

FOLEY'S | LIST

THE LEGAL PROFESSION UNIFORM LAW & SOLICITORS' CONDUCT RULES – HOW HAS THE ETHICAL LANDSCAPE CHANGED?

Author: Jeremy St John

Date: 26 November 2015

© Copyright 2015

This work is copyright. Apart from any permitted use under the *Copyright Act 1968*, no part may be reproduced or copied in any form without the permission of the Author.

Requests and inquiries concerning reproduction and rights should be addressed to the author c/- annabolger@foleys.com.au or T 613-9225 6387.

THE LEGAL PROFESSION UNIFORM LAW & SOLICITORS' CONDUCT RULES – HOW HAS THE ETHICAL LANDSCAPE CHANGED?

By J.W. St. John, QC, Victorian Bar

When the Legal Profession Uniform Law came into effect on 1 July 2015 so too did the new Conduct Rules made on 26 May 2015 under the new Uniform Law by the Legal Services Council (“the new Rules”). They replaced the *Professional Conduct and Practice Rules 2005* (“the old Rules”) made pursuant to the *Legal Profession Act 2004 (Vic.)*.

The new Rules regulate the ethical conduct of legal practitioners only in New South Wales and Victoria. Whilst other legislation imposes duties or obligations which may fall under the general description of ethical standards or requirements (see eg. the Civil Procedure Act 2010 (Vic.)), it is the Conduct Rules which are the primary regulatory source of ethical duties and obligations.

In accord with the previous regulatory structure, there are separate Conduct Rules for those legal practitioners who act as solicitors or barristers and solicitors, and for those who act solely as barristers, (being members of the Victorian Bar or the New South Wales Bar).

For the purposes of this discussion I shall confine my remarks to the new Rules for Victorian legal practitioners who are not members of the Victorian Bar.

Introduction

Whilst the new Rules greatly re-cast and re-word the old Rules, as one would expect, much remains of the principles and obligations they imposed. Identifying the changes is difficult as not only the wording but also the headings and divisions within the old Rules have been changed and / or shuffled.

The regime of enforcing ethical obligations with the concepts of “unsatisfactory professional conduct” and “professional misconduct” remain. A contravention of the new Rules (or of the common law as to professional conduct) can constitute either disciplinary offence, depending upon the seriousness of the breach (new Rule 2). It is important to remember that conduct outside professional practice can attract disciplinary proceedings (see Rule 5.1).

My paper is not intended to encyclopaedic.

I do not traverse all the ethical obligations encompassed in the new Rules, only those aspects I have identified as newly imposed and/or which significantly vary the old Rules.

I make no reference to matters which relate to procedural or structural requirements for solicitors, (eg dealing with trust monies), or the new notice requirements associated with legal costs and the like, nor do I address the varied wording in the two sets of Rules which are intended to prevent the same behavior but which allows for argument as to the subtle effect of the changes.

The changes I address reflect the emphasis within the new Rules to make into ethical obligations principles arising from statute or the common law. This touches upon a number of aspects of contemporary practice, particularly the increasing prevalence of solicitor/ advocates.

Rule 3 – The Paramount Duty

The new Rules insert a new "paramount duty" for solicitors in the following terms:

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

This concept of a paramount duty is reinforced in Rule 4.1.4 which imposes "other fundamental ethical duties" which *inter alia* require a solicitor to "avoid any compromise to their integrity and professional independence".)

(This new "paramount duty" is similar that of imposed by s.16 of the Victorian Civil Procedure Act 2010 which talks of a paramount duty to further the administration of justice.)

(The old Rules contained no "paramount duty". They instead had General Principles in their Introduction intended to ensure every solicitor:

- (i) acted in accordance with the general principles of professional conduct;
- (ii) discharged that practitioner's obligations in relation to administration of justice; and

- (iii) supplied to clients legal services of the highest standard unaffected by self-interest.

(See also old Rule 30.1 which imposed standards of conduct.)

Rules 10 & 11 - Confidential Information

There has been a change in the new Rules concerning the protection to be given confidential information of a former or present client where the information is material to another client and disclosure would be detrimental to the client who supplied the confidential information.

As to former clients:

Rule 10.1 of the new Rules provides that a solicitor and law practice must avoid conflicts between the duties owed to current and former clients "*except as permitted by Rule 10.2*".

Rule 10.2 provides as follows:

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

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

*10.2.2 **an effective information barrier has been established.**"*(Emphasis added)

As to current clients:

The new Rules retain the previous obligation to avoid conflicts between the duties owed to two or more current clients.

Rule 11.2 provides that if a solicitor or a law practice seeks to act for two or more clients in the same or related matters where their interests are adverse, and there is a conflict or potential conflict of the duties to act in the best interest of each of them, the solicitor or law practice must not act "*except where permitted by Rule 11.3*".

At Rule 11.3 it is provided that where a solicitor or law practice seeks to act in the circumstances specified in rule 11.2, the solicitor or law practice, subject always to

each solicitor discharging their duty to act in the best interests of their client, may act if each client is aware that the solicitor or law practice is also acting for another client and has given informed consent to them so acting.

Additional to Rule 11.3, Rule 11.4 provides that where a solicitor or law practice is in possession of confidential information which might reasonably be concluded to be material to another client's current matter, and which is detrimental to the interest of the first client if disclosed, the solicitor or practice must not act for the other client save with the informed consent of both clients and:

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

(If it transpires that a conflict subsequently does arise during the course of the matter the solicitor or law practice can only continue to act for one client (or a group of clients between whom no conflict exists) provided the duty of confidentiality to the other client(s) is not put at risk and the parties have given informed consent (see Rule 11.5). There is no express reference to establishing “an effective information barrier”.)

What is “an effective information barrier”?

It is important to initially note the difference between ethical obligations and the requirements of the common law in a legal action to restrain a solicitor acting. Compliance with ethical guidelines does not mean a restraint will not be ordered by a Court. However, the reported cases do give an insight into what might for ethical purposes constitute an “effective information barrier”.

The decisions of Bergin, J of the New South Wales Supreme Court in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Limited* [2005] NSWSC 550 (when a restraint was refused) and the subsequent case at [2007] NSWSC 350 (when the undertaking was broken and the application for a restraint renewed), are of assistance.

In the latter case, His Honour noted (para 4):

“These structures have in the past been referred to as “Chinese Walls” however ... the more anodyne description “information barrier” is now utilized.”

His Honour continued (at paragraph 35):

“The structure of the practising profession is that the more senior solicitors supervise the more junior solicitors. The consequence of this regime is that the experience and judgment of the more senior lawyer is observed by and communicated to the junior lawyer as that lawyer develops in the practice of the profession. One aim of such a structure is that the important aspects of daily legal practice, including protecting the client's privileged information, will become second nature to the developing lawyer. It is not part of the everyday legal practice for a lawyer to have his or her knowledge from a case quarantined from another lawyer within the same section of the firm. The system of justice permits this unusual process in instances where the client's right to have the lawyer of choice is not outweighed by a real risk of disclosure of confidential information of a former client to the present client. The quarantining of such knowledge is a somewhat ethereal concept that is not second nature to a lawyer and when it is permitted it needs very special care.”

Having noted that the respondent firm did not call evidence of any further steps taken to ensure a heightened consciousness of the solicitors to their confidentiality undertakings following the breach, His Honour continued (paragraph 40):

“There is obviously daily contact or at least the opportunity for daily contact between the solicitors who acted on the Retainer and the solicitors acting for the defendant in these proceedings because they work in close proximity to each other. It is extremely difficult to compartmentalise knowledge that has been gleaned from confidential information and even more difficult to know whether such knowledge may trigger an inadvertent affirmative or negative response to a question posed by a colleague in general discussion about a case. The unfortunate inadvertent conduct of both Mr Fairbairn and Mr Webb is a salutary lesson to the proponents of the advantages of information barriers as a mechanism for law firms seeking to retain “business” in this very competitive environment. It must be remembered that although there are “business” pressures on the operations of the law firm the duties of the lawyers are professional duties both to the Court and to the client. If the Court

endorses the creation of an information barrier the professional obligations of the lawyers are onerous to ensure that it is maintained and that is perceived to be able to be maintained. Such a barrier must be robust to justify such perception. In this case it is proved to be paper-thin at least in respect of one of its essential elements, the quarantining of the lawyers who acted on the Retainer from having any involvement in the present proceedings.”

His Honour restrained the firm of solicitors from further acting.

Shortly following the 2005 *Asia Pacific Communications* case to which I have referred, and perhaps prompted by it, on 20 April 2006 both the Law Institute of Victoria and the Law Society of New South Wales adopted “Information Barrier Guidelines”.

I have appended to this paper the Institute’s précis of those Guidelines issued in November 2010.

Babcock & Brown DIF III v Babcock & Brown International Pty Ltd [2015] VSC 612 is a very recent decision (6 November 2015) of Riordan, J. in the Victorian Supreme Court concerning the restraining of solicitors and *inter alia* “information barriers”.

The contest within the case was largely the proposed compliance by the respondent firm with the New South Wales Guidelines, including the degree of physical separation (if any) necessary to exist between the conflicted solicitor and the solicitors in the firm acting in the matter (see paragraphs 12 – 18). However His Honour also examined the obligations of legal practitioners pursuant to the *Civil Procedure Act 2010 (Vic.)*

In *Harris V Stiefel Research Australia Pty Ltd [2013] VSC 90* there is a helpful discussion of the applicable common law by Almond, J. in a case where the Guidelines of the Institute were adopted by the respondent firm.

See also the recent Full Court case in the Family Court of *Osferatu & Osferatu [2015] FamCAFC 177* (15 September 2015).

In *Osferatu* an employee solicitor of the firm representing the husband had previously worked for the firm representing the wife, although the solicitor had no dealings with

the wife during his previous employment. The wife sought to restrain the husband's firm from acting. Undertakings were offered both by the solicitor and the husband's firm that arrangements would be maintained within the firm which would quarantine the solicitor and his staff from the proceedings. (The solicitor had given a like undertaking in earlier proceedings in 2014 and his undertaking had been accepted by the wife.) Evidence was also given that arrangements had been made within the firm so as to prevent the solicitor advertently or inadvertently gaining access to either the electronic or physical file.

At first instance the solicitor was restrained from continuing to act.

On appeal, the Full Court unanimously decided *inter alia* that "strong and appropriate measures" had been taken to quarantine the solicitor from the proceedings, including the proposed undertakings to the Court from the partners of the firm and from the solicitor. When discharging the restraining Order the Court formally accepted the undertakings offered.

(It should be noted that in *Osferatu* the solicitor had had no effective contact with the wife at the previous firm, and the wife could not point to any particular aspect of confidentiality that might be potentially disclosed. The giving of undertakings will not necessarily be sufficient to permit a lawyer or a firm to continue to act. It will always be a "balancing act" having regard to the particular circumstances of the case.)

Rule 18 – Formality before the Court

The new Rules require that a solicitor must not in the presence of any of the parties or solicitors, deal with the court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.

A similar provision was within the old Rules (Rule 19.2) but it extended additionally to appearances before a referee, arbitrator or mediator.

However the change is more apparent than real; the term "court" has been given an extended meaning in the new Rules (see Glossary) which includes arbitrations and mediations.

Rule 19.12 – Informing as to incorrect concessions made by opponent

Again a provision that appears in both the old and new Conduct Rules for barristers but which is new to solicitors:

*“A solicitor must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the solicitor contrary to the true position **and is believed by the solicitor to have been made by mistake.**”*

(Emphasis added)

(See also new Rule 30 discussed later.)

Rule 21.1 – Responsible use of court process

Whilst the new Rules in large part echo the requirements in the old Rules, a new obligation is cast upon a solicitor to ensure that advice to invoke the coercive powers of a court *“is not made principally in order to gain some collateral advantage for that client or the solicitor or the instructing solicitor out of court.”*

Whilst this is new within the regulatory framework, it has of course at common law long been an abuse of court for proceedings to be commenced for a collateral purpose.

Rule 21.8 – Cross-examining a witness in a sexual assault case

Reflective of the extensive public discourse on sexual assault and its impact upon victims, the new Rules place specific ethical obligations upon a solicitor who is acting as an advocate, cross-examining in a case where allegations of sexual abuse, indecent assault or the commission of an act of indecency are made:

“21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

- (i) to mislead or confuse the witness; or*
- (ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and*

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks.”

The old Rules were silent on the topic for both solicitors and for barristers (although there were general obligations upon barristers when cross-examining). This new provision appears in the new Conduct Rules for both barristers and solicitors.

Rule 22.4 – Communicating with unrepresented Insured parties

The new Rules provide:

“22.4 A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer unless the party and the insurer have signified willingness to that course.”

The old Rules had no comparable provision.

Rule 27 – Acting where the solicitor will be a witness

The old Rules 9 (at Rule 13.4), forbade a solicitor from acting in all save “*exceptional circumstances*” where it was reasonably anticipated they would be a witness in the action.

The new Rule 27 however does not provide such a blanket provision. Instead, only the ability of the solicitor to act as an advocate in the action is curtailed.

It provides:

“27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.

27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.”

(An “associate” is defined in the Glossary to the new Rules and *inter alia* includes a principal, partner, employee or agent of the solicitor.)

Rule 30 - Taking advantage of another person's obvious error

Whilst the old Rules placed a general obligation upon solicitors to act honestly and fairly, they contained no specific provision concerning obvious errors made by another practitioner or person.

The new Rules provide:

“A solicitor must not take unfair advantage of the obvious error of another solicitor or other person if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.”

(Interestingly, there is no specific provision in like terms in the new Rules for barristers.)

Rule 31 – Inadvertent disclosure

Similarly, whilst the old Rules had no specific provision, the new Rule 31 provides:

“31.1 Unless otherwise permitted or compelled by law, a solicitor to whom material known or reasonably suspected to be confidential is disclosed by another solicitor, or by some other person and who is aware that the disclosure was inadvertent must not use the material and must:

31.1.1 return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent; and

31.1.2 notify the other solicitor or the other person of the disclosure and the steps taken to prevent inappropriate misuse of the material.

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

31.2.1 notify the opposing solicitor or the other person immediately;
and

31.2.2 not read any more of the material.

31.3 If a solicitor is instructed by a client to read confidential material received in error, the solicitor must refuse to do so.

The new Rule basically echoes the common law.

Rule 32 – Unfounded allegations of unprofessional conduct or misconduct

In a sign of these competitive times, this newly inserted Rule requires that a solicitor not make an allegation of unsatisfactory professional conduct or professional misconduct against another Australian legal practitioner unless the allegation is made *bona fide* and the solicitor believes on reasonable grounds that available material provides a proper basis for the allegation.

(See also Rule 34.1.2 which provides *inter alia* that a solicitor must not in any action or communication associated with representing a client threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor’s client is not satisfied. Like provision was within the old Rules (Rule 28.3).)

Rule 42 – Anti-discrimination & Harassment

Solicitors are now ethically required not to engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. They may however draw some comfort from the fact that barristers have been enjoined from so behaving since at least 2005. What conclusions one should draw from those perceptions as to the two branches of the profession I shall leave to you!

**Owen Dixon Chambers West,
25 November 2015**