities. Informed consent by the client is essential.

Three submissions commented on the proposition that the current rules adequately express the legal position and ethical considerations in relation to referral fees; and executor's commission.

One submission stated that referral fees are inconsistent with a lawyer's independence and fiduciary duties, and should be prohibited:

- this is the position in Western Australia[44], New Zealand[45], under the Model Code of Professional Conduct of the Federation of Law Societies of Canada[46] and the Model Rules of the American Bar Association[47].

The submission stated:

> *The permission of referral fees, in and of itself, undermines the standing of the profession and the reputation of the fiduciary relationship and independence from interference from third parties. Further, there is no benefit to the client, who is bearing the cost of the fee.*

The second submission agreed with the view that Rules 12.2.3 and 2.2.4 adequately express the legal position and ethical considerations about referral fees

- this is the position in other Australian jurisdictions and in England and Wales[48].

This submission also recommended, in support of national consistency, that some consolidated *Commentary* would be welcome. The *Commentary* also needs to draw attention to legislation such as, for example, section 68 of the *Personal Injuries Proceedings Act 2002* (Qld) which prohibits fees for the soliciting or inducing of a potential claimant to make a claim.

A third submission maintained that in relation to both referral fees and executor's commissions, disclosure must provide more detail about the type/value of the benefit, on the basis that this is an area of high-risk of consumer detriment.

[44] Rule 18(5) of the *Legal Profession Conduct Rules 2010*
[45] *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008* NZ [Rule 5.9 - Collateral rewards].
[46] Rule 3.6-7 – referral fees are permissible between lawyers with informed consent.
[47] Rule 7.2(b) - referral fees are permissible between lawyers with informed consent under Rule 1.5(e).
[48] Chapter 9 – SRA Handbook, Solicitors Regulation Authority.

The underlying principles involved in referral fees are explained by Dal Pont[49] as:

- a fiduciary must not profit from the fiduciary position without the informed consent of the person to whom the fiduciary duties are owed;
- if, by reason of acting for a client in a particular matter, the lawyer (or an associate) stands to gain a benefit directly or indirectly additional to reasonable professional fees, the benefit must either be disclosed, or the lawyer must cease to represent the client;
- a lawyer who accepts a benefit from a third party under a referral arrangement has loyalties to both the client and the third party, thereby creating a risk that in recommending the services of the third party the solicitor may not act independently in the best interests of the client, and the client might receive services of a lower standard, or at a higher cost, than if those services were obtained through an independent provider;
- a lawyer must disclose to the client any fee or commission to be received in addition to the professional fee as a prelude to informed client consent;
- obtaining informed consent requires more than merely advising a client to obtain independent advice – it involves the solicitor ensuring the clients are independently advised as to the potential for conflict, or at the very least personally advising the client explicitly on the issue.

The Law Council is mindful that referral fees and the ethical considerations about them arose at a time when distinctions could easily be made between independent service providers – for example between a solicitor, a real estate agent and a financial institution in a conveyancing transaction. The controversies about referral fees in this situation centred on:

- whether it is ethically appropriate for a solicitor to have a business relationship involving the receipt or payment of referral fees from or to preferred service providers and;
- if so, to what extent should the client be informed about the nature of the arrangement and the benefit involved; and
- that the client's informed consent to the benefit is obtained.

While the Law Council does not agree there should be a blanket ethical prohibition of referral fees, there are risks of inappropriate situations where, for example, multidisciplinary entities (i.e. firms within firms) engage in self-referral or firms engage in "claim farming", aided by technology providing easy access to potential "clients". Another example of risk is where real estate agents might hold all the shares in an incorporated legal practice (**ILP**) and refer all clients to the ILP for the conveyancing legal work. These are examples of newly emerging relationships and practices among law firms and other service providers that were not in contemplation when Rule 12.2.3 was first formulated. Similar considerations apply to Rule 39 (Sharing premises).

[49] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017, [6.105-6.110].

The Law Council view is that Rule 12 and Rule 39 (see page 191 below) require a more detailed review than has been possible in the current Review, in light of new and emerging approaches to services delivery, the kinds of structures and arrangements under which they are delivered, the service fee models being employed and the arrangements being deployed to distinguish between legal and other services. The Law Council concluded that no changes should be made to Rule 12 in relation to referral fees, pending the next review of the ASCR when the desirably of amalgamating these two rules can be considered.

Executor's commission

In relation to executor's commission specifically, a submission referred to seven successful prosecutions before VCAT from 2010 relating to unauthorised charging of executor's commissions, noting that while it is correct that the courts have the ultimate decision, the costs involved might be prohibitive, especially where the value of the estate is small.

Attention was also drawn to recent reforms to the *Administration and Probate Act* (Victoria). Section 65B, for example, which provides that a personal representative who is an executor is not entitled to receive payment under a remuneration clause of a Will unless the testator gave written informed consent to the inclusion of the remuneration clause before the Will was executed. In addition, section 65C provides that where there is no remuneration clause in a Will, or where informed consent to a remuneration clause was not given by the testator, or where the remuneration clause makes no relevant provision for the claimed fee or commission – an executor may only receive fees or commission with the informed consent of each interested beneficiary.

Not all States and Territories have amended their *succession* legislation, as Victoria has done, to express in statute requirements that have applied to solicitors under legal profession ethical rules, and the Law Council concluded that Rule 12.4.1 should not be amended, but the *Commentary* should be expanded to draw attention to the core issue of fully informed consent in relation to executor's commissions.

Issue 3 – Rule 12.4.3 – signing a Will

The Consultation Paper asked whether the expression "the client signs the Will" is too narrow and should be amended to cater for the ability, in some situations, of a person other than the testator to sign a Will. Only one submission responded to this question, supporting the proposed amendment.

Issue 4 – *Commentary* to address vulnerable clients

A detailed submission (supported in another submission) from a regulatory authority:

a) recommended greater emphasis be placed in *Commentary* on the *vulnerability* of the client when considering conflicts of interest under Rule 12, especially in relation to high-risk areas such as administration of estates, debt collection and financial planning/mortgage and finance broking. Relevant factors in addition to informed consent might be the quality of the business, the degree of regulation and access to redress, in determining whether a solicitor is acting in the client's best interests;

b) recommended additional information in the *Commentary* regarding personal conflicts in family-related matters;

c) recommended Rule 12 and Rule 39 be reviewed to consider situations where a solicitor is operating two or more affiliated businesses but there are no commissions/referral fees because the solicitor is earning income from both businesses;

d) noted that the phrase *fair remuneration* in Rule 12.2 is different to the phrase 'fair and reasonable" as used in the Uniform Law;

e) recommended the *Commentary* to Rule 12 include cross-references to Rule 8 (client instructions) of the Uniform Law Legal Practice Rules.

The Law Council:

a) agrees that emphasis in the *Commentary* on the question of *vulnerability* would be helpful;

b) agrees that additional information in the *Commentary* regarding personal conflicts in family-related matters would be helpful;

c) proposes to undertake a more detailed review of Rules 12 and 39 in light of new and emerging approaches to services delivery, the kinds of structures and arrangements under which they are delivered, the service fee models being employed, and the arrangements being deployed to distinguish between legal and other services;

d) agrees that the phrase *fair remuneration* in Rule 12.2 be replaced with *fair and reasonable remuneration* and in the *Commentary* to include a cross-reference to the Committee's recommended reformulation of Rule 39.2.

e) agrees that the *Commentary* to Rule 12 should cross-reference Rule 8 of the Uniform Law Legal Practice Rules.

Issue 5 – Solicitor briefing a family member

Subsequent to the release of the Consultation Paper, two additional issues were raised as possibly requiring addressing in Rule 12:

1. Whether there needs to be a rule dealing with a solicitor's ethical duties when considering representation of a family member.
2. Whether it is appropriate for a solicitor to instruct another legal practitioner where that other practitioner is the solicitor's spouse or other member of the solicitor's family.

In relation to the first issue, the Law Council noted that in *Temby & Anor v Chambers Investment Planners Pty Ltd & Anor*[50] the respondent made application to restrain the applicants' son (a practising solicitor) from representing his parents, arguing that the son could not perform his primary duty to the court if he might be affected by the relationship with his clients (his parents), asserting that he could not give objective and dispassionate advice to his clients because they were his parents. The Court noted that there is a "*comparative dearth of authority*" on lawyers acting for relatives, one reason being that "*at least in modern times…the potential for conflict of interest is so obvious that modern lawyers refer matters involving their relatives to independent solicitors*." The Court granted the application for restraint after reaching the view "*that a fair-minded, reasonably informed*

[50] [2010] FMCA 783

member of the public would consider it appropriate in the interests of justice to restrain [the solicitor] from acting because of the actual or likely conflict of interest arising from him acting for his parents". The Court also granted the application to restrain the son's law firm from acting for the parents.

The Court also accepted as accurate Dal Pont's summation of the law with respect to lawyers acting for immediate family members[51]:

> *Especial care should be taken where a lawyer proposes to act in a transaction for herself or himself and a family member or associate. In addition to potentially compromising a lawyer's independent judgment, such a situation is fraught with potential for conflict of interest. The point is well illustrated by Woolley v Ritchie,[52] where a solicitor acted on his own behalf and for his de facto spouse in real estate transactions. Upon inquiring, the de facto spouse was told by the solicitor that it was unnecessary for her to seek independent legal advice. Salmon J held that the spouse was not fully informed as to the implications of the transactions, which included the transfer of property and a mortgage in her name to a trust. His Honour held that the solicitor was under a duty to ensure that his de facto spouse was fully informed and freely consented, and the solicitor's conflict stemming from his interest in the transactions requiring securing for the spouse independent legal advice.*
>
> *Prudent lawyers will not, therefore, act in transactions in which they are personally interested and that involve their spouses, other family members or business partners, unless the other party is separately represented or advised. The need for independent representation or advice in these cases is heightened by the likelihood that the relative or associate places greater trust in the lawyer than a client lacking that association, and that the lawyer may be less scrupulous in matters of full disclosure. The lawyer may be less inclined to advise the relative or associate of the risks of the deal, and the latter may simply assume without inquiring that the lawyer acts in her or his best interests.*

Dal Pont also commented that lawyers:

> *…should be wary of the dangers of representing friends or relatives. In addition to issues of independence and objectivity, lawyers who do so may be tempted to cut corners, accept work beyond their competence, or be less exact with issues of professional responsibility.[53]*

In relation to the second issue, the Law Council considered that similar considerations would apply where a solicitor instructs another legal practitioner, where that other practitioner is the solicitor's spouse or other member of the solicitor's family, to act as counsel. Further, Barristers' Rule 105(k) provides that a barrister may refuse or return a brief "where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party."

[51] G E Dal Pont, Lawyers' Professional Responsibility (4th Edn) – [6th Ed at [6.50] [citations omitted]
[52] [1999] ANZ Conv R 385.
[53] Supra at [17.65]

The Law Council does not consider there is a need for a specific rule because the above practices, while fraught with risks of conflict, have not been proscribed completely by the courts. The *Commentary* will be expanded to discuss these kinds of conflict.

Issue 6 – Drawing Wills and instruments for immediate family of a solicitor's spouse

Rule 12.4.2 currently provides that a solicitor will not have breached the duty to avoid conflicts between the best interests of a client and the interests of the solicitor merely by:

> 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.

The term *immediate family* is defined in the Glossary to mean *the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a solicitor*.

A submission received by the Review recommended that Rule 12.4.2 be expanded to allow for a child, grandchild, sibling, parent or grandparent of the spouse of the solicitor to be added to the class of persons captured by the exemption. The proposal would amend the rule as follows:

> 12.4 A solicitor will not have breached this Rule merely by:
>
> 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 member of the immediate family of the solicitor's spouse; or**
>
> ~~**(ii)**~~ (iii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

The submission noted that this change would allow for Wills to be drawn for family members not currently listed under the provision, which would include parents-in-law where the solicitor or the spouse of the solicitor stood to receive a benefit, as well as step-children and half-siblings.

The Law Council agreed the proposal should be adopted.

Issue 7 – Interests of another partner of a law firm

Subsequent to the release of the Consultation Paper a question was raised about the application of Rule 12 where a solicitor, by acting in the best interests of a client, would be acting against the interests of another partner in the law practice. It was said that this situation does not quite seem to be a factual situation where Rules 11 or 12 would apply. It

was also commented that the statement in the *Commentary* to Rule 12 that a solicitor must not "engage in situations where his or her own interests do or may conflict with the duty owed to the client except with the latter's fully informed consent" might be seen as negativing a requirement for informed consent except where the solicitor's personal interests are involved.

The Law Council did not consider that a rule on this issue is required, but additional *Commentary* will be developed.

Conclusions

1. That Rule 12.2 be amended to make clear that undue influence must not be exercised on either the client or a third party (who might be in a position to influence the client).

2. (a) No change should be made to Rule 12 as it relates to referral fees, pending a further review.

(b) The *Commentary* be expanded to draw attention to the core issue of fully informed consent in relation to executor's commissions, and to recent legislative developments in some jurisdictions.

3. That Rule 12.4.1 be amended as follows:

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

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

4. a) that the *Commentary* be amended to emphasise the question of *vulnerability*;

b) that additional information be inserted in the *Commentary* regarding personal conflicts in family-related matters;

c) that the scope of Rule 12 be considered in light of changing structures for the delivery of legal and other services, when the rules are next reviewed;

d) that the phrase *fair remuneration* in Rule 12.2 be replaced with *fair and reasonable remuneration*.

e) that the *Commentary* to Rule 12 should cross-reference Rule 8 of the Uniform Law Legal Practice Rules.

5. That the *Commentary* be expanded to include discussion of ethical issues where a solicitor acts for a family member.

6. That the *Commentary* be expanded to include discussion of ethical issues where a solicitor briefs a family member to act in a matter.

7. That the *Commentary* be expanded to clarify that Rule 12 applies where there is a conflict between the best interests of a client and another member of the solicitor's law practice.

Proposed rule

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 do anything:

(i) calculated to dispose a client or 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

(ii) that the solicitor knows, or ought reasonably 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; ~~**or**~~

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

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

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

(i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;

(ii) that the client may refuse any referral, and

the client has given informed consent to the commission or benefit received or which may be received.

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

Rule 13 (Completion or termination of engagement)

Current rule

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

13.1.1 the client has otherwise agreed;

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

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

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

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

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

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

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

Issues canvassed

1. That Rule 13 should not set out procedures that a solicitor should follow if he or she considers a client's instructions to be unreasonable in their further instructions in an ongoing matter.
2. That the *Commentary* should provide more explanation about the termination of a retainer for just cause when there is a breakdown in the relationship of trust and confidence between a solicitor and client.
3. Rule 13 is not appropriate to situations where limited retainers are used for the delivery of unbundled legal assistance.

Responses and considerations

Issue 1 – When a client's instructions become unreasonable

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

No responses were received to the view in the Consultation Paper that it would not be appropriate to amend the rules to set out *procedures* that a solicitor should follow if he or she considers a client's instructions to be unreasonable in their further instructions in an ongoing matter.

Issue 2 – Breakdown of the relationship of trust and confidence – "just cause"

The Consultation Paper also noted calls for more explanation about termination of a retainer for *just cause* when there is a breakdown in the relationship of trust and confidence between a solicitor and client. Comments were sought on whether this matter should be explained in expanded *Commentary*.

A regulatory authority that responded to this issue said they have received complaints about solicitors who have ceased to act on the basis of loss of trust and confidence because the client has raised a genuine resolvable issue with the solicitors' handling of a matter or where the solicitor is attempting to cover up a mistake. The submission expressed the view that while there are complexities of acting for clients who are experiencing challenging personal situations, the fact that a client may be emotional, or questioning is not sufficient to amount to a loss of trust and confidence.

The Law Council agreed with the submissions calling for additional *Commentary* to deal specifically with the situation where the relationship of trust and confidence between solicitor and client has broken down, which could usefully be expanded to refer to the principles set by the courts relating to termination of a retainer before completion of the legal service, including what is embodied in the expression "just cause" in judgments such as, for example, *French v Carter Lemon Camerons LLP*[54].

Issue 3 – Termination and limitation of a retainer - unbundled legal services

One of the submissions received expressed the view that Rule 13 as presently formulated could act as a barrier to the provision of unbundled legal services because the Rule does not contemplate the concept of a limited retainer.

Another submission received made similar comments, suggesting that while Rule 13.1.1 (the solicitor must ensure completion of the matter unless the client has otherwise agreed to the termination of the retainer) does not expressly prohibit the use of limited retainers, the Rule as presently formulated can be seen as contemplating a full retainer as the 'norm'. It was recommended that a rule based on rule 1.2(c) of the American Bar Association Model Rules be adopted - that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent". This rule could be accompanied by practice notes developed by the Law Societies as to how to create and conduct limited retainers, including in relation to the termination of such retainers.

Another submission said that this issue could be addressed in the *Commentary*. It was suggested that the *Commentary* could clarify a solicitor's responsibilities when providing a limited scope service. This could include:

1. that a solicitor should make an assessment as to whether providing services under a limited scope arrangement is appropriate; and

[54] [2012] EWCA Civ 1180.

2. when providing services under a limited scope arrangement, the solicitor must outline to the client what services will be provided, and what actions the client will need to undertake themselves.

The Law Council took these submissions into consideration in developing a proposed Rule 11A (see pages 74-85 above) but notes that, in its view, the definitions in the Glossary of "matter" and "engagement", when read together, would apply Rule 13 to limited scope representation situations. Nevertheless, these matters will be addressed in *Commentary*.

Conclusions

1. No change to Rule 13.
2. The *Commentary* to Rule 13 be expanded to explain the established principles relating to termination of a retainer, including what is meant by "just cause".
3. That termination of a retainer for limited-scope legal services be addressed in the *Commentary*.

Rule 14 (Client documents)

Current rule

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 legislation to the contrary.

Issues canvassed

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

2. Should Rule 14 also be expressed as applying to documents in a Will file?

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

4. Should there be a Legal Practice Rule dealing with the subject of client files and documents when a solicitor leaves a law practice?

5. The following issues were raised in Submissions for consideration:

   i. that Rule 14 does not clearly address whether a solicitor is required to retain copies of client documents after a request is made to return them;

   ii. that Rule 14 does not clearly address whether a solicitor is obligated to keep their own file records for a period of seven years (noting they have encountered situations where a solicitor has simply given the client the whole file, which causes difficulty in investigating complaints);

   iii. that the present *Commentary* includes text relating to liens under Rule 14, rather than Rule 15;

   iv. that in Rule 14.2 the expression *may destroy client documents* be replaced with *must destroy client documents* in light of cases where old client files have been left in unsecured bins in laneways; and

   v. that *Commentary* links the issues in Rule 14 with Rule 9 (confidentiality) in the context of information privacy, data protection and retention obligations.

6. In the context of both Rules 14 and 16, the storage of electronic documents raises a different set of issues to storage of physical documents and that "record destruction may

be incomplete if solicitors are unaware that practices such as purging or physical destruction of backup tapes, computer and photocopier hard-drives along with the audit records for this activity may be necessary for complete record destruction."

7. The definition of "client documents" in the Glossary should be reviewed and the *Commentary* expanded.

8. Rule 14.2 should be deleted.

Responses and considerations

Issue 1 – Documents such as title deeds, Wills or original executed agreements

The Consultation Paper sought comments on whether Rule 14 should refer to certain documents that should never be destroyed, such as title deeds, Wills and original executed agreements.

A submission received from a regulatory authority agreed that Rule 14 should be amended to include a statement of a solicitor's duty to not destroy certain documents (for example, a title deed, Will or original executed agreement).

It was noted in another submission that the Western Australia Rules prohibit a practitioner from dealing with or destroying anything held by the practitioner for safekeeping without instructions by an appropriate authority, and that this would include documents in a Will file.

However, another submission said that where there are no specific common law or statutory requirements to retain records, the destruction of records by a solicitor is primarily a risk management issue and not appropriate for enshrining in a conduct rule. Instead, it was submitted that the issue be included in *Commentary*, including a reference to risk management factors so that practitioners can make informed decisions. Alternatively, or in addition to Rule 14.2, the following amendment to the current Rule was recommended:

> *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.*

A further reformulation suggested was:

> *14.2.1 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 if the client has given instructions for that destruction.*
>
> *14.2.2 A solicitor may destroy client documents within a lessor period if instructed by the client to do so subject to any legal obligations to the contrary*

It was suggested in one of the submissions received that Rule 14.2 should be deleted, on the basis that the nature of the Rules (usually as a mere guide to what comprises professional conduct) means that they do not affect a client's common law rights in any client document. Thus, the client owns certain documents, and the rules cannot negate that common law right. Also, the Commentary should note that among the kinds of documents that should not be destroyed, it would be important to note files relating to minors.

The Law Council considered:

- that a reformulation of Rule 14.2 as proposed in the submissions should be adopted;
- the reformulated Rule should encompass documents held on a client file, excluding documents that are ordinarily in safe custody or security;
- the *Commentary* be updated;
- that technology is going to cause a re-think of this Rule – for example – where a practitioner keeps electronic copies of documents, and where electronic documents are stored under "cloud" services - further consideration will need to be given to the definition of "client documents" and how a change might also impact Rules 15 and 16, having regard also to the Western Australia Rule (see Issue 7 below).

Issue 2 – Documents in a Will file

The Consultation Paper invited comments on whether the commonly understood duty to retain certain essential documents such as Wills, should, if included in Rule 14, be expressed as also applying to other documents in a Will file.

One of the submissions recommended the rule expressly refer to the Will file itself, and not just client documents in the Will file, observing that it is likely that, if there is a question of capacity that ultimately needs to be considered, the evidence needed to help a Court determine that question will most likely be on the Will file itself (e.g. file notes of the solicitor's attendances on the testator), as opposed to being in the documents that are on the Will file.

Another submission recommended that *Commentary* to Rule 14:

> *should articulate the principle that a solicitor is required to retain client documents in a secure and confidential manner and that essential documents should be retained in this manner indefinitely. The high amount of complaints about, and laxity towards, secure retention of documents has led us to the view that the common law principle is not necessarily well understood. The Commentary or the rule itself should note that this obligation does not end merely because the solicitor no longer holds a valid practising certificate.*

The Law Council considered that the underlying issue is broader than a Will file and would apply to any file in which there could be a possibility of future litigation. Also, there is an increase in statutory requirements for record retention – for example, the retention of documents in cases involving institutional response to child sexual abuse legislation.

Further, so far as a Will file is concerned, it would be a subject better dealt with in a Legal Practice Rule, rather than as an ethics issue, and that a cross-reference to such a Rule should be included in the *Commentary*.

Issue 3 - Destroying or removing documents out of jurisdictional reach

The Consultation Paper invited comments on whether there should be a specific addition to the rules, replicating the (since repealed) Regulation 177 of the *Legal Profession Regulation 2005* (NSW) which essentially stated in a legislative form the commonly understood position that a lawyer should never advise or assist a client in destroying, or removing out of jurisdictional reach, documents that are relevant, or might be relevant, if litigation is necessary.

A submission that responded to this issue noted that while it may be helpful for solicitors to have a provision in the Rule which clearly permits them not to follow instructions to destroy or remove out of jurisdictional reach relevant documents, coverage of this issue in other regulation is adequate.

The Consultation Paper noted that conduct of this kind would come within the principles embodied in a number of rules, and that the subject matter of Regulation 177 does not constitute an ethical principle not already embodied in the rules. The better approach would be to deal with the issue in *Commentary,* as well as giving further consideration to definitions of "destroy" and "client documents" in the context of electronic documents.

Issue 4 - Client files and documents when a solicitor leaves a law practice

The Consultation Paper sought comments on whether there should be a Legal Practice Rule, rather than an ethical rule, dealing with the commonly understood position that a solicitor leaving a law practice should not assume an automatic right or entitlement to remove a client's file/documents without the authority of the client and the law practice.

The four submissions received in response to this issue took different positions:

- one submission agreed with the recommendation that there be a Legal Practice Rule dealing with the transfer of files when a solicitor leaves a law practice.
- another submission suggested that the *Commentary* draw attention to Legal Practice Rules regarding the obligations to clients when transferring a legal practice.
- the third submission considered a solicitor has an ethical obligation, when leaving a law practice, to ensure the transfer of a file to another practitioner with designated responsibility and that promulgating a rule on this could assist regulators take action when the obligation is breached.
- the fourth submission did not agree that a Legal Practice Rule should be developed, but that it would be appropriate for the *Commentary* to provide guidance.

The Law Council concluded that this issue does not amount to an ethical principle and should be dealt with by way of a Legal Practice Rule.

Issue 5 – Additional comments on Rule 14

A regulatory authority also raised for consideration:

a) that Rule 14 does not clearly address whether a solicitor is required to retain copies of client documents after a request is made to return them;

b) that Rule 14 does not clearly address whether a solicitor is obligated to keep their own file records for a period of seven years (noting they have encountered situations where a solicitor has simply given the client the whole file, which causes difficulty in investigating complaints);

c) that the present *Commentary* includes text relating to liens under Rule 14, rather than Rule 15;

d) that in Rule 14.2 the expression *may destroy client documents* be replaced with *must destroy client documents* in light of cases where old client files have been left in unsecured bins in laneways; and

e) that *Commentary* links the issues in Rule 14 with Rule 9 (confidentiality) in the context of information privacy, data protection and retention obligations.

The Law Council concluded:

a) whether a solicitor retains copies of documents returned to a client would be a risk management decision rather than an ethics issue;

b) whether a solicitor provides the whole file to the client on request following the completion of the engagement is also a risk management decision rather than an ethics issue;

c) the *Commentary* to Rule 14 will be amended to transfer material relating to liens to the *Commentary* to Rule 15;

d) the issue of client files being left in garbage bins also raises questions about breach of the duty to maintain client confidentiality, and that duty extends to secure destruction (not simply disposal) until the documents no longer exist;

e) the *Commentary* should be expanded to deal with these issues.

Issue 6 – Storage and destruction of electronic documents

Two submissions to the Review highlighted that storage of electronic documents raises a different set of issues to storage of physical documents and that:

> *record destruction may be incomplete if solicitors are unaware that practices such as purging or physical destruction of backup tapes, computer and photocopier hard-drives along with the audit records for this activity may be necessary for complete record destruction.*

The Law Council concluded that these issues need to be covered in an expanded *Commentary*, including a discussion in the context of the duty to maintain client confidentiality.

Issue 7 - Definition of client documents

In light of the many issues raised and suggestions received, the Law Council agreed it is necessary to redefine “client documents”. The current definition in the Glossary refers to “documents to which a client is entitled’, but a more informative definition (supported by *Commentary*) is required (see pages 212-214 of this Report).

Issue 8 - Should Rule 14.2 be deleted?

A submission to the Review noted that the nature of the Rules (usually as a mere guide to what comprises professional conduct) means that they do not affect a client’s common law rights in any client document. Thus, the client owns certain documents, and the rules cannot negate that common law right. The Law Council notes this view is contrary to what is probably the view of many solicitors - that rule 14.2 gives the solicitor legal authority (vis-à-vis the client) to destroy client documents after 7 years.

It was recommended that:

- that rule 14.2 (including the misleading reference to destruction after 7 years) be deleted outright; and
- the Commentary be revised to highlight both the common law position that requires client consent to the destruction of any client document, and to suggest that client consent be obtained as part of the initial terms of engagement of the solicitor by the client.

The Law Council considers that the matters raised might be addressed by the proposal under Issue 1 (above) to amend Rule 14.2 to include a reference to *legal obligations*. The reference to *legal obligations* (to be explained in the *Commentary*) would encompass both statutory and common law obligations. It is noted, for example, that the existing *Commentary* discusses the position in Queensland, as explained by Daubney J in *In Public Trustee of Queensland as a Corporation Sole*[55], that a solicitor to whom a testator entrusts a testamentary document for safekeeping holds that document as bailee. His Honour noted that the existence of the bailment attracts a range of obligations on the bailee (including not to part with possession of the bailed property other than in accordance with the bailor's instructions) and a corresponding range of rights in the bailor.

Solicitors are accordingly obliged under common law and Rule 2.2 to continue holding such documents until instructed otherwise by the bailor and are not permitted under Rule 14 to destroy or otherwise deal with such documents except in accordance with client instructions. The *Commentary* on Rule 14 will be expanded to note these considerations.

Conclusions

1. That Rule 14.2 be reformulated as follows, with the *Commentary* to be expanded:

   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 ~~legislation~~ **legal obligations** to the contrary.

2. A Legal Practice Rule be developed dealing with retention of documents in a Will file.
3. The definition of *client documents* in the Glossary be amended, with expanded *Commentary*.
4. The *Commentary* to Rule 14 be expanded to discuss the commonly understood position that a lawyer should never advise or assist a client in destroying or removing out of jurisdictional reach documents that are relevant, or might be relevant, in litigation.
5. A Legal Practice Rule be developed concerning retention and removal of client files when a solicitor leaves a law practice.
6. The *Commentary* to Rule 14 be expanded to provide information about:

[55] [2012] QSC 178 [14]

a. whether a solicitor might retain copies of client documents after a request is made to return those documents;

b. whether a solicitor is obligated to keep their own file records for a period of seven years; and

c. that the duty to maintain client confidentiality extends to secure disposal and destruction of documents until the documents no longer exist.

7. That *Commentary* to Rule 14 be expanded to include information about the storage and destruction of electronic documents.

8. That Rule 14.2 be retained and the *Commentary* to Rule 14 be expanded to provide information about the range of statutory and other legal obligations that relate to retention and destruction of client documents.

Rule 15 (Lien over essential documents)

Current rule

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

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

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

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

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

Issues canvassed

1. Whether Rule 15 should be amended as follows:

Rule 15 (Lien over ~~essential~~ documents)

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

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

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

2. That there is no conflict between Rule 15.1.1(i) and Rule 6.2.

3. In what circumstances, if any, might it be appropriate conduct for a solicitor to seek documents from, or to provide documents to, another solicitor where the effect would be to subvert a lien validly claimed by a third solicitor over those documents?

Responses and considerations

Issue 1 – Minor amendments to Rule 15

Rule 15.1 states the accepted principle that a solicitor who has claimed an effective lien over client documents (as contemplated by Rule 14) which are essential to a client's defence or prosecution of current proceedings, must surrender those documents if one of the three circumstances set out in Rules 15.1 and 15.2 apply. They are: if another solicitor acting for the client undertakes to hold those documents with reasonable security for payment of the first solicitor's costs; the second solicitor agrees to pay the costs or enters into an agreement with the client to procure payment; or the first solicitor receives reasonable security.

The Consultation Paper agreed the heading to the Rule could be simplified by omitting the word "essential", noting that the requirement for the documents to be essential to the defence or prosecution of a matter is stated in Rule 15.1. One response was received on this issue, recommending the word *essential* be retained in Rule 15.1, on the basis that there may be practical implications of omitting the word *essential* as it would place huge pressures on solicitors to copy their entire file often as a matter of urgency.

The Law Council did not consider that the word "essential" needed to be retained in the heading to the Rule, as the heading is a descriptor rather than the Rule itself, and Rule 15.1 makes clear the Rule is directed to documents "essential to the client's defence or prosecution of current proceedings."

Issue 2 – Is there a conflict between Rule 6.2 and Rule 15.1.1?

The Consultation Paper noted the suggestion that there is a conflict between Rule 6.2 (a solicitor must not seek an undertaking that would require the co-operation of a third party who is not a party to the undertaking) and Rule 15.1.1 (see above).

No responses were received to this issue.

The Law Council did not consider the Rules to be in conflict in the way suggested, but that Rule 15.1.1 contemplates a tripartite agreement between the two solicitors and the client. The *Commentary* will be expanded to include this issue.

Issue 3 – Subverting a lien

The Consultation Paper invited comments on whether it is ethically appropriate for a solicitor to take steps which would subvert a lien claimed by a former solicitor over client documents and if so, in what circumstances.

One of the submissions noted that because of the variety of situations encountered, it would be difficult to prescribe what is subversion of a lien.

A regulatory authority advised that complaints have been raised in cases where a solicitor's lien has been subverted and considers "*that this sails very close to the ethical line*." While noting there is merit is attempting to devise a rule against subverting another solicitor's lien, such a rule would be difficult to draft, and some practical difficulties would arise where:

- the client has some documents, and it would be problematic to prevent the client giving those documents to a new solicitor;

- the new solicitor can obtain documents from the court, and it would be problematic to prevent the client giving those documents to a new solicitor;
- additional issues arise where there are disputes about the first solicitor's fees and there are allegations of incompetence or negligence.

A *fruits of litigation* lien was suggested as an alternative approach, with a reformulated rule to include:

> ...the second solicitor shall not take steps to subvert or avoid the application of the first solicitor's lien by procuring or receiving client documents from sources other than his or her client.

The Law Council did not consider a *fruits of litigation* lien appropriate for the following reasons:

- how would the duty of the second solicitor to look after the best interests of the first solicitor be performed?
- how would such a rule cater for the different situations and circumstances that might arise?
- a lien is an equitable remedy, i.e. it is a shield rather than a sword; and
- a fruits of litigation lien is about establishing an equitable fund by the court.

The Law Council concluded that the issues might be better dealt with in *Commentary*, noting that the first solicitor must remain vigilant, the second solicitor should advise the client of the first solicitor's entitlement to payment of unpaid costs and of the options that might be available to secure payment, including an equitable charge over any fund from litigation (formerly known as a "fruits of labour*"* lien).

Conclusions

1. That Rule 15 be revised as set out below.
2. That the *Commentary* be expanded, to include more explanation of tripartite agreements between solicitors and a client for securing payment of the unpaid costs of the former solicitor holding a lien.
3. The *Commentary* be expanded to discuss subversion of a lien and draw attention to existing guidance material on this topic.

Proposed rule

Rule 15 (Lien over ~~essential~~ documents)

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

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

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

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

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

Rule 16 (Charging for document storage)

Current rule

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.

Issues canvassed

1. Whether Rule 16 should be amended as follows: (DP Q53)

16.1 A solicitor must not charge:

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

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

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

2. Storage and destruction of electronic documents.

Responses and considerations

Issue 1 – Should Rule 16.1 be reformulated?

The Consultation Paper noted the suggestion that Rule 16 should be amended to read "UNLESS *the storage fee has been disclosed and* the client or former client has agreed in writing to such charge being made" and suggested that such a change was not necessary, as disclosure of the fee is implicit in obtaining client consent and would be disclosed as part of the retainer agreement.

One of the submissions that responded to this question said there may be confusion among solicitors as to the nature and operation of the proposed amended rule. It was recommended the *Commentary* be expanded to make the operation of the rule clearer, including whether a specific form of writing is required for the client to agree such a charge.

Other submissions commented:

- that Rule 16 should say "consented or agreed to", noting that 'consent" and "agreement" are different concepts.
- the *Commentary* should include a discussion of the benefits to the client (and the solicitor) in providing written disclosure of these fees and their amounts and that the solicitor bears the onus of proving disclosure.

- the Rule need only say "…UNLESS the client or former client has agreed to such a charge being made."

The Law Council concluded that expanded *Commentary* to accompany the proposed amended Rule would be useful.

Issue 2 – Destruction of electronic documents

Attention was drawn - in the context of both Rule 14 (Client documents) and Rule 16 – to differing considerations between physical and electronic storage:

> *that storage of electronic documents raises a different set of issues to storage of physical documents and that "record destruction may be incomplete if solicitors are unaware that practices such as purging or physical destruction of backup tapes, computer and photocopier hard-drives along with the audit records for this activity may be necessary for complete record destruction.*

It was also noted in the Submission that:

- the storage of electronic documents may be a more proactive process than the storage of paper records, and that electronic storage may require ongoing software, format and/or hardware upgrades over time to retain record accessibility;
- record storage and destruction risks may extend to third party hosted arrangements;
- while the government sector is well supported in records management retention and destruction processes, this may not be the case for smaller private law firms or in the not for profit sector; and
- the issue of records management including ongoing storage, destruction and the imposition of charges may require ongoing review in light of current best practice.

The Law Council agreed that *Commentary* on these issues would be useful.

Conclusions

1. That Rule 16 be reformulated as set out below.
2. That *Commentary* be expanded to provide information (and references to Law Society materials) about written disclosure, form of consent and issues relating to electronic document management and destruction.

Proposed rule

16.1 A solicitor must not charge:

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

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

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

ADVOCACY AND LITIGATION RULES

Rules 17 to 29 inclusive set out the ethical principles and considerations that apply when a solicitor is in an advocacy and litigation situation. The Consultation Paper (page 85) noted the observation that in a litigation context, issues can arise for a solicitor in one of two capacities:

- in the solicitor's capacity as solicitor on the record for the client; or
- when the solicitor is undertaking an advocacy role akin to that of a barrister in proceedings.

In response to calls often made that the ASCR advocacy and litigation rules and their equivalent Barristers' Rules should be uniform, the Review considered Rules 17-29 of the ASCR and sought consultation comments on several possible amendments to the ASCR to align them with the Barristers' Rules.

It was not possible in the current Review to address every harmonisation option; however, the Law Council's Professional Ethics Committee and Australian Bar Association's Ethics Working Group will be undertaking further work on harmonisation.

Rule 17 (Independence – avoidance of personal bias)

Current rule

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

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

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

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

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

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

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

Issues canvassed

1. That the expression "forensic judgment" should not be defined.

2. That rule 17 be reformulated as follows:

Rule 17 (Independence – Avoidance of personal bias)

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

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

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

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

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

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

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

Responses and considerations

Issue 1 – No definition of "forensic judgment" is needed

The Consultation Paper (page 86) commented that the term "forensic judgment" is contextual to the circumstances and a matter for professional judgment by an advocate in discharging duties to the court and to his or her client, and therefore should not be defined. It was also noted that there is no definition of "forensic judgment" contained in the Barristers' Rules.

Only one response was received, which supported the view that the expression "forensic judgment" should not be defined.

Issue 2 – Reformulating Rule 17.2

The Consultation Paper sought comments on a reformulation of Rule 17 to align with the equivalent Barristers' Rule (Rule 42). The proposed change is a minor wording change, without changing the substantive Rule. No responses were received to the proposal to reformulate Rule 17.

Also, it was noted that Rule 17.4 (a solicitor must not become surety for a client's bail) has no equivalent in the Barristers' Rules, and is a difference to be discussed with the Australian Bar Association.

Conclusions

1. That the expression "forensic judgment" not be defined.
2. That Rule 17 be reformulated as follows.

Proposed rule

Rule 17 (Independence – Avoidance of personal bias)

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

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

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

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

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

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

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

3. That the Law Council discuss with the Australian Bar Association whether an equivalent to Rule 17.4 might be useful in the Barristers' Rules.

Rule 18 (Formality before the court)

Current rule

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.

No issues were raised for consultation on Rule 18.

Rule 19 (Frankness in court)

Current rule

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:

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

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

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

(ii) must 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.

Issues canvassed

1. That Rule 19.3 should be omitted as it has no equivalent in the Barristers' Rules, and that *Commentary* should be developed for the guidance of solicitors on the general question of disclosure and the duty to the court in relation to correcting errors, omissions or false or misleading statements during the course of proceedings.

2. That Rules 19.1 to 19.5 be amended as follows:

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

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

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

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

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

19.4.1 are within the solicitor's knowledge;

19.4.2 are not protected by legal professional privilege; and

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

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

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

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

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

(ii) **must refuse to appear on the application.**

(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.~~

Responses and considerations

Issue 1 – Whether Rule 19.3 should be omitted

The Consultation Paper suggested that Rule 19.3 could be omitted, on the basis that a solicitor appearing as an advocate in court proceedings is under no general obligation to correct any misleading statement made by *any* person.

The Consultation Paper referred to the common law obligations to correct any false or misleading statements the solicitor may have made, but that a solicitor is not obliged to correct *all* errors or mistakes of which he or she becomes aware.

ASCR Rule 19.2 (and its equivalent Rule 25 in the Barristers' Rules) sets out the practitioner's duty to take all necessary steps to correct any misleading statement made by the *solicitor or barrister* to the *court*. ASCR Rule 22.2 (and its equivalent Barristers' Rule 50) sets out the *solicitor's* or the *barrister's* duty to take all necessary steps to correct any misleading statement made by the practitioner to the *opponent.*

ASCR Rule 19.3 qualifies Rule 19.2 by stating that 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. Similarly, ASCR Rule 22.3 qualifies Rule 22.2 by stating that 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.

Thus both Rule 19.3 and Rule 22.3 serve the purpose of clarifying that the duty of a solicitor who appears as an advocate to correct a misleading statement does not extend to correcting any and all errors by an opponent or any other person – the focus of the rules is on statements made by the solicitor. The rationale for not being obligated to correct errors in statements made by an opponent or the opponent's practitioner reflects the basic

principle that a solicitor "would, it is said, 'fail in his duty to his own client were he to supplement the deficiencies in his opponent's evidence".[56]

There is no equivalent to ASCR Rules 19.3 or 22.3 in the Barristers' Rules.

Also, the Consultation Paper noted that Rules 19.6, 19.7, 19.9 and 19.12 deal with specific situations where, broadly speaking, a solicitor appearing in court proceedings is aware of an error, and sets out the expected conduct in the context of the circumstance in which the particular rule applies.

Submissions responding to this issue broadly supported the removal of Rule 19.3, although one submission commented that while removal of Rule 19.3 in the civil jurisdiction serves the desirable purpose of limiting the circumstances under which the court might operate on the basis of incomplete or incorrect information, the removal of the rule in the criminal jurisdiction would have the effect of reversing the onus of proof which rests on the Crown.

They noted:

- to require a solicitor acting for the defence in criminal proceedings to correct an error by the opponent or some other person (not being the client or a witness called on behalf of the client) would place the solicitor in the position of assisting the Crown or the prosecution to make its case – a proposition which is repugnant to a long established doctrine that the prosecution must prove *beyond reasonable doubt* each of the elements of the offence charged.
- similar considerations apply in a sentencing hearing. The question of the standard to which matters adverse to the offender must be proved was considered in *R v Morrison*, where the plurality (Fitzgerald P, Williams J and Davies JA) considered that such matters should be proved beyond reasonable doubt, while in a joint dissenting judgment, Fryberg J and Pincus JA held that the *Briginshaw* principle was the appropriate standard. It was, however, clear that the burden of proving such matters lies with the prosecution not the defence.

The Law Council did not agree that the effect of removing the current Rule 19.3 would be to negate the general principle that in a criminal matter the Crown has the duty to prove its case.

Another submission noted that in a fused profession distinguishing between conduct as being in the capacity of a solicitor or of a barrister is not resolved simply by determining if the practitioner has elected to practice only in the manner of a barrister. A practitioner's course of conduct in a particular manner may cross over each set of rules, causing difficulty in distinguishing which rules(s) apply. The Law Council agreed that there is no substantive reason why there should be a difference between the rules applying to solicitor advocates and those applying to barristers, and that retention of different Rules will cause difficulties, particularly in jurisdictions with fused professions.

The Law Council concluded that Rule 19.3 (and Rule 22.3) might be omitted as this would bring the ASCR and Barristers' Rules into alignment, and that additional *Commentary* could be developed to explain the limitations on the duty to correct errors under existing Rules

[56] G. E. Dal Pont, *Lawyers' Professional Responsibility*, 6th ed at [17.105].

19.3 and 22.3. In response to this suggestion the Australian Bar Association Ethics Committee Working Group agreed it was sensible to have the same rules in relation to frankness in court to apply to solicitor advocates and barristers. They further advised that the reference to "the possible consequences of not doing so" in the preceding sub-rule is ambiguous as to what those possible consequences might be, and that further work will be undertaken by the ABA Ethics Committee to improve the equivalent barristers' rule.

The Law Council concluded:

- That Rule 19.3 be reviewed following the ABA review of whether or not to adopt an equivalent barristers' rule; and
- That Rule 19.5.2(ii) be amended as proposed.

Issue 2 – Reformulating Rules 19.1-19.5

The Law Council consulted on whether Rules 19.1-19.5 (and the Rule's title) should be harmonised with their Barristers' Rules equivalents (Rules 24, 25, 27 and 28). This would involve:

- amending the title of Rule from *Frankness in court* to *Duty to the court;*
- omitting Rule 19.3 (see above); and
- modifying Rule 19.5.2 about the appropriate course of conduct in an ex parte matter where the client does not waive privilege, as follows:

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

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

  (ii) **must refuse to appear on the application.**

  (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.~~

The VLSB+C agreed with the proposed change to the title of Rule 19. The Law Council received submissions that supported the change in the title of the Rule and the proposed amendments to Rule 19.

A submission opposing the proposed change to Rule 19.5.2 noted that the proposed changes *does not reflect the practice in Queensland where the profession is divided*. This comment highlights that while the advocacy and litigation rules are directed towards situations where a solicitor is acting as a solicitor-advocate (and therefore substantive equivalence between the ethical rules applying in a litigation setting to a solicitor-advocate and a barrister is desirable) a distinction between the roles and duties that apply to a solicitor on the record and a solicitor acting purely as a solicitor-advocate are not clear cut.

As noted in the discussion about Rule 20 (see pages 125-129 below) while a solicitor might undertake an advocacy role in proceedings, there may still remain certain duties and obligations toward clients, other parties and to the court that might be said to be inherent in the role of a solicitor. A similar observation was made by another organisation in their submission on proposed Rule 22.9 (communication with an unrepresented party).

Legal assistance providers have commented that in their experience courts will often request solicitor advocates to do things only a solicitor (non-advocate can do) even though that might conflict with the barristers' advocacy rules, and in doing so, often refer to the duty to the administration of justice as prevailing.

Further, in the context of proposed Rule 11A, both the Productivity Commission and the Victorian Access to Justice Review pointed to the issue that a solicitor on the record cannot be removed without the leave of the court, and that the duty owed by practitioners to the court can demand that they continue to perform certain functions — beyond the limited scope that the client agreed to — in order to satisfy the proper administration of justice.

The Law Council concluded that further work is needed on these issues, in consultation with the Australian Bar Association on the advocacy and litigation rules.

Conclusions

1. Further consultations with the Australian Bar Association on whether Rule 19.3 should be omitted.
2. Further consultations with the Australian Bar Association on whether Rule 19.5 should be amended.

If the Law Council and Australian Bar Association concur on these matters, a reformulated Rule (not proposed at this time) would be as follows.

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

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

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

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

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

19.4.1 are within the solicitor's knowledge;

19.4.2 are not protected by legal professional privilege; and

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

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

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

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

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

(ii) **must refuse to appear on the application.**

(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 - 19.12 no change

Rule 20 (Delinquent or guilty clients)

Current rule

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

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

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

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

must –

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Issues canvassed

1. Should the rules (specifically Rule 20.2) adopt the equivalent of Rule 80(d) of the Barristers' Rules that requires a legal practitioner, when acting as an advocate, to ensure that the prosecution is put to proof of its case when a client has confessed guilt to the practitioner, but maintains a plea of not guilty?

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

Rule 20 (Delinquent or guilty clients)

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

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

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

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

must –

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

~~20.1.5~~

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

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

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

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

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

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

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

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

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

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

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

Responses and considerations

Issue 1 – Whether Rule 20.1.4 should be harmonised with Barristers' Rule 80(d)

Rule 80(d) of the Barristers' Rules provides that where a client confesses guilt to a barrister in a criminal matter but maintains a plea of not guilty, the barrister must (among other things) ensure that the prosecution is put to proof of its case. The proposal that the ASCR be harmonised by inserting the same requirement where a client confesses guilt to a solicitor who is acting as the client's advocate was supported in three submissions, one of which noted that Rule 80(d) of the Barristers' Rules:

> *…emphasises that notwithstanding a confession of guilt, the advocate still owes positive duties to his client, to ensure that he or she is not convicted on material which does not prove the charge beyond reasonable doubt...rule 20.2 [of the solicitors' rules] does not presently emphasise this factor to a sufficient degree.*

Issue 2 – Harmonise Rules 20.1 and 20.2 with their equivalent Barristers' Rule 79

Rule 20.1

This Rule currently provides that where a solicitor becomes aware that the client or a witness on the client's behalf has lied, falsified a document tendered, or suppressed evidence, the solicitor has to do two things – firstly to advise the client that the court should be informed [Rule 20.1.4] and, secondly, if the client does not authorise the disclosure, to

refuse to take any further part in the case [Rule 20.1.5], and to not inform the court of the lie, falsification or suppression.

The Law Council consulted on whether the first requirement – a positive ethical obligation to advise the client that the court should be informed of the lie, falsification or suppression - should be omitted as there is no equivalent obligation in Barristers' Rule 79. The rationale for the suggestion is that the first requirement for the solicitor [Rule 20.1.4] is implicit in the second requirement for the solicitor [Rule 20.1.5], which could be explained in *Commentary*.

One of the submissions received did not support the proposal to delete Rule 20.1.4, on the basis that the positive obligation to provide advice to clients in these circumstances is an important intermediate action for solicitors, and that the obligation is not sufficiently implied in Rule 20.1.5 to warrant deleting Rule 20.1.4 in order to align with the Barristers' Rules.

Further, it was said that retaining Rule 20.1.4 would also more closely reflect the requirements of Rules 19.5.1 and 19.5.2 - that is, to seek instructions from the client to waive privilege so as to make a disclosure to the court of matters that would support an argument against granting or limiting the terms of the interlocutory relief, and if the client does not waive privilege, to advise the client of the consequences and to withdraw from the matter.

This submission highlights that while a solicitor might undertake an advocacy role in proceedings, there may still remain certain duties and obligations toward clients, other parties and to the court that might be said to be inherent in the role of a solicitor. A similar observation was made in another submission on proposed Rule 22.9 (communication with an unrepresented party – see page 141).

The Law Council observes that the requirements of solicitors under Rule 20.1.4 have no direct equivalent in the Barristers' Rules, perhaps on the assumption that in the typical case a barrister has an instructing solicitor, who (as the client's legal adviser/solicitor on the record) would undertake the task of explaining to the client that the court should be informed of the lie, falsification or suppression and request authority from the client to inform the court. This distinction is perhaps less clear-cut nowadays with more and more solicitors undertaking advocacy work, perhaps without their own instructing solicitor.

The Law Council concluded that Rule 20.1.4 should be omitted, and to expand the *Commentary* to emphasise the importance of the solicitor explaining to the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court.

Rule 20.2

Rule 20.2.1 provides that where a client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty, the solicitor 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.

Rule 20.2 is formulated differently to its equivalent Barristers' Rule 80, and Rule 20.2.1 has no equivalent in the Barristers' Rules.

The only substantive response received to this issue noted that it will often be difficult for a solicitor to judge whether another solicitor has adequate time to take over the case, and that it would "be protective of the solicitor that the client who maintains a plea of not guilty expresses his or her consent to the constraints on appearance (Rule 20.2.2) which arise after a confession of guilt."

Further, the submission expressed the view that the structure of Rule 80 of the Barristers' Rules is preferable to ASCR Rule 20.2.2 insofar as it deals with the obligation or otherwise to keep acting for the client.

A reformulation of Rule 20.2 to align with Barristers' Rule 80 would be as follows:

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; ~~and~~

20.2.7 may argue that for any other reason not prohibited by 20.2.2 and 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.**

Conclusions

1. The equivalent of Rule 80(d) of the Barristers' Rules be included in a revised Rule 20.2
2. That Rule 20.1.4 be omitted, and the Commentary expanded; and
3. Rule 20.2 be harmonised with Rule 80 of the Barristers' Rules.

Rule 21 (Responsible use of court process and privilege)

Current rule

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client's case on its merits;

21.1.3 is not made principally in order to harass or embarrass a person; and

21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.

21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client's case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

21.3 A solicitor must not allege any matter of fact in:

21.3.1 any court document settled by the solicitor;

21.3.2 any submission during any hearing;

21.3.3 the course of an opening address; or

21.3.4 the course of a closing address or submission on the evidence,

unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.1, 21.2, 21.3 and 21.4 apply**,** as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).

21.7 A solicitor who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.

21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

Issues canvassed

1. That the words "take care to" be retained in Rules 21.1 and 21.2.

2. That Rule 21.1.4 be amended to include a reference to third parties.

3. That the *Commentary* to Rule 21 draw solicitors' attention to the need (in the context of Rule 21.5) to have regard to the applicable provisions (if any) of the *Evidence Act* of the relevant jurisdiction.

4. Should Rule 21.8 be amended to include a reference to domestic or family violence as an additional (but not exhaustive) issue where a solicitor must take care in pursuing a line of questioning of a witness? Alternatively, should Rule 21.8 be reformulated to express the general principle that care must be taken to not pursue improper lines of questioning, with *Commentary* also developed to highlight specific issues where the principle must be observed, including allegations of sexual assault, indecent assault, and allegations of domestic or family violence?

5. That Rule 21 be reformulated as follows:

Rule 21 (Responsible use of court process and privilege)

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client's case on its merits;

21.1.3 is not ~~made~~ **given** principally in order to harass or embarrass a person; and

21.1.4 is not ~~made~~ **given** principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor or a third party out of court.

21.2-21.5 [no change]

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules ~~21.1, 21.2~~, 21.3 and 21.4 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).

21.7-21.8 [no change]

21.9 A solicitor does not infringe Rule 21.8 merely because:

(i) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

(ii) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

Responses and considerations

Issue 1 – Retain "take care to" in Rules 21.1 and 21.2

The Consultation Paper referred to the suggestion that the words "take care to" be removed so that the rule might be seen as placing a positive obligation on a solicitor to ensure the advice to the court to invoke its coercive powers is effected in accordance with the principles underlying Rules 21.1.1-21.1.4.

The view expressed in the Consultation Paper is that the words "take care to" reinforce, rather than diminish, a solicitor's responsibilities when tendering advice to their client about invoking the coercive powers of the court. The suggested change would not add to the substance of the rules. Barristers' Rules 60 and 61 likewise use the expression "take care to".

The only response to this issue supported the retention of the words "take care to".

Issue 2 – Amend Rule 21.1.4 to include a reference to third parties

The Consultation Paper noted that the present Rule refers to the duty not to invoke the coercive powers of the court in order to obtain a collateral advantage for the client, the solicitor or the instructing solicitor out of court. The Consultation Paper suggested that giving advice to invoke the coercive powers of the court to gain a collateral advantage for a third party would be clearly understood as a serious breach of the principle underscoring Rule 21.1.4 and should be included in the Rule, consistent with Barristers' Rule 60(d).

Submissions received in response to this issue agreed with the recommendation.

Issue 3 – Rule 21.5 and the Evidence Acts

Rule 21.5 provides that a solicitor appearing as an advocate 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. It had been recommended that this Rule be harmonised with its relevant counterparts in section 103 of the uniform evidence laws, for example, the *Evidence Act 1995* (Cth).

The Consultation Paper recommended against this, noting that while some jurisdictions have uniformity, the Evidence Acts in other jurisdictions contain different provisions. The Law Council considered that it would be better to draw attention to the various Evidence Acts in the *Commentary*.

The only submission that responded to this issue agreed with the recommendation.

Issue 4 - Should Rule 21.8 include a reference to domestic or family violence

Rule 21.8 provides:

> 21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:
>
> 21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:
>
> (i) to mislead or confuse the witness; or
>
> (ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and
>
> 21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.

The Consultation Paper canvassed a large number of considerations and views about whether Rule 21.8, which refers to proceedings related to sexual offence allegations, should be expanded to include references to domestic and family violence.

The Consultation Paper noted that Rule 21.8 draws to the attention of solicitors that they must not unfairly question a victim of an alleged sexual assault about prior sexual conduct in order to colour the issue of consent to the act that forms the basis of the complaint. Barristers' Rule 62 is the equivalent of ASCR Rule 21.8.

The Consultation Paper also drew to attention Barristers' Rule 63 which sets out that a barrister does not breach Barristers' Rule 62 (the equivalent of ASCR Rule 21.8) merely because the line of questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or because the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

Submissions and responses supported the inclusion of an equivalent to Barristers' Rule 63 within ASCR Rule 21.

There was also support for including a reference to domestic and family violence in Rule 21.8 (although other submissions suggested this be dealt with in the Commentary).

One of the detailed submissions that supported an amendment to Rule 21.8 noted that domestic and family violence is an area of significant and appropriate concern for society, and specific attention should be brought in the Rules to the special vulnerability of alleged victims giving evidence in relation to alleged domestic violence offences. In response to the issues specifically canvassed in the Consultation Paper, the submission:

- disagreed that a specific amendment to the Rules would 'overemphasise the importance of protections for witnesses in domestic and family violence cases as compared with other classes of vulnerable witnesses.'
- disagreed that a specific amendment would obscure the original intention of the rule; to the contrary, it would appropriately draw attention to the vulnerability of alleged victims to alleged domestic violence offences.
- noted the concern that the introduction of a specific amendment would also necessitate that the rules define 'domestic and family violence.' If a definition is necessary, guidance is available from definitions that are used for existing domestic violence offences. For instance, see ss 5 and 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).
- it would be preferable to make a specific amendment in conjunction with a similar amendment to the Barristers' Rules, but not necessary.
- a specific amendment to the Rule would not preclude further amendments to adopt more general provisions as to improper questions, such as those at s 41 of the *Evidence Act 1995* (Cth). However, a benefit of a specific amendment to Rule 28.1 as compared to adopting such general provisions is that Rule 28.1 draws attention to the special vulnerability of alleged victims to alleged domestic violence offences before a question is asked.

Subsections 41(1)-(3) of the *Evidence Act 1995* (Cth) provide as follows.

> **41 Improper questions**
>
> (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a ***disallowable question***):
>
> (a) is misleading or confusing; or
>
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
>
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
>
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
>
> (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:

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

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

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

(i) the nature of the proceeding; and

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

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

(3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or

(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

The Attorney-General (Queensland) noted the Queensland Government adopted Recommendation 111 of the *Not Now, Not Ever: putting an end to domestic and family violence in Queensland* Report that the Rule should include reference to domestic and family violence.

The Chair of the Australian Bar Association Ethics Committee commented that amending the Rule to add a reference to domestic or family violence would not address the broader issues covered by the *Evidence Act 1995* (Cth). The Law Council's Professional Ethics Committee and the ABA's Ethics Committee will consult on further reformulations when the ASCR are next reviewed, noting the choices are between removing any reference to characteristics of vulnerability (as various States have done in their amendments to the Evidence Act) or attempting to define characteristics of vulnerability more broadly – beyond being a victim of domestic of family violence, as the Commonwealth's Evidence Act does.

In another submission, a legal assistance organisation recommended the *Commentary* also address the need for practitioners to be mindful of the potential for legal proceedings and processes to be used by alleged perpetrators of family violence or psychological abuse to maintain a dynamic of abuse in a relationship.

It is also noted that the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth) amends the *Family Law Act 1975* by inserting sections 102NA and 102NB, dealing with mandatory cross-examination protections for parties where allegations of family violence are involved. While there is an emphasis in the Rule on matters pertaining to sexual assault, indecent assault, acts of indecency, and family and domestic violence, the Law Council agrees that the significant issue the Rule is dealing with is vulnerable witnesses, and the reformulated rule should not be seen as detracting from ethically responsible approaches to other vulnerable witnesses.

Conclusions

1. That the words “take care to” be retained in Rules 21.1 and 21.2.
2. A reference to third parties be included in Rule 21.1.4.
3. That Rule 21.5 not be harmonised with the various Evidence Acts, but the Commentary be expanded.
4. That Rule 21.8 be amended to include reference to domestic or family violence, subject to further consultations with the Australian Bar Association on the adoption of a similar amendment to Barristers’ Rule 62 and an agreed formulation of the amended rules.
5. That Rules 21.1.1 to 21.1.4, Rule 21.6 and Rule 21.9 be reformulated to align with the equivalent Barristers’ Rules.

Proposed rule

21.1 A solicitor must take care to ensure that the solicitor’s advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client’s case on its merits;

21.1.3 is not ~~made~~ **given** principally in order to harass or embarrass a person; and

21.1.4 is not ~~made~~ **give**n principally in order to gain some collateral advantage for the client or the solicitor or ~~the instructing solicitor~~ **a third party** out of court.

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 **family or domestic 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:

29.9.1 the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or

29.9.2 the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

Rule 22 (Communication with opponents)

Current rule

22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.

22.3 A solicitor will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

Issues canvassed

1. That *Commentary* explains general principles of professional conduct concerning the need for courtesy and the inappropriateness of making threats about future actions as opposed to making a statement that actions will be taken consistent with a client's rights under the law.

2. Should ASCR Rule 33 (about not dealing directly with the client or clients of another legal practitioner) be replicated in Rule 22 to highlight that the principle also applies in an advocacy and litigation setting, as well as in general legal practice?

3. That Rule 22 be reformulated as follows:

Rule 22 (Communication with opponents)

22.1 A solicitor must not knowingly make a false **or misleading** statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false **or misleading** statement in relation to the case made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.

22.3 A solicitor ~~will not have made~~ **does not make** a false **or misleading** statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.

22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the ~~opponent's~~ consent **of the opponent**.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

22.9 A solicitor must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course.

4. That the *Commentary* draw attention to the application of the principles in Rule 22.5 where solicitors utilise online court systems.

5. An additional issue was raised in submissions about Rule 22.4, suggesting a need for guidance in the Commentary about the effects of subrogation and dealing with insurers in subrogated proceedings.

Responses and considerations

Issue 1 – Should former NSW Rule 25 be incorporated into Rule 22

The Consultation Paper noted that Rule 25 of the former *Professional Conduct and Practice Rules 2013* (NSW) stated that a solicitor must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring courteousness and by avoiding offensive or provocative language. The Consultation Paper stated that these requirements are implicit in Rule 4 (other fundamental ethical duties) and recommended the *Commentary* could be expanded.

The three responses to this issue agreed with the views in the Consultation Paper, with one submission adding that the *Commentary* discuss solicitors making threats about personal costs orders.

Issue 2 - Should Rule 33 be replicated in Rule 22

Rule 33 provides that a solicitor must not deal directly with the client or clients of another practitioner unless that other practitioner has consented, except in limited circumstances and for limited purposes, for example: where the matter is urgent and the contact would not be unfair to the opponent's client; where the contact is solely to ascertain if the parties are represented and by whom; or the other practitioner has been given notice, but has failed to respond and there is a reasonable basis for proceeding to contact the client.

A submission that responded to this issue commented that Rule 33 should not be replicated in Rule 22, but it should be stated in Rule 22 that the circumstances in which Rule 33 applies includes advocacy and litigation.

The Law Council concluded that no change should be made to Rule 22 to replicate Rule 33.

Issue 3 - Reformulation of Rule 22 to harmonise with the Barristers' Rules

The Consultation Paper sought comments on:

- substituting "false statement" in Rules 22.1, 22.2 and 22.3 with "false or misleading statement" and other minor word changes to align with the Barristers' Rules; and
- adopting Barristers' Rule 53, which provides:

  A barrister must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course.

There were no submissions received commenting on the first group of changes, but many submissions raised concerns about the adoption into the ASCR of Barristers' Rule 53.

It was suggested in submissions and discussions that Barristers' Rule 53 would likely have been formulated in the typical case where the barrister has an instructing solicitor, who would undertake the task of communicating with an unrepresented opponent. The AFP for example, said that "*it is frequently necessary for lawyers in our CAL [Criminal Assets Litigation] team to deal directly with unrepresented litigants in order to efficiently and effectively progress proceeds of crime litigation*." An ethical prohibition on a solicitor conferring or dealing directly with an unrepresented party unless the party has signified

willingness to that course would, in the AFP view, give rise to the following problems about the efficient conduct of proceedings:

- the proposed rule would appear, for example, to prevent AFP lawyers from approaching a self-represented litigant to seek an adjournment by consent, inform them of pending court dates, put forward a settlement offer, or even to advise a self-represented litigant that he or she should obtain independent legal advice about a matter;
- the proposed rule would hinder the ability to comply with the obligation to be a model litigant under the *Legal Services Directions 2017* (Cth) including obligations to: deal with claims promptly and not cause unnecessary delay in the handling of claims and litigation; endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, and where it is not possible to avoid litigation, keep the costs of litigation to a minimum;
- such a rule may conflict with requests by a court which are directed to AFP lawyers to assist unrepresented litigants with procedural aspects of a court proceeding per, for example, subsection 56(3) of the *Civil Procedure Act 2005* (NSW) – the duties of lawyers to assist the court when opposing unrepresented litigants was stated by Macfarlan JA in *Serobian v Commonwealth Bank of Australia*[57] ; and
- the proposed rule would be at odds with Rules 22.2, 22.6 and 22.8.

Another submission that did not support proposed rule 22.9 noted that:

> *…such a rule may be appropriate for barristers. However, in the absence of a solicitor conferring with, or dealing directly with, an unrepresented party, unreasonable burdens may be imposed on courts and tribunals or the represented party to undertake or oversee necessary communications.*

Other submissions commented:

> *It might be appropriate if the solicitor was purely an advocate, but if the solicitor is also acting on behalf of the solicitor's client generally it is impractical to prevent the solicitor from dealing directly with the unrepresented party.*
>
> *[The proposed Rule]…may cause difficulty or concern for solicitors such as those within government departments that are often required to deal with unrepresented members of the public in a variety of contexts that are not always strictly adversarial but may have elements that are adversarial in nature.*
>
> *…government solicitors often act for the registrars of professional-body tribunals or boards and other licence regulators. Government solicitors are sometimes called upon by the relevant registrar or regulator to handle queries, applications, or general correspondence received from members of the public. Sometimes these matters proceed to more formal adversarial settings, but other times they do not. In these situations, it is difficult to ascertain whether a solicitor would be in breach of proposed sub rule 22.9. For this reason, it is submitted that perhaps the sub rule should include an express reference to not conferring or dealing with an*

[57] [2010] NSWCA 181 [42]

unrepresented party 'to proceedings' or similar it is perhaps troublesome to broadly prohibit the solicitor from conferring or dealing with unrepresented parties if they have not expressly signified their willingness for that to occur. Barristers rule 53 (and proposed sub rule 22.9) do not immediately translate to the similar but slightly differing roles played by a solicitor in this situation."

proposed Rule 22.9 appears to be inconsistent with the obligation on solicitors to confer with the other side and resolve disputes at an early stage. Often such conferral is also ordered by the Court, and is required by O59r9 of the Rules of the Supreme Court 1971 (WA).

In light of the above, and other comments received, the Law Council concluded it would not be appropriate to adopt Barristers' Rule 53 in the ASCR.

Issue 4 – on-line court systems

The Consultation Paper noted that on-line court systems enable a solicitor to electronically lodge a "Request" with the court (which might include a request for an adjournment), and which is viewable by all parties. It has been commented that the use of on-line court systems in this way might result in a solicitor communicating with the court concerning a matter of substance in connection with current proceedings, without the opponent's consent being obtained beforehand, contrary to Rule 22.5.2.

The Consultation Paper also noted that the obligation in Rule 22.5 is an obligation of conferral with an opposing solicitor before filing documents, which serves the important purpose of both solicitors being aware of and consenting to approaches by each of them to the court which might affect the course of the proceedings.

The Committee sought comments on whether the *Commentary* to Rule 22.5 should highlight the application of the principle in the context of on-line court systems, drawing attention to the need for a solicitor to confer with the opponent, regardless of the means by which documents might be lodged with the court.

One of the submissions received supported an expansion of the Commentary, but another submission recommended that Rule 22.5 be amended to:

…draw a clear distinction between communication with the court generally and communication between parties and the court in an online court environment. This distinction will become more important as the use of online courts expands.

The submission noted that in New South Wales the Online Court is a "virtual courtroom" and that the Online Court Practice Notes require the parties to communicate and act as if physically present in a court room. Accordingly:

"*it is not appropriate for Rule 22.5 to apply to communications within the Online Court, which is the virtual equivalent of the parties standing before a Registrar*" and that "*to apply the Rule in these circumstances would undermine the efficiency and effectiveness of the Online Court*."

It was recommended that:

- Rule 22.5 be amended to provide an exception in circumstances where the solicitors are operating in accordance with the procedures and processes of an online court (where that court is intended to be a "virtual courtroom") and
- the obligation in Rule 22.6 (to inform opponents promptly of any communications with the court) not apply if an opponent is automatically notified of communications by an on-line court.

The Law Council concluded that as not all States and Territories have moved to on-line court systems, and the systems already in place are still developing, it would be preferable at this stage to address the issues in the *Commentary*.

Issue 5 – Rule 22.4 and the effect of subrogation

Rule 22.4 provides that a solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer unless the party and the insurer have signified willingness to that course.

The absence of guidance in the *Commentary* on Rule 22.4 and the effect of subrogation on dealing with unrepresented parties was raised in a submission:

> *While it is common for an insurer to stand behind a party that they indemnify, unless or until the insurer engages a solicitor to represent the insured it is neither practical nor appropriate for a solicitor to deal with the insurer rather than directly with the party. Insurers are not solicitors. In court proceedings, the solicitor is obliged to serve documents on the other party's lawyer or, where a party is unrepresented, directly. There is no provision for a solicitor to serve documents on the insurer. There are also other contexts where a solicitor will need to deal directly with a party, including:*
>
> - *Serving notices under a contract;*
> - *Complying with dispute resolution obligations under s contract; attending a mediation (if the insurer is not present); and*
> - *Negotiating consent orders at court (if the insurer does not appear).*
>
> *If there are specific situations in which this rule is appropriate, the rule should be explicitly limited to those situations.*

It was submitted that if there are specific instances where Rule 22.4 is appropriate, then the rule needs to be explicitly limited to those situations. It was suggested that the Rule could be amended to clarify that a solicitor 'should not confer with any party who is known to be represented, or indemnified by an insurer, who has requested that contact should only be made through the insurer, except to the extent of any other statutory or contractual obligation.'

It was also submitted that guidance in the *Commentary* on the effect of subrogation would be helpful.

This issue is related to the suggested rule on the disclosure of the insurer in such circumstances, addressed on pages 245-246 of this Report. From a practical standpoint, it

is recognised that a party cannot comply with Rule 22.4 unless the identity of the insurer has been disclosed. For the reasons addressed from page 246, the Law Council does not consider that parties be required to disclose the involvement of an insurer in proceedings.

The effect of this is, unless the party has been provided with the insurer details, the insured has tacitly signified agreement to direct contact as the other party has no alternative and cannot assume subrogation unless otherwise informed. Accordingly, the reformulation suggested amounts to a clearer representation of the same rule.

The Law Council agrees that clarification of this issue in the *Commentary* would be useful, and should address some specific circumstances where the Rule may not apply, for example, where the insurer has not yet appointed legal representation (which might perhaps happen more often in less serious matters at the Local Court level) or circumstances where a solicitor is statutorily obliged to contact a defendant as well as the defendant's insurer (such as in serving a statement of claim under motor accident legislation).

The Law Council also proposes to revisit this issue in the next review of the Rules.

Conclusions

1. That the *Commentary* to Rules 4 and 22 emphasise that a solicitor must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring courteousness and by avoiding offensive or provocative language.
2. That no change be made to Rule 22 to replicate Rule 33
3. That Rule 53 of the Barristers' Rules (*A barrister must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course*) not be adopted in the ASCR.
4. That the *Commentary* be expanded to explain the application of the Rule when using an on-line court system.
5. That the *Commentary* be expanded to provide guidance on Rule 22.4 and the effect of subrogation, and the issue be revisited in the next review of the Rules.
6. That the words "or misleading" be included in Rules 221.-22.3.

Rule 23 (Opposition access to witnesses)

Current rule

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

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

Issues canvassed

Whether Rule 23 be reformulated as follows:

Rule 23 (Opposition access to witness)

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

23.2 A solicitor ~~will not have~~ does not breach Rule 23.1 simply by:

23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed; or

23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality.

Responses and considerations

The Consultation Paper sought comments on whether Rule 23 could be reformulated as above, for clarity and harmonisation with the equivalent Barristers' Rules 74 and 75.

Submissions received on this issue supported the reformulation, and one submission proposed an alternative formulation of Rule 23.2:

23.2 A solicitor does not breach Rule 23.1 by advising a prospective witness or a witness:

23.2.1 that he or she need not agree to confer or to be interviewed; or

23.2.2 about relevant obligations of confidentiality.

Conclusions

1. That the Rule be reformulated to harmonise with the equivalent Barristers' Rules.

Proposed rule

Rule 23 (Opposition access to witness)

23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.

23.2 A solicitor does not breach Rule 23.1 simply by:

23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed; or

23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality.

Rule 24 (Integrity of evidence – influencing evidence)

Current rule

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rule 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

Issues canvassed

No issues were raised for consultation

Rule 25 (Integrity of evidence – two witnesses together)

Current rule

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.

Issues canvassed

No issues were raised for consultation

Rule 26 (Communication with witnesses under cross-examination)

Current rule

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.

Issues canvassed

No issues were raised for consultation

Rule 27 (Solicitor as a material witness in client's case)

Current rule

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

Issues canvassed

Whether Rule 27 should be reformulated as follows:

Rule 27 (Solicitor as material witness in client's case)

27.1 A solicitor must not, unless the due administration of justice would warrant otherwise in the solicitor's considered opinion:

27.1.1 appear for a client at any hearing; or

27.1.2 continue to act for a client

in a case where it is known, or becomes apparent, that the solicitor will be required to give evidence material to the determination of the contested issues before the court.

Responses and considerations

The Consultation Paper noted criticism that the current drafting of Rule 27.1 implies that it is a discretionary decision for the solicitor to determine whether to appear as an advocate for the client in the hearing in the circumstances outlined in that rule. It has been suggested the rule should be re-drafted as an absolute prohibition by replacing the words "may not" with "must not". The Law Council view was that judicial consideration of the issue has not gone so far as to impose an absolute prohibition, that restraining a solicitor from appearing as an advocate in a particular case was ultimately a matter for the court, and the Rule should not therefore pre-emptively prohibit a solicitor from appearing or continuing to appear.

Further, the Consultation Paper noted that Rule 27.2 deals with the situation where the solicitor who may be required to give evidence material to the determination of the contested issues is also the solicitor on the record, which can give rise to the potential for conflicts between the solicitor's duties to the client, with the solicitor's personal interests as a witness and the duty to the court. The Consultation Paper suggested that current Rule 27.2 did not need to be amended to revert to a previous formulation that a solicitor should withdraw from acting "unless exceptional circumstances exist", noting that the expression "unless doing so would prejudice the administration of justice" was a more certain statement of the underlying

rationale which, as was noted in *Barrak Corporation Pty Ltd v Kara Group of Companies Pty Ltd*,[58] had not changed the purpose of the provision.

One of the submissions received noted that while the Consultation Paper assumes Rule 27.2 is limited to the solicitor on the record, it is important that there be no such limitation, although the wording of the Rule does not reflect such a limitation.

It was commented that the proposed reformulation is a useful clarification, and was suggested that the words "in the solicitor's considered opinion" are superfluous, and that the use of the word "the" before "contested issues" could suggest a limitation to existing issues rather than contested issues which might arise out of the solicitor's evidence.

Another submission did not support the proposed reformulation of Rule 27, noting there is significant difficulty in formulating absolute rules that account for all contexts, and the power of the Court to restrain a solicitor from acting is a safeguard against situations where solicitors exercise their discretion to act in circumstances where doing so would prejudice the administration of justice.

There was agreement in one submission to the replacement of "may not" in the present rule with "must not" in the proposed rule, but this was in the context of a view that Rule 27:

> *…should completely prohibit a solicitor from appearing as a witness in their client's case, whatever the circumstances. We consider that appearing both as a witness and an advocate in their client's case creates a conflict of interest which breaches the solicitor's duty to the court. We consider this conflict of interest to be of greater threat than the possibility of unnecessary complication as suggested [in the Consultation Paper]. Unlike barristers, solicitors are under no obligation to work for any client, and we consider this a circumstance in which it is appropriate that the solicitor should withdraw from their role as advocate for the client [and that] the phrase 'unless the due administration of justice would warrant otherwise in the solicitor's considered opinion' be omitted.*

Alternatively, this submission recommended that if the rule is reformulated, the expression "in the solicitor's considered opinion" be removed on the basis that this is open to subjective interpretation.

Another submission expressed the view that:

> *…the wording of Rule 27 should shift the onus back to being a presumption on withdrawal, unless there are compelling reasons (i.e. exceptional circumstances) for staying in (as it was in the previous Professional Conduct and Practice Rules 2005 at rule 13.4.) This is particularly so in light of the decision in Barak v Kara Group of Companies Pty Ltd [2014] NSWCA 395, as well as Bailey v Richardson [2015] VSC 255. These decisions make it clear that (irrespective of what rule 27 says) a solicitor material witness owes a* ***duty to the court*** *not to continue to act in a proceeding in which the solicitor is to be a material witness.*

[58] [2014] NSWCA 395.

This view was not shared in another submission, which noted that there is no difficulty with the proposed reformulation of Rule 21.1. Also, the Chief Justice noted he has no difficulty with the retention of Rule 27.2 - “In that respect, I agree with what was said by Adamson J in *Barrack Corporation Pty Ltd v Kara Group of Companies Pty Ltd* [2014] NSWCA 395 at [49]:”

> *[49] The effect of the amendment is to change the rule from a prohibition qualified where there are "exceptional circumstances justifying the practitioner's continuing retainer by the ... client" (Rule 19) with a qualified permission that allows a solicitor to continue to act for the client unless doing so would prejudice the administration of justice (Rule 27.2). I do not discern any change in the purpose of the provision, which is to protect the administration of justice by circumscribing the circumstances in which a solicitor who is, or may be, required to give evidence in proceedings is permitted to act.*

The Law Council concluded that whether or not a solicitor continues to act is ultimately a decision for the court. Both the current Rule and the reformulation refer to *prejudice to the administration of justice* as the fundamental test to be applied by practitioners under the rule.

Conclusions

1. That Rule 27 be reformulated as set out below.

Proposed rule

Rule 27 (Solicitor as material witness in client’s case)

27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member **must not** ~~may act or~~ continue to act for the client **if** ~~unless~~ doing so would prejudice the administration of justice.

Rule 28 (Public comment during current proceedings)

Current rule

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.

Issues canvassed

1. That Rule 28 be retained, in its current formulation.

2. That *Commentary* provides examples of the application of Rule 28.

Responses and considerations

Issue 1 – should Rule 28 be omitted?

The Consultation Paper noted suggestions that the Rule should either be deleted as it unreasonable fetters the ability of legal practitioners and community legal centres to publicly comment on current proceedings, or alternatively, guidance be given in the *Commentary* about how the rule applies in relation to public interest cases.

The Consultation Paper expressed the view that the rule does not completely prohibit public comment – the underlying principle is that any comment should not prejudice a fair trial or the administration of justice.

The submissions received supported this view and recommended;

- the *Commentary* includes a discussion of *Legal Services Commissioner v Orchard*[59] to explain the breadth of the term 'publication.
- the *Commentary* consider reference to proposed amendment to the *Corporations Act* (Cth) dealing with whistle-blower protections.
- the *Commentary* include examples of cases where community legal centres are involved in public interest proceedings and the extent to which they can inform the public of the issues raised in a public interest matter.

Attention was also drawn to the equivalent Western Australia rule (WA Rule 43(1)) which expands on ASCR Rule 28 to allow a practitioner to make comments when participating in lectures, talks, public appearances, radio, television or other transmissions or contributing to written or printed publications except where it contravenes other rules. However, a practitioner must not publish or take steps towards the publication of any material concerning current proceedings that may prejudice a fair trial or otherwise subvert or undermine the administration of justice (WA Rule 43(2)). Also, a practitioner must not participate in or contribute to a forum if the forum is, in whole or in part, about a matter in which the practitioner is or has been professionally engaged unless: participation is not contrary to the interests of the client; the practitioner gives a fair and objective account of the matter in a manner consistent with the maintenance of the good reputation and standing

[59] [2012] QCAT 583.

of the legal profession; and if the forum is radio, television or some other transmission, the client has given informed consent (WA Rule 43(3)).

Issue 2 – Should the *Commentary* be expanded

Submissions in response to Issue 1 supported expanded *Commentary*.

Conclusions

1. That the Rule be retained.
2. That the Commentary be expanded to include examples of the application of the Rule.

Rule 29 (Prosecutor's duties)

Current rule

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn; or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances;

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point

already adequately established by another witness or other witnesses; or

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable,

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii) or (iv) together with the grounds on which the prosecutor has reached that decision.

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material; and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

29.9 A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.

29.10 A prosecutor must not inform the court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

29.11 A prosecutor who has informed the court of matters within Rule 29.10, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

29.12 A prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence;

29.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;

29.12.3 must assist the court to avoid appealable error on the issue of sentence;

29.12.4 may submit that a custodial or non-custodial sentence is appropriate.

29.13 A solicitor who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 29.1, 29.3 and 29.4 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 29.

Issues canvassed

1. That the rule should not contain a specific exemption for Directors of Public Prosecutions or their staff.

2. That a new rule be adopted in the same terms as Rules 96-100 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) concerning solicitors who appear as counsel assisting an investigative tribunal.

3. That *Commentary* draw attention to the decision in *Barbaro v R* and that solicitors need to be aware of any jurisdictional legislation enacted in response.

4. That it would not be appropriate to amend Rule 29.3 to require a prosecutor to, in every case, inform the opponent of the existence of a belief, and the grounds for believing, material available to the prosecution may been unlawfully or improperly obtained.

5. That Rule 29 be reformulated as follows:

Rule 29 Prosecutor's duties

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn; or and

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; ~~or~~

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable*;* **or**

(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case,

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii), ~~or~~ (iv) **or (v)** together with the grounds on which the prosecutor has reached that decision**, unless the interests of justice would be harmed if those grounds were revealed to the opponent.**

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material; and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

29.9 A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.

29.10 A prosecutor must not inform the court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

29.11 A prosecutor who has informed the court of matters within Rule 29.10, and who has later learnt that such evidence will not be available, must immediately

inform the opponent of that fact and must inform the court of it when next the case is before the court.

29.12 A prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence;

29.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;

29.12.3 must assist the court to avoid appealable error on the issue of sentence; **and**

29.12.4 may submit that a custodial or non-custodial sentence is appropriate.

~~29.12.5 may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant decisions.~~

~~29.13 A solicitor who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 29.1, 29.3 and 29.4 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 29.~~

Investigative tribunals

29.13 Rules 28 and 29.1-29.12 do not apply to a solicitor who appears as counsel assisting an investigative tribunal.

29.14 A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.

29.15 A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.

29.16 A solicitor who appears as counsel assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the solicitor does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.

29.17 A solicitor who appears as counsel assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the solicitor is appearing or any potential proceeding in which a solicitor is likely to appear, other than:

(a) a solicitor may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal, or

(b) a solicitor may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:

(i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,

(ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal, or

(iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.

Responses and considerations

Issue 1 – Should the Rule exempt Directors of Public Prosecutions (DPP) and their staff?

The Consultation Paper noted calls had been made on a number of occasions to specifically exempt Directors of Public Prosecutions and their staff from Rule 29 on the basis that existing legislation or guidelines cover their duties and responsibilities. The Consultation Paper suggested that, consistent with the inclusion of similar rules in the Barristers' Rules, it is appropriate to include statements of ethical principles as they apply to solicitors carrying out prosecutorial duties as DPP.

No responses were received.

Issue 2 – Should the Rule be aligned with Rules 96-100 of the Barristers' Rules?

The Consultation Paper sought comments on five matters relating to Rule 29 (Prosecutors duties) including whether to omit current Rule 29.13 (appearing as counsel assisting an inquisitorial body) and substitute that rule with the more detailed barrister's rules 96-100 (investigative tribunals). This would have the effect of setting discrete ethical rules applying in the specific circumstance of appearing as counsel assisting an inquisitorial body.

Rule 29.13 presently provides:

> *A solicitor who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 29.1, 29.3 and 29.4 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 29.*

The Consultation Paper noted that a number of elements of Rule 29 as they relate to the conduct of counsel assisting an investigative body with the powers of a Royal Commission should be removed, consistent with similar comments made in relation to the Barristers' Rules. It was suggested that the attempt to adapt rules, which were drafted for the specific purpose of regulating the conduct of a prosecutor in the criminal trial of an accused, is misplaced and that the desired outcome would be better achieved by specific rules tailored to an inquisitorial process. Particular rules variously refer to "a prosecutor", "the court", "the accused" and "a finding of guilt". The Consultation Paper noted that none of these terms

can be meaningfully applied to an investigative body with coercive powers, and suggested that a separate section of the rules, with the title “Investigative Tribunals” or “Inquisitorial Tribunals” would be appropriate.

While the responses to the Consultation Paper did not reject the suggestion of a separate set of rules relating to appearances as counsel assisting an investigative tribunal, two submissions:

- questioned why current Rule 29.13 includes the Australian Competition and Consumer Commission and the Australian Crime Commission as inquisitorial bodies;
- noted that there was no definition of ***investigative tribunal*** proposed for the ASCR; and
- questioned why the definition of ***investigative tribunal*** in the Barristers’ Rules includes the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, and the ACCC.

Three submissions supported the recommendation to reformulate Rule 29.

However, the Criminal Intelligence Commission raised several concerns with the proposal to adopt in the ASCR the equivalent Barristers’ Rules 96-100. As an organisation that employs/engages solicitors in exercising coercive criminal intelligence and information gathering powers pursuant to the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**) the Commission considers it is unclear whether the reformulated Rules are intended to apply to ACIC’s solicitors engaged in Counsel Assisting duties:

> *If it is the intention to extend the current obligations on Counsel Assisting the Examiners, then the reformulated rules are not drafted in a way that adequately reflects the nature of an examination or the statutory functions being discharged. Indeed, some of the proposed reformulated rules put solicitors acting as Counsel Assisting in conflict with the express statutory provisions of the ACC Act.*

The Australian Criminal Intelligence Commission also noted that the reformulated Rule 29.16 is in direct conflict with the statutory secrecy provisions applicable to ACIC solicitors under the ACC Act.

The Australian Competition and Consumer Commission also raised similar concerns. The substantive issue is that the investigative processes of the ACCC are not the same as the investigative processes undertaken by Royal Commissions and other similar inquiries with coercive powers. Discussions with the ACCC identified that ASIC has similar concerns.

The inclusion of organisations such as the Australian Criminal Intelligence Commission and the Australian Competition and Consumer Commission (as well as the Australian Securities and Investments Commission) arises from their inclusion in the barristers’ rules for many years.

ASCR Rule 29.13 was adopted many years ago from former Barristers’ Rules. The Australian Bar Association Ethics Committee Working Group considers the definition of *investigative tribunal* is outdated, and that the references to the ACC, ASIC, etc do not seem to be consistent with the other proceedings and roles to which the rules now apply.

While the Law Council supports the approach of separate rules dealing with ethical principles to be applied in an investigative body or tribunal, it concluded that further consultations are required before a concluded view can be settled on substituting existing Rule 29.13 with its equivalent barristers' rule 96-100. Similarly, the Law Council does not consider it appropriate to modify the definitions of *court* and *investigative tribunal* in the Glossary.

Issue 3 – Should the *Commentary* discuss Barbaro v R?

The Consultation Paper noted that the Law Council had previously agreed that Rule 29.12.5 be omitted as a consequence of the judgment in *Barbaro v* R[60]*,* and that some jurisdictions had indicated an intention to amend legislation in response. The Consultation Paper recommended that *Commentary* draw attention to the decision and that solicitors need to be aware of any jurisdictional legislation enacted in response.

No responses were received.

Issue 4 – Unlawfully or improperly obtained material

The Consultation Paper noted that ASCR Rule 29.8 refers to material which a prosecutor believes on reasonable grounds may have been "unlawfully or improperly" obtained whereas the equivalent Barristers' Rule (Rule 91) refers to material that may have been "unlawfully obtained". The Consultation Paper suggested Rule 29.8 might be harmonised with Barristers' Rule 91.

One response was received opposing the proposed change, but without explanation of the basis of this view.

Issue 5 – Reformulation of Rule 29.7 to align with Barristers' Rules 89 and 90

Rule 29.7 requires that, as part of the prosecution's case, a prosecutor must call all witnesses whose testimony is admissible and necessary for presentation of all relevant circumstances, or whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue. Rule 29.7 currently provides four (4) exceptions, each of which is identical to the exceptions in the equivalent Barristers' Rule 89. However, Barristers' Rule 89 also provides an additional exception where:

> the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.

The Consultation Paper recommended the adoption of this fifth exception in the ASCR.

Where one or more of the above exceptions (apart from the first exception) is applied, Rule 29.7 requires that the prosecutor must inform the opponent as soon as practicable of the identity of any witness the prosecution does not intend to call, and to provide the opponent with the grounds for not calling the witness. Barrister's Rule 90 contains the same condition, with the proviso that disclosure is not required *where the interests of justice would be*

[60] [2004] HCA 2

harmed if those grounds were revealed to the opponent. The Consultation Paper also proposed harmonisation by including this qualification.

No comments were received to these suggestions, but in a supplementary submission to the draft Report it was stated:

> *Whilst [we agree] that the rules should be harmonious, we disagree with the original change to the Barristers Rules to include this exception. It permits a prosecutor to unilaterally decide not to call a relevant, truthful and reliable witness and not disclose the reasons for that decision if he or she considers that the interests of justice would be "harmed". Such an exception is not consistent with the exercise of a prosecutor's duties, at least not in South Australian courts (even if one notes the preamble to the exception that the prosecutor has "the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused").*
>
> *Further, if this change is to be made, we consider it would be of assistance if examples were provided of when it might be considered appropriate (and not appropriate) for a prosecutor to make such a decision. For example, it would not be appropriate for a prosecutor to decide not to call a witness merely because that person had given a different version than other witnesses, or merely because the prosecutor wished to cross-examine the witness.*

Another submission subsequently advised that the proposed amendment appears to be inconsistent with the common law in Queensland, although the basis of this view was not explained.

Conclusions

1. That the Rule not specifically exempt DPPs and their staff.
2. That separate rules dealing with ethical principles to be applied where a solicitor appears as counsel assisting in an investigative body or tribunal are desirable, but a final recommendation will be made following consultations with the Australian Bar Association.
3. That the *Commentary* be expanded to highlight the decision in *Barbaro v R* and alert solicitors that local legislation might be relevant.
4. That Rule 29.7 be reformulated as set out below.
5. That Rule 29.8 be reformulated as set out below

Proposed rule

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

UNLESS

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; ~~or~~

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; **or**

(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case,

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii), ~~or~~ (iv) **or (v)** together with the grounds on which the prosecutor has reached that decision**, unless the interests of justice would be harmed if those grounds were revealed to the opponent.**

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully ~~or improperly~~ obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material; and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

RELATIONS WITH OTHER PERSONS

Rule 30 (Another solicitor's or other person's error)

Current rule

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.

Issues canvassed

That the word "unfair" not be deleted from Rule 30.1

Responses and considerations

It was suggested that Rule 30 should be reformulated to state that a solicitor should not take any form of advantaged (unfair or otherwise) of another solicitor's error. The Consultation Paper noted that, as a general principle, a solicitor does not have a general duty to remedy any deficiencies in an opponent's case. After reviewing relevant case law, the Law Council concluded that the suggested change should not be adopted.

Submissions that responded to this issue supported not amending the Rule. It was also recommended the *Commentary* be updated to include the reference and analysis of the *Thames Trains Ltd* case[61] canvassed in the Consultation Paper.

Conclusions

1. That the *Commentary* be expanded to explain why, as a general principle, a solicitor does not have an ethical duty to remedy any deficiencies in an opponent's case.

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[61] *Thames Trains Ltd v Adams* [2006] EWHC 3291

Rule 31 (Inadvertent disclosure)

Current rule

31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must:

31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and

31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

31.2.1 notify the opposing solicitor or the other person immediately; and

31.2.2 not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

Issues canvassed

1. That *Commentary* highlight the reference to Rule 31.1.3 by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.[62]

2. That the rule does not need to be modified to state that a solicitor must not rely on an inadvertent disclosure to obtain an unfair advantage.

3. That Rule 31.2 be modified as follows:

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.

Responses and considerations

Issue 1 – High Court reference to Rule 31.1.3

The Consultation Paper (page 136) asked whether the *Commentary* should be expanded to discuss the High Court's comments on Rule 31.1.3 in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.

Only one response was received, which supported the recommendation.

[62] (2013) 303 ALR 199.

Issue 2 - Relying on an inadvertent disclosure to obtain an unfair advantage

It had been suggested that Rule 31 should contain a statement similar to Rule 30 - that a solicitor must not rely on an inadvertent disclosure of confidential material by another solicitor to obtain an unfair advantage. The Consultation Paper suggested that a Rule on this point was not necessary, but Rule 31.2 could be reformulated to clarify that a solicitor may not use such of the inadvertently disclosed confidential material as may have already been read by the solicitor, unless permitted or compelled by law.

One response to this issue supported the reformulation of the Rule, while the other response opposed the reformulation.

Issue 3 – Reformulation of Rule 31.2

The Consultation Paper sought comments on whether Rule 31.2 might be reformulated as follows:

> 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.

A number of submissions supported the proposed reformulation; however, one submission noted that:

> *a solicitor should be open and honest with their clients and that this enhances the solicitor-client relationship of trust and confidence. However, no information read by a solicitor inadvertently can be used in their client's case, so there is no tangible purpose served by [existing Rule 31.2.1] telling the client, particularly as they may not fully understand why it cannot be used. Further, informing the client may incur an additional and unnecessary cost to the client. Time spent reviewing the correspondence, calling the client, informing the sender etc. are all billable to the client and would only serve to highlight to them that the solicitor holds information they cannot use to their advantage… requiring the solicitor to tell their client about the inadvertent disclosure may in reality produce the opposite effect and potentially undermine the relationship of trust and confidence. It may also place a solicitor under further ethical pressure.*

Submissions supporting the proposed reformulation said: "it clarifies a solicitor's obligation which may prevent the difficulties in rectifying any inadvertent disclosure and the return of the documents" and that there should be clarification of "the competing ethical obligations a practitioner is exposed to if a client instructs the practitioner to read confidential material received in error".

The Law Council concluded that where a solicitor has inadvertently received confidential information that cannot be read or used, the solicitor does have an ethical obligation to inform the client of the circumstances, but not the content of the material. In the Law Council's view, to not do so could, for example, also undermine the client's trust and confidence in the solicitor.

Conclusions

1. The Commentary should be expanded to highlight the High Court's views on Rule 31 expressed in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.
2. Rule 31.2 should be reformulated to clarify that a solicitor may not use such of any inadvertently disclosed confidential material as may have already been read by the solicitor, unless permitted or compelled by law.
3. That Rule 31.2 be reformulated as set out below.

Proposed rule

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

31.2.1 not disclose or use the material, unless otherwise permitted or compelled by law;

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

31.2.3 not read any more of the material.

Rule 32 (Unfounded allegations)

Current rule

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.

Issues canvassed

No issues were raised about Rule 32 in the Consultation Paper; however, a submission was received raising a concern that the requirements of Rule 32:

> *…may have a 'chilling effect' on those who might be considering making a complaint of sexual harassment because in many cases the circumstances do not allow for additional material to be provided in support of the allegation."*

The submission noted that a new sexual harassment reporting process has been introduced by the NSW Legal Services Commissioner that encourages anyone who has experienced or witnessed sexual harassment to notify the Commissioner's Office.

> *Where complainants wish to remain anonymous, the Commissioner's Office will retain and monitor this data, which may provide an evidence base for the Commissioner to conduct a compliance audit of a law practice under the Legal Profession Uniform Law.*

It was suggested that consideration should be given to whether the *Commentary* to Rule 32 should address its application where the conduct consists of sexual harassment.

The Law Council has been unable to fully consider this issue in the current review but will do so when the *Commentary* is reviewed.

Conclusions

1. The *Commentary* be reviewed to address the application of Rule 32 to situations involving complaints of sexual and other unlawful forms of harassment.

Rule 33 (Communication with another solicitor's client)

Current rule

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.

Issues canvassed

1. That Rule 33 should not provide an exemption to the ethical prohibition on a solicitor directly contacting the client of another solicitor, where the client of that other solicitor is a financial institution.

2. That Rule 33 should not provide an exemption to allow a solicitor to contact a former client to arrange an orderly transfer of the client file.

3. That *Commentary* explains the expectation that a solicitor, having communicated directly with a client of another solicitor, as permitted under the rule, would notify the other solicitor of that communication.

4. That Rule 33 does not need to be amended to include a new exception where a solicitor serves a document on a client of another solicitor pursuant to a law or contractual obligation.

5. Is Rule 33 intended to capture circumstances where a client has sought a second opinion?

6. That the Commentary clarify the position of in-house solicitors within the context of Rule 33.

Responses and considerations

Issue 1 – Prohibition on direct contact with the other party to a dispute.

The Consultation Paper noted calls to modify the long-standing principle that a solicitor must not contact an opposing party directly when the solicitor knows that party is legally represented, in a situation where a solicitor (usually) from a legal assistance organisation

wishes to make direct contact with a financial institution rather than the solicitor representing the institution in a debt recovery matter.

The Consultation Paper noted that Rule 33 is an essential requirement for the proper administration of justice. Its rationale is the protection of the other party to a dispute. A legal practitioner who directly contacts an opposing party might "secure damaging admissions, or access to privileged material, or undermine the opponent's trust in that person's lawyer": *Legal Services Commissioner v Bradshaw*[63].

The Law Council view is that Rule 33 was devised for a different context to that which is the basis for calls for an exception – to permit a solicitor to directly contact a financial institution after another legal practitioner has been retained by that institution to commence processes for recovery of a debt.

Two submission supported retention of the current formulation, for the reasons set out in the Consultation Paper.

Another submission recommended there be an exception in the limited circumstances as suggested in the Consultation Paper, noting 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. The submission also noted that internal dispute resolution services are not usually staffed by lawyers, and do not consider there should be a prohibition on legal practitioners acting for a client in contacting these internal dispute resolution services.

Another submission also recommended a limited exemption permitting direct contact with financial institutions or other businesses in debt matters and in circumstances where there is a legal requirement on financial institutions to be a member of an external dispute resolution (EDR) scheme and to have internal dispute resolution (IDR) processes.

The consultation process did not identify any ethical principle to justify an exception to a basic ethical rule. The Law Council still considers the appropriate way of resolving these debt payment matters would be though 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. The Law Council concluded that the *Commentary* should be expanded to canvass these matters.

Issue 2 – Transfer of client files to a new solicitor

The Consultation Paper noted that where a client has changed solicitors, the former solicitor would be able to contact the former client at the request of the new solicitor to arrange the orderly transfer of the client's file to the new solicitor. The Law Council did not consider this matter to be one where a new rule was required – a view supported in the submissions that responded to this issue – and that the matter should be dealt with in *Commentary*.

[63] [2008] LPT 9, [26]

Issue 3 – Communication between solicitors

It had been suggested that Rule 33 should be expanded to include a rule which would require a solicitor who had communicated directly with the client(s) of another practitioner to notify that practitioner of that communication. The Consultation Paper noted that it would normally be expected as a matter of professional courtesy that a solicitor, having communicated directly with a client of another solicitor, as permitted under the rule, would notify the other solicitor of that communication. The submissions that responded to this issue supported the view that a new rule was not needed, and that this matter could be addressed in the *Commentary*.

Issue 4 – Serving documents on a client of another

It had also been suggested that Rule 33 should be expanded to include an exception where a solicitor serves a document on a client of another solicitor pursuant to a law or contractual obligation. The Consultation Paper suggested that a requirement to serve a document pursuant to a law or contractual obligation would not amount to a "dealing" under Rule 33, and that a change to the Rule as suggested is not necessary.

One of the submissions recommended that the *Commentary* be revised to make it clear that the mere service of documents would not be considered to breach Rule 33, while the other submission that responded to this issue recommended a specific exemption within the rule. No other responses were received in respect of this issue.

The Law Council concluded the issue is better addressed in *Commentary*.

Issue 5 – Second opinions

A submission to the Review suggested:

> *…clarity around whether the rule is intended to capture communication with the client of an opposing party or any person who is represented by a solicitor. In other words, is it intended to capture circumstances where a client has sought a second opinion? We would recommend that the Rule should not exclude a solicitor from providing a second opinion. However, we submit that it would be reasonable to exclude a solicitor approaching a person and offering a second opinion. Any Commentary should also make it clear that the second opinion should not include any disparagement of the first solicitor or attempt to undermine that solicitor/client relationship.*

Another submission also recommended that Rule 33 should be limited to situations of contact with opposing parties, so to allow "courteous communications" such as second opinions and finalising retainers.

The Law Council did not consider that Rule 33 as it presently stands would necessarily exclude a client from seeking a second opinion, but 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.

Rule 7.2-7 of the Nova Scotia Barristers' Society *Code of Professional Conduct* provides:

> ***7.2-7*** *A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a lawyer with respect to that matter.*

The *Commentary* to Rule 7.2-7 is as follows:

> *Rule 7.2-7 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.*

A second opinion is one of the kinds of unbundled legal service referred to by the Law Society of Western Australia in its August 2017 Guidelines on unbundling of legal services (see page 75 above).

An additional rule could be added to Rule 33 (and the *Commentary* could be expanded) as follows:

> 33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:
>
> …
>
> 33.1.4 the purpose is to enable a solicitor who is not otherwise interested in a matter to give a second opinion to a person who is represented by a solicitor or law practice with respect to that matter.

However, Rule 33 as presently formulated is directed toward communications between a solicitor and an *opposing* party, rather than communication to a solicitor by a client of another solicitor. This change would conflate two quite different situations into one rule.

Rule 4.2 of the Model Rules of the American Bar Association provides:

> ***Transactions with Persons Other Than Clients***
>
> *In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.*

A reformulation of Rule 33 along similar lines would address the doubt about whether Rule 33 permits the giving a second opinion. The Law Council concluded that Rule 33 should be amended as follows:

> 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 in the same matter 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 communication would not be unfair to the opponent's client;

33.1.3 the substance of the communication is solely to enquire whether the other party or parties to the 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.

Issue 6 – In-house solicitors

A submission to the Review recommended that the *Commentary* should clarify the position of in-house solicitors in respect of Rule 33:

> *For instance, it could be clarified that, where there are also external solicitors engaged, the in-house solicitors are still acting for their organization and are not clients of the external solicitors, for the purposes of the rule.*

The submission explained:

> *…that there may be uncertainty about the operation of this rule in relation to in-house corporate solicitors and whether they can contact their equivalent on the other side of a litigious matter without going via that party's external lawyer…it would be useful for the commentary to clarify that, where there are also external solicitors engaged, the in-house solicitors are still acting for their organisation and are not clients of the external solicitor for the purposes of this rule.*

The Law Council agreed this issue should be addressed in Commentary.

Conclusions

1. That Rule 33:
   (a) should not exempt direct communication with an opposing party which is a financial institution in a debt recovery matter;
   (b) does not need to provide an exemption to allow a solicitor to contact a former client to arrange an orderly transfer of the client file;
   (c) does not need to be expanded to include a rule which would require a solicitor who had communicated directly with the client(s) of another practitioner to notify that practitioner of that communication;
   (d) does not need to be expanded to include an exception where a solicitor serves a document on a client of another solicitor pursuant to a law or contractual obligation;
   (e) should not be expanded to include a rule specifically about a client seeking a second opinion.

2. That the *Commentary* to Rule 33 be expanded to include the above matters.
3. That Rule 33 be amended as set out below.
4. The Commentary be expanded to explain the operation of Rule 33 in relation to in-house corporate solicitors contacting their equivalent on the other side of a litigious matter without going via that party's external lawyer.

Proposed rule

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 in the same matter 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 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 the 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.

Rule 34 (Dealing with other persons)

Current rule

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

Issues canvassed

1. That Rule 34.1 be substituted as follows:

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement to another person:

(i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client; and

(ii) which is likely to mislead or deceive or intimidate the other person;

34.1.2 threaten the institution of a criminal or disciplinary complaint against the other person if a civil liability to the solicitor's client is not satisfied; or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

2. That *Commentary* clarifies:

(a) the reference in Rules 34.1.1 and 34.1.2 to "the other person";

(b) what is meant by the phrase "threaten the institution of criminal or disciplinary proceedings"; and

(c) that the rule would also prohibit securing, as a term of a settlement, an agreement not to institute criminal or disciplinary proceedings in respect of civil liability.

3. That *Commentary* to Rules 22 and 34.1 provide discussion on adhering to professional obligations when interviewing or communicating with opponents. (DP Q88)

Responses and considerations

Issue 1 - Reformulation of Rule 34.1 and the *Australian Consumer Law*

The Consultation Paper noted previous suggestions that because Rule 34.1.1 refers to a statement by a solicitor which "grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person", the Rule sets a lower standard of behaviour and provides weaker protection of consumers than section 18 of the *Australian Consumer Law*, which provides:

> (1) A person must not, in trade or commerce[64], engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

It has been suggested that Rule 34.1.1 appears to permit a greater range of (mis)behaviour than under the *Australian Consumer Law* - for example, it permits a solicitor to engage in conduct that is likely to mislead but falls short of being grossly excessive.

The Consultation Paper noted that Rule 34.1.1 must be read in conjunction with other Rules such as Rule 4 (to be "honest in all dealings in the course of legal practice" and "avoid any compromise to their integrity and professional independence"), Rule 5 (not to engage in dishonest or disreputable conduct such as conduct likely to a material degree to bring the profession into disrepute) and Rule 12 (to avoid conflicts between a client's interests and the solicitor's own interests).

The view expressed in the Consultation Paper is that Rule 34.1.1 (and the other Rules mentioned above) should not be replaced with a rule that merely paraphrases the *Australian Consumer Law*, because Rule 34, in its entirety and in conjunction with other Rules, addresses a broader range of duties and ethical behaviours than the relevant provision in the *Australian Consumer Law*.

One submission was received on this issue supporting the position set out in the Consultation Paper, while the other submission did not support the continued use in the rule of the phrase "which is likely to mislead or deceive or intimidate the other person". The submission maintained the view that the rule sets a lower standard of behaviour and weaker consumer protection than the *Australian Consumer Law* and places the onus on the consumer to prove they were actually misled or intimidated.

The Consultation Paper acknowledges that the *Australian Consumer Law* can apply, according to its terms, to the provision of legal services to a client and to interactions between solicitors and third parties, per *Burrell Solicitors Pty Ltd v Reavill Farm Pty Ltd*[65] (concerning the solicitor and client) *and Australian Competition and Consumer Commission v Sampson*[66] (concerning a solicitor and a third party) respectively.

[64] Section 2 of the Australian Consumer Law defines "trade or commerce" to include "any business or professional activity (whether or not carried on for profit).
[65] [2017] NSWCA 156.
[66] [2011] FCA 1165.

However, the Law Council questions how a "*legitimate* assertion of the rights or entitlements of the client" could be held to be misleading or deceptive. The Law Council does not accept that the *Australian Consumer Law* necessarily overrides or supplants all of the ethical duties and professional responsibilities of legal practitioners in advancing their clients' interests.

As indicated in paragraph 31 in the *Background* section of the Consultation Paper the relationship between a solicitor and client is not simply like the relationship between a supplier and a consumer but goes much further to include fiduciary and contractual relationships, and duties of confidentiality and privilege. In contrast, the *Australian Consumer Law* primarily regulates the provision of goods and services to consumers but does not regulate the entirety of the relationship between a legal practitioner and client.

The Law Council considers that practitioners must ensure that the particular course of action they pursue in acting in the best interests of a client meets the applicable ethical and fiduciary standards and, also, does not contravene any applicable statutory provisions; however, the Law Council does not consider that Rule 34.1.1 needs to be amended to paraphrase section 18(1) of the *Australian Consumer Law*. Instead, the Committee considers these are matters for the *Commentary*.

The Consultation Paper also proposed that Rule 34 be reformulated for clarity, as well as replacing the phrase "threaten the institution of criminal or disciplinary proceedings" in current Rule 34.1.2 with "threaten the institution of a criminal or disciplinary complaint". The Law Council agrees with the observation made that criminal *proceedings* and disciplinary *proceedings* can usually be initiated only by a law enforcement or regulatory authority, whereas any person can initiate a criminal, disciplinary or consumer *complaint*. The technical argument put forward in complaint investigations has been that (an unethical) threat to make a criminal or disciplinary *complaint* is outside the scope of the Rule. Clearly this is not the intended outcome and the proposed amendment to the Rule will address this issue.

Issue 2 – Expanded *Commentary*

The Consultation Paper also sought comments on whether the *Commentary* to Rule 34 should be expanded to clarify:

(a) the reference in Rules 34.1.1 and 34.1.2 to "the other person";

(b) what is meant by the phrase "threaten the institution of criminal or disciplinary proceedings"; and

(c) that the rule would also prohibit securing, as a term of a settlement, an agreement not to institute criminal or disciplinary proceedings in respect of civil liability.

Submissions received on this issue supported expanding the *Commentary* to Rule 34, which should discuss the decision in *Legal Services Commissioner v Sing*[67].

Issue 3 – Interviewing or communicating with opponents

The Consultation Paper noted the suggestion that Rule 34.1 should be expanded to include that a solicitor representing a defendant must not deal directly with a victim or complainant. The rationale given for the suggestion is that such a principle might assist to protect victims,

[67] [2007] LPT 4

relatives of deceased victims or complainants from inappropriate approaches, and that such a principle already applies in a litigation context under Rules 23.1 and 23.2. (Rule 33 limits the situations where a solicitor can appropriately make such a contact where the other party is represented by a solicitor).

The view expressed in the Consultation Paper was that the duty to exercise considerable care towards complainants in matters where the solicitor is representing the defendant are well recognised, and that this issue might be appropriately addressed in *Commentary* to Rules 23 and 34.

No responses were received on this issue.

Subsequent to the lodgment of the draft of this Report on 1 May 2020, the Legal Services Council and Law Council settled some minor drafting amendments, which did not affect the substance of Rule 34.

Conclusions

1. That Rule 34.1:

   (a) not be rewritten to paraphrase section 18(1) of the *Australian Consumer Law;*

   (b) be reformulated as follows.

   34.1 A solicitor must not in any action or communication associated with representing a client:

   34.1.1 make any statement to another person:

   (i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client; and

   (ii) which 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.

2. That *Commentary* to Rule 34 should be expanded to clarify:

   (a) the reference in Rules 34.1.1 and 34.1.2 to "the other person";

   (b) what is meant by the phrase "threaten the institution of a criminal or disciplinary complaint; and

   (c) that the Rule would also prohibit securing, as a term of a settlement, an agreement not to institute criminal or disciplinary proceedings in respect of civil liability.

3. That the *Commentary* discuss the application of the Rule in situations where a solicitor, representing the defendant, has occasion to contact a victim, relatives of a deceased victim or a complainant.

Rule 35 (Contracting with third parties)

Current rule

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.

Issues canvassed

1. That *Commentary* to Rule 35 should state that if a solicitor accepts personal liability for payment of a third party's fees, the solicitor should inform the third party of that.

2. That *Commentary* to Rule 35 should state that where a solicitor does not intend to accept personal liability for payment of a third party's fees, the solicitor should inform the client of the client's liability to pay those fees.

Responses and considerations

Issue 1 – Accepting personal liability for payment of third-party fees

The Consultation Paper noted the suggestion that while Rule 35.1 requires a solicitor to notify a third party in advance if the solicitor was not intending to accept personal liability for payment of the third-party's fees, the Rule should also require the solicitor to notify the third-party if the solicitor was accepting personal liability for payment of the fees. The Consultation Paper suggested that notifying the third-party is implicit in the rule, and that the *Commentary* be expanded to address this point. No submissions were received in response to this issue.

Issue 2 – Notifying non-acceptance of personal liability for third-party fees

It had also been suggested that Rule 35.1 be amended so that if the solicitor does not accept personal liability for payment of the third party's fees, the solicitor must not only inform the third party but also inform the third party of the arrangement intended to be made for the payment of the fees.

The Consultation Paper noted that arrangements for the payment of fees of a third party where a solicitor does not accept personal liability are a matter between the third party and the instructing client. The solicitor's ethical duty is to advise the third party that the solicitor is not accepting responsibility for the payment of the fees and to ensure that the client is aware of his or her liability to do so. However, the view expressed in the Consultation Paper is that the solicitor's ethical duty should not extend to an obligation to negotiate the payment arrangement between the client and third party unless the solicitor has been instructed to do so, and that this is an issue which could be dealt with in *Commentary*. No submissions were received in response to this issue.

Conclusions

1. That Rule 35 not be amended.

2. That *Commentary* to Rule 35 be expanded to discuss the two issues raised in the Consultation Paper.

LAW PRACTICE MANAGEMENT

Rule 36 (Advertising)

Current rule

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.

Issues canvassed

Should Rule 36 be retained in its present formulation?

Responses and considerations

The Consultation Paper referred to the question of whether Rule 36 is still required given that all the matters mentioned in this rule are covered already by civil and criminal law.

The Consultation Paper suggested that the Rule needed to be retained because it addresses the ethical principles concerning the use of advertising, marketing and promotion by solicitors. It was also noted that a breach of a conduct rule can have different consequences than a contravention of legislation which addresses the same conduct - i.e. a breach of a rule is conduct capable of constituting unsatisfactory professional conduct or professional misconduct and may result in one or more disciplinary sanctions, in addition to sanctions that might be imposed under legislation.

Only one response was received in respect of this issue, which agreed that Rule 36 should be retained in its present form.

Conclusions

1. That Rule 36 be retained.

Rule 37 (Supervision of legal services)

Current rule

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.

Issues canvassed

No issues were raised in the Consultation Paper about Rule 37, but a submission was received that the scope of Rule 37 should be broadened to encompass solicitors who have supervisory duties, but who are not principals. It was submitted that there is a need to ensure that these solicitors exercise reasonable supervision over any other solicitors and all other employees, to ensure that those who work for them, are able to properly perform the duties required of them. It was also suggested that the term 'designated responsibility' be defined, either within the ASCR or the *Commentary*.

The Law Council considers that this issue is best addressed in the *Commentary.*

Conclusions

1. That the *Commentary* be expanded to discuss issues related to supervision by non-principals and the term *designated responsibility*.

Rule 38 (Returning judicial officers)

Current rule

38.1 A solicitor who is a former judicial officer must not appear in:

(i) any court if the solicitor has been a member thereof or presided therein; or

(ii) any court from which appeals to any court of which the solicitor was formerly a member may be made or brought,

for a period of two years after ceasing to hold that office unless permitted by the relevant court.

Issues canvassed

The Consultation Paper canvassed whether Rule 38 should be retained its present formulation, including that a period of two years must elapse before a former judicial officer who is practising as a solicitor, should appear before a court of which that solicitor was formerly a member. The Consultation Paper recommended retaining the two-years period, noting that the moratorium period is always subject to the views of the court.

Responses and considerations

The Consultation Paper noted suggestions that the time period of two years in Rule 38 might be harmonised with the different timeframes in Rule 101(n) of the Barristers' Rules. The Consultation Paper also noted that the overarching consideration is that legal practitioners should not appear before a court where their relationship with the court may be perceived as inconsistent with the impartial administration of justice. It also noted the view that the difference between the time periods that apply to barristers and solicitors unnecessarily implies differences in the integrity and status of the two branches of the profession.

The Consultation Paper also noted the contemporary situation whereby solicitors (and barristers) generally are increasingly taking on appointments to administrative tribunals and roles as magistrates, where these appointments may be on a part-time or sessional basis to a particular panel or division of a tribunal. In these situations, a solicitor (or barrister) can be in the position of occupying a role as a judicial officer as well as engaging in legal practice.

One submission expressed the firm view that at least in Superior Courts, a prohibition on a former judge appearing in the court of which he or she is a member for a period of two years is quite inadequate, and that there is no difference in this regard between the position of barristers and solicitors.

> *So far as the counter argument is concerned, members of Superior Courts are not appointed on a part-time or sessional basis. Further, from a practical point of view, a limitation period of two years may discourage the appointment of solicitors to Superior Courts.*

Another submission recommended retaining the current two year's moratorium period, also noting that in a fused profession jurisdiction the differentiation can be difficult to rationalise.

The recommendation to retain the two-year period was also supported in another submission, "given that solicitors may be suitable and appropriately qualified for appointment as part-time and sessional members of the Administrative Appeals Tribunal."

The Australian Bar Association has since amended its equivalent Rule as follows.

Legal Profession Uniform Conduct (Barristers) Rules 2015

101A Refusal of briefs by barristers who are current and former judges or tribunal members

(1) In this rule:

"court " does not include a tribunal.

"former rules " means the rule or rules of conduct (however described) in force immediately before 1 July 2015 governing the right of a barrister to appear before a court of which the barrister was a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or any person acting in any of those offices, including rule 95(n) of the *New South Wales Barristers' Rules* and rule 92A of the Victorian Bar Practice Rules 2009.

"judge" includes a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices, but does not include a person appointed as a judge before 1 July 2015.

"tribunal" means a tribunal constituted by or under an Act or a disciplinary tribunal.

(2) A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

(a) the brief is to appear before a court:

(i) of which the barrister is or was formerly a judge; or

(ii) from which appeals lie to a court of which the barrister is or was formerly a judge; and

(b) the appearance would occur less than 5 years after the barrister ceased to be a judge of the court.

(3) A barrister must refuse to accept or retain a brief or instructions to appear before a tribunal that does not sit in divisions or lists of matters to which its members are assigned if:

(a) the barrister is a full time, part time or sessional member of the tribunal, or

(b) the appearance would occur less than 2 years after the barrister ceased to be a member of the tribunal.

(4) A barrister must refuse to accept or retain a brief or instructions to appear before a tribunal that sits in divisions or lists of matters to which its members are assigned if:

(a) the brief is to appear in a proceeding in a division or list to which the barrister is assigned as a member of the tribunal, or

(b) the brief is to appear in a proceeding in a division or list to which the barrister was assigned and the appearance would occur less than 2 years after the barrister ceased to be assigned to the division or list.

(5) The former rules continue to apply to a barrister who was, before 1 July 2015, appointed as a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices.

(6) For the purposes of subrule (2) (a) (ii):

(a) an appeal is not to be considered to lie to the Federal Court of Australia from the Supreme Court of a State or Territory, and

(b) the Supreme Court of Victoria (in the exercise of any of its jurisdiction) is taken to be a court to which an appeal from the County Court of Victoria lies, and

(c) the Supreme Court of New South Wales (in the exercise of any of its jurisdiction) is taken to be a court to which an appeal from the District Court of New South Wales lies.

(7) This rule does not apply in respect of a tribunal if a provision of an Act or a statutory instrument made under an Act prohibits a member or former member of the tribunal from representing a party before the tribunal or prohibits any such representation within a certain period after ceasing to be a member or in certain circumstances.

The Law Council concluded that the differentiation between appearances before a court and appearance before a tribunal is appropriate and that Rule 38 should be harmonised with the Barristers' Rule.

Subsequent to the lodgment of the draft of this Report on 1 May 2020, the Legal Services Council and Law Council settled some minor drafting amendments, which did not affect the substance of Rule 38.

Conclusions

1. That Rule 38 be amended to replicate the Rule now applying to barristers.

Proposed rule

38.1 In this rule:

court does not include a tribunal.

former rules means the rule or rules of conduct (however described) in force immediately before the commencement of these Rules governing the right of a solicitor to appear before a court of which the solicitor was a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or any person acting in any of those offices.

judge includes a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices, but does not include person appointed as a judge before the commencement of these Rules.

tribunal means a tribunal constituted by or under an Act or a disciplinary tribunal.

38.2 A solicitor must refuse to accept or retain a brief or instructions to appear before a court if:

38.2.1 the appearance would be before a court:

(i) of which the solicitor is or was formerly a judge; or

(ii) from which appeals lie to a court of which the solicitor is or was formerly a judge; and

38.2.2 the appearance would occur less than 5 years after the solicitor ceased to be a judge of the court.

38.3 A solicitor must refuse to accept or retain a brief or instructions to appear before a tribunal that does not sit in divisions or lists of matters to which its members are assigned if:

38.3.1 the solicitor is a full time, part time or sessional member of the tribunal, or

38.3.2 the appearance would occur less than 2 years after the solicitor ceased to be a member of the tribunal.

38.4 A solicitor must refuse to accept or retain a brief or instructions to appear before a tribunal that sits in divisions or lists of matters to which its members are assigned if:

38.4.1 the appearance would be in a proceeding in a division or list to which the solicitor is assigned as a member of the tribunal, or

38.4.2 the appearance would be in a proceeding in a division or list to which the solicitor was assigned and the appearance would occur less than 2 years after the solicitor ceased to be assigned to the division or list.

38.5 The former rules continue to apply to a solicitor who was, before the commencement of these Rules, appointed as a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices.

38.6 For the purposes of subrule 38.2.1(ii), an appeal is not to be considered to lie to the Federal Court of Australia from the Supreme Court of a State or Territory.

38.7 This rule does not apply in respect of a tribunal if a provision of an Act or a statutory instrument made under an Act prohibits a member or former member of the tribunal from representing a party before the tribunal or prohibits any such representation within a certain period after ceasing to be a member or in certain circumstances.

Rule 39 (Sharing premises)

Current rule

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

Issues canvassed

1. That *Commentary* should draw attention to the specific statutory disclosure obligations of incorporated legal practices and multidisciplinary partnerships (for NSW and Victoria, a multidisciplinary partnership is within the scope of the definition of *unincorporated legal practice* under the Uniform Law) when providing services that are legal services and services that are not legal services.

2. That the *Commentary* explain the underlying rationale of Rule 39.

3. That the rule does not require amendment to incorporate the confidentiality principles in Rule 9.

4. Should the Glossary contain a definition of "office" as follows:

   Office…is not limited to physical business premises and includes the media through which a law practice provides legal services to clients away from a central, physical location.

Issue 1 –*Commentary* on disclosure and alternative business structures

The Consultation Paper noted the ethical principle underlying Rule 39 is that a client must be made aware of which services are to be provided as a legal service, and which services are not being provided as a legal service, where a law practice shares premises with another business or entity. Clients need to be aware that services provided as legal services attract particular rights, remedies, protections and expectations of professional conduct under legal profession law, and that services not provided as legal services may not attract those same rights, remedies, protections and expectations. The rule also serves the purpose of ensuring that a client is fully informed of possible financial benefits that a solicitor might receive from services provided by another entity.

There is a relationship between Rule 39 and Rules 12.1 and 12.2 where a solicitor or law practice has a personal interest in the provider or provision of services other than legal services. Until now it has been possible to make a reasonably clear distinction between non-arm's length relationships between solicitors and other service providers (the underlying logic of Rule 39) and arm's length relationships (the underlying logic of Rule 12).

The Law Council considers that the changing nature of legal practice, particularly the growing demand for, and the greater provision of, joined-up services (i.e. legal services and

non-legal services) will mean the disclosures required by Rule 39 will occur more frequently. Joined-up services can already be provided through a multi-disciplinary partnership (in Uniform Law jurisdictions an *unincorporated legal practice*) or an incorporated legal practice However innovation in communication technologies, and a desire to tailor a set of joined-up services to meet the legal and other services needs of a client will mean that a joined-up services approach will become more common, and not necessarily provided only though multi-disciplinary partnerships or incorporated legal practices.

The Law Council has also considered the ways in which communication technologies are enabling people to access services and transact legal business without the need for the services providers (including legal practitioners) and clients meeting in physical offices. This means that the reference in the current rule to "office" is too limiting if its meaning is restricted to a physical office.

The Law Council suggests that Rule 39 might better reflect the changes occurring if it were reformulated as follows:

> **Rule 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** entity or business engaged in another calling to provide services other than legal services to a client; and
>
> 39.1.2 the client is offered, or is, or will be receiving services concurrently from both the law practice and the other entity;
>
> the solicitor, or law practice (as the case requires) must take all reasonable steps to ensure that the client is clearly informed about the nature and the terms of the services being provided to the client by the law practice, including (if applicable) that the services provided by the other entity are not provided by the law practice **as legal services**.

Further, it might be appropriate, when the ASCR are next reviewed, to amalgamate Rule 39 with Rule 12 into a single rule or set of rules dealing with the ethical principles that apply when a solicitor or law practice provides, promotes or facilitates the provision of non-legal services.

Issue 2 –*Commentary* on rationale for Rule 39

The Consultation Paper suggested the *Commentary* be expanded to explain the rationale of Rule 39. This was supported in the only submission that responded directly to this issue.

The VLSB+C agreed with the recommendation and suggested the *Commentary* (or a reformulation of the rule) focus and expand in detail on the underlying principle and considerations that clients must be fully informed of which services are, and are not, being provided to them as a legal service:

> *We suggest changing the title of this rule and having the content focus more heavily on disclosure of information to the client that creates a full and clear understanding of the services provided by each business they are being serviced by, and the various rights, remedies and protections that may apply to clients, as opposed to the risks posed by simply sharing physical premises.*

The Law Council concluded that the *Commentary* to Rule 39 should be expanded, noting the proposal to review the rule itself when the ASCR are next reviewed.

Issue 3 –Incorporate confidentiality principles of Rule 9 into Rule 39

The Consultation Paper referred to comments previously made that it is important that in shared premises, arrangements are in place to keep confidential information secure and that appropriate "barriers" are in place between the multiple businesses.

The duty of confidentiality in Rule 9 prohibits a solicitor from disclosing any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client. One of the exceptions to this prohibition is where the client expressly or impliedly authorises disclosure (Rule 9.2.1).

The Law Council does not consider there is a need to replicate rule 9 in rule 39, however given the increasing provision of joined-up services, the expanded *Commentary* to Rule 39 should emphasise the duty of confidentiality and the need for client authorisation to share confidential information.

Issue 4 –Definition of "office"

The Consultation Paper noted that legal services are increasingly capable of being provided outside of physical business premises - i.e., through a virtual office/web site and invited comments on whether a definition of "office" should be included in the Glossary, or whether the issue should be dealt with in the *Commentary*. A possible definition of *office* that might be adopted is:

> *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.

No responses were received, but the Law Council considers the definition should be adopted as proposed.

Conclusions

1. That Rule 39 be reformulated as set out below.
2. That the *Commentary* be expanded to explain the underlying rationale for Rule 39.
3. That Rules 12 and 39 be considered for amalgamation when the ASCR are next reviewed.
4. That the confidentiality principles of Rule 9 do not need to be incorporated into Rule 39 but that the *Commentary* be expanded to emphasise the importance of client authorisation.
5. That a definition of "office" be added to the Glossary:

   > *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.

Proposed rule

Rule 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** entity or business engaged in another calling to provide services other than legal services to a client; and

39.1.2 the client is offered, or is, or will be receiving services concurrently from both the law practice and the other entity;

the solicitor, or law practice (as the case requires) must take all reasonable steps to ensure that the client is clearly informed about the nature and the terms of the services being provided to the client by the law practice, including (if applicable) that the services provided by the other entity are not provided by the law practice **as legal services**.

Rule 40 (Sharing receipts)

Current rule

40.1 A solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from the provision of legal services by the solicitor, with:

40.1.1 any disqualified person; or

40.1.2 any person found guilty of an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.

Issues canvassed

The Consultation Paper canvassed whether Rule 40 should be amended as follows:

Rule 40 (Sharing receipts)

40.1 A solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from, **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.

Responses and considerations

The Consultation Paper sought comments on a possible reformulation of the Rule to address two matters:

- that a law practice's receipts can arise from any business of a kind ordinarily conducted by a law practice, and not strictly related to the provision of legal services; and
- the earlier amendment to Rule 41.1.2 to insert the words "found guilty" would not capture the situation where a guilty plea was accepted, whether or not a conviction was recorded.

The submission that responded to this issue noted the underlying ethical principle is that a law practice should not employ or share profits with a person found to have been involved in dishonest conduct. There was agreement that the proposed reformulation would address both of the matters canvassed in the Consultation Paper and a recommendation that the breadth of application of the reformulated Rule 40 should be clarified in the *Commentary*.

A question raised subsequently was whether merely employing someone who falls within the categories of persons mentioned in the Rule (but not sharing receipts with them) attracted the prohibition in the Rule.

The Law Council also considered whether Rule 40 continues to be needed as an ethical Rule. The origin of the Rule goes back to the time when solicitors were prohibited from sharing receipts from their law practice with unqualified persons. The Rule served the purpose of effectively prohibiting a law practice from having persons proven to be dishonest being partners and principals. The introduction of incorporated legal practices marked a move away from the previous position when it became possible to share the profits of the incorporated legal practice with shareholders who are not legal practitioners.

Further, legal profession legislation in all jurisdictions now contains specific provisions prohibiting law practices from having lay associates or employees known to be disqualified persons or persons who have been convicted of a serious offence, unless specific regulatory authority or court approval has been obtained. Also, Rule 40 is effectively a life-time prohibition, and thus inconsistent on its face with legislation that provides for lay associates and employees to be associated with a law practice with regulatory approval. Similar observations were made within the Law Council about lawyers who had been re-admitted to the profession.

The Law Council concluded that the question of whether Rule 40 should be omitted would be considered when the Rules are next reviewed.

Conclusions

1. That Rule 40 be reformulated as set out below.
2. That the *Commentary* on the scope and application of Rule 40 be expanded.
3. That the question of whether Rule 40 might be omitted be considered when the ASCR are next reviewed.

Proposed rule

Rule 40 (Sharing receipts)

40.1 A solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from, **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.

Rule 41 (Mortgage financing and managed investments)

Current rule

41.1 A solicitor must not conduct a managed investment scheme or engage in mortgage financing as part of their law practice, except under a scheme administered by the relevant professional association and where no claim may be made against a fidelity fund.

Issues canvassed

The Consultation Paper canvassed whether Rule 41 should be retained.

Responses and considerations

The Consultation Paper noted that legislation (or rules) in each jurisdiction prohibit the conduct by a law practice of managed investment schemes or engaging in mortgage financing *as part of their law practice*, except where these activities are regulated under a scheme administered by the relevant professional association. The Consultation Paper also noted that the call for Rule 41 to be omitted was based on an intention by at least one professional association to lobby for the repeal of the existing prohibition in primary legislation on a law practice conducting a managed investment scheme or mortgage financing arrangement as part of a law practice.

The policy rationale for the statutory prohibition on operating managed investment schemes and engaging in mortgage financing as part of a law practice was the high risks and experience of claims against (and depletion of) fidelity funds, the costs of which were being disproportionately borne by all solicitors through their compulsory fidelity fund contributions.

The subsequent introduction into the *Corporations Act 2001* (Cth) of the financial services licensing regime and regulation of financial products served to emphasise the importance of separating the operation of managed investment schemes and engaging in mortgage financing from legal practice. However, arrangements were already in place in some jurisdictions at the time of the Corporations Act reforms, and these pre-existing schemes and arrangements could continue if regulated under a scheme administered by the relevant professional association. Class Orders issued by ASIC exempted these arrangements from the financial services licensing regime.

Rule 41 thus served the purpose of drawing the attention of solicitors and law practices to the existence of prohibitions, unless a managed investment scheme or mortgage financing arrangement is regulated under the arrangements specified by the local professional association.

Since the release of the Discussion Paper the transitional arrangements under section 258 of the *Legal Profession Uniform Law*, which permitted schemes and arrangements regulated by a professional association in NSW or Victoria to remain in place for a further period of time from July 2015, have expired. However, section 258 of the Uniform Law has also been expanded so as to:

- prohibit a law practice from promoting or operating a managed investment scheme, or provide a service or conduct a business of a kind specified in the Uniform Rules;
- nevertheless, permit a law practice (or related entity) to promote or operate a managed investment scheme if:
    - the scheme is connected with or related to the business structure or ownership of the law practice; or
    - the scheme is connected with or related to the operation of the law practice and no person who is not an associate has an interest in either the scheme itself or the responsible entity for the scheme; or
    - the scheme is of a kind specified in the Uniform Rules.
- prohibit a law practice from providing legal services in relation to a managed investment scheme if any associate of the law practice has an interest in either the scheme itself or the responsible entity for the scheme, except where permitted to do so under the Uniform Rules, or with the approval of the local regulatory authority;
- prohibit a law practice or a related entity, in its capacity as the legal representative of a lender or contributor, from negotiating the making of, or acting in respect of a mortgage other than:
    - a mortgage where the lender is a financial institution;
    - a mortgage where the lender or contributors nominate the borrower (provided in essence that the introduction was at arm's length from the law practice or an associate or agent of the law practice).

Submission on this issue did not support retaining Rule 41 [in its current form] but recommended that Rule 41 be reviewed in light the amendments to section 258 of the Uniform Law, and associated Uniform Rules, to ensure that Rule 41 is no more restrictive than section 258 of the Uniform Law (as amended).

The Law Council concluded that Rule 41 should be omitted as the rule does not deal with an ethical principle, and that if there are jurisdictions that do not have complete prohibitions on operating a managed investment scheme or engaging in mortgage financing as part of legal practice, the arrangements that apply in those jurisdictions would be more appropriately the subject of a Legal Practice Rule.

A comparison of legal profession legislation across jurisdictions highlights that while Rule 41 places an ethical prohibition on operating a managed investment scheme or engaging in mortgage financing as part of a law practice, the Rule is inconsistent with statutory restrictions, which are not all encompassing (apart perhaps from Queensland). The Law Council concluded that Rule 41 should be omitted, and appropriate legal practice rules be devised by each jurisdiction in its place, having regard to the local legislation.

Conclusions

1. That:

    (a) Rule 41 be omitted (including the definitions of "managed investment scheme" and "mortgage financing" in the Glossary.

(b) The involvement by law practices in managed investment schemes and mortgage financing should be dealt with in Legal Practice Rules according to applicable local provisions.

Rule 42 (Anti-discrimination and harassment)

Current rule

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment; or

42.1.3 workplace bullying.

1. That the definition in the Glossary be reformulated by omitting the word “sexual”.

Context

The Consultation Paper canvassed whether Rule 42 should be retained and if so, whether it should be amended as follows:

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 ~~sexual~~ harassment; or

42.1.3 workplace bullying

The Consultation Paper also canvassed whether the definition of sexual harassment in the Glossary should be amended by omitting the word “sexual”, so as to broaden the definition to encompass all forms of harassment. The underlying purpose in considering the omission of the word “sexual” was to broaden the scope of the Rule to encompass all forms of harassment.

Only one submission responding to this issue recommended that Rule 42 be removed from the ASCR, on the basis that the conduct is regulated elsewhere and constitutes “unnecessary double regulation”. It was, however, clear from the responses commenting on whether the word “sexual” should be removed from the Glossary definition that there was support for retaining the Rule; for broadening it to encompass all forms of harassment, and for also retaining the specific reference to sexual harassment.

The Law Council concluded that the Rule should be retained and reformulated as follows:

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment;

42.1.3 any other form of unlawful harassment; or

42.1.4 workplace bullying.

The Law Council also concluded that the Glossary should be amended as follows:

endorsed the following reformulations:

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. Also, while the intention and for retaining the references to “sexual” harassment.

Subsequent to c

ed on the Glossary definition, to rule directed to this issue were received, although support for retaining the rule is implicit from the responses to Issue 2 below. The Law Council concluded that the Rule be retained

a number of matters raised with the Law Council about

Issue 1 – Should Rule 42 be retained

The Consultation Paper noted calls for Rule 42 to be omitted on the basis that there are comprehensive anti-discrimination laws that exist at the state, territory, and Commonwealth levels, with which all solicitors must be bound in any event.

The Law Council proposed retaining Rule 42 because the Rule sets out the ethical principles to be applied concerning discrimination and harassment, rather than the kinds of discrimination and harassment dealt with by jurisdictional legislation. Also, the *Commentary* to Rule 2 reminds solicitors of the need to have regard to any applicable jurisdictional legislation.

One.

Issue 2 – Should the word "sexual" be omitted from Rule 42.1.2

The Consultation Paper sought comments on whether the word "sexual" should be omitted so as to avoid the possibility that the Rule would be seen as applying only to sexual harassment, and no other forms of harassment.

One submission in response to this issue agreed the word sexual be removed so as to make clear the scope of the Rule extends to other forms of harassment.

Other submissions recommended that the word 'sexual' should be retained in rule 42.1.2, given that this has been identified as a serious issue affecting the legal profession. To address the concern that the current formulation of Rule 42.1 might be seen as limited solely to sexual harassment, it was recommended that the Rule refer to both unlawful harassment *and* sexual harassment .

It was also noted that the current definition of 'discrimination' in the ASCR Glossary of Terms does not capture all forms of unlawful conduct (such as harassment) under the relevant discrimination laws, and the Law Council might also consider amending the definition of discrimination to ensure it captures all forms of unlawful conduct.

The Law Council concluded that the Rule should be retained and reformulated as follows:

> 42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:
>
> 42.1.1 discrimination;
>
> 42.1.2 sexual harassment;
>
> 42.1.3 any other form of unlawful harassment; or
>
> 42.1.4 workplace bullying.

Issue 3 – Glossary definitions

The Consultation Paper noted that if the word "sexual" were to be omitted from Rule 42.1.2 (or the entire rule omitted) the Glossary definitions of *discrimination*, *sexual harassment* and *workplace bullying* might need to be amended.

Given the recommendation that the Rule be retained, and a new sub-rule inserted, the Law Council concluded that the word "sexual" should be omitted so that there is a generic definition of "harassment" in the Glossary.

Conclusions

1. That Rule 42 be retained.
   (a) That the word "sexual" be retained in Rule 42.1.2.
   (b) That a new sub-rule be adopted to state that the prohibited conduct includes "any other form of unlawful harassment".
2. That the word "sexual" be omitted from the Glossary so that there is a generic definition of "harassment".

Proposed rule

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment;

42.1.3 any other form of unlawful harassment; or

42.1.4 workplace bullying.

---

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 ~~unlawful~~ harassment; or
42.1.4 workplace bullying.

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

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

"**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.

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

Rule 43 (Dealing with the regulatory authority)

Current rule

43.1 Subject only to his or her duty to the client, a solicitor must be open and frank in his or her dealings with a regulatory authority.

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

Issues canvassed

1. Whether Rule 43.2 should be amended as follows. (DP Q102)

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

2. Should Rule 43 be omitted in its entirety or, alternatively, should Rule 43.2 be omitted?

3. There are discrepancies between the definition of *regulatory authority* in the Glossary, the expression *relevant regulatory authority* in Rule 43, and the definitions of *regulatory authority*, *relevant regulatory authority*, *commission* and *commissioner* in the *Legal Profession Act 2007* (Qld)

Responses and considerations

Issue 1 – Reference to documents

The Consultation Paper noted that Rule 43.2, if retained, should refer to "or documents" to avoid doubt, provided that disclosure of documents or any other client confidential information is made pursuant to one or more of the exceptions to maintaining confidentiality provided for in Rule 9.2.

The only submission that responded to this issue supported the recommended amendment.

Issue 2 – Should Rule 43 be retained?

Rule 43.1 reflects the common law duty of a solicitor as an officer of the court to assist and provide reasonable cooperation to an inquiry into his or her own professional conduct. A solicitor should not approach inquiries and proceedings related to complaints as if they were criminal proceedings in which the solicitor has been charged with an offence – The *Council of the Law Society of the Australian Capital Territory v LP 12*[68]

The Law Council invited submissions in response to the suggestion that Rule 43 was not necessary given that solicitors are subject to statutory information and document disclosure requirements under legal profession legislation.

A submission that responded to this issue recommended:

- the rule should be retained;
- that Rule 43.1 should include the word 'courteous';
- that Rule 43.2 should not include a reference to 14 days or such other time as the regulatory authority allows because each jurisdiction has different time frames; and
- the rule should include the reference to 'documents'.

In relation to the question whether Rule 43.2 should be retained, a submission received recommended the rule be omitted because Rule 43.1 adequately states the ethical principle, and Rule 43.2 is therefore an example of double regulation - restating the disclosure obligation owed by practitioners to a regulator in the Conduct Rules is not a necessary addition to the existing ethical obligations.

A view was also expressed that Rule 43.2 has no work to do because of the statutory provisions found in legal profession legislation relating to the production of documents – see for example *Etter v Legal Profession Board of Tasmania*[69].

Another view expressed was that the Rule is very important for a regulator to indicate to a respondent solicitor his or her obligation to disclose. Also Rule 43 is applied to general requirements to provide information to a regulator including own-motion complaints or conduct allegations where the information is obtained otherwise than as a formal complaint.

It was also noted that, as least as far as the position in Queensland is concerned, Rule 43.2 is inconsistent with the confidentiality, client consent and protection against self-incrimination provisions of the *Legal Profession Act 2007* (Qld). Thus retaining Rule 43.2:

- could be seen as abrogating a solicitors' rights of protection against self-incrimination;
- could be seen as abrogating a client's right to first give consent to disclosure by a solicitor;
- is unclear in its application to a third-party complaint.

[68] [2018] ACTCA 60 at [56]
[69] [2017] TASSC 77

In further consultations on Rule 43.2, the Law Council set out a number of problems with Rule 43.2 that make it difficult to support as a rule of ethical conduct:

- "openness and frankness", which are the core of the duty set out in Rule 43.1, require that a solicitor must respond to a regulator's inquiries or requests for information within a reasonable time and with complete and accurate information;
- Rule 43.2 in effect re-states the duty of timeliness, but does so in a way that attempts to take into account the varying time periods set out in legislation in different jurisdictions;
- also, Rule 43.2 deals only with conduct related enquiries and investigations and if the rule were to be retained, it would need to be significantly expanded to embrace all of the statutory requirements to furnish information or respond to regulator enquiries, and the various fixed and discretionary time periods involved;
- the Rule as presently drafted places a 14 day time period (or such extended time as the regulatory authority may allow) which is not consistent with the statutory time period for responding to conduct related enquiries across all jurisdictions. By way of example:
    - section 437(2) of the *Legal Profession Act 2007* (Qld) provides that where an investigation is being carried out the regulatory entity must notify the respondent of the complaint and "advise the respondent that he or she may make submissions to the entity by a stated date that is reasonable"; and
    - section 279(2) of the Uniform Law provides that a notice informing a respondent to a complaint of the right to make submissions must specify a period of 21 days within which to respond, or a shorter or longer period if the designated regulatory authority.

The utility to regulatory authorities of a rule which draws attention to a time period within which a solicitor must provide responses to requests for comments and information is acknowledged; however, the Law Council's concern is that Rule 43.2 does no more than attempt to paraphrase statutory provisions, and (given the examples above) sets a time period of 14 days which is, in some cases, inconsistent with (and cannot displace) the relevant statutory time periods.

The Law Council resolved to:

- amend Rule 43.1 to insert "timely" into the rule, to make clear that timeliness is an aspect of a solicitor's ethical duty; and
- to expand the Commentary to draw attention to the various statutory requirements for providing comments, information, submissions and documents, and the supporting case law which explains and emphasises the ethical duty of timeliness, frankness and openness.

In relation to the suggestion that Rule 43.1 be amended to refer to a duty of courtesy, the Law Council view is that the obligation of courtesy is already stated as a fundamental ethical duty in Rule 4 and does not need to be explicitly repeated in Rule 43.1. Nevertheless, the Commentary will be expanded to also explain the duty of courtesy, and the judicial considerations on this issue.

Issue 3 – Definitional discrepancies with legislation in Queensland

One of the submissions identified discrepancies between the definition of *regulatory authority* in the Glossary, the expression *relevant regulatory authority* in Rule 43, and the definitions of *regulatory authority*, *relevant regulatory authority*, *commission* and *commissioner* in the *Legal Profession Act 2007* (Qld). The concern is that Rule 43, as it applies in Queensland, might not extend to requests to solicitors from the Legal Services Commission (Qld).

The Law Council will seek further information on these issues and will give them further consideration when the ASCR are next reviewed.

Conclusions

1. Amend Rule 43.1 to insert a reference to timeliness.
2. That:
   (a) Rule 43.2 be omitted; and
   (b) the *Commentary* be expanded to discuss the rationale and issues that were dealt with in Rule 43.2.
3. The definitional issues with the Glossary definition of "regulatory authority" and the legal profession legislation in Queensland be considered when the ASCR are next reviewed.

Proposed rule

Rule 43	**(Dealing with the regulatory authority)**
43.1	Subject only to his or her duty to the client, a solicitor must be timely, open and frank in his or her dealings with a regulatory authority.

GLOSSARY OF TERMS

Introduction

The Consultation Paper considered a number of the definitions in the Glossary that might be added, amended or omitted as a consequence of proposed amendments or omission of particular rules.

Also, during the adoption in 2015 of the ASCR as the first set of *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* a question was raised as to differences between the definition of terms in the Glossary and the definition of those terms in the Uniform Law. At that time it was agreed that this issue would be examined in more detail in the (now current) review of the ASCR.

It has again been suggested that terms defined in the Glossary which are also defined in the Uniform Law should be omitted in all cases, and the Uniform Law definition applied, as required by virtue of section 23 of the *Interpretation of Legislation Act 1984 (Vic),* which provides

> **23 Construction of subordinate instruments**
>
> *Where an Act confers power to make a subordinate instrument, expressions used in a subordinate instrument made in the exercise of that power shall, unless the contrary intention appears, have the same respective meanings as they have in the Act conferring the power as amended and in force for the time being*

The Law Council agrees that, for the purposes of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, where a term in the Glossary is textually uniform with the same term as defined in the Uniform Law, it would be appropriate to omit that term from the Glossary.

However, the Law Council does not support the proposition that other terms in the Glossary that have an equivalent (but not textually uniform equivalent) in the Uniform Law should also be omitted and the Uniform Law definition applied in their place. The reasons for the Law Council's view that a contrary intention appears are set out below.

…unless a contrary intention appears…

In the present context, this expression permits an otherwise applicable statutory definition in primary legislation to be displaced in a subordinate instrument. That this is permissible is clearly stated in section 7(3) of the Uniform Law which provides:

> *(3) Definitions, words and other expressions have in the Uniform Rules or part of the Uniform Rules the same meanings as they have in this Law or the relevant part of this Law, unless a contrary intention appears in this Law or the Uniform Rules.*

Section 7(3) of the Uniform Law is consistent with sections 4(1) and 4(2) of the *Interpretation of Legislation Act 1984* (Vic):

> ***4 Application, construction and repeal provisions***
>
> *(1) The provisions of this Act—*

(a) *unless a contrary intention appears in this Act or in the Act or subordinate instrument concerned, extend and apply to all Acts, whether passed before or after the commencement of this Act, and to all subordinate instruments, whether made before or after that commencement; and*

(b) *apply to the interpretation of this Act.*

(2) *Nothing in this Act excludes the application to an Act or subordinate instrument of a rule of construction applicable thereto and not inconsistent with this Act.*

Similar provision is made in the *Interpretation Act 1987* (NSW):

5 Application of Act

(2) *This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.*

11. Words etc in instruments under an Act have same meanings as in the Act

Words and expressions that occur in an instrument have the same meanings as they have in the Act, or in the relevant provisions of the Act, under which the instrument is made.

A *contrary intention* may appear from the scope, nature and subject-matter of legislation or the general character of the legislation itself.[70] In the relevant passage in *Forsyth v Deputy Commissioner of Taxation* (2004) NSWLR 132, Spigelman CJ said, at [28]:

> *In Promenade Investments Pty Ltd v New South Wales (1991) 26 NSWLR 203 at 223-224, Sheller JA adopted a passage from par 6.19 of Pearce & Geddes Statutory Interpretation in Australia (5th ed) that a contrary intention "will need to be spelled out". I do not, however, understand his Honour to say that a contrary intention must always be express. Pursuant to s5(2) of the Interpretation Act, s68 applies unless "the contrary intention appears … in the Act or instrument concerned". Such a contrary intention may appear from the scope nature and subject matter of legislation. It does not necessarily require express words.*[71]

In the relevant passage in *Pfeiffer v Stevens* (2001) 2009 CLR 57, McHugh J said, at [56]:

> *An intention contrary to the [Acts Interpretation Act 1954 (Qld)] may appear not only from the express terms or necessary implication of a legislative provision but from the general character of the legislation itself.*

70 *Waterfront Place Pty Ltd v Minister for Planning and Ors* [2019] VSCA 156 [24] citing *Forsyth v Deputy Commissioner of Taxation* (2004) NSWLR 132 and *Pfeiffer v Stevens* (2001) 2009 CLR 57. As discussed by Carroll, Cuthbert and Park in *Administrative law updater: Calculating time in legislation – a matter of interpretation* May 2020, at https://www.claytonutz.com/knowledge/2020/may/administrative-law-updater-calculating-time-in-legislation-a-matter-of-interpretation

71 This point was not contested on appeal in *Forsyth v Deputy Commissioner of Taxation [2007] HCA 8*

Scope, nature and subject matter of the ASCR

The Background section of the Consultation Paper noted that comments about the ASCR often raise the question about whether the Rules for solicitors derive their binding force when (and because they are) made in legislative form, or whether they derive their binding force as an exercise in professional self-regulation. There is an extensive discussion of this issue in the Consultation Paper. The Law Council's view is that the ASCR comprise a statement by the profession of the ethical standards expected of legal practitioners in their professional conduct and derive a binding force from a number of sources.

A key point for the Law Council is that while the ASCR are made in the *form* of delegated legislation in some jurisdictions, they should not, *ipso facto*, be regarded in *substance* as legislative rules. They are much more than that. Unlike legislative rules, a breach of the Rules is not a contravention giving rise to a civil or criminal offence under the Uniform Law, but is *conduct capable* of constituting unsatisfactory professional conduct or professional misconduct, going to the question of whether a person is a fit and proper person to engage in legal practice.

Importantly, the Rules deal with particular subject matters related to a practitioner's role and duties in the justice system as an officer of the Supreme Court, and for which the practitioner is subject to the inherent jurisdiction of the Supreme Court to control and discipline its officers.

A number of provisions in the Uniform Law reinforce the Law Council position that the Rules should be regarded as sitting alongside a body of legislation that governs certain aspects of legal practice and the provision of legal services, as well as the common law:

> ***3 Objectives***
>
> *The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by—*
>
> *…*
>
> *(f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained*.
>
> ***264 Jurisdiction of Supreme Courts***
>
> *(1) The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of Australian lawyers are not affected by anything in this Chapter, and extend to Australian legal practitioners whose home jurisdiction is this jurisdiction and to other Australian legal practitioners engaged in legal practice in this jurisdiction.*
>
> *(2) Nothing in this Chapter is intended to affect the jurisdiction and powers of another Supreme Court with respect to the control and discipline of Australian lawyers or Australian legal practitioners.*
>
> ***423 Contents of Legal Profession Conduct Rules***
>
> *(1) The Legal Profession Conduct Rules may provide for any aspect of—*

(a) the professional conduct of Australian legal practitioners, Australian-registered foreign lawyers and law practices; and

(b) the conduct of Australian legal practitioners and Australian-registered foreign lawyers as it affects or may affect their suitability as Australian legal practitioners and Australian-registered foreign lawyers

(2) Without limitation, the Legal Profession Conduct Rules may include provisions with respect to what Australian legal practitioners, Australian-registered foreign lawyers and law practices must do, or refrain from doing, in order to—

(a) uphold their duty to the courts and the administration of justice, including rules relating to—

(i) advocacy; and

(ii) obeying and upholding the law; and

(iii) maintaining professional independence; and

(iv) maintaining the integrity of the legal profession; and

(b) promote and protect the interests of clients, including—

(i) rules relating to client confidentiality; and

(ii) rules for informing clients about reasonably available alternatives to fully contested adjudication of cases; and

(c) avoid conflicts of interest.

General character of the Law Council's Rules

The ASCR (and their predecessor *Model Rules of Professional Conduct and Practice* (February 1997 and March 2002) were developed by the Law Council as a coherent and uniform set of professional conduct rules, capable of adoption, interpretation and application on their own terms by each State and Territory. The *Introduction* to the March 2002 version states:

> *The Rules are intended as set of model rules which each Constituent Body of the Law Council might agree to adopt with a view to ensuring greater uniformity in the regulation of legal practitioners throughout Australia. It is anticipated that the model Rules will be supplemented as necessary to meet the requirements of each Constituent Body.*

The historical context is the 25 February 1994 COAG decision (responding to the *Hilmer Report*) to bring about a more competitive and integrated national market, and more efficient and effective arrangements, for the delivery of services in the areas of shared responsibility between Governments. The Law Council's response was set out in the *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (July 1994) and included agreement by the Law Council and its Constituent Bodies that the legal profession should be subject to a uniform code governing a lawyer's practice. This would include a "core" set of rules of professional conduct and ethical rules, supplemented as necessary by additional rules considered necessary and desirable for application in particular jurisdictions.

A discrete set of definitions (now referred to as the *Glossary*) has been included in each set of professional conduct rules developed by the Law Council, to give particular meaning to particular terms in the context of the Rules. The Glossary is critical to the uniformity objective of the ASCR Rules formulated by the Law Council:

- it provides a solution to the variances in the definitions of terms across jurisdictional legislation, and mitigates the risk that the Rules will not apply equally in all jurisdictions on their own terms if the differing definitions in local legal profession legislation are applied as enacted, in interpreting and applying the rules in each jurisdiction.
- it avoids the alternative of developing and maintaining local versions of the Rules to incorporate local definitions in primary legislation, and then making necessary modifications to align these definitions with the intended scope and application of the Rules themselves, and then developing *Commentary* to explain the differences.

It is also noted that national uniformity in rules is important to supporting multi-jurisdictional law practices. Jurisdictional variations in legislation and rules adds uncertainty, compliance burdens and costs, which are ultimately borne by consumers.

Jurisdictional versions of the Australian Solicitors' Conduct Rules

Each jurisdiction gives binding force to the ASCR for application to practitioners and law practices in the jurisdiction, and interstate legal practitioners providing legal services in the jurisdiction, pursuant to local legislative requirements:

- in South Australia, the ASCR are given binding force as local rules when adopted by the Law Society as the Society's professional conduct rules.
- in Queensland, the ASCR are given biding force as local rules when the Attorney-General gives notification that the Law Society has made the rules
- in the other jurisdictions the ASCR are given binding force as local rules when made as a statutory instrument.

Each implementation of the ASCR as jurisdictional rules has included definitions relevant to the rules as originally envisaged, and the Law Council is not aware of the question about applying definitions in primary legislation instead of definitions in the Glossary (or definitions in the Barristers' Rules) having been raised prior to 2015.

By way of example, the preamble to the *Revised Professional Conduct Rules of the Law Society of New South Wales* (1995 - No 561) [GG No 110 of 8 Sept 1995] states:

> *The Rules which follow were made by the Council of the Law Society of New South Wales, pursuant to its power under section 57B of the Legal Profession Act 1987, on 24 August, 1995. The Rules replace those Rules published in the Government Gazette of Friday, 10 June, 1994 and the amendments to those rules subsequently made and published prior to 24 August, 1995. Most of the New South Wales Rules have been included in a national set of Model Rules of Professional Conduct approved in principle by the Law Council of Australia.*
>
> *The legend which follows identifies those rules which appear in the National Model Rules and also identifies those rules which have been changed or added to the rules since their commencement on 1 July, 1994.*

Note: The National Rules were based on the Rules of the Law Society of New South Wales but, in their format and terminology, vary the original NSW Rules.

Both these 1995 Rules, and the *New South Wales Professional Conduct and Practice Rules 2013 (Solicitor' Rules)* which were in place immediately before the commencement of the Uniform Law, included their own set of particular definitions.

In some instances definitions in the Glossary necessarily differ from corresponding legislative definitions, reflecting the fact that the ASCR serve a different purpose to the regulatory objectives of legal profession legislation, as explained above.

In other instances, definitions in the Glossary have been developed as generic (umbrella) definitions, capable of interpretation and application in any jurisdiction, given substantial differences in some instances in the way a term is defined in primary legal profession legislation. As mentioned above, the utility of this approach is that it avoids the need to develop and maintain local versions of the Rules to incorporate local definitions, and make necessary modifications to align the scope and application of the definitions with the intended scope and application of the Rules themselves.

Definitional differences between primary and subordinate legislation are also necessary to give effect to different policy objectives - see for example Rules 50(5) and 51(5) of the *Legal Profession Uniform Law General Rules* which modify the Uniform Law definition of *law practice* to include former law practices and the principals thereof immediately before a law practice has ceased, for the purposes of the notification requirements regarding general trust accounts.

The Law Council view is that differences between definitions in the Glossary that are also defined in the Uniform Law reflect, and are appropriate and necessary as expressions of a contrary intention or context. Put another way, while the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* are a statutory instrument *in form*, *in substance* they deal with different policy matters and contexts to those dealt with by the Uniform Law. In particular, the critical objective of the Rules as expressing ethical standards required of practitioners is considered by the Law Council as the most important determinant of the definitions adopted in the Glossary, in the uncommon event that there is any inconsistency with a legislative definition, in lieu of achieving consistency for the sake of consistency (a prime example being the definition of "associate" to reflect the ethical standards required by the ASCR, whilst the regulatory definition would lower the currently required ethical standard). This is the essence of the exception in *Interpretation Acts* referred to above for expressions of "contrary intention".

This section of the Report considers definitions in the Glossary that:

- might be amended or omitted as a consequence of proposed amendments or deletion of particular rules;
- are unique to the ASCR;
- are better suited to the objective of the ASCR as rules which are capable of uniform adoption, interpretation and application on their own terms in each State and Territory;
- might be omitted because the definition in the Uniform Law is textually the same as the definition in the Glossary; or

- should be retained because, even though there is a corresponding definition in the Uniform Law, that definition, if used, will change the scope and application of the ASCR.

Client

Glossary definition

> **"client"** with respect to the solicitor or the solicitor's law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter.

Uniform Law definition

> ***client*** - includes a person to whom or for who legal services are provided

Issues canvassed

Should the Uniform Law definition apply to the ASCR in the Uniform Law jurisdictions.

Responses and considerations

The term “client” in the Uniform Law is an inclusive definition, not intended to exhaustively define who is or is not a “client” for the purposes of the Uniform Law. The definition is modified or extended by, for example section 170 in relation to commercial or government clients, and by section 171(4) which provides that Uniform Rules may provide that particular references in the Uniform Law to a client may include references to an associated third-party payer, as in Uniform General Rule 72A(4) which extends the definition of client (where relevant) to an associated third party payer for the purposes of costs disclosure provisions.

The term “client” is also defined in the interpretative provisions of the Legal Profession *Acts* in other jurisdictions with references to one or more provisions where a specific definition is required, and a general statement “otherwise - includes a person to whom or for whom legal services are provided.”

The term “client” in the Glossary is an exhaustive definition, limited to the person for whom the solicitor is engaged to provide legal services, which serves a number of purposes:

- it ensures that ethical duties (for example the duty of confidentiality) apply from the time of the engagement, and not from the time legal services begin to be provided;
- it both limits the application of ethical duties to a “client” as that term is generally understood as well as, by use of the word “engaged” and the definition of “engagement”, clarifying that ethical duties can apply to a law practice as a whole, as well as the individual solicitor actually providing the legal service to the client.

That is not to say that a solicitor may not owe, or be held to hold some duties to a non-client such as a third party payer, in some circumstances. For example, a solicitor may be held liable in tort for loss incurred by a third-party if the lawyer does not make it clear to the non-client that the lawyer does not represent the non-client’s interests and does not undertake to give the non-client legal advice. A solicitor may owe a duty of confidentiality to third party, or may owe duties under contract if an assurance or undertaking is given to a third-party in that setting. A solicitor may owe a duty of care to beneficiaries named in a will if the solicitor

does not take reasonable care in performing the client's instructions.[72] However, the Law Council cautions against the introduction into the ASCR of an apparent extension of ethical duties to non-clients that would result from the adoption of the Uniform Law definition of "client", and the uncertainty will arise because of the word "includes".

It is noted that the term "client" is defined in the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, and differs from the definitions in the Uniform Law and the ASCR. The Barristers' Rules definition is:

> ***client*** means the client of the barrister in question, and for the purposes of rules 71, 79 and 81 includes those officers, servants or agents of a client which is not a natural person who are responsible for or involved in giving instructions on behalf of the client.

Also relevant to the Glossary definition of "client" is the definition of "former client" for Rule 10:

> **"former client"** for the purposes of Rule 10.1, may include a person or entity that has previously instructed:
>
> (a) the solicitor;
>
> (b) the solicitor's current law practice;
>
> (c) the solicitor's former law practice, while the solicitor was at the former law practice;
>
> (d) the former law practice of a partner, co-director or employee of the solicitor, while the partner, co-director or employee was at the former law practice,
>
> or, has provided confidential information to a solicitor, notwithstanding that the solicitor was not formally retained and did not render an account.

Conclusions

The inclusive definition of "client" in section 6 of the Uniform Law does not definitively set out who is or is not a "client" for the purposes of the ASCR, and is extended for Uniform Law purposes to persons who are not clients for ASCR purposes.

The Law Council concluded that the ASCR definition should be retained as a *contrary intention* definition, and to avoid any doubt occasioned by "includes" over the issue of who is, or is not, a client for the purposes of the ASCR.

[72] See G E Dal Pont, *Lawyers' Professional Responsibility*, 6th ed, 2017 [Chpt. 21]

Client documents

Current definitions

The Glossary contains the following definition:

> **"client documents"** means documents to which a client is entitled.

However, the term "**document**" is not defined in the Glossary, nor are there definitions of "client documents" or "document" in the Uniform Law or General Rules.

Issues canvassed

Consultation submissions on Rule 14 (Client documents) highlighted the need to review the current definition of "client documents". Also, the Law Council proposes that Rule 16 (Charging for document storage) be amended to broaden the references to client documents to include documents stored electronically. The Law Council considers a more informative definition of "document" (supported by *Commentary*) might also be useful to explaining the meaning of the term "client documents".

Responses and considerations

The term "document" is defined in legal profession legislation in some jurisdictions, and in other legislation elsewhere. These definitions follow a similar form, but are not textually uniform. For example, the *Legislation Act 2001* (ACT) contains the following definition of "document":

> ***document*** means any record of information, and includes—
>
> (a) anything on which there is writing; or
>
> (b) anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or
>
> (c) anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or
>
> (d) a drawing, map, photograph or plan.

The *Legal Profession Act 2007* (Qld) Schedule 2 contains the following definition of "document":

> **"document**" means 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 in this Act to a document, as so defined, 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; mentioned in paragraph (f)

The *Legal Profession Act 2006* (Northern Territory) - section 4 contains the following definition:

"document" means 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 in this Act to a document (as so defined) 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.

The *Interpretation of Legislation Act 1984* (Vic) – section 38 contains the following definition:

document includes, in addition to a document in writing—

(a) any book, map, plan, graph or drawing;

(b) any photograph;

(c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever;

(d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;

(e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and

(f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them;

The Law Council concluded that the definition contained in the *Legal Profession Act 2006* (NT) is the most comprehensive definition of "document" and should be adopted for the purposes of the ASCR.

The Law Council also notes the Queensland Law Society's publication *Australian Solicitors' Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners* contains

useful discussion of what Hope JA in *Wentworth v de Montford*[73] considered to be documents of the client and what are documents of the legal practitioner, as well as a categorisation in Appendix C of the Commentary of various kinds of documents.

Conclusions

1. That the Glossary definition of ***client*** remain unchanged.

2. That the Glossary be amended to include a definition of ***document*** as follows:

   "document" means 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.

3. That the Glossary definition of client documents be amended as follows:

   "client documents" means a document of a client.

4. That the *Commentary* be expanded to incorporate the explanatory materials developed by the Queensland Law Society.

[73] (1988) 15 NSWLR 348

Community legal service

Proposed definition

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

Uniform Law definition

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

(a) holds itself out as—

(i) a community legal service; or

(ii) a community legal centre; or

(iii) an Aboriginal and Torres Strait Islander Legal Service;

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

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

(c) provides legal or legal-related services that—

(i) are directed generally to people who are disadvantaged (including but not limited to being financially disadvantaged) in accessing the legal system or in protecting their legal rights; or

(ii) are conducted in the public interest;

Issues canvassed

Should the Uniform Law definition apply to the ASCR in the Uniform Law jurisdictions.

Responses and considerations

The term "community legal service" has been proposed for inclusion in the Glossary because of the conclusion that the definition of "law practice" should be amended to specifically include community legal services, to make clear the application of the ASCR to community legal services and their solicitors.

Consistent with the design parameter of the ASCR as a uniform package, and given the substantial differences in the way the term community legal service/community legal centre is defined in primary legal profession legislation, the Law Council view is that a generic (umbrella) definition is preferable to jurisdictional specific definitions. By way of example:

- the definition of "law practice" in the *Legal Profession Act 2006* (ACT), the *Legal Profession Act 2006* (NT), and the *Legal Profession Act 2007* (Qld) do not include a community legal centre/service;

- the definition of “community legal service” in the *Legal Profession Act 2007* (Qld) differs from the Uniform Law definition by including family violence prevention services and for organisations prescribed by regulation;
- the definition of “community legal centre” in the *Legal Practitioners Act 1981* (SA) differs from the Uniform Law definition in referring to a body that “that provides legal services to the community, or a section of the community on a non-profit basis, and includes the Aboriginal Legal Rights Movement…”;
- the definition of a “complying community legal centre” in the *Legal Profession Act 2006* (NT) differs from the Uniform Law definition by including a requirement that there be a “qualified legal practitioner” who is responsible for the provision of the legal services; and
- definition of “complying community legal centre” in the *Legal Profession Act 2007* (Tasmania) differs from the Uniform Law definition by including a requirement that there be an Australian legal practitioner who is generally responsible for the provision of the legal services.

If the Uniform Law definition were to be adopted in the Uniform Law version of the ASCR, the Law Council considers it would be necessary in any event to extend that definition to ensure it included community legal centres/services within the meaning of the definitions in the legislation of non-participating jurisdictions, or alternatively, would require separate definitions in the ASCR of each jurisdiction.

Conclusions

The generic definition of community legal service is better suited to the objective of the ASCR as developed by the Law Council, to be capable of uniform adoption, interpretation and application on their own terms in each State and Territory.

Corporate solicitor and employer

Current definitions

> **"corporate solicitor"** means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity.
>
> **"employer"** in relation to a corporate solicitor means a person or body (not being another solicitor or a law practice) who or which employs the solicitor whether or not the person or body pays or contributes to the solicitor's salary.

Uniform Law definition

> **corporate legal practitioner** means an Australian legal practitioner who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity, but does not include a government legal practitioner;

Issues canvassed

Should the Uniform Law definition of *corporate legal practitioner* apply to the ASCR in the Uniform Law jurisdictions, in place of the Glossary definition of *corporate solicitor*.

Responses and considerations

The definition of *corporate solicitor* in the Glossary is linked to the definition of *employer*, which is relevant to the application of elements of Rule 12, dealing with conflicts between the interests of a solicitor and the interests of a solicitor's client:

> Rule 12.3 a solicitor must not borrow any money, nor assist an associate to borrow money, from a client or former client, except where, among other things, the client is the solicitor's employer.
>
> Rule 12.4 a solicitor will not have breached Rule 12 by drawing a Will or other instrument under which the solicitor will or may receive a substantial benefit provided the person instructing is, for example, among other things, a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

The definition of *employer* in the Glossary recognises that in some entities or groups, the entity that actually pays the solicitor's remuneration may be a different entity to the actual employing entity - thus, a corporate solicitor who has dealings to which the rules applies with an entity within the corporate group will not have breached the rule simply because the solicitor's remuneration as an employee is paid by another entity in the group.

The Uniform Law term *corporate legal practitioner* is relevant to Uniform Law provisions relating to supervised legal practice, categories and scope of practising certificates, and fidelity fund contributions. It is also relevant to the exemptions in Uniform General Rule 82 from the requirement to hold professional indemnity insurance. It is a separate and distinct term for the purposes of the Uniform Law, and can include a barrister, but specifically excludes government lawyers.

Conclusions

The Glossary definition of *corporate solicitor* should be retained as a *contrary intention* definition.

Court

Current definition

"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.

Issues canvassed

The Consultation Paper canvassed whether the definition should be harmonised with the definition used in the Barristers' Rules. The Barristers' Rules definition is as follows:

> **"court"**:
>
> means any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a Parliament), Royal Commissions [the Criminal Justice Commission/ICAC or equivalent], arbitrations and mediations.

The Consultation Paper suggested a revised definition for the ASCR might be:

> "**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~~.

Responses and considerations

The definition of "court" is relevant to many of the Rules and/or the setting in which they apply:

- Rule 3 paramount duty to the court and the administration of justice
- Rule 6 the court may release a solicitor from an undertaking
- Rule 17 independence and avoidance of personal bias before the court
- Rule 18 formality before the court
- Rule 19 frankness in court
- Rule 20 delinquent or guilty clients
- Rule 21 responsible use of court process and privilege
- Rule 22 communication with opponents
- Rule 23 opposition access to witnesses
- Rule 24 integrity of evidence – influencing evidence
- Rule 25 integrity of evidence – two witnesses together
- Rule 26 communication with witnesses under cross-examination
- Rule 27 solicitor as material witness in client's case
- Rule 28 public comment during current proceedings
- Rule 29 prosecutor's duties
- Rule 38 returning judicial officers

The Consultation Paper sought comments on five matters relating to Rule 29 (Prosecutors duties) including whether to omit current Rule 29.13 (appearing as counsel assisting an inquisitorial body) and substitute that rule with the more detailed barrister's rules 96-100 (investigative tribunals). This would have the effect of setting out a set of discrete ethical rules applying in the specific circumstance of appearing as counsel assisting an inquisitorial body.

Consideration of proposed changes to Rule 29.13 will impact on the definition of "court", particularly as it relates to inquisitorial bodies.

In light of this, the Law Council concluded that reconsideration of the definition of "court" should be deferred pending further consultations with the Australian Bar Association on the proposals relating to Rule 29.

Mediation and other forms of dispute resolution

The Consultation Paper also proposed that the definition of "court" should exclude the reference to "any other form of dispute resolution" following "an arbitration or mediation".

The Law Council considers that mediation and other forms of alternative dispute resolution are not conducted before bodies exercising judicial or quasi-judicial functions, and so do not logically fit under the definition or commonly understood meaning of "court", nor do the activities of solicitors participating in these processes fully equate to the role of a prosecutor, which is the focus of Rule 29. Including mediation and other forms of alternative dispute resolution under the definition of "court" can, therefore lead to unnecessary confusion.

That is not to say that solicitors participating in these processes do not have an obligation to satisfy ethical standards, and it was proposed to develop *Commentary* on this subject. It is noted, however, that there have been many calls, including from the Australian Law Reform Commission, for new or supplementary Rules covering lawyers in ADR settings. The Law Council has also noted the important address given by the Honourable Tom Bathurst, Chief Justice of the Supreme Court of New South Wales, on 22 August 2017 "Advocacy Behind Closed Doors: Duties of the Lawyers in Non-Curial Settings" at the 2017 State of Dispute Resolution Conference.

The Law Council does not, at this stage, propose to amend the definition of ***court*** to exclude references to mediation and other forms of alternative dispute resolution, but this will be reconsidered when the ASCR are next reviewed, in conjunction with the possible development of ethical rules specifically for application in mediation and other alternative dispute resolution settings.

Conclusions

1. The Law Council undertakes further consultations with the Australian Bar Association on the inclusion of bodies such as the ACCC, ASIC and the Australian Crime Commission in a specific rule dealing with situations where a practitioner appears as counsel assisting an investigative body or tribunal.
2. That the consultations with the Australian Bar Association include the definition of "court".
3. That a specific rule dealing with ethical conduct when participating in mediations and other forms of alternative dispute resolution be considered when the ASCR are next reviewed.

Disqualified person

Current definition

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

(a) a person whose name has (whether or not at his or her own request) been removed from an Australian roll and who has not subsequently been admitted or re-admitted to the legal profession under legal profession legislation or a corresponding law;

(b) a person whose Australian practising certificate has been suspended or cancelled under legal profession legislation or a corresponding law and who, because of the cancellation, is not an Australian legal practitioner or in relation to whom that suspension has not finished;

(c) a person who has been refused a renewal of an Australian practising certificate under legal profession legislation or a corresponding law, and to whom an Australian practising certificate has not been granted at a later time;

(d) a person who is the subject of an order under legal professional legislation or a corresponding law prohibiting a law practice from employing or paying the person in connection with the relevant practice;

(e) a person who is the subject of an order under legal profession legislation or a corresponding law prohibiting an Australian legal practitioner from being a partner of the person in a business that includes the solicitor's practice; or

(f) a person who is the subject of any order under legal profession legislation or corresponding law, disqualifying them from managing an incorporated legal practice or from engaging in partnerships with certain partners who are not Australian legal practitioners.

Uniform Law definition

disqualified person means—

(a) a person whose name has been removed from a Supreme Court roll and who has not subsequently been admitted or readmitted by the Supreme Court of any jurisdiction; or

(b) a person who has been refused the grant or renewal of an Australian practising certificate and who has not been granted an Australian practising certificate at a later time; or

(c) a person whose Australian practising certificate is suspended (for the period of the suspension); or

(d) a person whose Australian practising certificate has been cancelled and who has not been granted an Australian practising certificate at a later time; or

(e) a person who is the subject of a decision under section 94 that the person is not entitled to apply for a certificate for a specified period; or

(f) a person who is disqualified under section 119;

Note: Section 94 pertains to a decision by a local regulatory authority to refuse to grant or renew, or to cancel, a practising certificate.

Section 119 pertains to a decision by a designated tribunal to make an order disqualifying a person (other than an Australian legal practitioner).

Issues canvassed

Should the Uniform Law definition of *disqualified person* apply to the ASCR in the Uniform Law jurisdictions, in place of the Glossary definition of *disqualified person*.

Responses and considerations

The definition of *disqualified person* is relevant to Rule 40 – Sharing receipts. The Rule is directed at solicitors and provides that 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:

- a *disqualified person*, or
- any person who has been found guilty of an indictable offence or has had a guilty plea accepted in relation to an indictable offence involving dishonesty.

The definition of *disqualified person* in the Uniform Law is relevant to:

- the prohibition on a law practice having a *lay associate* known to be a disqualified person or a person who has been convicted of a serious offence, unless the lay associate has been approved by the regulatory authority;
- the prohibition on a disqualified person or a person convicted of a serious offence from seeking to become a *lay associate* of a law practice without first informing the law practice of the disqualification or conviction.

The term *lay associate* is defined in the Uniform Law to mean a person who is not an Australian legal practitioner and who is —

(a) an associate of the law practice; or

(b) a consultant to the law practice (however described) who provides services related to legal services to the law practice, other than services of a kind specified in the Uniform Rules for the purposes of this definition; or

(c) a person who shares the receipts, revenue or other income arising from the law practice.

The ASCR includes a generic "umbrella" definition of "disqualified person" so as to not require different forms of the definition in the jurisdictional versions of the ASCR.

There is no inconsistency between the Uniform Law definition and the generic definition in the Conduct Rules apart from this difference. The Law Council received no submission or

comment in the consultation process about the use of the generic definition or the risk of confusion in using an extended definition of the term in the Conduct Rules.

The Law Council considers that a generic definition is appropriate because the status of disqualification is not only important in the home jurisdiction of the disqualified practitioner but is of like importance in every other jurisdiction. The ethical considerations relating to a disqualified practitioner involve cross-border implications; and inclusion of an extended definition is needed for practitioners engaged in cross-border legal practice.

The Law Council considers there is no significant risk of confusion arising in maintaining the extended definition in the Conduct Rules because of the statement at the commencement of the Conduct Rules, in Rule 1.2, that the definitions applying in the Rules are set out in the Glossary. Retaining a generic definition in the Conduct Rules will also maintain the national uniformity of the ASCR.

Conclusions

The Law Council concluded that the existing definition of *disqualified person* should be retained.

Law practice (multidisciplinary partnerships)

Current definition

"law practice" means:

(a) an Australian legal practitioner who is a sole solicitor;

(b) a partnership of which the solicitor is a partner;

(c) a multi-disciplinary partnership;

(d) an incorporated legal practice.

Uniform Law definition

law practice means—

(a) a sole practitioner; or

(b) a law firm; or

(c) a community legal service; or

(d) an incorporated legal practice; or

(e) an unincorporated legal practice;

Issues canvassed

1. Should the reference to *multi-disciplinary partnership* be retained in the Glossary definition of *law practice*.

2. Should the expression *unincorporated legal practice* be included in the Glossary definition of *law practice*.

Responses and considerations

The Consultation Paper proposed, in relation to Rule 1, that the Glossary definition of *law practice* be amended to include reference to a "community legal service". A supplementary submission received by the Law Council recommended that, if the definition of *law practice* in the Glossary is to be amended to include reference to a community legal service then the definition should also be brought into line with the definitions used in the Legal Profession Uniform Law. This recommendation noted that the expression *multi-disciplinary partnership* has been omitted from the Uniform Law, and that entities of this kind now fall within the definition of *unincorporated legal practice* in section 6.

Consistent with the design of the ASCR as coherent and uniform set of professional conduct rules, capable of adoption, interpretation and application on their own terms by each State and Territory, the Glossary definition of *law practice* should include a reference to both a "multi-disciplinary partnership" and an "unincorporated legal practice", accompanied by an explanation in the Commentary of the difference between the two terms.

Conclusions

The Glossary definition should include reference to both a “multi-disciplinary partnership” and an “unincorporated legal practice”, with the Commentary drawing attention to the different definitions found in the Uniform Law and non-uniform law jurisdictions.

Proposed definition

“law practice” means:

(a) an Australian legal practitioner who is a sole solicitor;

(b) a partnership of which the solicitor is a partner;

(c) a multi-disciplinary partnership;

(d) a community legal service

(e) an unincorporated legal practice or

(f) an incorporated legal practice.

Legal costs

Current definition

"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.

Uniform Law definition

legal costs means—

(a) 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; or

(b) without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person—

including disbursements but not including interest;

Section 171 Third party payers

(1) For the purposes of this Law—

(a) a person is a ***third party payer***, in relation to a client of a law practice, if the person is not the client and—

(i) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or

(ii) has already paid all or a part of those legal costs under such an obligation; and

(b) a third party payer is an ***associated third party payer*** if the legal obligation referred to in paragraph (a) is owed to the law practice, whether or not it is also owed to the client or another person; and

(c) a third party payer is a ***non-associated third party payer*** if the legal obligation referred to in paragraph (a) is owed to the client or another person but not the law practice.

(2) The legal obligation referred to in subsection (1) can arise by or under contract or legislation or otherwise.

(3) A law practice that retains another law practice on behalf of a client is not on that account a third party payer in relation to that client.

(4) The Uniform Rules may provide that particular references in this Law to a client include references to an associated third party payer.

Issues canvassed

Should the Uniform Law definition of *legal costs* apply to the ASCR in the Uniform Law jurisdictions, in place of the Glossary definition of *legal costs*.

Responses and considerations

The ASCR have included since their commencement a generic definition of "legal costs" encompassing the common definition in the legal profession legislation of each state and territory, and which is now found in para (a) of the definition in the Uniform Law.

The definition of "legal costs" in the Uniform Law is extended by paragraph (b) to include "without limitation" a third party payer who may be liable to pay those same legal costs. The extended definition ensures, for example, that the statutory costs disclosure provisions in Part 4.3 (Legal costs) applies to third party payers. By way of example, section 176 of the Uniform Law provides:

> **176 Disclosure obligations of law practice regarding associated third party payers**
>
> (1) If a law practice is required to make a disclosure to a client of the law practice under section 174 or 175, the law practice must, in accordance with subsection (2), also make the same disclosure to any associated third party payer for the client, but only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs that are payable by the associated third party payer in respect of legal services provided to the client.
>
> (2) A disclosure under subsection (1) must be made in writing—
>
> (a) at the time the disclosure to the client is required; or
>
> (b) if the law practice only afterwards becomes aware of the legal obligation of the associated third party payer to pay legal costs of the client—as soon as practicable after the practice became aware of the obligation.

The legal profession legislation in non-participating jurisdictions includes similar third party payer provisions to those in the Uniform Law. For example, the terms related to *third party payers* set out in section 261A of the *Legal Profession Act 2006* (ACT) and the disclosure obligations to associated third-party payers in section 278A of that *Act*.

The two Conduct Rules which refer to the term "legal costs" are:

- Rule 12.4.1(ii), which refers to an ethical obligation to disclose to a client in writing before a Will is signed, that the Will contains a provision giving an entitlement to charge legal costs for the administration of the estate; and
- Rule 15, which refers to circumstances where a solicitor "claims to exercise a lien for unpaid legal costs".

Rule 12.4.1(ii) deals with the situation where a solicitor or law practice is appointed under a Will as executor of the testator's estate. It is ethically proper that a professional person who

is appointed executor and provides professional services to an estate is entitled to remuneration by the estate in the form of professional fees for those professional services rendered, in exactly the same way as a professional person who is not an executor would be entitled to charge professional fees for rendering those services to the estate. Rule 12.4.1(ii) simply makes clear that such an arrangement does breach Rule 12.1 provided the client has been informed in writing, before the Will is signed, of the inclusion of a provision to that effect. In these circumstances, paragraph (b) of the Uniform Law definition of legal costs is superfluous, and its inclusion in the ASCR Glossary apt to confuse.

Rule 15 deals with the situation where, having rendered a bill for legal costs, those legal costs remain unpaid and the solicitor claims a lien over client documents that are essential to the client's defence or prosecution of current proceeds. The Rule sets out circumstances where a solicitor should, as an ethical duty, deliver up those documents. Rule 15 deals with a situation that is not dealt with by or under Part 4.3 of the Uniform Law. As with Rule 12.4.1(ii), paragraph (b) of the Uniform Law definition of legal costs is superfluous to Rule 15, and its inclusion in the ASCR Glossary apt to confuse.

Further, the Uniform Law enables the inclusive term *client* wherever used in the Uniform Law to be extended by the Uniform Rules to include a third party payers, whereas the term *client* in the Glossary is an exhaustive definition, which limits to the application of the ASCR to a person for whom the solicitor is engaged to provide legal services.

Conclusions

The Law Council concluded that the ASCR Glossary should retain the existing definition of *legal costs*.

Legal services

Current definition

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

Uniform Law definition

> ***legal services*** means work done, or business transacted, in the ordinary course of legal practice;

Issues canvassed

Should the definition of *legal costs* be omitted from the Glossary on the basis that it is the same as the definition in the Uniform Law.

Responses and considerations

This term is defined in the same form in the legal profession legislation of each state and territory, whether a participating jurisdiction or non-participating jurisdiction. The ASCR do not extend ethical obligations relating to legal services beyond the scope of the statutory definition of "legal services".

Conclusions

The definition of *legal services* is to be omitted from the Glossary.

Managed investment schemes and mortgage financing

Current definitions

"**managed investment scheme**" has the same meaning as in Chapter 5C of the *Corporations Act 2001* (Cth).

"**mortgage financing**" means facilitating a loan secured or intended to be secured by mortgage by –

(a) acting as an intermediary to match a prospective lender and borrower;

(b) arranging the loan; or

(c) receiving or dealing with payments under the loan,

but does not include:

(d) providing legal advice, or preparing an instrument, for the loan;

(e) merely referring a person to a prospective lender or borrower, without contacting the prospective lender or borrower on that person's behalf or facilitating a loan between family members; or

(f) facilitating a loan secured by mortgage:

(i) of which an Australian legal practitioner is the beneficial owner; or

(ii) held by an Australian legal practitioner or a corporation in his, her or its capacity as the trustee of any will or settlement, or which will be so held once executed or transferred.

Uniform Law definitions

managed investment scheme has the same meaning as it has 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 for the purposes of, or under, the loan—

but does not include providing legal advice or preparing an instrument for the loan;

Issues canvassed

Should the above definitions be omitted from the Glossary.

Responses and considerations

These definitions are relevant to Rule 12.3.2(iii) and Rule 41 (Mortgage Financing and Managed Investments).

Rule 12.3 states that it is not ethically appropriate for a solicitor to borrow money or assist and associate to borrow money from a current client, or a former client who still relies on the advice previously provided in relation to investment of money. One of the exceptions to

this general principle is where the client is the responsible entity or custodian of a managed investment scheme registered under Chapter 5C of the Corporations Act 2001 (Cth).

The text of Rule 12.3.2(iii) repeats the text of the Glossary definition, and on this basis, it would be appropriate to omit the definition from the Glossary.

Rule 41 deals with the involvement of solicitors and law practices in mortgage financing arrangements and managed investment schemes. It is intended to omit Rule 41 from the ASCR (see pages xx of this Report) in which case both definitions will longer be required for the purposes of the ASCR.

Conclusions

The definitions of *managed investment scheme* and *mortgage financing* are to be omitted from the Glossary.

Practitioner

Current definition

"practitioner" means a person or law practice entitled to practise the profession of law.

Uniform Law definition

Australian legal practitioner means an Australian lawyer who holds a current Australian practising certificate.

Issues canvassed

Should the Glossary definition of *practitioner* be retained, or substituted by the term *Australian legal practitioner.*

Responses and considerations

Both of the terms *Australian legal practitioner* and *practitioner* are used in the ASCR:

- Rule 32 (Unfounded allegations) – *Australian legal practitioner*
- Rule 33 (Communication with another solicitor's client) - *practitioner*
- Glossary definition of *Australian roll - practitioners*
- Glossary definition of *barrister – Australian legal practitioner*
- Glossary definition of *corporate solicitor - Australian legal practitioner*
- Glossary definition of *disqualified person - Australian legal practitioner*
- Glossary definition of *law practice – Australian legal practitioner*
- Glossary definition of *opponent - practitioner*
- Glossary definition of *professional misconduct – Australian legal practitioner*
- Glossary definition of *solicitor – Australian legal practitioner*
- Glossary definition of *unsatisfactory professional conduct – Australian legal practitioner*

Practitioner

The term *practitioner* was adopted in the first set of *Model Rules of Professional Conduct and Practice*, approved by the Law Council in March 1996. The definition in the March 1996 version (promulgated in February 1997) was:

> **"practitioner"** means a legal practitioner who holds a current practising certificate as a barrister and solicitor, or as a barrister, and includes a practitioner corporation.

In the March 2002 version of the *Model Rules*, the definition had been modified to:

> **"practitioner"** means a person or corporation entitled to practise the profession of the law.

The reason for adoption of this term was explained as follows:

> *With the exception of the Rules headed "Advocacy & Litigation Rules", which have specific application to advocates, the Rules apply principally to legal practitioners practising as solicitors, or as solicitors and barristers.*

The term "practitioner" is used throughout to refer to persons practising as solicitors, or as barristers, or as barristers and solicitors. The rules headed Advocacy & Litigation Rules apply to all practitioners when engaged in advocacy, whether or not their predominant style of practice is that of a solicitor or a barrister.

In the first version of the *Australian Solicitors' Conduct Rules* (2011) the definition was modified to:

> **"practitioner"** means a person or law practice entitled to practise the profession of the law.

This definition reflects changes in regulation since 1996, including the introduction of regulation of foreign lawyers as Australian-registered foreign lawyers, incorporated legal practices (replacing solicitor corporations), multi-disciplinary partnerships, unincorporated legal practices, and the adoption of the terms *Australian lawyer* and *Australian legal practitioner*.

The definition, where used, is now intended to apply as appropriate to a solicitor, a barrister, a barrister and solicitor, an Australian-registered foreign lawyer, and/or an incorporated legal practice. The use of the "umbrella" term "practitioner" considerably simplifies the drafting of the ASCR.

Rule 32

This rule states that 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.

The use of the term *solicitor* (as defined in the Glossary) is appropriate for Rule 32, which deals with unfounded allegations made by either an Australian legal practitioner who is a solicitor or by an Australian-registered foreign lawyer acting in the manner of a solicitor.

The term *Australian legal practitioner* identifies that the target of the unfounded allegations is an *Australian lawyer* who holds or is taken to hold an Australian practising certificate, which can include a barrister. Arguably, this term is not sufficient to clearly extend the ethical principle to not make unfounded allegations to include unfounded allegations against an Australian-registered foreign lawyer or an incorporated legal practice.

For the avoidance of doubt, the Rule might be better drafted as follows:

> **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.
>
> 32.2 For the purposes of this Rule:
>
> (i) "solicitor" includes an Australian-registered foreign lawyer; and

(ii) "practitioner" includes an Australian legal practitioner, an Australian-registered foreign lawyer, and a law practice.

Rule 33

This rule states that a solicitor must not communicate with the client of another practitioner about the subject matter of the representation except in the limited circumstances set out in the rule.

The use of the term *solicitor* (as defined in the Glossary) is appropriate for Rule 33, which deals with communications by a solicitor or by an Australian-registered foreign lawyer.

The term *practitioner* is also appropriate to identify that the target of the rule is a client of another solicitor, or a barrister, or an Australian-registered foreign lawyer, or of any other kind of law practice.

Australian roll

This term is relevant to the definition of *disqualified person*, and is defined in the Glossary as:

> **"Australian roll"** means a roll of practitioners maintained under the legal profession legislation of any Australian jurisdiction.

The Uniform Law uses the term *Supreme Court roll*, which is defined as:

> ***Supreme Court roll*** means—
> (a) the roll of Australian lawyers maintained by the Supreme Court; but
> (b) so far as the term is used in the context of (or that includes or implies the inclusion of) another jurisdiction (for example, by the words "a Supreme Court roll"), it means a roll of Australian lawyers maintained by the Supreme Court of the other jurisdiction;

By way of contrast, the non-Uniform Law jurisdictions use the following:

- *Legal Profession Act 2006* (ACT):

  Australian roll means the local roll or an interstate roll.

  local roll means the roll of lawyers kept under this Act

  interstate roll means a roll of lawyers kept under a corresponding law.

- *Legal Profession Act 2007* (Qld)

  Australian roll means the local roll or an interstate roll.

  interstate roll means a roll of lawyers kept under a corresponding law.

  local roll means the roll of persons admitted to the legal profession, under this Act or a previous Act, that is kept under section 37.

- *Legal Profession Act 2006* (NT)

  "Australian roll" means the local roll or an interstate roll;

  "interstate roll" means a roll of lawyers maintained under a corresponding law;

  "local roll", see section 27(1);

- *Legal Profession Act 2007* (Tas)

"Australian roll" means the local roll or an interstate roll;

"interstate roll" means a roll of lawyers maintained under a corresponding law;
"local roll" means the roll of lawyers maintained under this Act;

- *Legal Practitioners Act 1981* (SA)

  legal practitioner or ***practitioner*** means—

  (a) a person duly admitted and enrolled as a barrister and solicitor of the Supreme Court; or

  (ab) an interstate legal practitioner who practises the profession of the law in this State;

The Glossary definition of *Australian roll* is an "umbrella" definition better suited to the objective of the ASCR as rules which are capable of uniform adoption, interpretation and application on their own terms in each State and Territory.

Opponent

The term *opponent* is defined in the Glossary to mean:

(a) the practitioner appearing for a party opposed to the client of the solicitor in question; or

(b) that party, if the party is unrepresented.

The term *opponent* is relevant to a number of the Advocacy and Litigation Rules, which by virtue of the definition of *court* in the ASCR can include an arbitration, mediation or any other form of dispute resolution. An Australian-registered foreign lawyer is, for example, permitted to provide legal services relating to these kinds of proceedings, as well as appearing before a court per se where knowledge of the relevant foreign law is essential. (see also sections 69(2) and (3) of the Uniform Law).

Substituting the term *practitioner* with the Uniform Law term *Australian legal practitioner* would require consequential changes to Rules 19, 20, 22, 23, 29 and 33 to also include an *Australian-registered foreign lawyer* and *a law practice* where appropriate:

Australian legal practitioner

The Uniform Law defines this term to mean "an Australian lawyer who holds a current Australian practising certificate". As noted above, there are a number of Rules that are also applicable to Australian-registered foreign lawyers and law practices. Also, there are certain classes of lawyers permitted under jurisdictional legislation to engage in legal practice without being required to hold an Australian practising certificate – see for example Uniform General Rule 10(1)(d) and(e). Even though these persons are not "Australian legal practitioners" as defined, the ASCR will apply to them as persons entitled to practise the profession of law.

Conclusions

The definitions of "practitioner", "court", and "opponent" considerably simplify the drafting of the Rules by obviating the need to combine and repeat the use of terms such as "Australian legal practitioner", "Australian registered foreign lawyer" and "incorporated legal practice".

Also, the term “practitioner” embraces government lawyers and other persons who are entitled to engage in legal practice without holding a practising certificate.

The Law Council considers that the term “practitioner” (which is not defined in the Uniform Law) is distinct from, and serves a different purpose to, the term ”Australian legal practitioner”.

Regulatory authority

Current definition

"regulatory authority" means an entity identified in legal profession legislation which has responsibility for regulating the activities of solicitors in that jurisdiction.

Uniform Law definitions

corresponding authority means—

(a) a person or body having functions under a corresponding law; or

(b) when used in the context of a person or body having functions under this Law in this jurisdiction—a person or body having corresponding functions under a corresponding law;

designated local regulatory authority means a person or body specified or described in a law of this jurisdiction for the purposes of a provision, or part of a provision, of this Law in which the term is used.

local regulatory authority, in the context of a reference to "a local regulatory authority" or "local regulatory authorities" in a provision of this Law, means any designated local regulatory authority.

Issues canvassed

Should the term *regulatory authority* be omitted from the Glossary and the affected Rules, and replaced with be replaced with *designated local regulatory authority*:

Responses and considerations

The term *regulatory authority* is used in Rule 43 to signify that a solicitor has a duty to be timely, open and frank in his or her dealings within any regulatory authority in any jurisdiction. Adoption of the Uniform Law term *designated local regulatory authority* would restrict the application of Rule 43 in the Uniform Law jurisdictions to dealings with Uniform Law regulatory authorities only. To ensure the intent of Rule 43 is maintained, the rule would also need to include a reference to a "corresponding authority" (defined in section 6 of the Uniform Law) and might need to be drafted as follows:

43. DEALING WITH A DESIGNATED LOCAL REGULATORY AUTHORITY OR A CORRESPONDING AUTHORITY

43.1 Subject only to his or her duty to the client, a solicitor must be timely, open, and frank in his or her dealings with a designated local regulatory authority or a corresponding authority.

A similar change might also need to be made to Rule 2.3, as follows.

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 designated local regulatory authority or a corresponding authority.

Given that the term “designated local regulatory authority” is unique to the Uniform Law, the text of Rule 43 in the ASCR of non-participating jurisdictions would need to either remain as developed by the Law Council, or redrafted to reflect the way those jurisdictions each refer to local and interstate regulatory authorities.

The Law Council questions the utility of such an exercise, which would, when other definitions in the Glossary are considered, replace the single integrated ASCR package with six separate sets of ASCR – one for the Uniform Law jurisdictions and one for each of the five non-participating jurisdictions, with variations that only serve to reconcile the particular definitions of terms in their primary legislation with the principles and objectives of the ASCR.

Conclusions

The ASCR definition of “regulatory authority” is the appropriate definition to be used for the purposes of the conduct rules.

Serious criminal offence

Current definition

"serious criminal offence" means an offence that is:

(a) an indictable offence against a law of the Commonwealth or any jurisdiction (whether or not the offence is or may be dealt with summarily);

(b) an offence against the law of another jurisdiction that would be an indictable offence against a law of this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or

(c) an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction).

Uniform Law definition

serious offence means an offence that is—

(a) an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily); or

(b) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia);

Issues canvassed

Should the definition of *serious criminal offence* be omitted from the Glossary and the term replaced in Rule 9.2.4 with *serious offence*.

Responses and considerations

The Law Council propose to adopt the text of the definition of "serious offence" as used in the Uniform Law as a more succinct expression.

The expression "serious criminal offence" has long been used in Rule 9.2.4, which sets out the well-known exception to the duty of confidentiality if the disclosure is made for the sole purpose of avoiding the probable commission of a serious criminal offence.

While the word "criminal" is otiose because the Rule is directed to indictable offences, to omit the word "criminal" would lead to unnecessary confusion about whether there has been a change to this Rule.

Conclusions

The Law Council concluded that the definition of *serious criminal offence* be amended as follows

Proposed definition

serious criminal offence means an offence that is—

(a) an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily); or

(b) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia);

Solicitor

Current definition

"solicitor" means:

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

(b) an Australian registered foreign lawyer who practises as or in the manner of a solicitor.

Uniform Law definition

solicitor means an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only

Issues canvassed

1. Should the definition of *solicitor* be amended as follows.

   "**solicitor**" means:

   (a) an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only; or

   (b) an Australian registered foreign lawyer who practises as or in the manner of a solicitor.

2. Should the definition of *solicitor* in the Uniform Law be used.

Responses and considerations

The Consultation Paper sought comments on whether the definition of "solicitor" should follow the same form as the definition of *barrister* to make clearer distinctions between rules which apply to solicitors and rules which apply to barristers.

The Law Council is concerned to avoid a situation whereby there may be doubt as to whether a Barristers' Rule or a rule in the ASCR applies. The overlap between rules developed by the Australian Bar Association to apply to those who choose to practise as a barrister, and the rules developed by the Law Council of Australia to apply to those who choose to practise as a solicitor, should not create a situation in fused jurisdictions whereby a choice might be able to be made between which of two rules might apply.

To help avoid a situation where there maybe confusion as to whether a Barristers' Rule or a rule in the ASCR applies, it was suggested that there should be a change to the definition of "solicitor" in the Glossary which reflects harmonisation with the definition of *barrister*.

No responses were received to this issue.

The Law Council concluded that the definition of "solicitor" in the Conduct Rules should been amended to use the same wording in paragraph (a) as is used in the Uniform Law.

The ASCR definition of the term has an extended meaning (paragraph (b)) to include an Australian-registered foreign lawyer. The extended definition of the term *solicitor* avoids the need to use both *solicitor* and *Australian-registered foreign lawyer* in each of the 346 instances where the term *solicitor* is currently used in the ASCR.

The term "solicitor" is only used in the Uniform Law:

- in paragraph (b) of the definition of "admission" in section 6,
- in relation to the entitlement to use that title (section 12);
- in the costs assessment provisions (sections 196 and 269(2)); and
- in section 427(2) – development of proposed Uniform Rules for solicitors.

No submission or comment was made to the Law Council in the consultation process about the use of the extended definition or the risk of confusion by using an extended definition in the ASCR compared to the definition in the Uniform Law, which has limited use.

Conclusion

That the definition of "solicitor" be amended as set out below.

Proposed definition

"**solicitor**" means:

(a) an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only; or

(b) an Australian registered foreign lawyer who practises as or in the manner of a solicitor.

Workplace bullying

Glossary definition

"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.

Issues canvassed

The Consultation Paper canvassed whether the definition should be amended given that since the definition was first settled, the Commonwealth enacted the *Fair Work Act* has, in section 789FD, set out a legislative test for when a worker is bullied at work.

The proposed amendment is highlighted in the following redrafted definition:

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

Responses and considerations

No responses received to this issue.

Conclusions

The Law Council concluded that the definition of "workplace bullying" be amended to include the expression "or constitutes bullying at work under Commonwealth legislation".

Proposed definition

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

PROPOSALS FOR NEW RULES

Disclosure of insurer

Issues canvassed

The Consultation Paper referred to suggestions that the Rules should require lawyers to advise the other party if the solicitor is acting under the right of subrogation and, if so, the identity of the insurer. The Consultation Paper recommended no such Rule is required.

The issue raised with the Law Council is that lawyers acting for an insurer under a right of subrogation pursuant to an insurance policy do not regularly inform the other parties that an insurance company is involved. In circumstances where the insurer is instigating proceedings on behalf of the insured (in this case, the plaintiff) this can mean that debtors may not be advised that they have rights, such as the right to make a complaint to the Financial Ombudsman Service (a less costly dispute resolution forum compared to a court). The recently revised General Insurance Code of Practice, via cl 8.10, obliges subscribing insurers to be identified in any communication with debtors, as well as the nature of any claim.

The Consultation Paper expressed the view that the existence of insurance is generally a matter relevant only to the insurer and insured and, unless there are clearly permissible or compulsory grounds for disclosure of that relationship, a solicitor would not be entitled to make such a disclosure without contravening the duty of confidentiality. The Consultation Paper asserted that a solicitor cannot disclose that an insurer has exercised its rights of subrogation in relation to the matter being handled by the solicitor, unless the client's insurer expressly or impliedly authorises the disclosure, or the solicitor is permitted or is compelled by law to do so.

Responses and considerations

Two submissions were received, one of which supported the Consultation Paper position. The other submission stated:

> *While it can be argued that this issue may be managed either by requirements of the General Insurance Code of Practice, the Conduct Rules, or a combination of both, we believe there would be benefit in a rule being included that directs solicitors to disclose that they are acting under the right of subrogation enabling debtors to better know their rights and position. This direction could be limited to simply disclosing that the solicitor is acting under the right of subrogation and the client they are acting for. We do not believe the simple acknowledgement by a solicitor that they are acting under subrogation and the client they are acting for would breach the clients' confidentiality. It is the substance of the retainer that creates the potential confidential information, not the fact a retainer exists. We are not satisfied there is any demonstrable detriment to the insurer here particularly where codes of conduct promote disclosure and when weighed against the detriment to the debtor.*

The view was also expressed that a simple acknowledgement by a solicitor that they are acting under subrogation, and the client they are acting for, would breach the clients'

confidentiality. The Law Council respectfully suggests that this is an erroneous conclusion for the following reasons:

- as canvassed in the Consultation Paper the courts have traditionally been reluctant to compel disclosure of the of details of a party's insurance cover as that fact is not normally relevant to the proof of any cause of action or issue in proceedings; and
- the contractual arrangements that the insured has entered into with a third party, in order to protect its own assets and safeguard against financial stress, are confidential matters outside of any proceedings.

In these circumstances, the Law Council considers that a solicitor has no unfettered ability to voluntarily disclose to other parties that the insured (whether the plaintiff or defendant in the proceedings) has claimed on its own policy and subrogated its rights to its insurer.

The Law Council view is that these are essentially public policy questions to be addressed in legislation regulating insurance companies and consumer protection, rather than ethical questions for legal practitioners, and the solution proposed of introducing a rule requiring a solicitor to make disclosure of the subrogation is, it is suggested, not the appropriate solution.

Conclusions

That a Rule requiring a solicitor to disclose the involvement of an insurer to any other parties to litigation is not warranted.

Claiming costs in letters of demand

Issues canvassed

The Consultation Paper recommended that a separate and specific ethical rule about claiming legal costs in letters of demand is not required, but further attention should be drawn to this kind of conduct in *Commentary* to the rules.

The Consultation Paper noted that the ethical duty to not mislead a person into believing legal costs or other debt recovery costs are payable is embodied in the principles underpinning a number of rules, including: to be honest and courteous in all dealings in the course of legal practice; to not bring the profession into disrepute; and to not make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the client, and which misleads or intimidates the other person.

The Consultation Paper also noted that in *Australian Competition and Consumer Commission v Sampson* [2011] FCA 1165 it was accepted, by consent, that the respondent solicitor had (in sending out letters of demand on behalf of clients) "engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of section 52 of the *Trade Practices Act 1974* (Cth)".

Responses and considerations

One of the three submissions received in response to this issue supported the recommendation that a rule was not required.

A regulatory authority that responded to this issue recommended the adoption of a rule to address this behaviour as making claims for costs in letters of demand, whether described as a 'demand' or a 'request' is an ongoing, problematic behaviour.

The third submission said that there is a clear need for a separate rule because of the extent of the practice among solicitors of claiming or requesting costs in letters of demand and the problems experienced in asking regulatory bodies to address the professional ethics of this practice, pointing out that such a rule would bring together the principles underling the four rules referred to above.

The Law Council noted the comments made in submissions but concluded that a specific ethical rule is not necessary, and that the issues could be set out and cross-referenced in *Commentary* to the Rules already applicable to this behaviour.

Conclusions

That the *Commentary* to Rule 34 and other relevant rules be expanded to include discussion of the issues raised by claiming legal costs in letters of demand.

Transfer of practice

Issues canvassed

It was drawn to the Law Council's attention that the ASCR do not include provision for transfer of a practitioner's practice as did, for instance, Rule 24 in the Law Institute of Victoria's now superseded *Professional Conduct and Practice Rules 2005.* It was suggested such a Rule be introduced.

The Law Council suggested in the Discussion Paper that the responsibilities and expectations of solicitors when transferring their law practice to another law practice are matters for legal practice rules rather than rules relating to ethical principles.

Responses and considerations

The only submission that responded to this issue agreed that the matter is best addressed in a Legal Practice Rule.

Conclusions

That a Legal Practice Rule be developed setting out the responsibilities and expectations of solicitors when transferring their law practice to another law practice.

Personal relationships with clients

Issues canvassed

It was suggested to the Law Council that the rules relating to relations with clients could include a Rule relating to sexual misconduct.

The Consultation Paper acknowledged that there have been calls over many years for a declaration that any sexual relationship between a solicitor and a client be regarded as unethical conduct. The Consultation Paper noted that the ethical duty to not form an inappropriate relationship with a client, including a sexual relationship, is embodied in the principles underpinning a number of rules, including to maintain independence, to not bring the profession into disrepute, to act in the best interests of the client and to avoid conflicts with a solicitor's own interests. The Consultation Paper suggested that a separate and specific ethical rule is not required, but that further attention could be drawn to this kind of conduct in *Commentary* to the rules.

Responses and considerations

The two submissions that responded to this agreed that this issue is best dealt with in Commentary.

Conclusions

That a specific Rule prohibiting the formation of a sexual relationship with a client is not required, but the *Commentary* will be expanded on this issue.

Mental wellbeing

Issues canvassed

The Consultation Paper considered whether a solicitor who forms a view that a fellow practitioner might be suffering a mental impairment has an ethical duty to respond, and if so, whether it should be a matter to be raised initially, and within a confidential setting, with the relevant professional association and addressed under a pastoral care program, or whether the appropriate ethical duty would be to report the matter to a regulatory authority.

Responses and considerations

The eight submissions that responded to this issue did not support the suggestion that this is a matter for a new rule. The range of views expressed are summarised as follows:

- such an obligation would be discriminatory and place a stigma on mental illness, and there are already sufficient obligations to the Court and opportunities for colleagues to assist, without the necessity to create an ethical obligation to report.

- a distinction needs to be made between *mental impairment* and *mental well-being*. Many law firms have sophisticated *mental well-being* programs in place for their solicitors and non-legal employees.

- in relation to mental impairment, this issue is linked to the broader question about whether the impairment either inhibits the solicitor's capacity to properly provide legal services or contributes to the solicitor breaching conduct rules or other legal duties:

  > *Seen in this way, a purpose of the proposed duty to report a practitioner with a perceived mental impairment is to protect against unsatisfactory professional conduct or professional misconduct. This would in effect tie the duty to report to circumstances where a practitioner's mental impairment has, or may, result in a client's interests being harmed.*

- however, if the only purpose of the proposed duty is to protect against unsatisfactory professional conduct or professional misconduct then it may "otherwise be seen as odd that a mental impairment giving rise to unsatisfactory professional conduct or professional misconduct should trigger a duty to report, whereas other instances of unsatisfactory professional conduct or professional misconduct do not trigger such a duty."

- further, if a general duty to report unsatisfactory professional conduct or professional misconduct is being considered, it would appropriate for the Law Council conduct a separate consultation to canvass a broader range of views on the matter.

- a clear distinction should be made between mental impairment on the one hand and unsatisfactory professional conduct or professional misconduct on the other - processes for addressing misconduct should not discriminate against persons who are experiencing mental impairment.

- concerns about lawyers' mental health should be addressed through a positive framework that recognises capacity, values diversity, addresses structural factors that contribute to mental ill health and supports lawyers to access appropriate support.
- the development of mental health and well-being initiatives is the most effective way to support lawyers and that any approach to this issue must be consistent with the *Convention on the Rights of Persons with Disabilities* and relevant anti-discrimination legislation.

It was also noted in one of the submissions that the Australian Medical Association's Code of Ethics does not require reporting, and that their Rule 3.2.2 might provide a better model for a rule for solicitors, if it is decided such as rule is required. The AMA Ethics Rule provides:

> Recognise colleagues who are unwell or under stress. Know how and when to respond if you are concerned about a colleague's health and take action to minimise the risk to patients and the doctor's health.

Conclusions

The Law Council concluded that a rule requiring the reporting of a belief that a fellow practitioner is suffering a mental impairment would not be appropriate.

Suggested introduction – cultural awareness

Issues canvassed

An additional issue raised in consultation was that the ASCR should include an introduction that highlights the need for cultural competency when advising and representing clients.

Responses and considerations

It was submitted that cultural differences and barriers can impact the client's understanding of the advice given, particularly when indigenous interpreters are not utilised or available. Cultural barriers and differences, and distrust of the legal system and/or practitioners can also impact the client's communication of relevant information and instructions to the solicitor for the giving of full and proper advice or representation.

It was suggested that the Rules should draw attention to these barriers and considerations so that solicitors can ensure that their clients can understand the advice given and can then make informed choices, as required by Rule 7. It was also submitted that cultural competency is relevant to the application of all the Rules and that a more thorough consultation should be undertaken in respect of the application of the Rules to indigenous clients.

Given that these issues were raised just prior to completion of the Review, the Law Council concluded that the most appropriate way to address this issue, at this juncture, would be to raise these issues in the *Commentary* and to undertake a more substantial consultation at the next Review of the Rules.

Conclusions

The requirement in Rule 7 to put clients in a position where they can make informed choices requires that when interacting with clients, solicitors must be aware of any cultural contexts, language barriers and other issues that may impact the client's access to, and understanding of, the legal system. Barriers preventing the provision of full instructions, or to understanding advice and providing fully informed consent, are an additional access to justice issue for such clients, which will be addressed in the Commentary, pending the next review of the Rules.

Responses received, including on proposed Rule 11A

Aboriginal Legal Service (NSW/ACT) Limited
Aged and Disability Advocates Australia
Attorney-General's Department (Commonwealth)
Australian Competition & Consumer Commission
Australian Criminal Intelligence Commission
Australian Federal Police
Community Legal Western Australia
Crown Solicitor, South Australia
Dr Lucy Cradduck and Mr Mark Thomas, Queensland University of Technology
Hunter Community Legal Centre
Judy Harrison, ANU School of Legal Practice
Justice Connect
Law Council of Australia, Equal Opportunity Committee
Law Council of Australia, President
Law Firms Australia
Law Institute of Victoria
Law Society of New South Wales
Law Society of New South Wales, Elder Law, Capacity and Succession Committee
Law Society of New South Wales Young Lawyers Human Rights Committee
Law Society of South Australia
Law Society of Western Australia
Legal Profession Conduct Commissioner, South Australia
Legal Aid ACT
Legal Aid New South Wales
Legal Aid Western Australia
Legal Aid Victoria
Legal Services Commission Queensland
Legal Practice Board of Western Australia
Legal Services Commission of South Australia
Linda Ryle, Cultural Advocacy Legal Mediation (CALM) Assist
Lise Barry, Macquarie Law School
My Community Legal Inc.
MyCRA Lawyers
Mr Shane Rattenbury MLA, Attorney-General, Australian Capital Territory
National Association of Community Legal Centres (Community Legal Centres Australia)
National Legal Aid
Office of the Legal Services Commissioner, New South Wales
Queensland Advocacy Incorporated
Queensland Law Society
Suncoast Community Legal Service
The Hon T F Bathurst AC, Chief Justice of New South Wales
The Hon Helen Murrell, Chief Justice of the Australian Capital Territory
The Hon Justice Quinlan, Chief Justice of Western Australia
The Hon Chris Kourakis, Chief Justice of South Australia
Victorian Legal Services Board + Commissioner
Women's Legal Service Qld

The Professional Ethics Committee

Members

Mr Steven Stevens	Chair	Law Institute of Victoria
Mr Ashley Macknay		Law Society of Western Australia
Ms Kellie Granger		Law Society Northern Territory
Mr Kelvin Strange		Law Society Northern Territory
Mr Chris Boundy		Law Society of South Australia
Mr Stafford Shepherd		Queensland Law Society
Mr Paul Monaghan		Law Society of New South Wales
Mr Mitchell Hillier		Law Firms Australia
Mr Ian Dallen		Law Firms Australia
Mr Michael Phelps		Law Society Australian Capital Territory
Mr Rob Reis		Law Society Australian Capital Territory
Mr Philip Jackson SC		Law Society of Tasmania

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