

COMPARISON OF CURRENT AND NEW SOLICITORS' RULES

<u>The Revised Professional Conduct and Practice Rules 1995</u>	<u>Australian Solicitors' Conduct Rules and New Solicitors Rules 2013 (NSW)</u>	Text Changes relating to the Rules unless otherwise stated
1. Acceptance of a retainer	See ASCR rule 4	The text remains largely the same, with the addition of requirements to avoid any compromise to the Solicitor's integrity and professional independence and to comply with these Rules and the law.
2. Confidentiality	See ASCR rule 9	<p>Solicitors are now permitted to disclose confidential information to barristers and others engaged by the firm to deliver legal services to the client without the express or implied consent of the client.</p> <p>The exceptions to the rule of confidentiality (9.2) have been expanded to include situations where the Solicitor seeks advice in connection with his/her legal or ethical obligations; and where information is disclosed to the insurer of the Solicitor or associated entities.</p> <p>The reference to confidentiality being "<i>not limited to information which might be protected by legal professional privilege</i>" has been removed.</p>
3. Acting against a former client	See ASCR rule 10	There are now two exceptions to the rule on acting against a former client; it is permissible where the former client has given informed written consent, or where an effective information barrier has been established ("Chinese wall"). The obligation is on the solicitor to demonstrate this and may be subject to the discretion of the Court in continuing to act.
4. Practitioners employed otherwise than by a practitioner	--	Does not appear in the New Solicitors Rules which are combination of the ASCR and selected Practice Rules adopted by Council of the Law Society ("N/A")
4A. Supervised legal practice	Retained as Solicitors' Rule 44	No change.
5. Termination of retainer	See ASCR rule 13	A retainer can now end when it is ended by the operation of law. Otherwise, there is no real change to this Rule.
6A. Legal aid application – criminal proceedings	Retained as Solicitors' Rule 45	No change.

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6B. Legal aid – Court of Criminal Appeal proceedings	Retained as Solicitors' Rule 46	No change.
7. Litigation lending	Retained as Solicitors' Rule 47	No change.
8. Ownership of clients' documents – termination of retainer	See ASCR rule 14, 15 and 16	<p>Practitioners may now be required to retain client documents for longer than seven years if instructed to by the client, or under legislation.</p> <p>The reference to orders under section 728 of the Legal Profession Act 2004 has been removed.</p> <p>Rule 8.5 specifying the documents to which a client "<i>should be entitled</i>" has been removed.</p>
9. Acting for more than one party	See ASCR rule 11	<p>The order of the rule has been changed to emphasize that Solicitors should not accept instructions to act for more than one party, except for certain circumstances set out in Rules 11.2-11.5. In addition, the rule has been broadened to include duties to two or more clients not necessarily involved in the same matter, but where there is a conflict or potential conflict of the duties to act in each client's best interests.</p> <p>While the requirements for informed consent from both clients in this situation remain, law practices may protect confidential information of a client by an effective information barrier ("Chinese wall") See ASCR rule 10.</p> <p>The other significant change is that where an actual conflict arises between the duties owed to two or more clients, the solicitor/practice may continue acting for one of the clients provided that confidentiality is maintained and parties have given informed consent. Previously practitioners were required to cease acting for all parties in this situation. It is emphasized that the obligation is upon the solicitor and in particular to comply with their duties pursuant to Rule 11.3 in continuing to act "...subject always to each solicitor discharging their duty to act in the best interest of their client..." and may be subject to the discretion of the Court in being able to continue to act in the matter.</p>

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10. Avoiding conflict between a client's and a practitioner's own interest	See ASCR rule 12	No significant change.
11. Receiving a benefit under a will or other instrument	See ASCR rule 12	No significant change.
12. Practitioner and client – borrowing transactions	See ASCR rule 12	The rule regarding a practitioner maintaining a private finance company does not appear in the new Rules. In addition, the list of entities from which a Solicitor may borrow money even if they are a client has been collapsed from fourteen to five (12.3.2 (i)-(v)).
13. File register	Retained as Solicitors' Rule 48	No change.
14. Safe custody registers	Retained as Solicitors' Rule 49	No change.
15. Register of financial interests	Retained as Solicitors' Rule 50	No change.
16. Inspection of registers	Retained as Solicitors' Rule 51	No change.
17. Preparation of affidavits	See ASCR rule 21 and 22	This rule has been subsumed into the general rules about responsible use of court process and privilege.
18. Duty not to influence witnesses	See ASCR rule 22 and rule 33	Solicitors continue to have an obligation not to prevent or discourage a witness or prospective witness from conferring with any party involved in proceedings. Solicitors still must not deal directly with the client of another practitioner, with some exceptions.
19. Practitioner a material witness in client's case	See ASCR rule 27	The phrase "exceptional circumstances justifying the practitioner's continuing retainer by the ... client" has been replaced with an exception that an associate of the solicitor or their law practice may continue to act for the client unless doing so would prejudice the administration of justice.

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20. Admission of guilt	See ASCR rule 20.2	In criminal matters where the client has confessed guilt to the solicitor but maintains a plea of not guilty, the solicitor may cease to act if there is enough time for another solicitor to take over the proceedings before hearing, or the client does not insist on the solicitor continuing to act. Otherwise, the wording has changed slightly but there is no significant change in meaning.
21. Admission of perjury	See ASCR rule 20.1	This rule has been expanded to cover witnesses called on behalf of the client, as well as the client themselves. In addition to false testimony and false or misleading documents, this rule now also covers situations where a client or witness called on behalf of a client has suppressed material evidence where there was a positive duty to disclose that evidence.
22. Bail	See ASCR rule 17	Rule 22.1 does not appear in any form in the new Rules. Rule 22.2 appears at Rule 17.4 in the new Rules.
23. Advocacy rules		
A.15. Efficient administration of justice	See ASCR rule 4, 17.2 and 22.8	Old Rule A15 has been subsumed into New Rule 4, without significant change in meaning. Old Rule A15A has been summarised at New Rule 17.2, requiring solicitors to confine any hearing to the real issues and to present the client's case as quickly and simply as possible. Old Rule A15B now appears at new Rule 22.8.
A.16. - A.17.B. Duty to a client	See ASCR rule 4, 7 and 17	The specific wording of Rule A16 does not appear in the new rules, but has been subsumed into the general duty to act in the best interests of the client (See Rule 4.1.1). Rules A17 and A17A appear almost identically worded at new rule 7. Rule A17B does not appear in the new rules.
A.18. - A.20. Independence – Avoidance of personal bias	See ASCR rule 17	No change

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A.21. - A.31. Frankness in court	See ASCR rule 19	<p>The wording of the overall duty (A21) has been broadened to include deception or recklessly misleading the court: "<i>A solicitor must not deceive or knowingly or recklessly mislead the court.</i>"</p> <p>Rule A29 does not appear in any form in the new rules.</p> <p>Rule A31 appears in the new rules without reference to civil proceedings; i.e. new rule 19.11 applies to all proceedings, not just civil proceedings.</p> <p>Otherwise, no significant change.</p>
A.32. - A.34. Delinquent or guilty clients (nb current rule 20 is similar to A32-33)	See ASCR rule 20	No further significant change; see discussion in respect of current Rules 20 and 21 above.
A.35. - A40. Responsible use of court process and privilege	See ASCR rule 21	<p>A new rule is added specifically regarding questioning of the alleged victim in matters where allegations of sexual assault, indecent assault or the commission of an act of indecency have been made. Solicitors may not intend to confuse or mislead the witness, or be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, and must take into account any particular vulnerability of the witness in manner and tone of questions asked.</p> <p>Otherwise, no change.</p>
A.43. - A.50. Integrity of evidence	See ASCR rule 23, 24, 25 and 26	<p>An exception has been added to the rule in ASCR rule 25.1 that the solicitor may not confer with two lay witnesses at the same time, except where the solicitor believes on reasonable grounds that special circumstances require such a conference.</p> <p>Otherwise, no significant change.</p>

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A.51. - A.58. Duty to opponent	See ASCR rule 22 and 33	Solicitors may confer with another solicitor's client where there is notice of the solicitor's intent to communicate with that person and the other practitioner has failed to respond within a reasonable time (ASCR rule 33.1.4 and current rule 31) . An additional duty has been added; that solicitors may not confer or deal with any party indemnified by an insurer (to the solicitor's knowledge) without the consent of both the party and the insurer (ASCR rule 22.4).
A.59. - A.61. Integrity of hearings	See ASCR rule 18	No significant change.
A.62. - A72. Prosecutor's duties	See ASCR rule 29	Prosecutors are not required to disclose to their opponent information which is subject to statutory immunity. Current rule A66(b) does not appear in the new rules. Prosecutors are no longer required to call all witnesses who have made statements in relation to the matter or who appeared at committal hearings. The exceptions for calling witnesses have been simplified, and the requirement for witnesses to be called who have been requested by the opponent for cross-examination does not appear in the new rules.
23A. Court dress	Retained as Solicitors' Rule 52	No change.
24. Former judicial officer resuming practice	See ASCR rule 38	This rule has been simplified to apply only to solicitors who are former judicial officers (rather than judicial or quasi judicial, with exceptions), and applies to appearances in any court of which the solicitor has been a member or presided over, and any court where appeals of such a court may be made. Permission to appear in such a court within the 2 year exclusion period is from the " <i>relevant court</i> ", rather than the Council of the Law Society.
25. Communications	Rule 4	This rule appears to be subsumed under ASCR Rule 4.1.2 of Rule 4 –" <i>Other Relevant Fundamental Ethical Duties</i> "
26. Undertakings	See ASCR rule 6	Solicitors can be released from undertakings by the recipient or a court of competent jurisdiction.

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27. Undertakings	--	N/A
28. Undertakings	See ASCR rule 6	No significant change.
29. Taking over a matter from another practitioner	See ASCR rule 14 and 15	No significant change.
30. Transfer of a practitioner's practice	Retained as Solicitors' Rule 53	No change.
31. Communicating with another practitioner's client	See ASCR rule 33	An exception for urgency has been added to the requirement that solicitors not communicate with another solicitor's client. Old rules 31.2 and 31.3 no longer appear.
31A. Place of settlement	Retained as Solicitors' Rule 54	No change.
32. Contracting for services	See ASCR rule 35	Rather than advising third parties of arrangements intended to be made for payment of fees notice only needs to be given in advance where the solicitor does not intend to accept personal liability for payment
33. Undertakings	See ASCR rule 6	No significant change; the rule regarding undertakings now covers undertakings to all parties, not just other solicitors.
34. Communications	See ASCR rule 34	Old rule 34.4 regarding demanding of payment of costs in the absence of existing liability does not appear in the new rule. However, the new rule requires that solicitors not use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.
35. Debt collection or mercantile agencies	Retained as Solicitors' Rule 55	No change.
36. Practitioner members of local government councils	Retained as Solicitors' Rule 56	No change.

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37. Conducting another business	Retained as Solicitors' Rule 59	No Changes to text. Also see commentary for ASCR rule 12 under "operating concurrent business"
38. Referral fees – taking unfair advantage of potential clients – commissions	See ASCR rule 12	No apparent change.
39. Sharing receipts (s.48F)	See ASCR rule 40	The prohibition on sharing of receipts is now restricted to disqualified persons and any person convicted of an indictable offence that involved dishonest conduct. The reference to sharing of receipts limiting or restricting exercise of practice management or compliance with the Rules or Legal Profession Act or regulations has been removed in relation to multidisciplinary partnerships.
40. Multi-disciplinary partnerships (s.48G) – deleted	N/A	N/A
41. Stationery – business name	Retained as Solicitors' Rule 60	No change
42. MCLE (CPD)	Retained as Solicitors' Rule 57	No change.
43. Sharing of premises	See ASCR rule 39	This rule now only applies to circumstances where a law practice shares offices with a business offering different services, and the client of the law practice is concurrently receiving services from both entities. In this case, the solicitor must ensure the client is clearly informed about the division of services provided by each entity. The new rule does not require the practitioner to maintain clients files or records separately.
44. Conducting a branch office	--	Query whether this has been subsumed by ASCR rule 37 "supervision of legal services"

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45. Solicitors advising on loan or security documents	Retained as Solicitors' Rule 58	Minor textual changes to take into account changes in legislation, recent relevant case law and feedback from practitioners practising in the area.