

PROFESSIONAL CONDUCT AND ADVOCACY

AVOIDING A BREACH OF THE PROFESSIONAL CONDUCT
AND PRACTICE RULES

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Professional Conduct and Advocacy – Avoiding a Breach of the Professional Conduct and Practice Rules

“Any judge who is invited to make or contemplates making an order arising out of an advocate’s conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae”

These observations by Sir Thomas Bingham M.R. (now Lord Bingham of Cornhill) in *Ridehalgh v Horsefield* [1994] Ch.205 are described as “instructive” by Lord Browne-Wilkinson in the recent House of Lords decision abolishing advocate’s immunity (*Arthur J S Hall and Co v Simons (AP) Barratt v Ansell and Others (Trading As Woolf Sebbon (A Firm) Harris v Scholfield Roberts and Hill (Conjoined Appeals)* [2000] UKHL 38 (20 July 2000)). They certainly emphasise the difficulties which advocates face.

Where do the Professional Conduct and Practice Rules fit in with practice as a solicitor advocate? What are the fundamental principles and how can you gain guidance for avoiding a breach?

Firstly, where do the Rules fit in with practice as a solicitor per se?

As well as being subject to the general law, solicitors as members of the profession are subject to:

- *The Legal Profession Act, 1987* “An Act to regulate the admission and practice of barristers and solicitors” (“the Act”)
- *The Revised Professional Conduct and Practice Rules* made by the Council of the Law Society of New South Wales on 24 August 1995 pursuant to its power under Section 57B of *the Legal Profession Act, 1987* (“the Rules”)

- The *Statement of Ethics* proclaimed by the Law Society of New South Wales in November 1994, a copy of which is reproduced at the end of this paper

There is a significant body of common law authority in relation to the professional obligations of solicitors.

Section 38H of the Act provides that practice as a solicitor is subject to the Rules. Section 57D(4) provides that while a breach of the Rules may not necessarily involve a breach of the Act it may amount to professional misconduct or unsatisfactory professional conduct. There may be situations which are not expressly covered by the Rules to which general ethical principles apply.

It is important to repeat some general observations about the legal profession, solicitors' duties and the solicitor/client relationship and its limitations. Some useful examples also follow explaining the application of the Rules.

The Honourable Profession

“The law should protect the rights and freedoms of members of the community. The administration of the law should be just.

The lawyer practises law as an officer of the Court. The lawyer’s role is both to uphold the rule of law and serve the community in the administration of justice.”

These are the opening words of the Statement of Ethics proclaimed by the Council of the Law Society of New South Wales on 20 November 1994.

Much earlier, Isaacs J made the following statement *in Incorporated Law Institute of New South Wales -v- R D Meagher (1909) 9 CLR 655 at 681* which is important in understanding the role of the lawyer in society:

“..there is therefore a serious responsibility on the court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be

careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential.”

These comments are mirrored by the much later comments of Kirby P speaking of the barrister's duty of candour to the courts in ***New South Wales Bar Association -v- Thomas (No 2) (1989) 18 NSWLR 193***, a matter involving a failure of counsel to disclose during criminal proceedings how certain statements had been obtained. Kirby P said at p204:

“The rank of barrister is one of status. With it go obligations which cannot be shaken off or forgotten simply because the holder of the office has not been practising in the daily work of a barrister. If a person does not wish to assume the obligations to the Court of the barrister, that person should not seek admission by the Court as such. Once admitted, the additional duties of invariable candour as well as honesty to a Court prevail.”

As I noted above, solicitors are subject to the law (statute law and the common law) – so are all members of the community. However, the legal profession is in a different position in a two-fold way: a breach of the law might bring professional as well as legal sanctions but also, members of the legal profession may be excused from complying with the law as ordinary members of the community must where that is for the proper protection of the client eg where legal professional privilege/client legal privilege applies. This often raises vexed issues and requires lawyers to walk a fine line.

In ***Rondel -v- Worsley [1969] 1 AC 191 at 227; [1967] All ER 993 at 998*** Lord Reid put the duty to the client and to the Court in perspective:

“Every Counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.”

The Law Society's Role: The Ethics Section and the Ethics Committee

Ethical dilemmas constantly arise for the profession in dealing with the conflicts between the various duties owed by solicitors. The Ethics Section of the Professional Standards Department of the Law Society of New South Wales, which I head as Senior Ethics Solicitor, receives well over 2,000 Ethics enquiries per year. Most of these involve conflict of interest and many involve communications, problems concerning confidentiality, misleading and assisting fraudulent activity. The issue of turning a blind eye in the context of legal practice and bearing in mind the lawyer's professional responsibility is very much a live issue and highly relevant to the problems which confront solicitor advocates.

The functions of the Ethics Section include: recognising, considering and acting upon policy issues involving ethical principles affecting solicitors in New South Wales; resolution of disputes involving ethical issues; complaint prevention and education. Matters which are particularly contentious or involve policy are referred to the Ethics Committee which is a committee of the Council of the Law Society of New South Wales. The matters referred from the Ethics Section to the Ethics Committee comprise a small proportion of the Ethics Section's work.

The Solicitor/Client Relationship

The solicitor/client relationship is the basis of professional practice. It is a relationship which obviously brings rewards but which also carries with it onerous responsibilities, risks and pressures.

The duty to the client is often described as paramount. This obviously means that in conducting a matter for a client your primary consideration is the client's best interests, not those of the opposing party or anyone else including yourself. However, the duty to the client cannot override the other duties referred to above.

A forceful commentary on the solicitor/client relationship is found in ***Tyrrell - v- Bank of London (1862) 10HLC26*** where at pp 39-40 Lord Westbury said:

“...there is no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client.”

There are many ways in which acting in accordance with the client’s wishes, and therefore on the face of it in accordance with the client’s interests, will interfere with the due administration of justice referred to by Lord Reid (see above.)

The crucial points in the Statement of Ethics and its acknowledgment of the lawyer’s role of upholding the rule of law and serving the community in the administration of justice vis-à-vis the solicitor’s duty to the court are that lawyers should:

- Act frankly and fairly in all dealings with the courts.
- Be trustworthy.

Crucial points vis-à-vis the solicitor/client relationship that lawyers should:

- Serve their clients’ interests competently.
- Communicate clearly with their clients.
- Keep the affairs of clients confidential, unless otherwise required by the law.
- Maintain and defend the rights and liberty of the individual.
- Avoid any conflict of interest.

Importantly, in terms of the “balancing act” which must be observed in putting the lawyer’s duties into context, the Statement of Ethics says:

“In fulfilling this role, lawyers are not obliged to serve the client’s interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.”

The Rules deal in discrete chapters with: relations with clients; practitioner's duties to the Court; relations with other practitioners and relations with third parties. The Advocacy Rules appear in Rule 23 which states:-

*"Rules A.15 to A.72 apply to all legal practitioners (whatever may be their predominant style of practice) when they are acting as advocates. The term **practitioner** is used throughout these Rules to refer to legal practitioners acting as advocates whether they are person who practise only as barristers, or persons, who practise as solicitors, or as barristers and solicitors."*

The remainder of the Rules apply to all legal practitioners practising as solicitors, or as barristers and solicitors (which obviously includes solicitor advocates). The Advocacy Rules were introduced by adopting with appropriate amendments the Advocacy Rules applicable to members of the New South Wales Bar in order to ensure consistency among advocates from either branch of the profession. In practical terms this was necessary as it would be impractical to maintain different ethical standards where matters might be conducted on the one hand by a solicitor advocate and on the other hand by a barrister.

Efficient Administration of Justice

The thrust of the Advocacy Rules has historically been based on the duties of officers of the Court not to mislead the Court and to act with fairness and honesty towards other practitioners, others parties and witnesses while at the same time observing the duty to the client i.e. the *proper* administration of justice. Recent amendments have introduced a new dimension: the *efficient* administration of justice.

These followed amendments to the Rules of the Supreme Court of New South Wales gazetted in January 2000, reflecting the changing face of the community, the legal system and the legal profession and the community expectations of them. It comes in the context of the increasing costs and increasing complexity of litigation both civil and criminal.

The amendments to the Supreme Court Rules 1970 include the insertion after Rule 2 of the following:

"Overriding purpose

3. (1) The overriding purpose of the rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.
- (2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.
- (3) A party to civil proceedings is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.
- (4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).
- (5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs."

Part 52A rules 25 was amended to read:

"Disobedience to rule, judgment or order

25. *Where any person fails to comply with any provision of the rules or any judgment or a direction of the Court, the Court may order that person to pay the costs of any other person occasioned by the failure."*

Relevant for the profession the amendments to Rule 43 of Part 52A include Rules in relation to the liability of a solicitor.

Rules 43(1) and 43(2) state:-

- "43** (1) *Where costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or*

default, and it appears to the Court that a solicitor is responsible (whether personally or through a servant or agent), the Court may, after giving the solicitor a reasonable opportunity to be heard;

- (a) disallow the costs as between a solicitor and a solicitor's client, including disallowing the costs for any step in the proceedings;*
- (b) direct the solicitor to repay to the client costs which the client has been ordered to pay to any other party; and*
- (c) direct the solicitor to indemnify any party other than the client against costs payable by the party indemnified.*

(2) Without limiting the generality of Subrule (1), a solicitor is responsible for a default for the purposes of that Subrule where any proceedings cannot conveniently proceed, or can proceed only with the incurring of extra costs or with the inconvenience of the Court or another party to the proceedings, because of the failure of the solicitor:

- (a) to attend in person or by a proper representative;*
- (b) to file any document which ought to have been filed;*
- (c) to deliver any document which ought to have been delivered for use of the Court;*
- (d) to be prepared with any proper evidence or account;*
- (e) to comply with any provision of the rules or any judgement or order or direction of the Court; or*
- (f) otherwise to proceed."*

This reflects the duty towards the Court and also the duty to act competently and diligently towards the clients, a duty encompassed in Rule 1.1 which says:-

"1. 1.1 *A practitioner must act honestly, fairly, and with competence and diligence in the service of a client, and should accept instructions, and a retainer to act for a client, only when the practitioner can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness."*

The Advocacy Rules contain the following sub-headings:

- Efficient administration of justice.
- Duty to client.
- Independence – avoidance of personal bias.
- Frankness in Court.
- Integrity of evidence.
- Duty to opponent.
- Integrity of hearings.
- Prosecutors' duties.
- The advocacy rules appear to be more detailed and more precisely applicable to particular situations than perhaps the other rules are.

Consideration of these points emphasises the constant need to apply sound professional judgment.

The other rules, outside the Advocacy Rules which particularly apply to solicitor advocates are the following:

In the chapter *"relations with clients"*

- Rule 2 – Confidentiality.
- Rule 3 – Acting against a former client.
- Rule 5 -Termination of retainer

- Rule 6A – Legal Aid Application – Criminal proceedings.
- Rule 6B – Legal Aid; Court of Criminal Appeal proceedings.
- Rule 9 – Acting for more than one party.
- Rule 10 – Avoiding a conflict between a client's and a practitioner's own interest.

In the chapter "*practitioners' duties to the Court*"

- Rule 17 – Preparation of affidavits.
- Rule 18 – Duty not to influence witnesses.
- Rule 19 – Practitioner a material witness in client's case.
- Rule 20 – Admission of guilt.
- Rule 21 – Admission of perjury.
- Rule 22 – Bail.

In the chapter "*relations with other practitioners*"

- Rule 25 – Communications.
- Rule 31 – Communicating with another practitioner's client.

Copies of the Advocacy Rules and the other Rules specifically mentioned are included at the end of this paper.

The *Inefficient* Administration of Justice?

It is instructive to reflect on the description of the 19th Century Court of Chancery described by Charles Dickens in *Bleak House* . Consider this and contrast it with the modern day Court.

"On such an afternoon, if ever, the Lord High Chancellor ought to be sitting here – as here he is – with a foggy glory round his head, softly fenced in with crimson cloth and curtains, addressed by a large advocate with great whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon some score of members of the High Court of Chancery bar ought to be – as here they are – mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a pretence of equity with serious faces, as players might. On such an afternoon various solicitors in the cause some two or three of whom have inherited it from their fathers, who made a fortune by it ought, to be – as are they not? – ranged in a line, in a long matted well (but you might look in vain for truth at the bottom of it) between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them."

The depressing scene continues with the naming of this infamous cause, the case of Jarndyce and Jarndyce. Who would want to be involved in this matter?

"Jarndyce and Jarndyce drones on. The scarecrow of a suit has, in course of time, become so complicated that no man alive know what it means. The parties to it understand it at least, that it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises..Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless ..has passed into a joke. That is the only good that has ever come of it..How many people out of the suit of Jarndyce and Jarndyce has stretched forth its unwholesome hand to spoil and corrupt would be a very wide question."

The chapter "*practitioner's duties to the Court*" in which the Advocacy Rules appear begins with the following preamble which does not form part of the Rules but is a statement of general principle intended to describe the underlying principles and objectives of the Rules:

"Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents."

Interpretation and Practical Application of the Rules

It is important and perhaps comforting to know that even experienced practitioners face ethical dilemmas which they cannot resolve easily.

In the American Bar Association Journal of February last year the following comment appears:

"The basic rules of professional conduct initially appear to be a fairly simple blueprint for appropriate behaviour by lawyers.

But when applied to real situations, those black-letter rules often seem to blur into a pool of [gray].

Many ethics questions have been asked and answered enough times that practitioners can feel confident that they know where the lines are. But in some evolving areas of law, the lines are considerably less bright."

You might agree, however, that the lines are not necessarily particularly bright even in established areas of the law. The new concept of the efficient administration of justice may not be difficult to accept into practice.

The Rules

Clearly the first step in avoiding a breach of the Rules is to have a good knowledge of their terms and their application.

The duty to act competently and diligently – Rule 1

This fits in with the requirement in Rule A15 that the practitioner must do work "which the practitioner is retained to do, whether expressly or implied, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice note of the Court".

Clearly sanctions will be imposed by the Court should its procedures not be complied with.

The duty of confidentiality – Rule 2

No information can be provided to the Court or to the other party without the client's authority.

Acting against a former client – Rule 3

Rule 3 requires that a solicitor should not act against a party where he or she has obtained confidential information from that party relevant to the current matter received as a result of a previous solicitor/client relationship and where that information could reasonably be perceived by the former client to be able to be used to his or her detriment in the proceedings.

A solicitor may be placed in the difficult position of having acted for a witness whom he or she must cross examine. While Rule 3 does not apply specifically to that situation the duty of confidentiality arises.

Example

A solicitor acting for a client in a criminal matter in which he was defending the client on a charge of perjury arising from a workers compensation claim made the embarrassing discovery during the course of the committal hearing that he

had, some time earlier, advised the witness about his role in the circumstances giving rise to the perjury charge. This then meant that he had to withdraw from acting for the accused because he felt he had, and certainly he could be perceived to have, information confidential to that person relevant to the defendant's defence giving rise to a conflict between the duty of disclosure to the present client and the duty of confidentiality to the former client.

Acting for more than one party – Rule 9

Rule 9 does not prevent a solicitor from acting for more than one party e.g. co-plaintiffs in a civil action or co-defendants in a civil or criminal action but the solicitor must be satisfied at the outset that each knows the solicitor is acting for the other and that if a conflict arises he or she will have to withdraw from the matter entirely. This also brings into play Rule 3 considerations. This might particularly be likely to occur in a criminal matter where defendants decide to implicate each other.

Termination of retainer – Rule 5

A solicitor must complete what the solicitor is retained to do. This is reflected in Rules A15 and A15(a) of the Advocacy Rules. Rule 5, however, allows a practitioner to withdraw where he or she and the client have agreed, the client discharges the practitioner from the retainer or *"the practitioner terminates the retainer for just cause, and on reasonable notice to the client"*.

In relation to notice Rule 5.2 provides that a practitioner who has accepted instructions to act for a defendant required to stand trial in the Supreme Court or the District Court for a criminal offence must not terminate the retainer and withdraw from the proceedings on the ground that the client has failed to make satisfactory arrangements as to payment of costs without serving notice on the client of the practitioner's intention to terminate the retainer *"at a time reasonable in advance of the date appointed for the commencement of the trial, or the commencement of the sittings of the Court in which the trial is listed"*.

Example

A solicitor acted for a client in an action against three hospitals. The solicitor's reporting expert was not supportive and Senior Counsel received a letter from the client criticising the solicitor quite unfairly. Lack of confidence by the client is a just cause for withdrawal as is conflict of interest and the receipt of information indicating that the client is not telling the truth (the last of which I will comment upon later).

Preparation of affidavits – Rule 17

Subrule 1 relates to the duty not to mislead the Court.

If a practitioner is

- aware that a client is withholding information required by an order or rule of the Court, with the intention of misleading the Court; or
- informed by a client that an affidavit of the client, filed by the practitioner, is false in a material particular

the practitioner must, on reasonable notice, terminate the retainer if the client will not make the relevant information available or allow the practitioner to correct the false evidence and give notice of his or her withdrawal from the proceedings without disclosing the reasons to the Court.

This rule does not relate to preparation of affidavits on behalf of witnesses i.e. person who are not clients. This appears to be an anomaly.

Example

A solicitor prepared an affidavit sworn by a potential witness in a matter, an officer of a company. Settlement negotiations were about to begin and the solicitor wished to use the affidavit during the course of the negotiations. However, some information came to light which suggested that the facts

deposed to in the affidavit might not be strictly accurate. The doubt about the affidavit arose from the solicitor's consideration of a file note sworn by the deponent. His question to the Society was whether the affidavit could nevertheless be used. It seemed that that might be misleading of the other side although it would not be misleading the Court. Were the affidavit filed in Court and the witness subjected to cross-examination the truth may have emerged but nevertheless the solicitor would have been potentially in a position of misleading the Court.

Three decided cases involving misleading the Court in relation to preparation of affidavits are:

- **Myers-v-Elman [1940] AC 282; [1939] 4 All ER 484** in which the House of Lord said a solicitor *“cannot simply allow the client to make whatever affidavit of documents he thinks fit, nor can he escape the responsibility of careful investigation or supervision ..a solicitor who has innocently put upon the file an affidavit by his client, which he subsequently discovers to be false, owes a duty to the Court to put the matter right at the earliest moment if he continues to act as solicitor on the record.”*
- A much more recent matter of **Coe-v-New South Wales Bar Association BC 2000 00540; [2000] NSWCA 13** concerns a barrister who was personally a party in Family Court proceedings who swore an affidavit verifying a Statement of Financial Circumstances which to his knowledge was untrue. The Legal Services Tribunal ordered that his name be removed from the Roll of Legal Practitioners following a finding of professional misconduct.
- In **Re Thom [1918] 18 SR(NSW) 70; 35 WM (NSW) 9** dealt with a solicitor who drew an affidavit by a client in which she stated *“I do not admit the allegations against my character”* when the solicitor had knowledge that the facts deposed to were true.

Allegations of fraud – Rules 17.2 And A37

This issue is dealt with in Rules 17.2 and A37 (commented upon more fully below).

Duty not to influence witnesses – Rule 18

While it is well recognised that there is no property in witnesses nevertheless there are constraints when a solicitor wishes to communicate with a witness or a possible opposite party. This partly reflects the general "golden" rule against communicating with another solicitor's client and can arise either in the course of preparation for a hearing, during settlement negotiations or during the hearing.

The Rule refers to *"any matter or event which is the subject of adversarial proceedings before a Court"* and prohibits a practitioner from conferring with or interviewing:

- the opposing party in the proceedings including a person who may be represented or indemnified in proceedings by an insurance company
- where the opposing party or a prospective opposing party is a corporation, any person authorised to make admissions on behalf of the corporation, or to direct the conduct of the proceedings.

Exceptions are:

- if the other person, unrepresented by a practitioner, has been fully informed of the practitioner's purpose in conducting interview, has been advised to seek and to take the opportunity of obtaining independent legal advice or
- the practitioner acting for the other person has agreed to the interview on conditions which may include the conduct of the interview in the presence of both parties' practitioners.

Example

A solicitor acting for a proposed plaintiff injured in a motor vehicle accident during the course of his employment sought advice as to whether he could interview a potential defendant (the driver of the relevant motor vehicle) on issues of causation and safe system of work. The owner of the vehicle was the employer of both the potential plaintiff and the first defendant i.e. the passenger (client) and the driver.

Strictly speaking Rule 18 did not apply because the matter was not yet "*the subject of adversarial proceedings before a Court*". If proceedings had been commenced then the solicitor could have contacted the driver (who he hoped would be able to give him information helpful to his client's case against the owner/employer) as long as the safeguards noted in Rule 18 were observed. However, a strong view was that as the Rule did not apply nor did the exceptions and ethically it would have been most undesirable for contact to be made. This issue is shortly to receive some further consideration.

Practitioner a material witness in client's case – Rule 19

Rule 19 prevents a solicitor advocate appearing as advocate in a case "*in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court*".

The Rule also goes on to provide that there may be exceptional circumstances which would allow a solicitor acting (i.e. not in the role of advocate) continuing to act but only if those "*exceptional circumstances*" exist.

For an advocate particularly, logistical considerations apply. Moving between the bar table and the witness box might have practical difficulties apart from any other considerations. The basis of the Rule is really conflict of interest; the solicitor/witness' evidence might be detrimental to the client's case or, the opposite – the evidence may assist but the Court may have difficulty in affording it the appropriate weight because the solicitor has an interest in seeing the matter succeed and the evidence may therefore be tainted. Riley's New South Wales Solicitors Manual 2000 edition deals with that last

consideration. I have further material which may assist in considering some of the other finer points arising from the Rule.

Example

A solicitor about whom I recently wrote in the Law Society Journal under the heading "*Do you make it clear you are representing*" in a column appearing in February 2001 page 49 asked if it would be ethical to use information which a witness volunteered to him in recent proceedings. In short the witness, who was a witness to be called by the other side, foreshadowed committing perjury. Subsequently the solicitor contacted the Society indicating that he had been instructed to act in a matter in which that witness was the opposing party. He felt he had information which would undermine that party's credibility but clearly were he to give evidence himself in the second case Rule 19 would prevent him from acting.

Admission of guilt

This is dealt with in Rules 20, A32 and A33.

In our adversarial system, a practitioner does not have to "*do the other side's work*" for it but of course cannot mislead the Court or the other party.

Therefore a practitioner can act for the accused or defendant in criminal proceedings who elects to plead "*not guilty*" after admitting guilt to the practitioner but the practitioner cannot:

- put a defence case which is inconsistent with the client's confession
- falsely claim or suggest that another person committed the offence
or
- continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

The practitioner must ensure that the prosecution is put to proof of its case and may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the events by

the client. In theoretical terms this is quite consistent with the parameters of our legal system. In practical terms it may cause some difficulties for the practitioner and cause urgent and serious judgments to be made.

The very familiar dilemma in which counsel for one Tuckiar found himself in 1934 demonstrates the obstacles placed in the part of the responsible and competent practitioner and caused the Court to state:

"Why he should have conceived himself to have been in so great a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and to the Court to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only ...Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted" (see **Tuckiar-v-R (1934) 52 CLR 335**).

The innocent client pleading guilty.

The Ethics Committee recently considered the opposite problem i.e. a solicitor accepting a plea of guilty from a client appearing or claiming to be innocent of a criminal charge, nevertheless instructing the solicitor to plead guilty in the matter.

There may be a number of factual situations. Firstly where there is doubt as to the client's guilt or innocence in which case it may not be inappropriate to obtain the client's instructions to plead guilty. Secondly the client might simply want to plead guilty to avoid a trial. Thirdly, the client might be trying to protect a third party.

The Ethics Committee felt that a solicitor accepting a plea of guilty from a client who could run a technical or some other defence, or who after proper advice considers that it is expedient to enter such a plea can do so without misleading the Court. However, clearly if the solicitor knew in fact that the client was only wishing to protect a third party then to put a plea of guilty to the Court would be misleading the Court and would be interfering with the due administration of justice in that the real offender would go free.

Admission of perjury/intended disobedience of a court's order

These are referred to in Rules 21 and A34.

If at any time before judgment is delivered in any proceedings a practitioner's client admits to having given materially false evidence or to having tendered a false or misleading document in the proceedings the practitioner must:

- advise the client that the Court should be informed of the false evidence and request the client's authority to inform the Court and correct the Court record and
- if the client refuses to provide that authority, withdraw from the proceedings immediately and terminate the retainer.

A practitioner whose client informs the practitioner that the client intends to disobey a Court's order must:

- advise the client against that course and warn of its dangers
- not advise the client how to carry out or conceal that course but
- not inform the Court or the opponent of the client's intention unless
 - the client has authorised the practitioner to do so beforehand or
 - the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any persons safety.

Therefore, without the client's authority or in the particular situation where the client's threat imposes a risk of harm to the safety of another party, the practitioner must observe the duty of confidentiality owed to the client. Present advice is that this is so even given the terms of Section 316(1) of the *New South Wales Crimes Act* (the statutory "misprision of felony" rule).

Duty to a client, independence and avoidance of personal bias

Rules A16 to A20 balance the duty to act in the client's interests with the principle that *"a practitioner must not act as the mere mouthpiece of the client or the instructing practitioner"*.

Taking on unpopular causes can have polarised effects: they can cause professional enthusiasm or cause significant difficulty. A practitioner is entitled to take on a case on behalf of a client e.g. whose alleged crime elicits the opprobrium of the community, lay persons and professionals alike. Everyone is entitled to representation - that is trite. Solicitors are not subject to the Bar's "cab rank" Rule which is a Rule designed to ensure proper representation for all parties as well as protecting the barrister against disapproval. However, there may be cases where a practitioner's view of the client or the client's activities may compromise the duty to act competently and diligently (the duty recognised in Rules 1.1 and A16).

The recent *"horrible moral dilemma"* faced by Melbourne barrister Robert Richter QC who was next in line under the cab rank rule to represent suspected war criminal Konrad Kalejs was solved *"on a professional basis"*, Mr Richter saying he was involved in a trial to begin shortly *"it is expected to go on for some time so professional I cannot devote the time"*.

There may be an argument for suggesting that to act for a client whose cause you cannot properly uphold would give rise to a conflict of interest and compromise your duty to act competently and diligently towards the client.

Frankness in court

The duty to the Court is explained succinctly in Rule A21:

"A practitioner must not knowingly make a misleading statement to a court on any matter."

The classic dilemma was faced by Counsel in ***Vernon-v-Bosley (No 2) [1999] QB***

18; [1997] 1 All ER614. The plaintiff in a claim for damages for post traumatic stress disorder (arising from unsuccessful attempts to rescue his two children from a car which had plunged into a river while being driven by their nanny) succeeded at first instance but the defendant appealed on the basis of the contents of a medical report relating to the plaintiff referred anonymously and obtained during the course of the plaintiff's separate proceedings with his wife concerning custody issues. Not surprisingly the medical evidence in the first proceedings had been that the plaintiff's psychiatric condition was not good whereas in the second proceedings the evidence was that it had greatly improved - polarised views which were within the knowledge of the plaintiff's Counsel.

Counsel argued that the latter report obtained in the Family Law proceedings was privileged and could not be used in the other proceedings but the Court held that it had been misled "*by the failure of the plaintiff and his advisers to correct an incorrect appreciation*". It was within the power of the plaintiff to authorise disclosure.

Other examples of similar matters are:

- ***New South Wales Bar Association -v- Thomas (No 2) (1989) 18 NSWLR 193.***

While on the Roll of Barristers although not actively practising T was found to have shown a lack of candour to the Court and a conscious deception of Crown Counsel as to how certain evidence in a criminal matter had been obtained.

- ***Kyle -v- Legal Practitioners' Complaints Committee (1999) 21 WAR 56.*** The Full Court of the Supreme Court of Western Australia considered the conduct of practitioner K who acted as solicitor advocate for clients in Supreme Court litigation concerning the circumstances in which the clients had entered into a deed with the plaintiff. K did not inform the Court, as advised a week before the trial, that one of his clients had signed the deed and forged his wife's signature on it.

While K denied ultimately intending to deceive the Court, Parker J said "*In that state of mind he then not only did not disclose the truth, but propounded pleadings and made factual assertions which were contrary to the truth, as he well knew from his instructions. In my view that is enough to*

establish the mental element involved in this allegation that the appellant intended to mislead the Court.”

Rules A21 to A31A inclusive deal with some specific issues including the need to inform the Court of the applicable law even if it is against the client’s case.

Responsible use of court process and privilege

This is dealt with in Rules A35 to A40.

Abuse of process/spurious cases

This is reflected in Rule A35(a) which says, “A practitioner must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the practitioner or on the practitioner’s advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person ..are reasonably justified by the material already available to the practitioner.”

Assisting a client by bringing a spurious case or a case brought to achieve an ulterior purpose is professional improper and there is an emerging body of case law dealing with costs orders being made personally against practitioners. A good example of these is *Levick -v- Deputy Commissioner of Taxation*, a judgment of the Full Court of the Federal Court of Australia N1466 of 1999 delivered on 23 May 2000 which summarises earlier authorities. In that case a costs order was made against a solicitor acting for a debtor who raised unarguable points in a Notice of Opposition filed in bankruptcy proceedings and the case deals fully with circumstances in which costs may properly be ordered against a solicitor. The judgment quotes favourably the following comment of Hill J in the original proceedings from which the appeal was brought:

“It is not as if these arguments would have originated from the client. They clearly originated with the lawyers. It is obvious enough that they were intended to delay as long as possible the making of a sequestration order against Mr Quinn. But it is not necessary to go that far to justify the making of an order that the solicitor pay the costs of the Deputy Commissioner on an

indemnity basis occasioned by the raising of these matters. There is, as well, an ethical question which arises where a solicitor or counsel advised their clients to pursue spurious arguments before the Courts.”

The Full Court quoted the following comment of the Sachs J in **Edwards -v- Edwards [1958] P 235** speaking of the jurisdiction to award costs against a solicitor *“No definition or list of classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the Court and oppressive conduct generally. It is also from the authorities clear, and no submission to the contrary is made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.”*

Hill J had said *“the jurisdiction is, I think, one that must be exercised sparingly, having regard to all the circumstances of a particular case. It is clear enough that a litigant is entitled to representation to vindicate a particular legal right, or to maintain a legal defence. Should it turn out that the litigation is decided adversely to the litigant it does not follow that costs should, in consequence, be ordered against the legal adviser, be he or she a solicitor or a barrister. Were that the case those seeking to advance legitimate claims, or to pursue legitimate defences might well be deprived of legal representation and access to justice, in consequence, would be impeded.”*

In **White Industries (QLD) Pty Limited -v- Flower and Hart (1998) 156 ALR 169 at 236**, Goldberg J, dealing with abuse of process by bringing or maintaining proceedings on behalf of a client with no or substantially no prospect of success said:

“There must be something more namely, carrying on that conduct unreasonably. It is not clear what is encompassed by “unreasonably” initiating or continuing proceedings if they have no or substantially no chance of success. It seems to me that it involves some deliberate or conscious decision taken by reference to circumstances unrelated to the prospects of success with either a recognition that there is no chance of success but an intention to use the proceedings for an ulterior purpose or with a disregard of any proper consideration of the prospects of the success.”

In that case Goldberg J also quoted a decision of the English Court of Appeal in **Ridehalgh -v- Horsefield [1994] Ch. 205**:

“It is, however, one thing for a legal representative to present, on instructions, a

case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the Court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.”

This is reflected in Rule A35 which says. “*A practitioner must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the practitioner or on the practitioner’s advice to invoke the coercive powers of court or to make allegations or suggestions under privilege against any person ..are not made principally in order to gain some collateral advantage of the client or the practitioner or the instructing practitioner out of court.”*

The conclusion which the Full Court reached in **Levick** was that “*What constitutes unreasonable conduct must depend upon the circumstances of the case; no comprehensive definition is possible. In the context of instituting or maintaining a proceeding or defence, we agree with Goldberg J that unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. ... We agree it was not necessary in the present case that the lawyers be satisfied that the points would succeed; but it was necessary they be satisfied there was a rational basis upon which they might succeed.”*

In **Anstis and Anstis; and Hill, Doyle & Teague Trading as Turnbull Hill Lawyers [1999] FamCa 842** (judgment delivered on 3 June 1999) a case in which solicitors were joined as respondent with their client following their refusal on behalf of the wife in a Family Law matter to hand over passports belonging to the husband Mullane J ordered that the solicitors pay on an indemnity basis a (large) proportion of the husband’s costs noting that they “*had knowingly engaged in unlawful and apparently criminal behaviour in withholding the husband’s passports*”. His Honour noted “*The solicitor has a duty to the Court to promote the interests of justice whilst at the same time attending to the needs of the solicitor’s client.”*

Integrity of evidence

Rules A43 to A50 deal with practitioners' communications with witnesses:

- A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings. (Rule A.43).
- Rule A44 says a practitioner will not have breached Rule A43 *“by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness’s attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true”*.

This should not be such a fine line and care must be taken in dealing with impressionable persons who may well be encouraged to change evidence to suit the desired outcome of a party with whom he or she has some association.

Questioning a witness as to what the witness saw or how, in the case of an expert, a particular view was reached, is not necessarily improper but should only be done with great care otherwise serious consequences may follow.

A solicitor was acting for a client charged with a criminal offence. There had been some suggestion that the victim might retract his statement made to the police in return for money. The position was that if the victim were to be inclined to suggest that the police take the matter no further because he was satisfied with civil recompense then clearly that would be of benefit to the solicitor's client particularly if the police then took the matter no further but attempting to achieve that outcome was fraught with risk for the solicitor.

Duty to opponent

Rules A51 to A58 deal with issues of fairness to an opponent: not misleading, not dealing directly with the opponent's client and not communicating with the Court, outside an ex parte application or a hearing of which the opponent has had proper notice, in the opponent's absence.

Integrity of hearings

Rule A61 says a practitioner should not deal with a Court or with any practitioner appearing before the practitioner when the practitioner is a referee, arbitrator or mediator, *“on terms of informal personal familiarity which may reasonable give the appearance that the practitioner has special favour with the Court or towards the practitioner”*.

It is not stated in the Rules but must be within the general duty as an officer of the Court that a practitioner should deal courteously with the Court.

In *Prothonotary of the Supreme Court of New South Wales -v- Costello* [1984] 3NSWLR 201 Glass and Samuels J J A referred to *“the insults and insolence which the opponent directed to the Magistrate”* as being *“deliberately employed in aid of a style of advocacy designed to intimidate rather than persuade”*. Their Honours went on to say *“Courage and aggression are acceptable and sometimes necessary weapons in a barrister’s armoury; calculated insult and insolence are not”*.

Prosecutor’s duties

Rules A62 to A72 deal with these duties.

Court dress

You may be pleased to know that pursuant to Rule 23A, which entitles a solicitor advocate to robe in Court dress in the same manner and style as a barrister that *“it shall not be either unsatisfactory professional conduct or professional misconduct should a solicitor and barrister choose not to robe when appearing in his or her role as an advocate”*.

Two Related Issues: Lawyers Criminal Complicity (Forsyth's Case) and

Advocates' Immunity

Criminal Complicity - Forsyth's Case

The case perhaps attracting most publicity and commentary about a legal practitioner's criminal complicity with a client involved Victorian barrister Forsyth who was tried in the Supreme Court of Victoria on a charge under the Commonwealth Crimes Act of conspiracy to defraud the Commonwealth. See *R -v- Forsyth (1990) 20 ATR 1818*. This involved an allegation that F had dishonestly advised promoters of a scheme to avoid tax when he must have known that they had as their purpose the defrauding of the Commissioner of Taxation. The barrister was acquitted of the charge on the direction of the judge to the jury at the end of the Crown case on the basis that F's knowledge of the unlawful purpose was not sufficient to found a lawful conviction.

This is a case which might rightly cause nervousness about advising a client as to the state of the law where the giving of that advice might be said to amount to an encouragement to the client to commit a breach of the law which might in turn involve a charge of conspiracy, as in Forsyth's case, with the client.

The difference between encouraging someone to break the law and explaining what the law is and the consequences of a suggested activity are also reflected in the Advocacy Rules. Rule A34 says:

"A practitioner whose client informs the practitioner that the client intends to disobey a Court's order must:

- (a) advise the client against that course and warn the client of its dangers;*
- (b) not advise the client how to carry out or conceal that course; but*
- (c) not inform the Court or the opponent of the client's intention unless:*

(i) *the client has authorised the practitioner to do so beforehand; or*

(ii) *the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety."*

In James Boswell *Journal of a Tour to the Hebrides* , Samuel Johnson opined "A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge."

Clearly it is not for a practitioner asked by a client for advice to purport to be the final arbiter of the case. There might be some inaccuracy in this quote from Boswell if it could be inferred that it means that no regard should be had to the likely outcome. This cannot be a logical inference.

Riley's New South Wales Solicitors' Manual deals with the case of Forsyth and the various comments of eminent commentators in the chapter "Acting honestly in the service of a client". McHugh J in his paper "Jeopardy of lawyers and accountants in acting on commercial transactions" delivered to the Perth Summer School 1988, published in Australian Bar Review, vol 5 No 1 March 1989 page 1 refers to conspiracy to defraud and aiding and abetting a breach of the law as the two areas of the criminal law which potentially apply to professional advice. His Honour dealt with the concept of encouragement by practitioners of clients' unlawful activities in this way:

"In the present context of the relationship between a commercial solicitor or accountant and his client, I think ...that it is unreal to suggest that the professional adviser is not "in any real sense encouraging the client to act or proceed in a particular manner". ...The lawyer, and in an appropriate case the accountant, has a vested interest in the matter proceeding ..much professional advice in commercial situations extends beyond the field of their legal advice. ... An inference of encouragement would usually be open even when the client simply asks whether a particular course of commercial conduct is lawful. It would be open to a jury to conclude that the client was relying on the lawyer's advice and was encouraged to carry out the prohibited conduct by reason of it" and further "when the lawyer goes beyond advice and draws documents for the purpose of enabling a client to achieve an objective, it is, I think, almost

impossible to contend that the adviser does not aid the commission of any offence which results.””

Both Davies QC and Gyles QC in their respective papers (“Revenue Offences Generally: Can the Professional Adviser be a Party or Conspirator”, published in the June issue of the Queensland Law Society Journal, vol 19 No 3 June 1989 p207 and “Criminal Liability of Professional Advisers” presented to the Australian Bar Association by a Centennial Conference, 13 July 1988 published in Taxation in Australia, vol 23 No 7, February 1989, p480) did not follow Hugh J’s approach, Gyles QC suggesting that it would mean “*That no citizen could obtain guidance from those qualified to give it as to the lawfulness of a proposed course of action*”.

Clearly, significant thought must be given before advising the client as to the reason for the request for advice and the possible repercussions for solicitor and client should that advice be accepted.

The consequences of breaches of duty as an advocate, advocates' immunity from suit and professional conduct

Advocates immunity from suit

Section 38I(5) of the Legal Profession Act says “*Nothing in this section affects any law relating to immunity to suit in relation to advocacy*”. You need to consider your possible liability and negligence when acting/appearing as a solicitor/advocate together with your professional conduct responsibility and the possible exposure to complaint or disciplinary action following conduct which might amount to a breach of the Rules or amount to common law professional misconduct or unsatisfactory professional conduct.

All it suffices to say here is that you need to be aware of the common law provisions in this area and particularly the most recent decision of the most recent decision of the United Kingdom House of Lords in *Arthur J S Hall and Co v Simons (AP) Barratt v Ansell and Others (Trading As Woolf Sebbon (A Firm) Harris v Scholfield Roberts & Hill (Conjoined Appeals)* [2000] UKHL 38 (20 July 2000) This was a 4:3 decision, not yet followed in Australia, that the

immunity no longer exists. This is now under some consideration in New South Wales. The case makes most interesting reading.

While immunity from suit might (while it continues to exist) may protect the practitioner from a negligence action, it will not necessarily protect the practitioner from disciplinary action.

Professional Misconduct

In Law Society of New South Wales v McNamara (1980) 47 NSWLR 72 the Court of Appeal held that a solicitor was unfit to remain on the Roll of Solicitors for attempting to mislead the Law Society and the Solicitors Statutory Committee in relation to disciplinary charges. Hutley J A said at page 78:

"Though I regard the attempt to deceive the officers of the Law Society as serious, I regard the attempt to deceive the Statutory Committee as still more serious. The assumption which seems sometimes to have been made that the accused cannot be expected to tell the truth to his own detriment in criminal proceedings has no place in proceedings before the Statutory Committee, which is not punitive but for the benefit of the public."

Another solicitor's application for re-admission was refused due to his lack of candour to the Court of Appeal. In ***Kotowicz v Law Society of New South Wales*** (unreported), CA (NSW), Kirby P said at page 17:

"Particularly in a case where candour or lack of it, was one of the principal causes for the removal of the solicitor, it was necessary for the solicitor to pay the closest attention to his frankness to the Court in this application."

In a much earlier case, ***Kennedy v Council of the Incorporated Law Institute of New South Wales (1939) 13 ALJR 563*** the High Court dismissed the appeal by a solicitor Kennedy from a decision of the Full Court of the Supreme Court of New South Wales affirming an order of the Solicitors Statutory Committee that his name be removed from the Roll of Solicitors for misconduct occurring during the course of a trial action pursuant to the Compensation to Relatives Act 1897. During the trial the solicitor sought to persuade a witness for the defendant to give an account of the accident leading to the proceedings in terms different from an earlier statement the witness had made which was favourable to his client. He was found to have interfered with the due administration of justice.

Acting as a solicitor/advocate is fraught with difficulty in assessing often difficult and urgent situations. In order to avoid a breach of the Professional Conduct & Practice Rules it is obviously firstly essential to become familiar with them and their operation.

Therefore, there are possible serious consequences.

Conclusion

Even experienced practitioners face dilemmas so there is no shame in seeking advice. In fact it is obviously most prudent. The authorities and examples referred to in this paper demonstrate how difficult it is to assess a problem in which you are involved but often how easy it is to look objectively at a situation and arrive at the right answer, without the pressures of urgency and clients' instructions.

VIRGINIA P SHIRVINGTON

12 March 2001

The Law Society of New South Wales

Statement of Ethics

The law should protect the rights and freedoms of members of the community. The administration of the law should be just.

The lawyer practises law as an officer of the Court. The lawyer's role is both to uphold the rule of law and serve the community in the administration of justice.

In fulfilling this role, lawyers should

- Serve their clients' interests competently
- Communicate clearly with their clients
- Treat people with respect
- Act fairly, honestly and diligently in all dealings
- Pursue an ideal of service that transcends self-interest
- Work with their colleagues to uphold the integrity of the profession and honourable standards and principles
- Develop and maintain excellent professional skills
- Act frankly and fairly in all dealings with the Courts
- Be trustworthy
- Keep the affairs of clients confidential, unless otherwise required by the law
- Maintain and defend the rights and liberty of the individual
- Avoid any conflict of interest

In fulfilling this role, lawyers are not obliged to serve the client's interests alone, if to do so would conflict with the duty which lawyers owe to the Court and to serving the ends of justice.

Revised Professional Conduct and Practice

Rules – Extracts

2- Confidentiality

- 2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -
- 2.1.1 the client authorises disclosure;
 - 2.1.2 the practitioner is permitted or compelled by law to disclose; or
 - 2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.
- 2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.

3- Acting against a former client

Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person -

- (a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously;
- (b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.

5- Termination of retainer

History of amendments to Rule 5

- 5.1 A practitioner must complete the work or legal service required by the practitioner's retainer, unless -
- 5.1.1 the practitioner and the practitioner's client have otherwise agreed;
 - 5.1.2 the practitioner is discharged from the retainer by the client; or
 - 5.1.3 the practitioner terminates the retainer for just cause, and on reasonable notice to the client.
- 5.2 Despite the above Rule, a practitioner, who has accepted instructions to act for a

Defendant required to stand trial in the Supreme Court or the District Court for a criminal offence, must not terminate the retainer and withdraw from the proceedings on the ground that the client has failed to make arrangements satisfactory to the practitioner for payment of the practitioner's costs, unless the practitioner has, at a time reasonably in advance of the date appointed for the commencement of the trial, or the commencement of the sittings of the Court in which the trial is listed -

5.2.1 served notice in writing on the client of the practitioner's intention to terminate the retainer and withdraw from the proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the practitioner's costs, and

5.2.2 delivered a copy of that notice to the Registrar of the Court in which the trial is listed to commence.

5.3 Without limiting the general application of Rule 5.1, a practitioner, who is acting for a legally assisted client in any proceedings, may terminate the practitioner's retainer upon giving reasonable notice in writing to the client of the practitioner's intention so to do, if the client's grant of legal aid is withdrawn, or otherwise terminated, and the client is unable to make any other satisfactory arrangements for payment of the practitioner's costs which would be incurred if the retainer continued.

6A- Legal Aid Application – Criminal proceedings

6A.1 A practitioner, who has accepted instructions to act for an accused person required to stand trial for a criminal offence, subject to the person's obtaining a grant of legal aid, must assist that person to apply for the grant as soon as practicable after receiving instructions, and not later than thirty (30) days before the commencement of the trial.

6A.2 If instructions to apply for a grant are received within thirty (30) days of the trial, the practitioner must serve on the Registrar, or listing director of the Court, notice in writing that an application for legal aid has been made, and explaining the circumstances in which the application is made, and forward a copy of that notice to the Legal Aid Commission.

6A.3 The practitioner must, thereafter, consult with the Legal Aid Commission in respect of the application, and give notice of the application to the prosecution and, if necessary, apply to the Court for directions.

6B- Legal Aid: Court of Criminal Appeal proceedings

6B.1 A practitioner who accepts instructions from an accused person who is an appellant to the Court of Criminal Appeal must not terminate the retainer and withdraw from the proceedings on the ground that the client has failed to make arrangements satisfactory to the practitioner for payment of the practitioner's costs, unless the practitioner has, not later than thirty (30) days before the date appointed for the callover at which the hearing date of the Appeal will be set -

6B.1.1 served notice in writing on the client of the practitioner's intention to terminate the retainer and withdraw from the proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the practitioner's costs, and

6B.1.2 delivered a copy of that notice to the Registrar of the Court of Appeal.

6B.2

6B.2.1 If a practitioner does not, in the circumstances described in Rule 6.1, terminate the retainer and withdraw from the proceedings, but undertakes to assist the appellant to apply for a grant of legal aid, the practitioner must ensure that the application for a grant of legal aid is lodged with the Legal Aid Commission as soon as practicable, and not later than ten (10) days prior to the callover, if that is practicable.

6B.2.2 If, in the circumstances, it is not practicable to lodge the application for legal aid earlier than ten (10) days prior to the callover, the practitioner must, before the callover date, serve on the Registrar of the Court of Criminal Appeal notice in writing of the lodgement of the Application for Legal Aid, containing an explanation for its late lodgement, and must serve a copy of that notice on the Legal Aid Commission.

6B.2.3 The practitioner must, thereafter, consult with the Legal Aid Commission in respect of the application, and give notice of the application to the other parties to the Appeal and, if required by the Legal Aid Commission, apply to the Registrar of the Court for direction.

9- Acting for more than one party

9.1 For the purposes of Rules 9.2 and 9.3 -

“proceedings or transaction” mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.

“party” includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.

“practitioner” includes a practitioner's partner or employee and a practitioner's firm.

9.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:

(a) may be, thereby, prevented from -

(i) disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner's knowledge,

or,

(ii) giving advice to one party which is contrary to the interests of another;

- and
- (b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.
- 9.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.

10- Avoiding a conflict between a client's and a practitioner's own interest

- 10.1 A practitioner must not, in any dealings with a client -
- 10.1.1 allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;
 - 10.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client;
- 10.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

17- Preparation of affidavits

- 17.1 If a practitioner is:
- 17.1.1 aware that a client is withholding information required by an order or rule of a court, with the intention of misleading the court; or
 - 17.1.2 informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular; and the client will not make the relevant information available, or allow the practitioner to correct the false evidence; the practitioner must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.
- 17.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:
- 17.2.1 factual material already available to the practitioner provides a proper basis for the allegation;
 - 17.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and
 - 17.2.3 the client wishes the allegation to be made after having been advised of the seriousness of the allegation.

18- Duty not to influence witnesses

A practitioner must not, in relation to any matter or event which is the subject of adversarial proceedings before a Court, confer with or interview:

- 18.1 the opposing party in the proceedings including a person who may be represented or

- indemnified in the proceedings by an insurance company; or
- 18.2 where the opposing party, or a prospective opposing party, is a corporation, any person authorised to make admissions on behalf of the corporation, or to direct the conduct of the proceedings; unless -
 - 18.3 the other person, if unrepresented by a practitioner, has been fully informed of the practitioner's purpose in conducting the interview, has been advised to seek and has had the opportunity of obtaining independent legal advice; or
 - 18.4 the practitioner acting for the other person has agreed to the interview on conditions which may include the conduct of the interview in the presence of the practitioners for both parties.

19- Practitioner a material witness in client's case

A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.

20- Admission of guilt

- 20.1 If a practitioner's client, who is the accused or defendant in criminal proceedings, admits to the practitioner before the commencement of, or during, the proceedings, that the client is guilty of the offence charged, the practitioner must not, whether acting as instructing practitioner or advocate -
- 20.1.1 put a defence case which is inconsistent with the client's confession;
 - 20.1.2 falsely claim or suggest that another person committed the offence; or
 - 20.1.3 continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.
- 20.2 A practitioner may continue to act for a client who elects to plead "not guilty" after admitting guilt to the practitioner, and in that event, the practitioner must ensure that the prosecution is put to proof of its case, and the practitioner may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the offence by the client.

21- Admission of perjury

If a practitioner's client admits to the practitioner, during or after any proceedings, while judgment is reserved, that the client has given materially false evidence or tendered a false or misleading document in the proceedings, the practitioner must -

- 21.1 advise the client that the Court should be informed of the false evidence, and request the client's authority to inform the Court and correct the record; and
- 21.2 if the client refuses to provide that authority, withdraw from the proceedings immediately, and terminate the retainer.

22- Bail

- 22.1 A practitioner must not promote, or be a party to, any arrangement whereby the bail provided by a surety is obtained by using the money of the accused person, or by which the surety is given an indemnity by the accused person or a third party acting on behalf of the accused person.
- 22.2 A practitioner must not become the surety for the practitioner's client's bail.

25- 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.

31- Communicating with another practitioner's client

- 31.1 A practitioner who is acting on behalf of a party in any proceedings or transaction must not communicate directly with any other party for whom, to the practitioner's knowledge, another practitioner is currently acting, unless-
- 31.1.1 notice of the practitioner's intention to communicate with the other party, in default of a reply from the other practitioner, has been given to that practitioner, who has failed, after a reasonable time, to reply;
 - 31.1.2 the communication is made for the sole purpose of informing the other party that the practitioner has been unable to obtain a reply from that party's practitioner, and requests that party to contact the practitioner; and
 - 31.1.3 the practitioner, thereafter, notifies the other practitioner of the communication.
- 31.2 A practitioner who receives notice from another practitioner that the practitioner's client has instructed or retained that practitioner may, after notifying the other practitioner, communicate with the former client for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's affairs to the other practitioner.
- 31.3 Rule 31.1 does not apply when the other party is represented by a barrister directly instructed by the party, and the barrister's retainer is so limited, in accordance with the rules of the New South Wales Bar Association, as to preclude the barrister from conducting correspondence on the party's behalf.

Rule 23-Advocacy Rules

Rules A.15 to A.72 apply to all legal practitioners (whatever may be their predominant style of practice) when they are acting as advocates. The term "practitioner" is used throughout these Rules to refer to legal practitioners acting as advocates whether they are persons who practise only as barristers, or persons, who practise as solicitors, or as barristers and solicitors.

Efficient administration of justice

- A.15. A practitioner must ensure that:
- (a) the practitioner does work which the practitioner is retained to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and
 - (b) warning is given to any instructing practitioner or the client, and to the opponent, as soon as the practitioner has reasonable grounds to believe that the practitioner may not complete any such work on time,
- A.15A. A practitioner must seek to ensure that work which the practitioner is retained to do in relation to a case is done so as to:
- (a) confine the case to identified issues which are genuinely in dispute;
 - (b) have the case ready to be heard as soon as practicable;
 - (c) present the identified issues in dispute clearly and succinctly
 - (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
 - (e) occupy as short a time in court as is reasonably necessary to advance and

protect the client's interests which are at stake in the case.

- A.15B. A practitioner must take steps to inform the opponent as soon as possible after the practitioner has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of the fact and the grounds of the application, and must try with the opponent's consent to inform the court of that application promptly.

Duty to a client

- A.16. A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these Rules.
- A.17A. A practitioner must inform the client or the instructing practitioner about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the practitioner 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 litigation.
- A.17B. A practitioner must (unless circumstances warrant otherwise in the practitioner's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty) if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

Independence – Avoidance of personal bias

- A.18. A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing practitioner's desires where practicable.
- A.19. A practitioner will not have breached the practitioner's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing practitioner's desires, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:
- (a) confine any hearing to those issues which the practitioner believes to be the real issues;
 - (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
 - (c) inform the court of any persuasive authority against the client's case.
- A.20. A practitioner must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner's personal opinion on the merits of that evidence or issue.

Frankness in court

- A.21. A practitioner must not knowingly make a misleading statement to a court on any matter.
- A.22. A practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner

- becomes aware that the statement was misleading.
- A.23. A practitioner will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.
- A.24. A practitioner seeking any interlocutory relief in an ex parte application must disclose to the court all matters which:
- (a) are within the practitioner's knowledge;
 - (b) are not protected by legal professional privilege; and
 - (c) the practitioner has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.
- A.24A. A practitioner who has knowledge of matters which are within Rule A.24(c):
- (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege, so as to permit the practitioner to disclose those matters under Rule A.24; and
 - (b) if the client does not waive the privilege as sought by the practitioner:
 - (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 practitioner cannot assure the court that all matters which should be disclosed have been disclosed to the court.
- A.25. A practitioner must, at the appropriate time in the hearing of the case and if the court has not yet been informed of that matter, inform the court of:
- (a) any binding authority;
 - (b) any authority decided by the Full Court of the Federal Court of Australia, a Court of Appeal of a Supreme Court or a Full Court of a Supreme Court;
 - (c) any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved;
- or
- (d) any applicable legislation; which the practitioner has reasonable grounds to believe to be directly in point, against the client's case.
- A.26. A practitioner need not inform the court of matters within Rule A.25 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 practitioner to have informed the court of such matters in the ordinary course has already arrived or passed.
- A.27. A practitioner who becomes aware of a matter within Rule A.25 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:
- (a) 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
 - (b) 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.
- A.28. A practitioner need not inform the court of any matter otherwise within Rule A.25 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
- A.29. A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.

- A.30. A practitioner 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.
- A.31. A practitioner must inform the court in civil proceedings of any misapprehension by the court as to the effect of an order which the court is making, as soon as the practitioner becomes aware of the misapprehension.
- A.31A. A practitioner must take all necessary steps to correct any express concession made to the court in civil proceedings by the opponent in relation to any material fact, case law or legislation:
- (a) only if the practitioner knows or believes on reasonable grounds that it was contrary to what should be regarded as the true facts or the correct state of the law;
 - (b) only if the practitioner believes the concession was in error; and
 - (c) not (in the case of a concession of fact) if the client's instructions to the practitioner support the concession.

Delinquent or guilty clients

- A.32. A practitioner whose client informs the practitioner, during a hearing or after judgment or decision is reserved and while it remains pending, that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:
- (a) must refuse to take any further part in the case unless the client authorises the practitioner to inform the court of the lie or falsification;
 - (b) must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but
 - (c) must not otherwise inform the court of the lie or falsification.
- A.33. A practitioner retained to appear in criminal proceedings whose client confesses guilt to the practitioner but maintains a plea of not guilty:
- (a) may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client;
 - (b) in cases where the practitioner 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; but
 - (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
 - (iv) may argue that for some reason of law the client is not guilty of the offence charged; or
 - (v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged.
- A.34. A practitioner whose client informs the practitioner that the client intends to disobey a court's order must:
- (a) advise the client against that course and warn the client of its dangers;
 - (b) not advise the client how to carry out or conceal that course; but
 - (c) not inform the court or the opponent of the client's intention unless:
 - (i) the client has authorised the practitioner to do so beforehand; or
 - (ii) the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

Responsible use of court process and privilege

- A.35. A practitioner must, when exercising the forensic judgments called for throughout the case, take care to ensure that decisions by the practitioner or on the practitioner's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:
- (a) are reasonably justified by the material already available to the practitioner;
 - (b) are appropriate for the robust advancement of the client's case on its merits;
 - (c) are not made principally in order to harass or embarrass the person; and
 - (d) are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court.
- A.36. A practitioner must not allege any matter of fact in:
- (a) any court document settled by the practitioner;
 - (b) any submission during any hearing;
 - (c) the course of an opening address; or
 - (d) the course of a closing address or submission on the evidence; unless the practitioner believes on reasonable grounds that the factual material already available provides a proper basis to do so.
- A.37. A practitioner must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the practitioner believes on reasonable grounds that:
- (a) available material by which the allegation could be supported provides a proper basis for it; and;
 - (b) 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.
- A.38. A Practitioner must not make a suggestion in cross-examination on credit unless the practitioner believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility.
- A.39. A practitioner may regard the opinion of the instructing practitioner that material which is available to the practitioner is credible, being material which appears to the practitioner from its nature to support an allegation to which Rules A.36 and A.37 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).
- A.40. A practitioner who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the practitioner believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.

Integrity of evidence

- A.43. A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.
- A.44. A practitioner will not have breached Rule A.43 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.

- A.45. (deleted)
- A.46. A practitioner must not confer with, or condone another practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:
- (a) as to which there are reasonable grounds for the practitioner to believe it may be contentious at a hearing;
- or
- (b) which could be affected by, or may affect, evidence to be given by any of those witnesses.
- A.47. A practitioner will not have breached Rule A.46 by conferring with, or condoning another practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.
- A.48. A practitioner must not confer with any witness (including a party or client) called by the practitioner on any matter related to the proceedings while that witness remains under cross-examination, unless:
- (a) the cross-examiner has consented beforehand to the practitioner doing so; or
 - (b) the practitioner:
 - (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 practitioner's intention to do so; and
 - (iii) otherwise does inform the cross-examiner as soon as possible of the practitioner having done so.
- A.49. A practitioner must not take any step to prevent or discourage prospective witnesses or witnesses from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.
- A.50. A practitioner will not have breached Rule A.49 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed.

Duty to opponent

- A.51. A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- A.52. A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.
- A.53. A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.
- A.54. A practitioner must not deal directly with the opponent's client unless:
- (a) the opponent has previously consented;
 - (b) the practitioner believes on reasonable grounds that:
 - (i) the circumstances are so urgent as to require the practitioner to do so;
 - and
 - (ii) the dealing would not be unfair to the opponent's client; or
 - (c) the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom.
- A.55. (deleted)
- A.56. A practitioner must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

- (a) the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or
 - (b) the opponent has consented beforehand to the practitioner dealing with the court in a specific manner notified to the opponent by the practitioner.
- A.57. A practitioner must promptly tell the opponent what passes between the practitioner and a court in a communication referred to in Rule A.56.
- A.58. A practitioner must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under Rule A.56(b), other than the matters specifically notified by the practitioner to the opponent when seeking the opponent's consent.

Integrity of hearings

- A.59. (deleted)
- A.60. (deleted)
- A.61. A practitioner must not in the presence of any of the parties or practitioners deal with a court, or deal with any practitioner appearing before the practitioner when the practitioner is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the practitioner has special favour with the court or towards the practitioner.

Prosecutor's duties

- A.62. 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.
- A.63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
- A.64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
- A.65. 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.
- A.66. A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused, unless:
- (a) such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person; and
 - (b) the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a legal practitioner, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other person.
- A.66A. A prosecutor who has decided not to disclose material to the opponent under Rule A.66 must consider whether:
- (a) the defence of the accused could suffer by reason of such non-disclosure;
 - (b) the charge against the accused to which such material is relevant should be withdrawn; and

- (c) the accused should be faced only with a lesser charge to which such material would not be so relevant.
- A.66B. A prosecutor must call as part of the prosecution's case all witnesses:
- (a) whose testimony is admissible and necessary for the presentation of the whole picture;
 - (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
 - (c) whose testimony or statements were used in the course of any committal proceedings; and
 - (d) from whom statements have been obtained in the preparation or conduct of the prosecution's case;
- unless:
- (e) the opponent consents to the prosecutor not calling a particular witness;
 - (f) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused; or
 - (g) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses; provided that:
 - (h) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within (a)-(d), if the prosecutor believes on reasonable grounds that the testimony of that witness is plainly unreliable by reason of the witness being in the camp of the accused;
 - (i) 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 (f), (g) and (h), together with the grounds on which the prosecutor has reached that decision; and
 - (j) the prosecutor must call any witness whom the prosecutor intends not to call on the ground in (h) if the opponent requests the prosecutor to do so for the purpose of permitting the opponent to cross-examine that witness.
- A.67. A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:
- (a) inform the opponent if the prosecutor intends to use the material; and
 - (b) make available to the opponent a copy of the material if it is in documentary form;
 - (c) inform the opponent of the grounds for believing that such material was unlawfully or improperly obtained.
- A.68. A prosecutor must not confer with or interview any of the accused except in the presence of the accused's representative.
- A.69. A prosecutor must not inform the court or the opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.
- A.70. A prosecutor who has informed the court of matters within Rule A.69, 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.
- A.71. A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:
- (a) must correct any error made by the opponent in address on sentence;
 - (b) must inform the court of any relevant authority or legislation bearing

- on the appropriate sentence;
 - (c) must assist the court to avoid appealable error on the issue of sentence;
 - (d) may submit that a custodial or non-custodial sentence is appropriate; and
 - (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority,
- A.72. A practitioner who appears as counsel assisting an inquisitorial body such as the National Crime Authority, the Australian Securities Commission, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules A.62, A.64 and A.65 as if the body were the court referred to in those Rules and any person whose conduct is in question before the body were the accused referred to in Rule A.64.