



THE LAW SOCIETY  
OF NEW SOUTH WALES

## **GUIDELINES FOR CONTACT WITH THE COMPLAINANT IN APPREHENDED DOMESTIC VIOLENCE MATTERS**

Developed by the Young Lawyers Criminal Law Committee, in  
collaboration with the Law Society's Criminal Law Committee.

THE LAW SOCIETY OF NEW SOUTH WALES  
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These Guidelines were developed by the Young Lawyers Criminal Law Committee, in collaboration with the Law Society's Criminal Law Committee. The Guidelines were adopted on behalf of the profession by the Council of the Law Society of NSW on 20 May 2004. The Guidelines were updated on December 2016.

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## OBJECTIVES

These Guidelines for Contact with the Complainant in Apprehended Domestic Violence Matters (**Guidelines**) outline some specific obligations and responsibilities of solicitors when dealing with complainants in apprehended domestic violence proceedings and associated criminal proceedings.

## INTRODUCTION

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (**C(DPV) Act**) sets out these following common terms, which are used in apprehended violence matters (all section references are to the C(DPV) Act unless stated otherwise):

- **Apprehended Violence Order (AVO):** Under section 3, an AVO is defined to include both a final apprehended violence order and an interim apprehended violence order.
- **Apprehended Domestic Violence Order (ADVO):** Part 4 sets out when an ADVO can be made. Under section 15, an ADVO may be made for the protection of:
  - a person against another person with whom he or she has or has had a domestic relationship; or
  - two or more persons against another person with whom at least one of those persons has or has had a domestic relationship.
- **Apprehended Personal Violence Order (APVO):** Part 5 sets out when an APVO can be made. Under section 18, an APVO may be made for the protection of one or more persons against another person.
- **Protected person or person in need of protection (PINOP):** A Protected Person or PINOP is the person for whose protection an order is sought or made.
- **Stalking:** Under section 8, stalking includes following a person about, or watching or frequenting the vicinity of, or an approach to, a person's residence, business or work, or any place that a person frequents for the purpose of any social or leisure activity.

## ORDERS AND BAIL CONDITIONS

- **Provisional orders:** Part 7 provides that provisional orders can be made by a Magistrate, a Local Court registrar, or by a police officer of or above the rank of sergeant.
- Provisional orders are made on the application of a police officer who has good reason to believe a provisional order needs to be made immediately to ensure the safety of the person who would be protected by the order, or to prevent substantial damage to any property that they own.
- **Interim orders:** Section 22 empowers a court to make an interim AVO if it appears to the court that it is necessary or appropriate to do so in the circumstances.
- Under section 78, a court may make a final AVO, or an interim AVO, without being satisfied as to the matters that are prerequisites to the making of those orders if the complainant and defendant consent to the making of the order.
- **Bail conditions:** Where the defendant has been charged with breach of an AVO, the court may have imposed bail conditions which may prohibit the defendant from contacting the complainant either directly or indirectly. Solicitors should familiarise themselves with all bail conditions imposed. A copy of the bail conditions can be obtained from the defendant or the court.

Solicitors acting for a defendant should establish whether there is an AVO in place. If there is an AVO in place, a copy should be obtained from the client or the court. An AVO may prohibit contact with the complainant and may prohibit a third party contacting the complainant on behalf of the defendant. Solicitors should ensure that they do not participate in a breach of an AVO.

If there is an AVO or bail conditions in place prohibiting contact, and if a solicitor considers that it is necessary to contact the complainant, the solicitor should seek a variation of the AVO or bail conditions before making contact.

## SOLICITORS' DUTIES

The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Conduct Rules)* set out solicitors' duties and responsibilities in dealing with courts and other parties: [www.legislation.nsw.gov.au/#/view/regulation/2015/244/full](http://www.legislation.nsw.gov.au/#/view/regulation/2015/244/full)

The Conduct Rules apply to all solicitors and Australian registered foreign lawyers acting in the manner of a solicitor.

The following rules should be considered when dealing with Complainants in apprehended domestic violence proceedings and associated criminal proceedings:

3. Paramount duty to the court and the administration of justice
4. Other fundamental ethical duties
24. Integrity of evidence – influencing evidence
25. Integrity of evidence – two witnesses together
26. Communication with witnesses under cross-examination
33. Communication with another solicitor's client
34. Dealing with other persons

## CONDUCT RULES

### **RULE 3. PARAMOUNT DUTY TO THE COURT AND THE ADMINISTRATION OF JUSTICE**

- 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

### **RULE 4. OTHER FUNDAMENTAL ETHICAL DUTIES**

- 4.1 A solicitor must also:
  - 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
  - 4.1.2 be honest and courteous in all dealings in the course of legal practice;
  - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
  - 4.1.4 avoid any compromise to their integrity and professional independence; and
  - 4.1.5 comply with these Rules and the law.

### **Rule 24. INTEGRITY OF EVIDENCE – INFLUENCING EVIDENCE**

- 24.1 A solicitor must not:
  - 24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or
  - 24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.
- 24.2 A solicitor will not have breached Rules 24.1 by:
  - 24.2.1 expressing a general admonition to tell the truth;
  - 24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or
  - 24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

### **RULE 25. INTEGRITY OF EVIDENCE – TWO WITNESSES TOGETHER**

- 25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:
  - 25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and
  - 25.1.2 where such conferral could affect evidence to be given by any of those witnesses, unless the solicitor believes on reasonable grounds that special circumstances require such a conference.
- 25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

## **RULE 26. COMMUNICATION WITH WITNESSES UNDER CROSS-EXAMINATION**

- 26.1 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:
- 26.1.1 the cross-examiner has consented beforehand to the solicitor doing so; or
  - 26.1.2 the solicitor:
    - (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
    - (ii) as, 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.

## **RULE 33. COMMUNICATION WITH ANOTHER SOLICITOR'S CLIENT**

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

## **RULE 34. DEALING WITH OTHER PERSONS**

- 34.1 A solicitor must not in any action or communication associated with representing a client:
- 34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person;
  - 34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied; or
  - 34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.
- 34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

## **CASELAW**

It is imperative that a solicitor does not try to influence a witness in any way with respect to the evidence that witness may give. It should be noted that an attempt to persuade a witness to give evidence favourable to his client was considered professional misconduct by the High Court of Australia in *Kennedy v Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563.

## **INITIATING CONTACT WITH A COMPLAINANT**

A solicitor acting for a defendant in apprehended domestic violence proceedings, or associated criminal proceedings, should be cautious when initiating contact with the complainant. There may be circumstances where it is necessary to obtain evidence from a complainant and initiate contact. In doing so, you must balance your professional obligations to act in the best interests of the client with adherence to the remaining solicitors conduct rules.

Contact should only be initiated where there is a legitimate basis for doing so.

When making contact, the solicitor should be sensitive and careful not to suggest any impropriety or intimidation.

Wherever possible, contact should be in written form.

Where it is necessary for a solicitor to contact a complainant, whether in person or otherwise, and there is no order in place prohibiting this contact, the solicitor should upon making contact:

- State their name;
- State the name of their firm;
- Identify themselves as the lawyer for the accused;
- Identify the reason for contacting the complainant;
- Inform the complainant that they are not required to speak to anyone unless they wish to;
- Recommend that the complainant may wish to obtain independent legal advice.

It is imperative that the solicitor keeps a detailed record of any contact with the complainant.

Where the contact is face to face, where possible there should be an independent witness present.

Under no circumstances should the defendant be present during the conference.

## **A COMPLAINANT INITIATING CONTACT WITH A SOLICITOR**

If the complainant contacts a solicitor for the defendant seeking to abandon all or part of the complaint, the solicitor should inform the complainant:

- That they act for another party in the proceedings and cannot provide the complainant with legal advice; and
- That they recommend that the complainant obtain independent legal advice about the consequences of their intended course of action.

As above, the solicitor should make a detailed record of any contact.

A solicitor must not assist the complainant in making representations to the police or assist in preparing a statement for withdrawal of the complaint. A solicitor must not suggest that the complainant make representations to police to withdraw a complaint.

It may be appropriate to contact the informant, police prosecutor or DPP solicitor with carriage of the matter, setting out in writing the information provided by the complainant.

If a complainant contacts a solicitor suggesting that they will not attend court, will refuse to comply with a subpoena, or wish to change the evidence they propose to give, the solicitor must make a detailed file note and ensure no further discussion is entered into and no further contact is made with the complainant.

## SOLICITORS MUST NOT BE MATERIAL WITNESSES IN THEIR CLIENT'S CASES

There are risks involved in initiating contact. Solicitors should be aware that, if they do have contact with a complainant, they put themselves in a position where they can potentially become a material witness in their client's case. Conduct Rule 27 applies in these circumstances.

### RULE 27. SOLICITOR AS MATERIAL WITNESS IN CLIENT'S CASE

- 27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.
- 27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

Additionally, consideration should be given to section 323 of the *Crimes Act 1900* which makes it an offence to influence or otherwise cause a witness to give false evidence, withhold true evidence, not attend as a witness, or not produce anything in evidence pursuant to a summons or subpoena.

## CONCLUSION

A solicitor must ensure that at all times they comply with the Conduct Rules and the C(DPV) Act, balancing their (sometimes competing) professional obligations with thought and consideration. Solicitors must act prudently and cautiously to ensure that they do not breach their obligations and responsibilities.

If a solicitor has any doubts as to their obligations and responsibilities, they should immediately seek guidance from the Ethics Section of the Professional Standards Department of the Law Society of New South Wales:

- Website: [www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/index.htm](http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/index.htm)
- Ethics Assistance Line: (02) 9926 0114
- Email: [ethics@lawsociety.com.au](mailto:ethics@lawsociety.com.au)

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