

Ethical & Practice Guidelines

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Table of Contents

1.	Ethical and Practice Guidelines – Preamble and Disclaimer	3
2.	Advocacy and Litigation	4
3.	Honesty, Courtesy and Fairness	7
4.	Threatening Conduct	9
5.	Undertakings	10
6.	Conflicts	11
7.	Commercial documents	13
8.	Court documents	14
9.	Negotiations	16
10.	Mediation	18
11.	Dealings with witnesses	22
12.	Unwelcome advice	23
13.	Advertising	26
14.	Termination of Engagement and Document Handover	33
15.	Guidelines for Closing, Storage and Destruction of Files	38
16.	Use of Social Media	42
17.	Cloud Computing	44
18.	Addendum 1	50

1. ETHICAL & PRACTICE GUIDELINES

Preamble

This Guide is based upon a reservoir of papers and articles written by Western Australian practitioners to ensure consistency with Western Australian practice. This Guide is not a substitute for an understanding of and compliance with the relevant ethical rules of law. Rather, this Guide is designed to serve as a practical guide to practitioners on ethical and proper conduct in their day to day practices. Each part of this Guide is not a stand-alone guide to the issue addressed. This Guide should be read as a whole. Some issues are addressed in more than one part.

Every practitioner is an officer of the court.¹ Practitioners are required to act with honesty and integrity, whether in litigious matters or commercial transactions. Practitioners must never misrepresent, mislead or deceive in any way. Practitioners must promptly correct statements which are false, inaccurate, misleading or deceptive once they come to a practitioner's attention. These obligations extend to all courts and tribunals, other practitioners, governmental authorities and members of the public.

Clients may demand your attention and services, but clients come and go. In contrast, your integrity and standing in the profession generally is your only permanent asset. The overarching focus of a practitioner should be to conduct him or herself with the utmost honesty and integrity befitting membership of the legal profession.

Practitioners are encouraged to gain an understanding of the concepts of "unsatisfactory professional conduct" and "professional misconduct" by reading sections 402 and 403 of the *Legal Profession Act 2008* (WA) and any related material explaining those provisions.

A thorough understanding and appreciation of the statutory *Legal Profession Conduct Rules 2010* (Rules) is fundamental to the practice of law. Practitioners should familiarise themselves with those Rules. In general, the Rules require practitioners to conduct litigation efficiently and not to abuse the court process or subvert the administration of justice. The law can be complex and this Guide is no substitute for a thorough review of the relevant legislation, Rules, authorities and principles.

Disclaimer

The information in this Guide is provided solely on the basis that readers shall be responsible for making their own assessment and verification of all relevant representations, statements and information.

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¹ s41 *Legal Practice Act 2008*.

2. ADVOCACY AND LITIGATION

Legal Profession Conduct Rules 2010 (Rules)

Part 6 of the Rules deals with the proper conduct of practitioners in advocacy and litigation. Practitioners should familiarise themselves with these Rules. In general, the Rules require practitioners to conduct litigation efficiently, to make proper disclosure and not to abuse the court process or subvert the administration of justice.

2.1 Efficiency

The duty to ensure efficiency includes:

- (a) confining the hearing of a matter to the issues in dispute and presenting the case as efficiently as is consistent with its robust advancement;
- (b) never pursuing a case or argument in respect of which there is no rational basis upon which it might succeed;²
- (c) never commencing or defending proceedings for an improper purpose or where the predominant purpose is ulterior to the purpose of the cause of action as pleaded;
- (d) taking on matters only when the practitioner has the time and expertise to do so efficiently;
- (e) complying with court rules, practice directions and orders as to case management and conferral; and
- (f) being punctual in respect of court attendances.

2.2 Honesty and proper disclosure

Proper disclosure includes:

- (a) making the court aware of authorities relevant to an issue which may be adverse to the practitioner's client's case;
- (b) never knowingly or recklessly misleading a court, and correcting any misleading statement made to the court as soon as possible after becoming aware of a misleading statement;
- (c) during *ex parte* proceedings, ensuring that all relevant information is brought to the court's attention including matters adverse to the practitioner's client; and
- (d) in criminal matters, complying with a prosecutor's duty to seek to have the whole of the relevant evidence placed before the court, including any exculpatory evidence of which the prosecutor becomes aware.

² See Summary of Case Law at Addendum.

2.3 Allegations of criminality, fraud or other serious misconduct

It is a breach of Rules 36(3) – (8) to allege criminality, fraud or other serious misconduct against any person, whether in submissions, court documents or during the examination of witnesses, unless the practitioner has a reasonable basis for doing so, having made proper inquiry in relation to the matter.

2.4 Communication with opponents

A practitioner must not confer directly with a client's opponent if the opponent is represented by another practitioner unless:

- (a) that other practitioner has consented to such contact being made; or
- (b) notice has been given to the other practitioner of the intention to communicate directly with the client's opponent and the other practitioner has failed to respond within a reasonable time to such notice.

2.5 Communication with the court

- (a) A practitioner must not communicate with the court in the absence of opposing counsel on a matter of substance unless the practitioner has opposing counsel's consent to the specific communication, or the practitioner is properly making an *ex parte* application on behalf of a client.
- (b) In respect of any communication with the court made in the absence of the opposing party, the practitioner must promptly tell the opponent of any such communication and provide a copy of all written communications with the court to the opponent without delay.
- (c) If opposing counsel is late for an appearance but was expected to appear, a practitioner should always make known that the appearance of opposing counsel is expected, and must facilitate contact with opposing counsel before commencing, subject to the direction of the court.

2.6 Dealing with witnesses

- (a) A practitioner must not do anything to prevent or discourage a witness from conferring with the practitioner's client's opponent or being interviewed by the client's opponent, but may advise that the witness is not legally required to communicate with the client's opponent.
- (b) A practitioner must never suggest that any witness should give false evidence or condone any such suggestion from a client.
- (c) A practitioner must never condone or be involved in the alteration of documentary evidence or any deliberate failure to give proper discovery.
- (d) A practitioner must not be involved in the conferral of two or more (non-expert) witnesses in an effort to make the evidence of such witnesses consistent, or condone such conferral between witnesses.
- (e) A practitioner must not communicate with a witness under cross-examination unless the cross-examiner has consented to such communication, or there are other special circumstances warranting such communication and the cross-examiner has been informed of those circumstances and the need for conferral.

- (f) A practitioner must not act for a client in circumstances in which the practitioner will be required to give evidence which is likely to be material to the determination of issues before the court.

2.7 **Public comment**

A practitioner must not make or facilitate the making of any public comment which may prejudice a fair hearing or subvert or undermine the administration of justice.

3. HONESTY, COURTESY AND FAIRNESS

Honesty and courtesy - fundamental ethical obligations

Rule 6 of the Rules provides that it is a fundamental ethical obligation to be honest and courteous in all dealings with clients, other practitioners and other persons involved in a matter.

3.1 Honesty

- (a) Dishonesty in respect of the practice of law not only breaches the Rules, but is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct for the purposes of the *Legal Profession Act 2008*.
- (b) Dishonest conduct of a practitioner outside of legal practice is likely to be unsatisfactory professional conduct or professional misconduct for the purposes of the *Legal Profession Act 2008*.
- (c) The requirement to be honest extends to negotiations and the provision of advice as well as the management of litigation.
- (d) Practitioners must be scrupulously honest in all of their dealings with clients, courts, commissions, tribunals (and their staff), opposing counsel and legal practitioners, their clients' opponents, witnesses and other third parties and the Legal Profession Complaints Committee.
- (e) If a practitioner ever inadvertently makes a false or misleading statement and later discovers that he or she has done so, it is the practitioner's professional duty to immediately take all necessary steps to disclose that error and to correct the statement. Where a misleading statement has been made inadvertently to the court, the Rules provide that this may be corrected by letter to the court, copied to opposing counsel.
- (f) In relation to clients, the Rules expressly provide that a practitioner must communicate candidly and in a timely manner with clients. A practitioner is required to advise a client of all events relevant to the client's matter in a timely way, including any error, act or omission on the part of the practitioner or the practitioner's legal practice which may adversely affect the client's case.

3.2 Courtesy

- (a) Practitioners must not use insulting, offensive, discriminatory, rude or intimidatory language or conduct, whether in the context of the workplace, a court, or in dealings with fellow practitioners and non-practitioners, including court staff.
- (b) Rule 6(2)(c) provides that a practitioner must not engage in conduct in the course of providing legal services which may bring the profession to disrepute. Rude, insulting or discriminatory behaviour potentially breaches this rule.
- (c) The duty to maintain courtesy is met by practitioners always behaving in a professional manner and maintaining objectivity and a level of independence from client interests.
- (d) Seeking default judgment without giving reasonable warning to the opposing party may be regarded as discourteous.

3.3 Allegations of misconduct against other practitioners

Practitioners must not make accusations of misconduct against other practitioners without a proper basis. To do so may breach Rule 16(1) which expressly provides that a practitioner must not attempt to further a client's matter by unfair or dishonest means, and may also breach Rules 36(3) – (8) (which are dealt with in the ethical and practice guidelines as to advocacy and litigation).

3.4 Mistakes of other practitioners

Rule 23 provides that a practitioner who observes that another practitioner is making or is likely to make a mistake or oversight which may involve the other practitioner's client in unnecessary expense or delay;

- (a) must not do anything to induce or foster that mistake or oversight; and
- (b) must draw it to the attention of the other practitioner, provided that doing so will not prejudice the interests of the first mentioned practitioner's client.

3.5 Inadvertent disclosure of privileged material

Rule 24 provides that where privileged material is inadvertently disclosed to a practitioner, the practitioner must not disclose the material to the practitioner's client and must immediately, in writing, notify the practitioner's client and the other practitioner that the material has been disclosed and that the practitioner will return, destroy, or delete the material (as appropriate) at a time set out in the notice, being not less than 2 clear business days and not more than 4 clear business days from the date of the notice and must return, destroy or delete the material as set out in the notice.

4. THREATENING CONDUCT

- 4.1 A practitioner may inform a client's opponent or their representative that the practitioner's client intends to commence proceedings failing compliance with a lawful demand.
- 4.2 However, a practitioner must, before making a demand on behalf of a client, satisfy him or herself that there is a proper basis for making that demand and a proper basis for instituting the threatened proceedings.
- 4.3 Practitioners must ensure that such demands are not couched in terms which may constitute a threat in breach of the *Criminal Code*. For example, a practitioner must not, on behalf of a client, threaten to bring a matter to the attention of police or a disciplinary authority in an effort to induce compliance with the demand of a practitioner's client.
- 4.4 Advice that proceedings will be commenced unless a demand is complied with must be couched in plain terms, and must not contain any intimation, direct or indirect, of unlawful action.

5. UNDERTAKINGS

- 5.1 It is critical that practitioners give careful thought before giving undertakings during the course of legal practice. The Rules (Rule 22) prescribe practitioners' obligations in the performance of undertakings. Given those obligations a practitioner should not provide an undertaking unless the performance of the undertaking is within his or her power to personally carry out. An undertaking given to the court has the status of an order. Breach of such an undertaking gives rise to a risk of the practitioner being in contempt of an order of the court.
- 5.2 Therefore, an undertaking to, for instance, produce a document in certain circumstances, must not be given unless the practitioner has possession of the document and cannot be compelled to part with it. That may require the practitioner to obtain from the practitioner's client an irrevocable authority to retain possession of the document until the undertaking has been performed.
- 5.3 Failure to perform an undertaking exposes the practitioner to the risk of breaching the Rules and being subject to disciplinary action, even if the client instructs the practitioner to not perform the undertaking.
- 5.4 If it becomes apparent that an undertaking cannot be performed for reasons beyond the practitioner's control, the practitioner should immediately inform the relevant parties, giving reasons, within the bounds of the practitioner's client confidentiality obligations.
- 5.5 Practitioners should be mindful that they should only use the term *undertaking*, in relation to the giving of a commitment, when they are prepared to have that commitment treated as an undertaking. Conversely, the obligation of performance of an undertaking cannot be avoided merely by the use of another term, such as *commitment* or *obligation*. Whether the practitioner has given an undertaking for the purpose of the Rules, and the law relating to the performance of professional obligations generally, will be judged according to the circumstances.

6. CONFLICTS

- 6.1 All practitioners should familiarise themselves with the law relating to conflicts of interest, and the relevant Rules (especially Part 4 and Rule 42 which specifically deal with the issue). The law can be complex and these Guidelines are no substitute for a thorough review of the relevant authorities and principles. The Guidelines only provide comment on certain particular issues. Of paramount importance when considering the issue of conflicts is the need to be ever alert to avoid placing oneself in a position of conflict.
- 6.2 Conflicts commonly arise in one of three circumstances. They are where a practitioner acts for more than one party, where a practitioner is asked to act for a party where the interests of a former client for whom the practitioner has previously acted may be affected or where the practitioner has an interest which may conflict with a current client's interest.
- 6.3 Before accepting instructions to act, practitioners should reflect on whether there is a conflict, or whether there is a potential that a conflict may arise. Even where there is just the potential for a conflict, practitioners should generally not accept the instructions.
- 6.4 Although it is often difficult to inform a client that one is prevented from accepting instructions, it is invariably better to do so at the inception to avoid the probable embarrassment, risk exposure and greater inconvenience of having to remove oneself in the middle of a transaction (or litigation) when costs have already been incurred and the matter has reached an advanced stage.
- 6.5 The first common situation of a conflict is where a practitioner acts for more than one party. Under the Rules, when a practitioner finds that new or existing instructions involve acting for clients, in the same or a related matter, whose interests are adverse and there is an actual or potential conflict, the practitioner can only act, or continue to act in very limited circumstances. They are when the clients are aware that the practitioner will, or is, acting for the other client(s), all the clients have given fully informed consent **and** an effective information barrier has been erected to protect each client's confidential information (Rule 14).
- 6.6 Not only will compliance with the Rule usually require each client receiving independent legal advice on the proposed arrangements before providing consent, the practitioner must ensure that the information barrier which is erected is fully effective; the disclosure of confidential information in such circumstances, despite the information barrier, even where the disclosure is accidental or unforeseen, is likely to expose the practitioner to both disciplinary proceedings and civil action. The information barrier must be effective (i.e. impenetrable).
- 6.7 It is self-evident that satisfying the requirements of Rule 14 will be onerous, and for the majority of practitioners impossible in all circumstances. Even small to medium sized legal practices will usually not be able to establish an effective information barrier, due to the interaction between staff and the risk of disclosure of information orally, in hard copy or electronically.
- 6.8 Therefore, it will only be in rare cases that practitioners will properly be able to act for clients in the same or a related matter where their interests are adverse and there is either an actual or potential conflict. Practitioners should also bear in mind that satisfying the requirements of Rule 14 will not guarantee that the Supreme Court will accept the arrangements. The Court exercises supervisory jurisdiction over practitioners and can restrain practitioners from acting even where the Rules are not breached.

- 6.9 The second common situation where conflict issues can arise is where the interests of a former client might be affected by acting for a current client. This can occur where the practitioner has confidential information from a former client which the best interests of a current client require be disclosed. In those circumstances, the Rules require that **either** the former client gives informed consent to the disclosure of the information **or** an effective information barrier to protect the information is erected (Rule 13). The earlier comments concerning the practical difficulties of even small and medium sized firms maintaining effective information barriers, and the need to ensure that the information barrier is effective (i.e. impenetrable), apply.
- 6.10 The third common situation where conflict issues arise is where there is a conflict, or potential conflict, between the client's interest and the practitioner's interests (or the practitioner's law firm, family members, associates and colleagues). The practitioner is prohibited from acting where it ought reasonably be known that a conflict between those interests **may** occur, unless certain requirements are met (Rule 15). The requirements to enable a practitioner to act in these circumstances are that the client is fully informed of the conflict, has received independent written legal advice about the effects of the conflict **and** agrees to the practitioner acting.
- 6.11 As with the other situations where a conflict may arise, practitioners are best advised to decline the instructions in those circumstances. If the practitioner nonetheless considers acting, extreme care must be taken to ensure the Rule is strictly complied with.
- 6.12 These Rules highlight the need for practitioners to have in place policies both for the early identification of conflicts and for the proper course of action should a conflict arise during a matter.
- 6.13 Practitioners should act in accordance with those policies when conflict related issues arise. For the reasons already referred to, this will commonly necessitate the practitioner advising the client(s) of his/her inability to act and referring the client(s) to another or other suitably qualified practitioner(s).
- 6.14 If in any doubt about conflict related issues, practitioners should seek specialist legal advice and perhaps discuss the matter with someone from the Law Society's Senior Advisors Panel.
- 6.15 Practitioners should be aware of the consequences that may follow if they allow themselves to act in a position of conflict. Apart from professional misconduct risks and possible removal from the proceedings by injunction, there is also the disgorgement of any legal costs paid to the practitioner. The refund of a practitioner's own legal costs is not covered under the Law Mutual (WA) professional indemnity policy.
- 6.16 The golden rules of conflict management are:
- (a) identify the conflict or potential conflict at the earliest possible stage; and
 - (b) be rigorous in avoiding placing oneself in a position of conflict even if it may seem to be to the detriment of one's short term commercial interests.

7. COMMERCIAL DOCUMENTS

- 7.1 For their own protection, practitioners should ensure that, when amending documents, tracked versions are supplied to the practitioners representing the other parties, showing the changes that have been made. Show all the tracked changes. Selectivity is likely to generate mistrust, miscommunication, allegations of professional misconduct and wasted time and effort.
- 7.2 When requesting amendments, communicate the request with precision, giving the rationale for each amendment.
- 7.3 When redrafting amendments, try as far as possible to follow the style of the author of the original document.
- 7.4 When suggesting a replacement for an original document, practitioners should try to do so without suggesting that the original document was inferior or incapable of adaptation.
- 7.5 Under no circumstances should a practitioner backdate any document, or make any changes to a document that amount to the creation of a false record. Such conduct is fundamentally inconsistent with the duties of honesty and integrity which a practitioner owes as an officer of the court. No matter how inconsequential such changes may seem to the practitioner or the client, such conduct is unacceptable and could amount to professional misconduct.
- 7.6 If a document contains a mistake, or requires amendment, a fresh document should be created to record the correction of the mistake, or the addition of the omitted material.

8. COURT DOCUMENTS

- 8.1 A court document which contains a misstatement is misleading. It follows that it is critical for practitioners to ensure that every court document for which the practitioner is responsible is accurate.
- 8.2 Affidavits require special attention because they contain sworn evidence. The consequences of inaccuracy in relation to the contents of the affidavit, or the circumstances under which an affidavit is sworn, may be very serious if a practitioner fails to apply the requisite level of care and attention to these matters.
- 8.3 Where an affidavit contains an inaccuracy, a fresh affidavit should be sworn to explain why the inaccuracy occurred or why additional relevant material needs to be added, or why it was omitted, or all of these.
- 8.4 The same principles apply to all formal documents, including statutory declarations, formal statements to government agencies, pleadings, court notices, and communications with judicial associates where such communications are required.
- 8.5 It is the obligation of all practitioners to ensure that litigation is confined to the true issues in dispute. The pleading of irrelevant matters or facts that are not supported by evidence creates false issues and distracts the court and the parties from the task at hand. The Rules deal in detail with practitioners' obligations in the efficient conduct of litigation (see Part 6, especially Rules 32 and 34).
- 8.6 A practitioner's duty to act competently, honestly and with integrity applies to pleadings as much as to other areas of practice.
- 8.7 This translates into refraining from
- (a) misleading the court or another party by a pleading;
 - (b) causing unnecessary expense or waste of the court's time through a pleading; and
 - (c) intentional delay in an action.
- 8.8 The duty of competence involves:
- (a) having a sound knowledge of the rules of procedure including those that apply to pleadings; and
 - (b) taking comprehensive instructions from clients and only pleading according to those instructions.
- 8.9 A practitioner's duty is not to accept a client's instructions uncritically, but to critically assess those instructions to see whether they can properly translate into pleadings. The practitioner has an obligation to exercise an independent judgment in litigation (see Rules 32, 36 and Part 6 generally).
- 8.10 This means that a practitioner must use reasonable endeavours to ensure that a claim or a defence has a rational basis on which it might succeed.

- 8.11 Importantly, a practitioner must not allege fraud or other forms of serious misconduct without proper foundation for making such a serious allegation. The precise obligations to be satisfied are set out in Rule 36.
- 8.12 Apart from the requirement of having reasonable grounds to make such an allegation, and the factual material in the form of admissible evidence to sustain it, a practitioner is obliged to advise the client of the seriousness of the allegation and the possible consequences to the client if the allegation is not made out prior to accepting and acting on instructions to plead an allegation of criminality, fraud or other forms of serious misconduct.
- 8.13 The fact that some proceedings may be conducted in private does not confer on a practitioner in such a matter any greater freedom to make serious allegations of misconduct without a proper foundation.
- 8.14 It is an abuse of process to commence proceedings for which there is no reasonable factual or legal foundation. The same applies to a defence.
- 8.15 A practitioner is obliged to advise a client on the prospects of success in a case. That does not preclude the practitioner from acting to prosecute a claim most likely to fail as long as there is a rational basis on which the case might succeed and the client persists in bringing the claim, despite having been fully informed of the prospects.
- 8.16 It is an abuse of process to use legal process for an ulterior purpose, for example, to harass another party, cause delay or increase the cost. A practitioner should exercise particular care in this regard when advising on litigation strategies, as to engage in such conduct, even on instructions, will amount to professional misconduct and a breach of the Rules.
- 8.17 Practitioners should take particular care when pleading denials or non-admissions.

There may be a legitimate forensic purpose in denying a fact or not admitting it, but a party remains under a continuing duty to make inquiries as to the accuracy of a fact which has been denied or not admitted. The practitioner also must ensure the positive duty to take all reasonable and practicable steps to confine the case to the real issues is not contravened.

9. NEGOTIATIONS³

- 9.1 Like any other area of practice, a practitioner must act with honesty and integrity when conducting negotiations on behalf of a client. The sanctions which apply to dishonesty and misleading or deceptive conduct, apply equally to negotiations.
- 9.2 A practitioner's obligation to act honestly and with integrity when negotiating on behalf of a client is consistent with the obligation not to attempt to further a client's matter by unfair or dishonest means.⁴
- 9.3 A practitioner's paramount duty is to the Court and the administration of justice.⁵
- 9.4 A practitioner's fundamental ethical obligation to be honest and courteous in all dealings with other practitioners and other persons involved in a matter where the practitioner acts for a client, applies with equal force to the negotiation context.⁶
- 9.5 This is not to say that the traditional secrecy or indirect dealings involved in negotiation inevitably mean that parties have engaged in misleading or deceptive conduct. The cards do not have to be on the table, but negotiation is not a licence to deceive.⁷
- 9.6 What this boils down to is that practitioners must appreciate that the negotiation context is no different to any other area of practice, as far as ethical standards are concerned. It follows that where a practitioner makes a misleading statement, for example in the context of informal settlement negotiations, a mediation or any other occasion when negotiations are taking place, the practitioner must correct the misleading statement.
- 9.7 An example is where a practitioner supplies the other side with unsigned witness statements and incorrectly represents that all the originals have been signed. If a settlement is reached on the false representation that the originals have been signed, the consequences are:
- (a) there is a possible breach of the Rules, depending on why the misrepresentation was made
 - (b) the settlement may be of no effect; and
 - (c) all parties who made the misrepresentation, including the practitioner may be held liable in law for misleading or deceptive conduct.⁸

³ See 'Ethics in Negotiating Settlements' by Stephen Penglis, Partner, Freehills, Law Society Paper presented on 2 September 2009.

⁴ Sub-section 16 (1) Legal Profession Conduct Rules 2010.

⁵ Section 5, Legal Profession Conduct Rules 2010.

⁶ Section 6 (1)(b), Legal Profession Conduct Rules 2010.

⁷ *Poseidon Ltd v Adelaide Petroleum NL* [1992] ATPR 41-164, 40,227.

⁸ Compare *Williams v Commonwealth Bank of Australia* [1999] NSW CA 345; *Legal Services Commission v Mullins* [2006] LPT 012.

- 9.8 The dire consequences of acting dishonestly or misleadingly in negotiations has been the subject of review in Western Australia.⁹ In that example, the practitioner misled the deceased's siblings into believing that a formal will had been executed, when this was in fact false.
- 9.9 It is important to bear in mind that one can engage in misleading or deceptive conduct, or conduct likely to mislead or deceive, by omission as well as by commission. By keeping silent when one has a duty to speak, a practitioner may engage in misleading conduct. This applies equally to affirmative statements which require some qualification or the statement of a partial truth without giving all the relevant information. It might also apply to statements which are literally true but which require qualification or a statement which is true initially, but becomes false in the course of the negotiations.¹⁰
- 9.10 It follows that before undertaking any negotiations for a client, the practitioner should ensure that the client understands the practitioner's role as the client's agent in negotiations. The practitioner should disabuse the client of any thought that negotiations will be conducted dishonestly, for instance, by attempting to "bluff" the other side.
- 9.11 An example of a "bluff" which would amount to misleading conduct, is where a practitioner is instructed to say that a particular amount is the "final offer", when to the practitioner's knowledge that is in fact not the case. Practitioners should bear in mind that conduct is misleading or deceptive if it induces or is capable of inducing error. Whether particular conduct is of that character is a question of fact, by reference to the conduct and the surrounding facts and circumstances. It is misleading if it contains or conveys a misrepresentation.
- 9.12 The obligation to act honestly during negotiations, despite instructions to the contrary from a client, is a reflection of the standard of professionalism demanded of every practitioner. In every matter in which a practitioner is engaged to represent a client, the practitioner must exercise independent judgment after giving appropriate consideration to the wishes of the client. The obligation enshrined in the rules¹¹ is equally applicable to the context of settlement negotiations, mediations and other forms of alternative dispute resolution.
- 9.13 Practitioners should be wary of agreeing to "negotiate in good faith" rather than simply agreeing to negotiate, to attend a mediation or without prejudice conference. An agreement to negotiate in good faith may carry more onerous obligations. For example, where there have been protracted negotiations aiming to achieve a specific outcome or commercial solution and a party decides to withdraw, the party may become liable for damages.¹²

⁹ *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352.

¹⁰ *Fleming* [73].

¹¹ Sub-section 32(1) of the *Legal Profession Conduct Rules 2010*.

¹² Ian B. Stewart, "Good faith in contractual performance and in negotiation", (1998) 72 ALJ 370.

10. MEDIATION

- 10.1 Practitioners may participate in mediation as mediators, or as lawyers acting for parties involved in mediation. In this section any reference to a practitioner is a general reference to a practitioner acting in either capacity, unless the context indicates otherwise.
- 10.2 The same ethical obligations apply in relation to mediation as apply in all other areas of practice. The paramount duty to the Court and to the administration of justice assumes great practical significance, since mediation is regarded as a primary means of achieving the objectives of case flow management.
- 10.3 As in the case of without prejudice informal settlement discussions and negotiations, no practitioner involved in a mediation should engage in conduct which is misleading or deceptive or likely to mislead or deceive.
- 10.4 In the case of a practitioner mediator, this will include accurately communicating the position of the parties to each other, when the parties are in separate rooms.
- 10.5 If a practitioner becomes aware that a client for whom the practitioner is acting during a mediation conference has engaged in conduct which is misleading or deceptive or likely to mislead or deceive, the practitioner should not in any way participate in such conduct, whether actively, passively, by silence or otherwise, directly or indirectly, or in any way lend approval to that conduct. The practitioner's duty is to advise the client to correct any material misrepresentation. If the client is not prepared to do so, the practitioner should cease acting.
- 10.6 A practitioner should be familiar with the law and practice relating to mediation generally and in relation to the particular jurisdiction in which the dispute has arisen, including the rules of the court or tribunal, any practice directions and any decided cases of relevance.

Representation of clients in mediations

- 10.7 Ethical rules apply equally to practitioners representing clients in mediation, including, in particular, the duties of practitioner in relation to negotiations.
- 10.8 The primary function of a practitioner in a mediation is to assist the client, not to engage in adversarial advocacy.
- 10.9 A practitioner representing a client in mediation should:
 - (a) participate in the mediation in good faith and advise their client to participate in the mediation in good faith. Good faith participation requires a preparedness to consider offers put by other participants in the mediation and to consider putting offers;
 - (b) withdraw from acting if the client gives instructions or insists on acting in a manner that indicates bad faith participation; and
 - (c) extend professional courtesies to the mediator and other participants in the mediation.

If there is any valid reason why the client is not prepared to participate in the mediation in good faith that should be disclosed prior to the mediation.

- 10.10 If a practitioner is aware of potential bias or conflict of interest or other reason why a mediator should not act, the practitioner should raise the issue at the earliest opportunity.
- 10.11 A breach of the strict confidentiality regime applicable to mediations would be regarded as a serious case of professional misconduct. Disclosure of information obtained in a mediation will generally require the consent of all parties to the mediation.
- 10.12 A practitioner may endeavour to persuade, but must not coerce or pressure, a client to accept a settlement which the practitioner considers is objectively in the client's best interests.
- 10.13 Practitioners must ensure that they and the client are adequately prepared for the mediation. This involves the practitioner providing advice to the client about the risks and likely costs of litigation.
- 10.14 A practitioner acting for a party (or parties) to a mediation, should have a thorough understanding of the mediation process and how a mediation conference differs from a Court hearing.
- 10.15 The practitioner should be fully prepared and be familiar with the client's case, especially the client's settlement strategy and objectives.
- 10.16 A practitioner acting for a plaintiff should be prepared to make an opening statement designed to achieve a settlement, rather than present a legal argument, more appropriate to the trial process.
- 10.17 Where possible, the practitioner making the opening statement should support the plaintiff's position with concise documentary material explaining graphically the party's position, e.g. a schedule of damages.
- 10.18 A practitioner acting for a defendant should be prepared to make a responding statement designed to achieve a settlement, rather than present a legal argument, more appropriate to the trial process.
- 10.19 A practitioner should not interrogate another practitioner's client during a mediation conference, without first seeking permission to do so from the other practitioner and the other practitioner's client. This is common courtesy and in most cases common sense.
- 10.20 Before the mediation conference, a practitioner acting for a party should invariably explain to that party the nature of the mediation process, the party's rights and obligations, the likely costs implications and the importance of participating in the mediation process willingly and in good faith. A practitioner should also ensure that the party has reflected upon and arrived at a position in relation to possible settlement so that the party can engage meaningfully in the mediation.
- 10.21 Practitioners should know the objectives of case flow management generally and as they relate to mediation. Practitioners should try to generate fruitful ideas for reaching a settlement in the given circumstances.
- 10.22 Practitioners must strictly maintain confidentiality and the "without prejudice" privilege to which mediation is subject. That applies to anything that occurred, was said or done by anyone during or in relation to any mediation conference.
- 10.23 Even where the mediation process has failed to result in a settlement, a practitioner should, as far as reasonably possible in the circumstance, keep the prospect of a

mediated settlement alive. From time to time the practitioner should explore with the client whether it would be in the client's best interest to return to mediation.

- 10.24 A practitioner should see to it that all parties whose agreement is essential to reaching a settlement are physically present during the mediation conference. Where the practitioner is acting for more than one party and one of the parties is unable to be physically present, the practitioner should ensure as far as reasonably possible that the absent party remains in constant telephonic contact throughout the mediation conference.
- 10.25 A practitioner should explain to the client the costs consequences of failing to participate in a mediation conference in good faith.
- 10.26 A practitioner should advise clients that mediation is available as a way of achieving the settlement of all civil litigation including appeals.

Practitioners as mediators

- 10.27 A practitioner should not act as a mediator unless the practitioner has the competence to do so and to satisfy the reasonable expectations of the parties.
- 10.28 Mediation involves facilitation of the resolution of a dispute by an independent third party. The mediator facilitates communication, promotes understanding, assists the parties to identify their needs and interests, invites clarification of issues, helps the parties generate and evaluate options, promotes a focus on the interests and needs of those who may be affected by the mediation and encourages good faith negotiation between the parties. A mediator may advise as to the process to be followed during the mediation. It is not the role of a mediator, particularly a lawyer mediator, to provide advice to the parties or one or more of the parties or to provide services of a legal nature to the parties (e.g. draft the settlement deed).
- 10.29 Unless the parties expressly agree otherwise, a mediator has no advisory or determinative role in relation to the content of the matter being mediated. If during the course of a mediation, the parties wish to move from a facilitative mediation to a process by which the mediator provides advice to the parties, the mediator should consider whether it is appropriate to continue to act.
- 10.30 A mediator must conduct the mediation in an impartial manner. If the mediator considers that he or she might be unable to maintain impartiality during the mediation, the mediator should decline or cease to act.
- 10.31 A mediator should identify and disclose any potential grounds of bias or conflict of interest that emerge at any time during the process. Disclosure should be made of any potential grounds of which the mediator is or becomes aware as soon as practicable, preferably before the mediation commences. After disclosure, the mediator should not proceed with the mediation unless the mediator is confident the parties have given informed consent, preferably in writing, and that he or she can act impartially.
- 10.32 A mediator should ensure that an outline of the mediation process has been given to the parties.
- 10.33 Mediation of a dispute may not be appropriate where power imbalance, safety, intimidation or control issues are present.
- 10.34 The mediator may suspend or terminate the mediation process if the mediator considers:

- (a) continuation of the mediation might harm or prejudice one or more of the participants; or
 - (b) the mediation is being used for a purpose other than the good faith resolution of the dispute; or
 - (c) the participation of one or more of the parties is not fully informed and free and voluntary or that one or more of the parties is subject to coercion, duress or undue influence; or
 - (d) the mediator considers that there is no reasonable prospect of an agreement.
- 10.35 Subject to the requirements of the law, a mediator must maintain the confidentiality required by the parties and must not use information obtained in mediation for personal gain or advantage.
- 10.36 After the mediation, the practitioner must not act in a manner which brings into question the integrity of the process. For example, a mediator should not accept instructions from one of the parties in a matter related to the mediation after completion of the mediation.
- 10.37 These obligations are in addition to any other professional ethical obligations which might be applicable to the mediator, e.g. under the Australian National Mediator Standards.
- 10.38 Suggested ways of ensuring that the practitioner mediator discharges the paramount duty, include:
- (a) thorough prior preparation;
 - (b) being conversant with the mediation process and its objectives and techniques;
 - (c) being conversant with the rights and powers of a mediator;
 - (d) being professionally qualified to act as a mediator, possibly by undertaking a recognised mediation course;
 - (e) seeing to it that an acceptable standard mediation agreement has been entered into by all parties before the mediation starts;
 - (f) facilitating the mediation process by using accepted mediation techniques;
 - (g) seeing to it that lay parties have a basic understanding of the process and how the mediator intends to conduct the mediation;
 - (h) only divulging confidential information to another party if authorised to do so;
 - (i) strictly keeping secret confidential or privileged material;
 - (j) seeing to it that any settlement agreement is written down and that the parties sign it as soon as practicable, if possible at the conclusion of the mediation session; and
 - (k) allowing the mediation process to continue for as long as there is a reasonable prospect of reaching a mutually acceptable settlement.

11. DEALING WITH WITNESSES

- 11.1 Practitioners are urged to familiarise themselves with and follow the *Best Practice Guide 01/2009* issued by the Western Australian Bar Association, incorporated into the Supreme Court Consolidated Practice Directions at 109 [4.5 (9)].
- 11.2 The golden rule is never to “coach” a witness. Let witnesses tell their stories in their own words. Never tell a witness what to say in evidence. It does not matter whether the evidence is going to be in an affidavit, a declaration, or oral testimony in court.
- 11.3 Adopt a method of interview that does not influence witnesses into saying things that they might think you or your client might want to hear. This includes shielding witnesses from the influences of other witnesses or client representatives. Invariably, witnesses should be interviewed separately to ensure that they are not unduly influenced.
- 11.4 The method of interview should include a neutral style of questioning, by avoiding leading questions.
- 11.5 Once a practitioner has obtained the evidence that the witness is able to give, the practitioner may test the witness’s evidence, for example by confronting the witness with inconsistencies from other sources. The practitioner should avoid telling the witness the source of the inconsistency if the source is another witness. The practitioner may, however, put inconsistent documents to the witness and ask for an explanation.

12. UNWELCOME ADVICE

- 12.1 Frequently a practitioner will be called upon to give advice to a client which advice the client does not like. Usually, this is because it is advice:
- (a) against a course of action that the client wants to take
 - (b) which will result in the client incurring a financial or commercial cost which will result in the client paying a significant amount of money to someone else;
 - (c) proposing that the client make an apology a concession, an acknowledgement or an admission someone else;
 - (d) explaining that a particular course of action is fraught with difficulty and may not achieve the result that the client believes it will;
 - (e) to pay into a trust account a deposit on account of legal costs or an amount in respect of security for costs;
 - (f) that the practitioner can no longer continue acting for the client; or
 - (g) any other relevant matter.
- 12.2 Like all other areas of practice, the practitioner must pay particular attention to discharging the practitioner's paramount duty to the court and to the administration of justice, as well as all of the other duties which a practitioner is required to discharge. Not least of these is to give advice independently and objectively, acting in the best interests of the client. Giving unwelcome advice to a client does not mean acting discourteously. The challenge for the practitioner is to remain cool, calm and collected, even when the client's reception of the advice leaves the practitioner in no doubt the client is dissatisfied with the advice.
- 12.3 In the case of an aggressive client, who insists on litigation as the best means of dispute resolution, come what may, practitioners should understand and apply their paramount obligations under the *Civil Dispute Resolution Act 2011 (Cth)* and *Order 59 Rule 9 of the Rules of the Supreme Court*.
- 12.4 It is all too easy to display anger, irritation or contempt at a client's refusal to accept advice. The challenge for the practitioner is to bear in mind the duty to act courteously and not bring the profession into disrepute.
- 12.5 One can deliver advice firmly and clearly without introducing a personal emotional element likely to upset, offend or anger the client.
- 12.6 Inappropriate delivery of unwelcome advice is likely to be counterproductive and may even result in a further dispute or litigation. This is contrary to the public interest, which favours the expeditious and cost effective resolution of disputes. As an officer of the court, a practitioner's duty is to resolve disputes, not generate them.
- 12.7 When delivering unwelcome advice, practitioners should have insight into and be sensitive towards the client's ability to understand the advice being given.

- 12.8 The client's ability to understand any advice (let alone unwelcome advice) may be constrained by language or other difficulties, making the delivery of the advice more difficult than usual. The practitioner should use appropriate techniques when delivering advice, adapting to the client's personal circumstances.
- 12.9 The practitioner should explain the advice clearly and in every-day language, without oversimplifying complex issues or explaining the problem superficially. The practitioner's duty is to give the advice honestly and courteously.
- 12.10 Once a practitioner forms a definitive view that the advice must be given, it should be given without undue delay.
- 12.11 Unwelcome advice should generally be confirmed in writing. This should invariably be done immediately after the oral advice is given, if at all possible. In any event, the practitioner should try to confirm the oral advice in writing as soon as reasonably possible.
- 12.12 When giving unwelcome advice, a practitioner should encourage the client to discuss the advice with the practitioner to ensure that the client has a complete understanding. The practitioner should exercise patience and sensitivity, but under no circumstances leave the client in any doubt about the essential nature of the advice being given.
- 12.13 When confirming the oral advice in writing, a practitioner should always try to summarise the essential points of the advice. As with any advice, a practitioner should always give reasons for the advice.
- 12.14 When giving unwelcome advice, a practitioner should appreciate that after receiving the advice, a client may wish to obtain a second opinion. Practitioners should not regard a request for a second opinion as a slight or an insult, but rather as the client's right. After all, it is the client's property, liberty or reputation which depends on the practitioner's advice. A client is entitled to request a second opinion to remove any uncertainty in the client's mind, or seek reassurance, or obtain satisfaction on matters of great significance to the client.
- 12.15 Where a practitioner is contemplating giving advice that the practitioner knows will be regarded as unwelcome, the practitioner may consult a colleague in the same firm to confirm the accuracy of the advice and obtain suggestions about the delivery of the advice. In the case of solicitors practising in partnership, the practitioner may ask a senior colleague to sign off on the written advice jointly.
- 12.16 Depending on the nature of the unwelcome advice, a practitioner should consider suggesting to the client that the advice be referred to an independent barrister at the client's expense, for a formal opinion.
- 12.17 A practitioner should not change or water-down any unwelcome advice because the client wants the practitioner to do so. The professional duty of any practitioner is to give advice without fear or favour. As long as the advice is given in good faith after diligent and due consideration, the practitioner would be failing in his or her duty if he were to accede to the client's wishes. This applies to both the oral and the later written confirmation.

- 12.18 The nature of unwelcome advice and the occasions on which it is likely to be given place particular demands on the practitioner. This means that before communicating any unwelcome advice, the practitioner should be fully prepared to be challenged by the client in relation to all the legal and factual elements relevant to the advice.
- 12.19 In commercial cases, the practitioner should have a good understanding of the client's financial capacity and ability to pay any amount of money.
- 12.20 In cases of a personal kind, like family law and criminal cases, the practitioner must be familiar with the client's personal circumstances. In criminal cases these will be relevant to any sentence that is likely to be imposed.

13. ADVERTISING

13.1 *The Legal Profession Conduct Rules 2010 (Rules)*

Rule 45 provides that:

“A practitioner and the principal of a law practice must ensure that any advertising, marketing or promotion in connection with the practitioner or the law practice is not:

- (a) false, misleading or deceptive; or
- (b) likely to mislead or deceive; or
- (c) offensive; or
- (d) likely to be prejudicial to, or diminish public confidence in, the administration of justice; or
- (e) bring the profession into disrepute; or
- (f) prohibited by law.”

13.2 *The Civil Liability Act 2002*

Part 3 of the *Civil Liability Act* deals with the advertising of legal services relating to personal injury and touting in respect of prospective personal injury clients. Any practitioner wishing to advertise such legal services should have regard to that Act.

In summary, the *Civil Liability Act* prevents a legal practitioner or a person acting on their behalf from publishing or causing to be published a statement likely to encourage or induce a person to make a claim for compensation for personal injury, or to use the services of a legal practitioner to make such a claim. Publication is allowed which is limited to stating the name and contact details of a legal practitioner or law practice and information as to areas of expertise.

13.3 *What qualifications can be quoted in an advertisement for legal services?*

Lawyers and other providers of legal services should not advertise that they have qualifications they do not have. Further, the qualifications should be represented for what they are and not exaggerated to create a false or misleading impression of their worth.

Similar care should also be taken when claims are made about links with professional and industry organisations. In these instances, claims of membership should always reflect up-to-date membership status. The professional and industry bodies of which membership is claimed should actually exist and not be created for the sole purpose of quotation in an advertisement.

Consumers who have doubts may approach the advertiser directly or contact the Legal Practice Board in Western Australia or the relevant State or Territory Law Society, Bar Association or other relevant professional association to ask for an explanation of what the qualifications mean.

13.4 Use of the terms ‘specialist’ and ‘expert’ in advertisements

The Legal Profession Complaints Committee issued Guidelines (Version 1) in March 2014 which have applied from 1 September 2014.

Those Guidelines are available on the Legal Practice Board of Western Australia website under Complaints/Information for Legal Practitioners/Guidelines.¹³ (Check for later versions).

13.5 Representation of rates of prior success

Is it potentially misleading for advertisements to include past rates of ‘success’ (for example, “we win 75% of cases we take on”)?

Advertisements quoting past rates of success can imply to consumers that future cases will have the same chance of success and are likely to be misleading.

Aside from concerns about how these past rates are calculated and expressed, every case is different. Even minor differences in facts between similar cases can bring about very different results in court. It may not be easy, therefore, in an advertisement, to counterbalance the impression of the chance of success with disclaimers and qualifications.

Lawyers and other providers of legal services are generally free to make existing and prospective clients aware, by way of advertisements, of the availability of legal rights and remedies in given circumstances save in respect of claims of compensation for personal injury which are dealt with in the *Civil Liability Act*.

13.6 Expectations of results in a legal matter

Is it potentially misleading to advertise in terms of “win” or “loss”?

Yes. Many cases are settled out of court and such settlements are difficult to classify as either a win or loss.

Further, a judgment may not easily be expressed in simple win or loss terms.

In a claim for compensation or damages, even though a claimant may “win” the case from one point of view, there may be other factors that will result in the amount of compensation being reduced or not meeting the cost of the action for the claimant.

In so far as an advertisement can be placed in relation to practicing in personal injuries, no advertisement should make mention of “win” or “loss”.

¹³ Use of the terms ‘specialist’ and ‘expert’ in advertisements – Guidelines March 2014 – Version 1
<https://www.lpbwa.org.au/Documents/Complaints/Information-for-Legal-Practitioners/Guidelines-for-use-of-terms-Specialist-and-Expert.aspx>

13.7 Comparative advertising

What are the pitfalls of comparative advertising?

In some States and Territories lawyers are prohibited from comparative advertising. Providers of legal services and advertisers should exercise particular caution in comparing services not of a comparable type.

Comparative advertising is an area of particular risk for advertisers of legal services because of the difficulty in comparing like with like and the risk of it being potentially misleading, deceptive or defamatory. Particular caution should be exercised in relation to services which are not of a standard type. Indeed, avoiding misleading and deceptive comparative advertising has proven to be a continuing concern for other advertisers, particular retailers.

To best avoid breaching the law, comparative advertising should at least:

- (a) be accurate;
- (b) disclose any basis for the comparison;
- (c) compare like with like; and
- (d) claims that will be current for the life of the advertisement (e.g. for the life of a telephone directory edition).

In many situations disclaimers and other explanatory notes can help to remove ambiguities or potentially misleading and deceptive material. The disclaimers and explanatory notes themselves should, however, also be clear and accurate.

Insofar as an advertisement can be placed in relation to practising in personal injuries, comparative advertising should not be used.

13.8 Fee Advertising

How can an advertisement avoid creating a misleading impression about the full cost of a particular service?

Fee advertising is one way of imparting to consumers information about potential costs of a particular legal service or legal service provider. However, it is often very difficult to predict accurately the final cost of a particular legal assignment. This is because costs are often dependent on the performance of certain activities by third parties or clients or on other factors outside the control of a lawyer or other legal service provider.

Advertisements that include references to legal fees and costs should always be presented accurately and in such a way that consumers know the difference and can make a fair assessment of price differences between competing service providers.

In addition, where fees are advertised, the advertisement should seek to disclose at least the possibility of other additional costs and fees that will go to make up the total cost of the service. The distinction between professional costs and disbursements should, where appropriate, be clearly made.

The use of the term 'first appointment free' can also create a great deal of confusion

for consumers. Some legal service providers have taken the view that a first appointment is necessarily followed by a second, with a bill for a second appointment being sent even where the consumer did not contract with them to do their legal work after the initial appointment. Some consumers have formed the view that all lawyers operate on a 'first appointment free' basis, although in reality this practice is far from universal.

An advertisement of 'first appointment free' should be capable of being read at face value. What constitutes the 'first appointment' could also be a source of confusion for consumers. Lawyers who only regard the first 20 minutes of the first appointment as free should make sure the consumer is aware of this before beginning to charge. To avoid misleading consumers, advertisements that offer a 'first appointment free' should clearly spell out the terms and conditions of the offer.

What do the expressions “No Win - No Fee” and “No Win - No Pay” mean?

It is not unusual for lawyers providing legal services, particularly in relation to personal injury claims, to advertise using the words “*No Win – No Fee*” or other slogans conveying that message.

The use of such words is potentially misleading. Such slogans cause confusion on the part of consumers because the words convey the impression that a consumer will not be liable to pay any costs in the event that they do not achieve a favourable outcome, when, in fact, if the consumer is unsuccessful in litigation, almost invariably the consumer will become liable to pay the legal fees incurred by the other party.

Even where a consumer is successful in obtaining a monetary settlement or judgment in their favour, the legal fees payable may outweigh the amount recovered. Such words are also capable of being misleading in relation to disbursements, as legal practitioners advertising using those words may require clients to pay disbursements irrespective of the outcome in the matter.

13.9 Testimonials and endorsements

Are recommendations in advertisements from former clients a reliable indicator of the performance of a particular legal services provider?

Testimonials are spoken or written recommendations from existing or former clients and are an advertising tool designed to entice consumers into choosing one particular firm over another. An endorsement can be described as a truncated testimonial that usually consists of an attestation or approval by a particular person.

Testimonials that have been paid for or scripted are of particular concern as consumers may believe that they are true and place considerable faith in them. Aside from anything else, consumer confidence in a particular lawyer or legal service provider will be severely affected should the testimonials be exposed as not genuine.

Testimonials or endorsements are most likely to mislead or deceive consumers when the words of clients are altered, when the claim itself is not genuine, and/or where someone is falsely attributed as having used the service in question.

Other ethical and practice guidelines will also apply to the content of a testimonial as the claim made by the person providing the testimonial may be considered by the consumer as indistinguishable from the overall claim being made by the advertiser of the legal service.

Testimonials should not be used in the advertising of personal injury services.

13.10 Identification of advertisements

When is an advertisement an advertisement and when is it not?

An advertisement will seek to convey a message that a particular service should be obtained from a certain provider over and above everyone else. Sometimes, however, this purpose is obscured and the advertisement is made to look or sound like something that it is not. Presumably, this is to avoid potential readers or listeners of the advertisement ignoring it for the mere fact that it is an advertisement.

To avoid misleading consumers about the true nature of a publication or broadcast, advertisements should be clearly described as such if it is not otherwise immediately obvious. This would mean that advertorials (editorial text that is aimed at attracting custom) and other forms of indirect advertising would be clearly labelled as such.

13.11 Methods of publication of advertisements

All usual recognised methods of advertising are permitted other than for the advertising of personal injury services.

Publication of a statement advertising personal injury services is restricted to the methods listed in sections 18(1)(a)-(f) of the *Civil Liability Act 2002*. Radio and television advertising are not among the listed methods.

Section 18(3) prohibits lawyers or persons on their behalf advertising in a hospital or on a vehicle in the vicinity of a hospital. Section 19 prohibits touting at the scene of an accident and restricts the information that a person having contact with an accident victim can provide.

13.12 Referral agents

Does the advertising of legal services through a referral agent present risks for advertisers and consumers?

Some organisations advertise the availability of legal services but do so without providing those services themselves. The organisation itself may be promoted as the initial point of contact for consumers, but in reality the legal service is provided by a third party.

In these situations the advertiser of the service, in effect, acts as a referral agent. The risk present in these circumstances is that consumers may not always be able to tell the difference between accessing a legal service directly or via a referral agency which is presented as being the principal service provider.

Consumers are unlikely to be aware that a referral agency may receive a portion of the fee paid to the legal service provider as a referral fee. Making it clear that an advertisement is an agency advertisement and that a referral fee is ultimately payable will greatly enhance the ability of consumers to make informed decisions about the nature of the legal service they may wish to access.

Practitioners in Western Australia are not permitted to pay an introduction fee or spotter's fee to any person for introducing professional business to the practitioner, and from receiving such a payment.

13.13 Referral Fees

Rule 18(5) expressly prohibits practitioners from giving or agreeing to give any allowance in the nature of an introduction fee or spotter's fee to any person for introducing professional business to the practitioner, or to receive or agree to receive such an allowance.

This prohibition encompasses a practice known as 'claims harvesting' and 'claim farming' which involves third parties identifying potential personal injury claimants and selling data relating to those claimants to legal practices.

Legal practitioners who practice in the area of compensation for personal injury should also be aware of sections 19 and 20 of the Civil Liability Act 2002 (CLA).

Section 19 of the CLA makes it an offence to solicit potential clients at the scene of an accident or at a hospital, and expressly prohibits any person involved in the treatment or management of a potential claimant's injuries from referring the potential claimant to a lawyer. Section 19(7) prohibits any person involved with the claimant disclosing the claimant's name or address to any other person.

Section 20 of the CLA makes it an offence for a person to provide or offer to provide or to receive or to seek to receive a fee for soliciting or inducing a potential claimant to make a claim. The section defines 'fee' to include a bonus, commission, cash payment, deduction, discount, rebate, remission or other valuable consideration.

In States of Australia that have adopted the Australian Solicitors Conduct Rules (ASCR), receipt or payment of a referral fee is not unlawful if the solicitor has "first disclosed the payment or financial benefit to the client"; ASCR Rule 12.4.4.

Legal Practitioners in Western Australia should ensure that they do not breach Rule 18(5) or assist or become involved in a breach of sections 19 or 20 of the CLA by adopting a practice that may be lawful in other States that have adopted the ASCR.

Western Australia is due to adopt the ASCR in 2020. However adopting the ASCR will not alter the need for compliance with sections 19 of the CLA.

13.14 Misleading and deceptive advertisements

What penalties can apply to individuals and organisations that produce misleading and deceptive advertisements?

Advertisements that are found to be misleading or deceptive under one of the provisions of the *Competition and Consumer Act 2010* (Commonwealth) or equivalent State or Territory legislation, and can be subject to fines or other penalties including requirements to produce corrective advertising.

Misleading and deceptive conduct, including misleading and deceptive advertising, may also amount to unprofessional conduct and can be the subject of consumer complaint.

For more information on this contact the Australian Competition and Consumer Commission.

13.15 What penalties can apply to a breach of the Civil Liability Act 2002?

The Act provides for a penalty of \$10,000 and a breach of the Act can constitute unprofessional conduct.

14. TERMINATION OF ENGAGEMENT AND DOCUMENT HANDOVER

14.1 What is a document?

'Document' is defined in section 3 of the *Legal Profession Act 2008 (Act)*:

document means any record of information, and includes –

- (a) anything on which there is writing; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- (d) a map, plan, drawing or photograph,
and a reference in this Act to a document (as so defined) includes a reference to –
- (e) any part of the document; and
- (f) any copy, reproduction or duplicate of the document or of any part of the document; and
- (g) any part of such a copy, reproduction or duplicate.

14.2 What are client documents?

'Client documents' is defined in rule 3 of the *Legal Profession Conduct Rules 2010 (LPCR)*:

client documents means documents to which a client is entitled as a matter of law including but not limited to the following –

- (a) documents received from the client by a practitioner or the practitioner's law practice;
- (b) documents prepared by a practitioner or the practitioner's law practice for the client or predominantly for the purposes of the client or the client's matter;
- (c) documents received by a practitioner or the practitioner's law practice from a third party for or on behalf of the client or intended for the use or information of the client or for the purposes of the client's matter.

What constitutes client documents may vary from case to case and it is necessary to review each document in the context of such matters as the purpose for which the document was prepared, whether the client was charged for the creation of the document and the circumstances in which it came into the practitioner's possession.¹⁴

Examples of client documents which are:

- Documents prepared by the practitioner for the client or predominantly for the purposes of the client or the client's matter (see (b) of the definition at 14.2) would be copies of correspondence sent by the practitioner to third parties on behalf of the client, deeds and documents prepared in non-contentious matters, Briefs to Counsel, correspondence and notes of conversations with court officials. These would include documents charged to the client.
- Documents received by a practitioner from a third party for or on behalf of a client (see (c) of the definition at 14.2) would be correspondence received from third parties, expert opinions and Counsel's opinions.

Examples of documents which belong to a practitioner (and which are not Client documents) are those created for the practitioner's own benefit and generally include copies of correspondence written to the client, file notes of conversations with the client, file notes of work done or requiring attention, diary entries, time sheets and computerised records.

14.3 **When may a practitioner terminate an engagement?**

Termination of engagement (Rule 27, LPCR)

- (1) Subject to subrules (2) to (4), a practitioner may terminate an engagement and cease to act for a client only in the following circumstances –
 - (a) the client commits a material breach of a written costs agreement;
 - (b) the termination is pursuant to an express right to terminate the engagement contained in a written costs agreement with the client;
 - (c) the practitioner is required to terminate the engagement by these rules or in order to avoid breaching these rules;
 - (d) the client materially misrepresents any material fact relating to the subject matter of the engagement;
 - (e) the practitioner reasonably believes that continuing to act for the client would be likely to have a serious adverse effect on the practitioner's health;
 - (f) the mutual trust and confidence between the practitioner and the client has irretrievably broken down;
 - (g) the termination is for any other reason permitted by law.

¹⁴ or a discussion of the authorities and texts on the subjects of entitlement to and ownership of documents as between practitioner and client see: *Wentworth v De Montfort* (1988) 15 NSWLR 348.

See also:

Areva Nc (Australia) Pty Ltd v Summit Resources (Australia) Pty Ltd [no 2] [2008] WASC 10: ownership of draft witness statements

Frigger v Clavey Legal Pty Ltd [2011] WADC 174: ownership of file notes of telephone conversations.

- (2) A practitioner who is engaged to represent a client charged with a serious offence must not terminate the engagement or otherwise cease to act for the client unless —
 - (a) there are exceptional circumstances for termination of the engagement or ceasing to act; and
 - (b) there is sufficient time for another practitioner to be engaged by the client and for that practitioner to master the case.
- (3) Despite subrule (2), a practitioner who is engaged to represent a client charged with a serious offence must not terminate the engagement or otherwise cease to act for the client because the client has failed to make satisfactory arrangements for the payment of costs unless —
 - (a) the terms of a written costs agreement between the practitioner and the client entitle the practitioner to terminate the engagement in such circumstances; and
 - (b) the client has been served with written notice of the practitioner's intention a reasonable time before the date appointed for commencement of a trial in relation to the matter or the commencement of the sittings of the court in which the trial is listed; and
 - (c) the client is unable to make other arrangements for payment of the practitioner's fees satisfactory to the practitioner within a reasonable period of time after such notice (not being less than 7 days); and
 - (d) there remains sufficient time for another practitioner to be engaged by the client and to master the matter.
- (4) A practitioner may terminate an engagement by giving reasonable notice in writing to a client who has a grant of legal aid in relation to the engagement if:
 - (a) the grant of aid is withdrawn or otherwise terminated; and
 - (b) the client is unable to make any other arrangement for payment of the practitioner's fees satisfactory to the practitioner.

14.4 What should a practitioner do on the termination of an engagement?

Client documents (Rule 28, LPCR)

- (1) In this rule – ***practitioner with designated responsibility*** means a practitioner with overall responsible for the carriage of a client's matter.
- (2) A practitioner with designated responsibility for a client's matter must, as soon as is reasonably practicable, ensure that any client documents or copies of electronic client documents are given to the client or former client or another person authorised by the client or former client if —
 - (a) the practitioner's or the practitioner's law practice's engagement is completed or terminated; and

- (b) the client requests the documents; and
 - (c) there is not a lien over the documents.
- (3) Subject to subrule (4), a practitioner or a law practice may destroy or dispose of documents held by the practitioner or law practice relating to a matter if a period of 7 years has elapsed since the practitioner's or law practice's engagement in the matter was completed or terminated except where there are client instructions to the contrary.
- (4) A practitioner must not deal with or destroy any title deed, will, original executed agreement or any document or thing held by the practitioner for safe keeping for a client or former client other than in accordance with –
- (a) the instructions of the client or former client; or
 - (b) the instructions of another person authorised by law to provide those instructions; or
 - (c) an order of a court.

14.5 **Lien over client documents**

14.5.1 **General rule**

A practitioner does not have to hand over client documents if the practitioner has a lien over the documents (subject to rule 29).

14.5.2 **Lien over essential documents** (Rule 29 LPCR)

Despite rule 28(2)(c), if client documents over which there is a lien are essential to the conduct of the client's defence or prosecution of current proceedings a practitioner must –

- (a) surrender the documents to another practitioner acting for the client if –
 - (i) the other practitioner undertakes to hold the documents subject to the lien and the practitioner has obtained reasonable security for the unpaid costs; or
 - (ii) there is an agreement between the practitioner and the other practitioner for the payment of the practitioner's costs on completion of the **relevant** proceedings; or
- (b) deliver the documents to the client if –
 - (i) another practitioner is not acting for the client; and
 - (ii) the practitioner has obtained reasonable security for the unpaid costs.

14.5.3 Client terminates retainer for practitioner misconduct

Where a retainer is terminated by the client, the practitioner is ordinarily entitled to maintain possession of the documents the subject of a lien. However, a practitioner cannot maintain the lien where the retainer has been terminated by the client as a consequence of the practitioner's negligence or other misconduct.¹⁵

14.5.4 Practitioner terminates retainer

Where a retainer is terminated by the practitioner the general rule is that the practitioner will be required to produce the client's papers upon an undertaking that they be returned to the practitioner upon the completion of the proceeding.¹⁶

14.6 Risk management

It is recommended that:

- (i) a 'useable' trail' of documents be kept by practitioners at the termination of a retainer;
- (ii) documents to be returned to the client be copied by the practitioner so that:
 - the investigation and defence of any claim is not hindered;
 - the taxing of a solicitor/client bill of costs, in the event a lien is not exercised, is not hindered;
- (iii) when handing over a file to another practitioner or to the client, the other practitioner or the client be informed of relevant time limitations.

¹⁵ A statement of the relevant principles can be found in *In Re Weedman* (Unreported decision of Drummond J of the Federal Court of Australia, delivered 17 December 1996, BC9606375).

<http://law.ato.gov.au/atolaw/print.htm?DocID=JUD%2FBC9606375%2F00002&PiT=99991231235958&Lif=10010101000001-99991231235959>

Castel Electronics Pty Ltd v Wilmoth Field Warne [2012] VSC 481; *Australian Receivables Ltd v Tekitu Pty Ltd (Subject To Deed of Company Arrangement) (Deed Administrators Appointed) and Ors* [2012] NSWSC 170 at [20]

Council of the Law Society of New South Wales v Prosilis [2013] NSWADT 151

Strikis v Legal Services Commissioner [2012] NSWADT 68.

¹⁶ See

Gamlen Chemical Co (UK) Ltd v Rochem Ltd [1980] 1 WLR 614
Cited in: *Kyriackou & Ors v Martin & Anor* [2014] VSC 122 at [11]
Rafferty v Time 2000 West Pty Ltd (2009) 257 ALR 503 at [42]
Ireland v Trilby Misso Lawyers [2011] 2 Qd R 320.

15. GUIDELINES FOR CLOSING, STORAGE AND DESTRUCTION OF FILES

15.1 Introduction

These guidelines pertain to:

- closing files;
- the storage of closed files; and
- the destruction of closed files.

They are aimed at protecting the interests of both the client and the law practice.

15.2 Terms of engagement

Terms of engagement between a law practice and client should include an **authority** to destroy the client's file in accordance with the firm's usual practice.

15.3 Closing files

Before a file is closed, a practitioner should review the file to ensure that:

- (a) Any loose unfiled paperwork is placed in the file.

Draft workings, records of telephone calls/messages, research material etc. should not be culled and destroyed. Their destruction could hinder the taxing of a solicitor/client bill of costs or the defence of an action in negligence.

- (b) All work required to be done has been completed.

For example:

- Have documents been stamped/registered?
- Has the court order/judgment been extracted?
- Have the client's original documents been returned to the client?
- Has a final account been rendered?
- Is there any money remaining in trust due to be paid to or on behalf of the client?

- (c) Advise the client:

- that the representation is at an end;
- that the file has been closed;
- that the client is entitled to collect the file;
- the file's designated destruction date; and

- any remaining duties or obligations of the client, for example:
 - the date for renewal of a licence;
 - the date upon which an option should be exercised;
 - if the retainer was for advice only, the date on which any limitation period will expire.

15.4 **Recording and storage of closed files and documents**

Before a file is stored, a record should be made of the following:

- (a) the date the file was closed;
- (b) that the file is in hard copy only, or partly or wholly in electronic form;
- (c) where or how the file is to be stored;
- (d) a description and the location of any documents the client has asked the firm to hold in safe custody, such as a will;
- (e) the file's designated date of destruction.

During the retention period, the firm should ensure that the file is adequately secured.

15.5 **Retention period – Rule 28 Legal Profession Conduct Rules 2010**

Rule 28(3) *Subject to subrule (4), a practitioner or a law practice may destroy or dispose of documents held by the practitioner or law practice relating to a matter if a period of 7 years has elapsed since the practitioner's or law practice's engagement in the matter was completed or terminated except where there are client instructions to the contrary.*¹⁷

Rule 28(4) *A practitioner must not deal with or destroy any title deed, will, original executed agreement or any document or thing held by the practitioner for safe keeping for a client or former client other than in accordance with –*

- (a) *the instructions of the client or former client; or*
- (b) *the instructions of another person authorised by law to provide those instructions; or*
- (c) *an order of a court.*

¹⁷ *Council of the Law Society (NSW) v Carbone* [2011] NSWADT 32.

15.6 No file should be destroyed without giving consideration to the statutes that might impact on the subject matter of the file. It is not possible for these guidelines to contain an exhaustive list.

15.7 **When is a longer retention period necessary?**

15.7.1 **Limitation Act 2005**

The general limitation period is 6 years unless Part 2, Division 3 provides for a different limitation period for a particular action.

Part 3 provides for extensions (or shortening) of limitation periods for persons under 18 years when the cause of action accrues, persons with mental health disability, extensions by courts, or confirmation, extension or shortening by agreement.

The limitation period is 12 years under s 18 (an action on a cause of action founded on a deed), s 19 (recovery of land), s 20 (money secured on real property or real and personal property), s 23 (recovery of possession of real property or real and personal property secured by a mortgage) and s 24 (action to foreclose the equity of redemption of real property or real and personal property secured by a mortgage).

15.7.2 **Matters which will generally not determine by a known date:**

- Trusts/superannuation
- Joint venture agreements
- Partnership agreements
- Workers' compensation (unless a common law judgment has been obtained)
- Unregistered easements
- Unregistered unrevoked Powers of Attorney.

15.7.3 **Leases**

A lease with an option to renew. A claim could arise up to 6 years after the last renewal date.

15.7.4 **Adoptions**

Consideration should be given to whether these records should ever be destroyed. Note: s 128 *Adoption Act 1994* (All proceedings for offences against this Act to be commenced within 12 months after the day on which evidence, sufficient in the person's opinion to justify the proceedings, comes to the person's knowledge).

15.7.5 **Litigation Pending**

If there is the prospect of impending litigation, a file should not be destroyed.

15.7.6 **Financial Agreements**

Consideration should be given as to whether financial agreements under either Part 5A of the *Family Court Act 1997* or Part VIII A of the *Family Law Act 1975* should ever be destroyed.

15.8 Client's request to collect file

If a client requests the collection of a file at the time the file is closed or prior to the expiration of the file's designated retention period, the firm should copy the file (including any records stored electronically) and retain the copy until the file's designated date of destruction.

15.9 Charging for document storage – Rule 30 *Legal Profession Conduct Rules 2010*

Rule 30: A practitioner must not, without agreement in writing, charge a client or a former client for –

- (a) *the storage of documents, files or other property on behalf of the client or former client; or*
- (b) *for retrieval from storage of those documents, files or other property.*

15.10 Destruction of documents

Each file should again be reviewed and if a decision is made to destroy the file:

- (i) Ensure that:
 - a) original documents were returned to the client when the file was closed;
 - all relevant time periods have expired.

Any **original** documents remaining on the file should be returned to the client or the person entitled to them.

- (ii) A record (to be retained permanently) should be made of the date and method of destruction and upon whose authority the file was destroyed.
- (iii) It is recommended that hard copies be shredded and that floppy disks and CDs be professionally destroyed.

15.11 Risk Management

It is recommended that a 'useable' trail' of documents be kept by solicitors at the termination of a retainer. It is recommended that documents to be returned to the client be copied by the practitioner so that:

- the investigation and defence of any claim is not hindered; and
- the taxing of a solicitor/client bill of costs, in the event a lien is not exercised, is not hindered.

16. USE OF SOCIAL MEDIA

16.1 Social media and your clients

16.1.1 Professional communications

All client communications must be reliable, provable and confidential. Unless you are utilising a private messaging capability provided for by some sites, messaging on social media will not be adequately confidential.

16.1.2 Socialising with clients using social media

You should consider carefully whether to socialise with clients using social media. If you know the client socially, this may be appropriate, but otherwise it may appear to be unprofessional to invite or engage in such contact, and it may be preferable to seek to use a business networking site.

16.2 Social media and other parties

16.2.1 Substituted service

Social media can be used legitimately in an effort to contact adverse parties. For example, a failed attempt to contact a party via a social media site can be used to support an application for substituted service. However the private messaging function available on such sites should be utilised in order to avoid the release of confidential information.

16.2.2 Locating potential witnesses

Social media sites may allow you to contact witnesses who cannot otherwise be found.

16.2.3 Gathering evidence

The Australian Privacy Principles (**APPs**) made pursuant to the *Privacy Act* 1988 (Cth) (***Privacy Act***) impose limits on the collection and use of information. The APPs apply to organisations which have, or have had since the introduction of the APPs, annual turnover in excess of \$3 million.

The *Privacy Act* does not prevent you from looking at information that is publicly available on social media sites (either your own or any other person's site which you access with that person's permission).

However if you take screen shots or print out pages from social media sites, or otherwise collect information from the sites, then potential issues arise under the APPs as to the collection of the information without disclosure to the individual about whom the information has been collected, and as to the use of that information.

The APPs permit the collection of personal information that is reasonably necessary for, or directly related to, one or more of the entity's functions or activities.

The APPs contain a number of 'exceptions' to the requirement to give access to the collected personal information. APP 12.3 provides an exception as to information about a person if the information relates to existing or anticipated legal proceedings involving that person which would not be accessible by the process of discovery in those proceedings.

The APPs, and guidelines as to their application, can be found on the website of the

Office of the Australian Information Commissioner; www.oaic.gov.au.

Provided that you have determined that the information to be gathered falls within one of the exceptions, investigation is appropriate without disclosure.

16.2.4 **Impersonation**

You should never under any circumstances send any message or make any contact using social media purporting to be another person for the purposes of gathering evidence or information. Such conduct is dishonest and a breach of the *Legal Profession Act*. Impersonation may also breach the *Competition and Consumer Act 2010* and, in some circumstances, may constitute a criminal offence.

17. CLOUD COMPUTING

Note: This guide is for the assistance of members of the Law Society of Western Australia. Compliance with this guide will not necessarily result in compliance with any legislation or regulations applicable from time to time.

17.1 General guidance

17.1.1 Practitioners who are considering using cloud computing services need to consider how the use of those services will affect their ability to comply with the Rules and their other professional obligations. The purpose of this guidance is to assist practitioners to do this.

17.1.2 To understand how a cloud computing service may affect your ability to comply with the Rules and other professional obligations it is necessary to understand what cloud computing is in a little detail. That is why this guidance starts with a discussion about what cloud computing is before turning to discussion of the relevant Rules. The acronym ICT used in this guidance means information and communication technology.

17.2 What is cloud computing?

17.2.1 There is no universally accepted definition of cloud computing. The Australian government has adopted the definition published by the National Institute of Standards and Technology, which is part of the U.S Department of Commerce. This definition starts: Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources that can be rapidly provisioned and released with minimal management effort or service provider interaction.¹⁸

It goes on to provide that the cloud computing model is composed of five essential characteristics, three service models and four deployment models.

17.2.2 From a consumer's perspective the essential characteristics are that computing resources are accessed automatically over a network, which will be the Internet for most people. The important point here is that the computing resources being used and the device from which they are being accessed are separate. To illustrate with an example, while your tablet will have an operating system it might not have any word processing software installed on it. You could still do word processing by using a word processing service offered by a provider over the internet. The word processing software would be located on the service provider's ICT infrastructure. Once you have finished your document you could store it on storage accessed over the Internet. Unless you made a back-up copy on your tablet your document would be stored on the relevant service provider's ICT infrastructure only. When you wanted to access the document again you would retrieve it over the Internet.

17.2.3 The essential characteristics from a service provider's perspective are: 1) pooled ICT infrastructure and applications that can service multiple consumers; 2) computing resources provided can rapidly match changes in demand for them; and 3) an ability to measure the computing resources being used and to use measurements to control and optimise their provision. For the purpose of this guidance the important characteristic to note is the first one. The use of the word 'cloud' suggests that computing resources accessed over it do not have a physical location. This is not true. Typically, computing resources are located at datacentres.

¹⁸ <http://www.nist.gov/itl/cloud/> accessed on 19 May 2015

Datacentres contain the underlying ICT infrastructure and applications necessary to provide computing resources to consumers. This includes server computers, operating systems, network systems, storage and software applications. Importantly, datacentres can be located anywhere in the world. This is an important consideration for practitioners because foreign laws will apply to data stored on datacentres located in foreign jurisdictions. In this guidance the term “cloud infrastructure” is used to refer to the ICT infrastructure that meets these essential characteristics.

- 17.2.4 The service models are: *Software as a Service (SaaS)*; *Platform as a Service (PaaS)*; and *Infrastructure as a Service (IaaS)*. Most relevant for practitioners and practices will be SaaS and IaaS.
- 17.2.5 *SaaS* is where the consumer accesses a service provider’s applications that are running on cloud infrastructure. Common consumer oriented examples include: web browser email services; cloud storage services; many smartphone apps; and social networking services. A common business oriented example is customer relationship management software.
- 17.2.6 *IaaS* is where a consumer can access a service provider’s cloud infrastructure as an on-demand service. Instead of owning and operating server computers, storage, network systems and operating systems a consumer can access, use and pay for these things as a service.
- 17.2.7 *PaaS* is where the consumer can create or acquire applications created using resources supported by the service provider and then use, or offer for use, those applications. It is mostly relevant for software development.
- 17.2.8 The four deployment models are: private cloud; community cloud; public cloud; hybrid cloud. Each model in effect describes a level of access to cloud infrastructure. In a private cloud the cloud infrastructure is provisioned for a single entity. In contrast, in the public cloud the cloud infrastructure is provisioned for the general public. This guidance is concerned with the public cloud only. The Law Society considers it likely that most practitioners and practices considering cloud computing services will be considering services on the public cloud. In practice that means paying a third party service provider to use particular cloud computing services that are accessed over the Internet.

17.3 **Professional conduct issues under the Rules**

- 17.3.1 Professional conduct issues arise under the Rules for two reasons. Firstly, because use of a particular cloud computing service may mean that a practitioner cannot comply with a requirement under the Rules, or will have difficulty doing so. Secondly, because of the risks associated with using cloud computing services. The relevant Rules are: rule 6(1)(c) – requirement to deliver legal services competently and diligently; rule 9 – requirement not to disclose information confidential to a client unless authorised or otherwise permitted to do; and rule 28 – requirement to return client documents at the end of an engagement, upon request and where there is no lien over the documents.
- 17.3.2 This guidance makes some general observations and then addresses each rule in turn starting with the requirement not to disclose confidential information.

17.4 General observations

17.4.1 The following observations apply generally to cloud computing services.

17.4.2 Firstly, given that cloud computing has such a broad meaning and includes any number of applications that a consumer can access from a service provider over the internet it is not possible to give prescriptive guidance. It is possible only to identify the issues that practitioners should consider before adopting a particular service and to suggest a broad approach for doing this, which will have to be adapted depending on the kind of service being considered.

17.4.3 Secondly, the issues the subject of this guidance is not unique to cloud computing. Whenever a law practice considers outsourcing a function it needs to consider whether in doing so it will be able to continue to comply with the Rules. More relevantly perhaps, whenever a law practice changes its practice in relation to the storage and handling of client information it needs to consider whether it will be able to continue to comply with the Rules – this applies to hard copy and soft copy information, however it is stored and handled.

17.4.4 Thirdly, the technology involved in cloud computing makes it difficult to consider how the adoption of a particular service will affect your ability to comply with the Rules. This can be illustrated by an example. Say a practitioner wishes to work remotely and saves some documents provided by her client onto a consumer oriented cloud storage service for this purpose. Are the documents secure? Is there a risk the practitioner may not be able to access them? Is storage of the documents a disclosure of client information to the service provider? It is not easy to answer these questions without some understanding of how the service provider stores the documents and where they are stored. There are barriers to gaining this understanding. Generally speaking, current service providers, particularly consumer oriented ones; do not readily provide this information. Even if they did, it would be technical and complex. This difficulty is compounded by a lack of international, Australian or industry standards. One relevant standard to look out for is ISO 27001:2013. It is entitled “Information technology – Security techniques – Information security management systems – Requirements” and some cloud service providers have adopted it.

17.4.5 Fourthly, as has already been mentioned, the location of a service providers cloud infrastructure is an important consideration. If you are considering using a cloud computing service where the cloud infrastructure is located offshore then you need to be aware of the following: any legal powers to access data or restrict access to data; and complications from data being simultaneously subject to multiple legal jurisdictions.

17.4.6 Fifthly, the risks of using cloud computing services apply generally. It is important to remember that the risks are not unique to cloud computing. Many of them will apply to a practitioner’s existing ICT arrangements. According to the Australian government the main risks are:¹⁹

- *Data Breaches* – data is stolen, leaked or accessed by unauthorised third parties.
- *Data Loss* – the permanent loss or deletion of data by accident or malicious activity.

¹⁹ Information Security Management Guidelines – Risk management of outsourced ICT arrangements (including Cloud), Australian Government, approved April 2015 V.1.1 available at <http://www.protectivesecurity.gov.au/informationsecurity/Pages/RiskManagementOfOutsourcedICTArrangements-IncludingCloud.aspx> accessed on 19 May 2015

- *Account Hijacking* – this is third parties hacking into your account. It still happens by “phishing”, fraud and exploitation of software vulnerabilities.
- *Insecure Interfaces* – this is the interface between your device and the cloud computing service; they can be exploited both accidentally and maliciously.
- *Denial of service (DoS)* – DoS attacks can prevent users from accessing their data or applications. Sometimes you here about web sites crashing from DoS attacks.
- *Malicious Insider* – this is self-explanatory.
- *Insufficient Due Diligence* – not understanding what you are getting yourself into.
- *Shared Technology Vulnerabilities* – the cloud is built on some relatively new technology, particularly developments in server technology.

Not all of it was designed for multiple users and there are some particular vulnerabilities in that environment.

17.5 Requirement not to disclose confidential information

- 17.5.1 Using a cloud computing service to store documents containing client information may result in a disclosure of that information to the service provider.
- 17.5.2 There are two aspects to this issue; a technical one and a legal one. The technical aspect is that once a document is stored on cloud storage service the service provider will be able to access it. The only exception to this is if the consumer encrypts the document before storing it (this is different to the service provider encrypting the document). Assuming the service provider can access a document stored on its service the legal aspect is whether the service provider agrees not to access documents stored on the service and to take steps to maintain confidentiality. The proposed agreement between a consumer and a service provider may provide that the service provider can access and use documents stored on the service for certain purposes. Many standard agreements for consumer oriented cloud storage providers provide that the service provider has the right to access documents for the purpose of providing the service and also if it is compelled to provide access to authorities.
- 17.5.3 Assuming the service provider can access a document stored on its service, the proposed agreement becomes an important consideration. If under that agreement the service provider can access documents you store on its service and there is no confidentiality obligation then information confidential to your client may be disclosed to the service provider. In addition the service provider may not be under an obligation to advise you when it proposes to access your documents.
- 17.5.4 In these circumstances, unless a practitioner takes other steps to ensure that a cloud storage service provider cannot access documents stored on its service, a practitioner should advise clients in writing that she proposes to store documents containing client information with a cloud storage provider and it is possible that client information will be disclosed to the provider.
- 17.5.5 Inadvertent disclosure of client information by a data breach or a breach of security that occurs on the service provider’s cloud infrastructure is a separate issue. Practitioners should advise their clients in writing that there is a risk that client information stored on a cloud storage provider will be disclosed in this way.

17.6 Requirement to deliver legal services competently and diligently

17.6.1 Under the Rules practitioners have a fundamental ethical obligation to deliver legal services competently and diligently. Relevant aspects of that obligation are:

- Maintaining effective control of data stored on cloud computing services.
- Ensuring adequate reliability of applications and access to data.
- Ensuring adequate security of data.

17.6.2 It is not possible to guarantee control of data, reliability of access to applications and data, and security of data when using cloud computing services (it is also not possible to guarantee such things in a local area network with a connection to the internet). Risks of loss of control of data, loss of access to data or applications and security breaches will always be present. Australian government policy for agencies considering the suitability of cloud computing services is to carry out a risk assessment. This assessment is set out in detail in 'Information Security Management Guidelines – risk management of outsourced ICT arrangements (including Cloud)'.²⁰ Practitioners may wish to consult this document to carry out their own risk assessment.

17.6.3 Practitioners should be satisfied that they can maintain effective control of data. Relevant considerations include:

- Who owns the data once it is stored on a cloud service?
- Can you remove data from the service? That includes, being able to delete data and any back-up copies of the data.
- Can you transfer data from one service provider to another, or back to your own ICT infrastructure?

17.6.4 There are both technical and legal aspects to these considerations. On the one hand for example the format data is stored in may have an impact on a practitioner's ability to transfer it. And on the other the agreement between the practitioner and service provider may or may not address these considerations.

17.6.5 Practitioners should be satisfied that any cloud computing service will be adequately reliable. It may be difficult to deliver legal services at all if you cannot access client documents and your email. For reasons already explained it will probably be difficult to make an independent technical assessment of reliability. Other ways to do this are consider services from reputable providers only and to review proposed service agreements to see whether they contain any relevant terms. Many cloud service providers provide service level guarantees for "up-time". That is, time that the relevant service is available. These guarantees vary so practitioners should take the time to understand what exactly is being guaranteed, and also whether the guarantee forms part of the service agreement.

17.6.6 Practitioners should also consider ways that they can continue to deliver legal services even if cloud services become unavailable. In the case of cloud storage one such measure is to back-up copies of documents stored on a cloud service to an accessible device off the cloud.

²⁰ Ibid

17.6.7 Practitioners should also be satisfied that any cloud computing service will be sufficiently secure. It is here that the risks of using cloud computing services are particularly relevant. Again, for reasons already explained, it will probably be difficult to make an independent technical assessment of security of a service provider's cloud infrastructure. There are still things to look for. They include:

- Whether the service provider encrypts data while in transmission and while at rest (that is, when stored on its server computers).
- The robustness of authentication requirements to log-on to services.
- Whether back-ups are carried out.
- Whether the service provider tests and audits its systems.
- Whether the service provider has any recognised accreditations or certifications.
- Security arrangements for the service provider's physical premises.
- Cyber security arrangements, including as between the service provider's virtual server computers (where one physical server computer can operate in effect as several server computers).
- Redundancy arrangements – that is, arrangements to ensure that a service can continue to operate if utilities fail or if part of the service provider's ICT infrastructure fails.

17.7 **Requirement to return client documents**

The requirement to return client documents in the context of cloud computing services means being able to permanently remove copies of client documents stored on a service. A practitioner will not be able to do this if she does not have effective control of data stored on cloud computing services. The same considerations apply.

17.8 **Useful resources**

The Australian government has published a number of useful cloud computing resources online.

These guidelines have already referred to 'Information Security Management Guidelines – risk management of outsourced ICT arrangements (including Cloud)' Others include 'Cloud Computing Security for Tenants' and 'Cloud Computing Security Considerations'.²¹

²¹ Both available at <http://www.asd.gov.au/infosec/cloudsecurity.htm> accessed on 19 May 2015

18. Addendum 1

Summary of cases:

Case or argument in respect of which there is no rational basis upon which it might succeed

- In *Ridehalgh v Horsefield* [1994] Ch 205 Sir Thomas Bingham said (at 233 - 234):
“A legal representative is not to be held to have acted improperly, unreasonably or negligently, simply because he acts for a party who pursues a claim or defence which is plainly doomed to fail ... legal representatives will, of course, whether barristers or solicitors, advise the clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely, if ever, safe for a court to assume that a hopeless case is being litigated on the advice of lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the Judge and not the lawyers to judge it.”
- In *Orchard v South Eastern Electricity Board* [1987] 1QB 565 it was held that *“it was not the duty of a solicitor to assess the results of a conflict of evidence or to impose a pre-trial screen on a litigant’s claim or defence.”*
- Justice Ipp, in his paper *“Lawyers Duties to the Court”* The Law Quarterly Review

Vol 114 January 1988 (at 99), says:

“I suggest it is no longer open to counsel to argue every point indiscriminately. While the duty to take every possible point might be a duty owed by lawyers to the client, the paramount duty to the Court is to advance only points that are reasonably arguable. Lawyers should indeed act as a screen so as to exclude unreasonable or hopeless arguments.”

In support of this proposition, Justice Ipp cites the following passage in *Giannarelli v*

Wraith (1988) 165 CLR 543 at 543 per Mason CJ:

“A barrister’s duty to the Court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client’s success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the Court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down every burrow.

The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of [an] independent judgment in the conduct and management of the case.”

The discussion of counsel’s duties in *Giannarelli* was in the context of a claim that lawyers negligently failed to object to the tender, in criminal proceedings, of evidence given at a royal commission after the plaintiffs’ convictions had been overturned by the High Court on that basis (that is it was used to justify the protection of counsel rather than to attack counsel).

- In *Levit v Deputy Commissioner of Taxation (2000) 102 FCR 155* the Full Federal Court said that caution must be exercised before exercising the jurisdiction to award costs and expressed concern about the risk of a practice developing whereby solicitors endeavour to browbeat their opponents into abandoning clients, or particular issues or arguments, for fear of a personal costs order being made against them, which conduct might amount to contempt of court (at [43]). It was, however, equally important to uphold the right to order costs wasted by a solicitor's unreasonable conduct of a case. What constituted "*unreasonable conduct*" would depend on the particular case and must amount to more than acting for a client with little or no prospect of success. "*There must be something akin to abuse of process; that is, using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success.*" (at [44])

The Full Court held:

"It is unreasonable, in the sense of a dereliction of duty (to both the client and the court), for any lawyer to take that course without first being satisfied that the points are, at least, seriously arguable. 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. The situation would be different if the viability of the points depended on one or more unresolved questions of fact. In that situation, lawyers might be entitled, acting reasonably, to notify the points, against the possibility that the facts, when determined, would lend support to them."

In *Levit*, it was relevant to the Court that the lawyers themselves thought up the legal points, which were not reasonably arguable, and advanced them on behalf of the client.

The client had not insisted on these points being pursued in the face of advice to do the contrary. It was also relevant that the judge at first instance had considered it was obvious that the purpose behind putting these arguments was to delay an order being made against the client for as long as possible (see [49]).

- In *White Industries (Qld) Pty Ltd v Flower and Hart (a firm) (1998) 156 ALR 169* a successful defendant applied for costs against the plaintiff's solicitors. The plaintiff had initiated the proceedings alleging fraud and misleading and deceptive conduct against the defendant. The defendant argued that a solicitor who maintained proceedings in which there were no, or substantially no, prospects of success could be the subject of a costs order. Goldberg J considered the right of a person to have a case conducted irrespective of the view that his or her legal advisor had formed about the case. He found that, in order to justify an order for costs against the solicitors, something more must be added to the equation such as an ulterior purpose, abuse of process, or serious dereliction of duty (see page 231). In particular, Goldberg J said:

" ... [I]t must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the Court. On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of the claim is mala fide or for an ulterior purpose or, to put it more broadly, if the proceedings would be or have become an abuse of the process of the Court or unjustifiably oppressive."

Goldberg J went on to say:

“[I]t is not clear what is encompassed by “unreasonably” initiating or continuing proceedings if they have no or substantially no prospects 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 but an intention to use the proceedings for an ulterior purpose or with the disregard of any proper consideration of the prospects of success. Expressing the principal this way accommodates the competing principal that a party is entitled to have a practitioner act for him or her even in an unmeritorious case. This principal was expressed succinctly in Ridehalgh v Horsefield ...

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 proceedings 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 he is entitled to evade the rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on an ex parte application or knowingly conniving an 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 it.”

- There is quite a good discussion (although largely directed to the NSW legislative context) on whether the pursuit of a hopeless case will justify a wasted costs order in “Wasted Costs Order Against Lawyers in Australia” by Hon Bill Pincus QC and Linda Haller (2005) 79 ALJ 497, the upshot of which appears to be that the position is unclear, there being some judicial comment that it is enough if you have given consideration to the merits and advised the client the case is hopeless and of the risks they face as to costs on the one hand, and, on the other, that there is a duty not to pursue a hopeless case. The writers contrast the latter view with the courts’ own reluctance to award summary judgment, save in the most obvious of cases.