



THE LAW SOCIETY
OF NEW SOUTH WALES

Practical aspects of ethics – duties,
conflicts and issues 2017.

***“Maintaining high ethical standards is the hallmark of
the legal profession”***



Regulatory Framework

- *NSW Legal Profession Act 2004*
- *Legal Profession Uniform Law (LPUL)*
- *NSW Legal Profession Regulations*
- *LPUL General Rules (regulations)*
- *LPUL Solicitors' Conduct Rules*
- *LPUL Practice (Solicitors) Rules*





NSW Legal Profession Uniform Law

- s.296 - unsatisfactory professional conduct
- s.297 - professional misconduct
- s.298 – conduct that can result in findings of PM/UPC
- Common law – ‘disgraceful & dishonourable’.





Professional Conduct & Practice Rules – Uniform Law

- Sec 298 (a) breach - Professional Misconduct / Unsatisfactory Professional Conduct
- Sec 298 (b) contravention of the uniform rules





Fundamental duties - ASCR 4

- 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.





Mistakes of other solicitor

- 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.





ASCR Confidentiality

- 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
 - 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or
 - 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
- EXCEPT as permitted in Rule 9.2.



ASCR - Confidentiality

- 9.2 A solicitor may disclose confidential client information if:
 - 9.2.1 the client expressly or impliedly authorises disclosure;
 - 9.2.2 the solicitor is permitted or is compelled by law to disclose;
 - 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;
 - 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
 - 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
 - 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.



Inadvertent disclosure

31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:

- 31.2.1 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.
- *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46 (6 November 2013) at 64 to 67 – Solicitors' responsibilities





Part 4 – Conflicts

- concerning a solicitor's own interests

- 12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.
- 12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client.
- 12.3 A solicitor must not borrow any money, nor assist an associate to borrow money





ASCR - Conflict concerning a solicitor's own interests

- 12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided that the solicitor advises the client:
 - (i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
 - (ii) that the client may refuse any referral, and the client has given informed consent to the commission or benefit received or which may be received.
- 12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided that the solicitor has first disclosed the payment or financial benefit to the client.



ASCR 6 - Undertakings

- > 6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, ***unless released by the recipient or by a court*** of competent jurisdiction.
- > 6.2 A solicitor ***must not seek*** from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation ***of a third party*** who is not party to the undertaking.





ASCR 24 – Integrity of evidence – influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will **not have** breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.



Client documents

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

14.1.1 the client or former client, or

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

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



ASCR 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.





NSW and ASCR Rule 42 – Anti- discrimination and Harassment

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment

42.1.3 workplace bullying – “bully by proxy”





ASCR- Dealing with the Media

28 Public comment during current proceedings

28.1 A solicitor must *not publish or take steps towards the publication* of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.





IBA - Dealing with the Social Media

- Independence
- Integrity
- Responsibility- *To understand use;*
To clarify use;
To use appropriately;
To adhere to practice promotion, advertising and solicitation rules, codes and legislation in use; and avoid Conflicts of interest
- Confidentiality
- Maintaining public confidence
- Policy

