

**THE LAW SOCIETY OF WESTERN AUSTRALIA
PROFESSIONAL CONDUCT RULES**

JULY 2008 REVISION

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PREAMBLE

One of the duties of any professional body is to ensure that the standards of competence and professional conduct among persons who practise in that profession are sufficient to secure adequate protection for clients and that the services provided by such persons are provided both economically and efficiently. Respect for the law depends to a large extent on the maintenance of high standards by all who practise in the legal profession.

From the founding of the Law Society in 1927, the Law Society's Council promulgated rulings. On 24 October 1983 the Council of the Law Society adopted its Professional Conduct Rules ("rules") which set out the requirements for the way in which legal practitioners should conduct themselves and their practices. Compliance with the spirit, not merely the letter of the rules, is ensured by the Law Society through informal means such as conciliation, example, education and peer group discipline.

The status of the rules was considered by the Full Court of the Supreme Court of Western Australia (Malcolm CJ, Anderson J and Parker J) in *Quigley v The Legal Practitioners Complaints Committee* [2003] WASCA 228. At paragraph 17, Parker J (on behalf of the Court):

The Professional Conduct Rules are not in the nature of a legislative prescription or standard of conduct. By their own expressed intention they are to be regarded as a guide to what is considered by the legal profession in Western Australia to be proper behaviour. Their role and value as a guide to the type of conduct to be expected or [sic] practitioners has been recognised by this Court: see, for example D'Allesandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198, at 214, per Ipp J, Pidgeon and Franklyn JJ concurring at 201. The Tribunal and its statutory predecessor, The Barristers' Board, have consistently treated the Professional Conduct Rules in this way.

All practitioners practising in Western Australia should comply with the rules in conjunction with their statutory obligations under the *Legal Practice Act 2003* ("Act").

The rules are not an exhaustive code of conduct. They do not address all aspects of practice provided for in the Act.

For example, the requirements for holding a trust account are prescribed in Part 10 of the Act. They are not addressed in detail in rule 17. Procedures relating to complaints and disciplinary matters are prescribed in Part 12 of the Act. Although the Law Society, through its Professional Conduct Committee, will attempt to bring about the resolution of a complaint by an informal conciliation process, the Law Society does not have powers of investigation or the power to discipline practitioners. Under the Act, the Legal Practitioners Complaints Committee holds statutory authority and powers of investigation. The Executive Director of the Law Society may make a complaint about a legal practitioner where the making of the complaint has been authorised by the Law Society's Council (s175(2)(c) of the Act).

AMENDMENTS

Amendments have been made to the rules since they were adopted in 1983. The amendments include those listed below. The numbers shown for each of the listed rules and Schedules are their numbers at the time they were added, amended or deleted. These numbers may not correspond with numbers in this 2005 revision but are referable to the revision "incorporating changes to December 2003."

Introduction

June 1996 Rule 1.2 deleted.
December 2005 Rules 1.1-1.4 deleted and substituted with Rules 2.1-2.2 under "General Rules."

Advertising and publicity

July 1985 Rules 4.1 and 4.6 deleted.
July 1996 Rules 4.6, 4.7 and 4.8 deleted.
December 1996 Rule 4.5 amended.

Confidentiality

August 1994 Rule 6.4 amended.

Conflict of interest

August 1994 Rules 7.5 and 7.6 amended and Rules 7.7, 7.8 and 7.9 added.

Mediation

July 2000 Former Rule 7A deleted and new rule substituted.

Keeping the client informed

May 2003 Rule 10.3 added.

Fees and trust accounts

October 1990 Rule 16.6 added.
October 1998 Rule 16.6 amended.

Costs disclosure rule

June 2002 Rule 16A added.

Termination of retainer

June 1996 Rule 17.3 amended.

Professional courtesy

December 1984 Rule 18.5 added.
September 2000 Rule 18.6 and 18.7 added.
October 2003 Rule 18.5 amended.

Guidelines for the advertising of legal services

October 2003 Schedule 5 amended.

Policy on harassment and discrimination

July 2001 Schedule 6 deleted.

Guidelines, leaving firms and contacting clients

December 1996 Schedule 7 added.

Equality of opportunity model briefing policy

May 2003 Schedule 8 added.
October 2003 Schedule 8 amended.

Guide to handover of documents on termination of retainer (civil and criminal matters)

July 2003 Schedule 9 added.
December 2003 Schedule 9 amended.

December 2005

All of the rules were revised as to format and style, but generally not as to substantive content, with the exception of:

Foreword

Foreword deleted and replaced by Preamble.

Interpretation/Meaning of Terms Used

“Interpretation”, Rule 2 in December 2003 revision, deleted and replaced by Rule 1, “Meaning of terms used.”

Introduction/General Rule

“Introduction”, Rule 1 in December 2003 revision, deleted and replaced by Rule 2, “General Rules.”

Conflict of interest

Rule 7.2 deleted.

Mediation

Renumbered – Rule 7A changed to Rule 8. Rules 8.9-8.14 inclusive deleted.

Professional Courtesy

Renumbered – Rule 18 changed to Rule 20. Rule 20.5 amended.

Rules renumbered

Subject matter	As at December 2003	From December 2005
Mediation	Rule 7A	Rule 8
Borrowing from client	Rule 8	Rule 9
Independence	Rule 9	Rule 10
Keeping client informed	Rule 10	Rule 11
Impecunious clients	Rule 11	Rule 12
Conduct of clients	Rule 12	Rule 13
Court proceedings	Rule 13	Rule 14
Defending person accused of a crime	Rule 14	Rule 15

Prosecuting a person accused of a crime	Rule 15	Rule 16
Fees and trust accounts	Rule 16	Rule 17
Costs disclosure	Rule 16A	Rule 18
Termination of retainer	Rule 17	Rule 19
Professional courtesy	Rule 18	Rule 20
Conduct of practice	Rule 19	Rule 21
Conduct of other business	Rule 20	Rule 22
Firms	Rule 21	Rule 23
Practitioner employed by person other than a legal firm	Rule 21A	Rule 24
Agents' and Counsel Fees	Rules 22	Rule 25
Undertakings	Rule 23	Rule 26
Tax Avoidance	Rule 24	Rule 27

Schedules

Schedules 3, 4, and 6 deleted. Glossary and Checklist to Schedule 5 deleted.

Schedules numbers from December 2005

Subject matter	As at December 2003	From December 2005
Independence – connection with client	Schedule 1	Schedule 1
Independence – connection with court	Schedule 2	Schedule 2
Guidelines for the advertising of legal services	Schedule 5	Schedule 3
Guidelines for leaving firms and contacting clients	Schedule 7	Schedule 4
Equal opportunity model briefing policy	Schedule 8	Schedule 5

Guide to hand over of
documents on termination
of retainer (civil and
criminal matters)

Schedule 9

Schedule 6

21 July 2008

Solicitors advising on loan or security documents

Rule 28 and schedules 1A, 1B, 2, 2A, 3, 4, 4A, 4B, 4C, 5 to rule 28 added.

These rules attempt to provide the legal profession of Western Australia with an up-to-date and comprehensive set of rules relating to professional conduct.

Practitioners are urged to give careful consideration to each and every aspect of these rules.

1. **Meaning of terms used**

1.1 In these rules:

Act means the *Legal Practice Act 2003*;

Board has the meaning given in the Act;

Complaints Committee has the meaning given in the Act;

Council means the Council of the Law Society;

counsel means a practitioner who appears as an advocate of a client before a court, whether or not on the instructions of another practitioner;

court includes any court or tribunal or any person or body of persons exercising judicial functions;

Executive Director means the Executive Director of the Society from time to time and any other person authorised by the Council to carry out the functions of the Executive Director from time to time;

partner means a legal practitioner partner or a legal practitioner director as those terms are defined in the Act;

practitioner means a legal practitioner as that term is defined in the Act;

President means the President of the Society from time to time;

Society means The Law Society of Western Australia (Inc.);

1.2 In these rules:

(1) the singular includes the plural and vice versa;

(2) reference to one gender does not exclude another gender;

(3) the term “person” includes a natural person, a body corporate, an unincorporated association, a partnership and a statutory body of any kind;

(4) a reference to a statute or other written law includes regulations and other instruments made under it and amendments, considerations, re-enactments or replacements of them.

1.3 Headings do not affect the interpretation of these rules.

1.4 Unless specifically referred to in these rules, the Schedules do not form part of, and therefore do not have the same effect, as these rules.

2. General rules

- 2.1 In acting for a client, a practitioner must act honestly and ethically and with competence and diligence.
- 2.2 A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is dishonest or likely to a material degree, to:
- (a) be prejudicial to the administration of justice; or
 - (b) bring the profession into disrepute; or
 - (c) adversely prejudice a practitioner's ability to practise according to these rules.

3. Maintaining professional integrity

- 3.1 A practitioner must not attempt to further a client's case by unfair or dishonest means.
- 3.2 A practitioner must not intentionally assist or induce another practitioner to breach these rules.
- 3.3 A practitioner must take reasonable care to ensure that any partner, associate or employee of the practitioner does not breach these rules.
- 3.4 A practitioner must properly supervise all professional work carried out for or on behalf of the practitioner by a non-practitioner.
- 3.5 If a practitioner becomes aware of a breach of Part 9 of the Act and the person in breach is a client, the practitioner must treat the information as confidential but must point out the breach to the client and recommend that the client should avoid future breaches.
- 3.6 If a practitioner becomes aware of a breach of Part 9 of the Act and the person in breach is not a client of the practitioner:
- (1) if the knowledge is received in the course of the practitioner's professional duties for someone who is a client of the practitioner, the practitioner must point out the breach to the client and recommend that the matter be brought to the attention of the Complaints Committee while making it clear that it is the client's prerogative to determine whether this course is to be followed; but
 - (2) if the knowledge is received other than in the course of professional duties for a client, the practitioner must, in accordance with the practitioner's duty to the public and to the legal profession, report the matter to the Complaints Committee.

4. Advertising and publicity

- 4.1 Subject to Schedule 3 to these rules relating to advertising and the *Civil Liability Act 2002* and subject to rule 4.2, a practitioner may participate in:
- (1) any lecture, talk, or public appearance; or
 - (2) any radio, television or other transmission; or
 - (3) any written or printed publication.

- 4.2 If the subject matter of anything referred to in rule 4.1 or any part of it concerns a matter in relation to which the practitioner is or has been professionally engaged, a practitioner must not participate unless:
- (1) the client has given an informed consent; and
 - (2) participation is not contrary to the interests of the client; and
 - (3) the practitioner gives an objective account of the matter in a restrained manner consistent with the maintenance of the good reputation and standing of the legal profession.

5. Diligence

- 5.1 A practitioner must treat the client fairly and in good faith, giving due regard to the client's position of dependence, the practitioner's special training and experience and the high degree of trust a client is entitled to place in the practitioner.
- 5.2 A practitioner must always be completely frank and open with the client and with others so far as the client's interest permits and must give the client a candid opinion on any professional matter concerning the client.
- 5.3 A practitioner must take the legal action which is necessary and reasonably available to protect and advance the client's interests unless the action is inconsistent with the practitioner's retainer.
- 5.4 If it is in the client's best interests, a practitioner must try to reach a solution by settlement out of court rather than by commencing or continuing legal proceedings.
- 5.5 A practitioner must try to complete any work on behalf of the client as soon as reasonably possible. If a practitioner receives instructions and it is or becomes apparent to the practitioner that the work cannot be done within a reasonable time, the practitioner must inform the client of this.
- 5.6 A practitioner must provide the client with the full benefit of the practitioner's knowledge and properly advance and protect the client's interests.
- 5.7 A practitioner must not accept instructions which are beyond the practitioner's competence.
- 5.8 A practitioner must not take unnecessary steps or do the work in such a manner as to increase the proper costs to the client.

6. Confidentiality

- 6.1 A practitioner must strive to establish and maintain a relationship of trust and confidence with the client.
- 6.2 A practitioner must impress upon the client that the practitioner cannot adequately serve the client without knowing everything that might be relevant to the client's case or instructions and that the client should not withhold from the practitioner information which the client might think is embarrassing or harmful to the client's interests.
- 6.3 A practitioner must not without the consent of the client directly or indirectly disclose information received from the client in confidence or use it in any way detrimental to

the interests of the client or disclose the contents of any brief or instructions to any person except to the extent:

- (1) required by law, rule of court or court order; or
- (2) necessary for replying to or defending any charge or complaint of criminal or unprofessional conduct or professional misconduct brought against the practitioner or the practitioner's partners, associates or employees .

6.4 Before a practitioner makes a disclosure relying on the exception in rule 6.3(1) the practitioner must, if there are reasonable grounds to do so, take reasonable steps to test the validity of the law or order.

6.5 A practitioner's duty of confidentiality towards the client continues after the relationship of practitioner and client has ceased.

7. Conflict of interest

7.1 Subject at all times to the duty of a practitioner to the court, a practitioner must give undivided faithfulness to the client's interest, unaffected by the interest of any other person, including the practitioner's own interest, or by the practitioner's perception of the public interest.

7.2 A practitioner must at all times fully and frankly disclose to the client any interest the practitioner has in any matter in which the practitioner acts for that client. If the interest is adverse to the client's interest the practitioner must decline to represent or cease representing the client (as the case may be) unless the client is fully informed and voluntarily assents to the practitioner acting or continuing to act on the client's behalf.

7.3 A practitioner must not give legal advice to a person knowing that the interests of that person are or may be in conflict with the interests of another person who is already a client, except for advice about obtaining the services of another practitioner.

7.4 A practitioner must not represent or continue to represent two or more clients with conflicting interests in litigation.

7.5 A practitioner may only represent or continue to represent two or more persons with conflicting interests in non-litigious matters if to do so is not likely to prejudice the interests of any one client and each client is fully informed of the nature and implications of any conflict of interest, and voluntarily consents to the practitioner so acting or continuing to act.

7.6 If a practitioner:

- (1) has obtained confidential information as a result of acting for a client; and
- (2) there is a risk that by acting for a person whose interests are or may be adverse to those of the client, the practitioner may disclose or make use of the confidential information, in breach of the practitioner's duty of confidentiality to the client,

the practitioner must not act for that person.

- 7.7 If counsel forms the view that there is a conflict of interest between the instructing practitioner and the client, counsel must advise the instructing practitioner that it would be in the client's interest to engage another practitioner. Counsel must give that advice either in writing to the instructing practitioner or at a conference at which both the instructing practitioner and the client are present.
- 7.8 When a practitioner accepts instructions to act for more than one party in any commercial or conveyancing transaction involving a diversity of interests between the parties, the practitioner must advise each party of the potential for conflict of interest and of the practitioner's duty if a conflict arises.

8. Mediation

- 8.1 Mediation is a process by which an impartial third party ("mediator") facilitates the resolution of a dispute by promoting uncoerced agreement by the parties to that dispute. The mediator facilitates communication, promotes understanding, assists the parties to identify their needs and interests, and uses creative problem solving techniques to enable the parties to reach their own agreement.
- 8.2 A practitioner engaged to act as a mediator must comply with this rule 8. In this rule 8, a reference to a practitioner means a practitioner who acts as a mediator.
- 8.3 A practitioner must avoid:
- (1) partiality or prejudice; and
 - (2) conduct that gives any appearance of partiality or prejudice.
- 8.4 A practitioner may therefore mediate disputes only if the practitioner can remain impartial. If at any time the practitioner is unable to mediate the dispute in an impartial manner, the practitioner must cease to mediate. Before the mediation begins, the practitioner must disclose to the parties all existing or potential conflicts of interest the practitioner has. The practitioner must make the same disclosure if a conflict of interest arises during mediation. The practitioner may proceed with the mediation only if all parties agree and the practitioner is satisfied that the conflict will not preclude the proper discharge of the practitioner's duties.
- 8.5 After the mediation the practitioner must not act in a manner which brings into question the integrity of the mediation process.
- 8.6 A practitioner must not mediate unless the practitioner has the competence to do so and to satisfy the reasonable expectations of the parties. A practitioner who agrees to act as a mediator is taken to hold out to the parties and the public that the practitioner has the competence to mediate effectively.
- 8.7 The practitioner must maintain the confidentiality required by the parties subject to the law.
- 8.8 A practitioner must prepare for and conduct the mediation diligently, having regard to the need for uncoerced agreement to resolve the dispute.

9. Borrowing from client

- 9.1 A practitioner is taken to borrow money from a client if the loan is made to:

- (1) the practitioner or a member of the practitioner's family; or
 - (2) a partner of a practitioner or a member of that partner's family; or
 - (3) a company (other than a company the shares in which are listed on any stock exchange in Australia or a building society registered under the *Housing Societies Act 1976*) in which any of the persons mentioned in rule 9.1(1) or 9.1(2) have a significant beneficial interest.
- 9.2 Subject to rule 9.3, a practitioner must not borrow money from a client irrespective of whether the practitioner gives security.
- 9.3 Rule 9.2 does not apply if it is the client's normal business (or part of the client's normal business) to lend money or, before the loan is made, the client acknowledges in writing that the client has been advised by the practitioner that:
- (1) it is desirable that the client should obtain independent legal advice concerning the transaction; and
 - (2) the loan is a personal loan with or without security (as the case may be); and
 - (3) in the event of default the client's remedy is against the borrower and the client may have no recourse to the Solicitor's Guarantee Fund; and
 - (4) the practitioner or the practitioner's partner or a member of the family of the practitioner or the partner (as the case may be) may benefit financially from the loan.

10. Independence

- 10.1 A practitioner must not act as counsel if by reason of the practitioner's connection with the client it would be difficult for the practitioner to maintain professional independence (examples are contained in Schedule 1) or if by reason of the practitioner's connection with the court or a member of the court the impartial administration of justice might be prejudiced or appear to be prejudiced (examples are contained in Schedule 2).
- 10.2 A practitioner must not become answerable for the client's default by acting as surety or guarantor for the client.

11. Keeping the client informed

- 11.1 A practitioner must fully inform the client of the client's rights and possible courses of conduct regarding issues of substantial importance and must keep the client informed about all significant developments and generally about the matter entrusted to the practitioner by the client unless the practitioner has been instructed not to do so.
- 11.2 A practitioner must notify the client promptly if the practitioner receives money or securities on behalf of the client.
- 11.3 A practitioner must as soon as possible after accepting instructions inform the client of the basis of calculation of the practitioner's costs. If the practitioner becomes aware of any circumstance likely to have a substantial affect on the amount or basis of calculation of such costs or any disbursements, the practitioner must promptly inform the client.

12. Impecunious clients

- 12.1 If a practitioner has reason to believe that the client will not be able to raise or borrow sufficient money to pay the practitioner's costs and the client may otherwise be eligible for legal aid, the practitioner must inform the client of the availability of legal aid (and if required, must make an application on behalf of the client) but the practitioner is not obliged to act for the client on a legal aid basis.
- 12.2 Subject to section 227 of the Act, a practitioner may act for a client who has no financial means and may expend the practitioner's own money in payment of counsel fees and other outgoings even if the practitioner has no prospect of being paid either those fees or outgoings except as a result of a judgement or order against the other party to the proceedings.

However, the practitioner may not in any case seek or receive from the client an interest in the subject matter of the litigation or, except to the extent permitted by any scale of costs which may be applicable, remuneration varying in accordance with the amount which may be recovered by the client in the proceedings.

13. Conduct of clients

- 13.1 A practitioner must not advise a client to engage in conduct which the practitioner considers may be illegal except in good faith to test the validity or scope of the law. Before doing so the practitioner must:
- (1) inform the client of the likelihood of the conduct being found to be illegal and the consequences; and
 - (2) give the client complete freedom of choice whether or not to engage in that conduct.
- 13.2 A practitioner must draw the client's attention to the possible effect of any proposed course of action which may adversely affect the client's reputation.
- 13.3 If the client being represented by counsel behaves in an offensive or improper manner, counsel must nevertheless continue to represent the client unless:
- (1) counsel is justified in assuming that instructions to represent the client have been withdrawn by the instructing practitioner or otherwise by the client; or
 - (2) in counsel's opinion, counsel's professional standing is being or is likely to be impugned and counsel can withdraw from the case or matter at that stage without jeopardising the client's interests.

14. Court proceedings

- 14.1 Subject to these rules, counsel must conduct each case in the manner counsel considers will be most advantageous to the client.
- 14.2 Counsel must not intentionally deceive or mislead the court.
- 14.3 If at any time before judgment is delivered in a civil case, the instructing practitioner or the client informs counsel that the client has committed perjury or has otherwise been guilty of fraud upon the court, counsel must not inform the court of that fact

without the client's consent but counsel must not take any further part in the case unless the client authorises counsel to inform the court of the perjured statement or other fraudulent conduct and counsel does inform the court.

14.4 Counsel must at all times:

- (1) act with due courtesy to the court before which counsel is appearing; and
- (2) use best endeavours to avoid unnecessary expense and waste of the court's time; and
- (3) when requested, inform the court of the probable length of the case; and
- (4) inform the court of the possibility of settlement if counsel can do so without revealing the existence or the content of "without prejudice" communications; and
- (5) inform the court of any development which affects the information already before the court.

14.5 Counsel must ensure that the court is informed about any relevant decision on a point of law or any legislative provision of which counsel is aware and which counsel considers to be relevant, whether it be for or against counsel's contention.

14.6 In cross-examination relevant to a matter in issue, counsel may put questions suggesting fraud, misconduct or the commission of a crime if counsel is satisfied that the matters suggested are part of the client's case and counsel has no reason to believe that they are put forward solely for the purpose of impugning the witness's character.

14.7 Counsel must not put questions in cross-examination which affect the credibility of a witness by attacking character, but which are otherwise not relevant to the actual inquiry, unless there are reasonable grounds to support the imputation conveyed by the questions. Counsel may regard instructions from the instructing practitioner that the imputation is well-founded as reasonable grounds to support the imputation conveyed by such questions.

14.8 A practitioner instructed to prepare or settle a pleading must not make any allegation unsupported by the instructions given to the practitioner and, in particular, must not allege fraud unless:

- (1) the practitioner has specific instructions to plead fraud; and
- (2) the practitioner has credible material which establishes an apparent case of fraud.

14.9 In all cases it is the duty of counsel:

- (1) to take care not to ask questions or statements which are only intended to insult or annoy either the witness or any other person or otherwise are an abuse of counsel's function; and
- (2) to exercise counsel's own judgment both as to the substance and the form of the questions put or statements made.

- 14.10 Counsel must not communicate with a witness whom counsel has called while that witness is under cross-examination unless there are exceptional circumstances and counsel has informed the counsel conducting the cross-examination of the intention to do so.
- 14.11 Counsel representing a party in a hearing must not initiate communication with the court about the facts or issues in a case counsel knows is pending or likely to be pending before the court unless counsel has first informed the counsel for all other interested parties of the nature of the matters counsel wishes to discuss with the court and has given the other counsel an opportunity to be present.
- 14.12 If counsel has a discussion with the court regarding the issues in a case in the absence of the other counsel, counsel must fully inform the other counsel about those discussions at the earliest opportunity.
- 14.13 Counsel must not accept instructions in a case if counsel has reason to believe that counsel is likely to be a witness in that case.
- 14.14 Counsel must withdraw from representing the client if counsel is likely to be a witness on a material question of fact and counsel can withdraw without jeopardising the client's interests.

15. Defending a person accused of crime

- 15.1 Except as otherwise stated in these rules, counsel must defend any person on whose behalf counsel is instructed in relation to a criminal charge, irrespective of any opinion which counsel may have formed about the guilt or innocence of that person.
- 15.2 When defending a client on a criminal charge, counsel must try to protect the client from being convicted except by a competent court and upon legal evidence sufficient to support a conviction for the offence with which the client is charged.
- 15.3 Counsel must not attribute to another person the crime with which the client is charged unless counsel can properly do so in accordance with rule 14.6 or unless there are facts or circumstances which reasonably support the crime being attributed to that person.
- 15.4 If the client clearly confesses guilt, counsel:
- (1) may, if the confession is made before the proceedings commence; or
 - (2) must, if the confession is made after the proceedings commence,
continue to act but must not set up an affirmative case inconsistent with the confession by, for example, asserting or suggesting that some other person committed the offence or calling evidence in support of an alibi.
- 15.5 Counsel may advise the client about the plea to a criminal charge, if necessary in strong terms, but counsel must allow the client complete freedom of choice to make the plea.
- 15.6 Counsel must not be absent from a trial unless:
- (1) there are exceptional circumstances which counsel could not reasonably have foreseen; and

- (2) Counsel obtains the consent of the instructing practitioner or that practitioner's representative or of the client; and
 - (3) a competent deputy who is well informed about the case and able to deal with any question which might reasonably be expected to arise takes counsel's place.
- 15.7 During the course of a criminal trial and prior to final sentence if the defendant absconds and counsel's instructing practitioner withdraws from the case, then counsel must also withdraw from the case.
- 15.8 If, for any reason, counsel's instructing practitioner does not withdraw from the case, counsel may continue to act. If counsel does so, counsel must conduct the case on the basis of the instructions received as if the client were still present in court but had decided not to give evidence.
- 15.9 If counsel becomes aware of a procedural irregularity before the verdict is returned, counsel must inform the court as soon as practicable and must not wait with a view to raising the matter later on appeal.
- 15.10 If the court has been led by the prosecution to believe that an accused has no previous convictions, counsel is under no duty to disclose facts to the contrary which are known to counsel nor to correct any information given by the prosecution if such disclosure or correction would be to the client's detriment, but counsel must not assert that the client has no convictions or ask a prosecution witness whether there are previous convictions against the client in the hope that the witness will give a negative answer.
- 15.11 Counsel may advise the client about giving evidence in the client's own defence but must allow the client complete freedom of choice whether to give evidence or not.
- 15.12 Counsel must not, in a plea in mitigation, make any allegation that is merely scandalous or calculated to vilify or insult any person.
- 15.13 Unless there is good reason not to do so, counsel must meet with the client after conviction and sentence or ensure that counsel's instructing practitioner or representative does so.

16. Prosecuting a person accused of crime

- 16.1 Counsel must not seek to obtain a conviction by any improper means. Counsel's duty is to present to the court the case for the prosecution fairly, impartially and in a competent manner.
- 16.2 If, before the hearing commences, counsel knows of the existence of a person who may be able to give evidence relevant to the case, and the prosecution does not propose to call that person before the jury, counsel must arrange to inform the defence of the identity and location (if known) of that person prior to the hearing.

If a witness called by the prosecution gives evidence on a material issue in substantial conflict with a prior statement made by that witness, counsel must inform the defence of the conflict.

- 16.3 Counsel must assist the court at all times before the verdict is returned by drawing attention to any apparent errors or omissions of fact or law or procedural irregularities which, in counsel's opinion, ought to be corrected.
- 16.4 If an accused person is unrepresented, it is proper for counsel to inform the court of any mitigating circumstances about which counsel has been instructed.

17. Fees and trust accounts

- 17.1 A practitioner must not claim costs in a letter of demand for debt written on behalf of the client unless the client has a right to recover those costs.
- 17.2 A practitioner must not, in the course of the practitioner's practice, give or agree to give an allowance in the nature of an introduction fee or spotter's fee to any person for introducing professional business to the practitioner and must not receive or agree to receive a similar allowance from any person for introducing or recommending clients to that person.
- 17.3 A practitioner must, within a reasonable time after receiving a request from the client, render an invoice for the work to which the request relates.
- 17.4 A practitioner may only charge costs which are no more than is reasonable for the practitioner's services having regard to the complexity of the matter, the time and skill involved, any scale of costs that might be applicable and any agreement as to costs between the practitioner and the client.
- 17.5 Subject to any order made under the Act, a practitioner must not charge a client or former client any costs for answering a complaint regarding the practitioner which is made to the Society or the Complaints Committee.

18. Costs disclosure

- 18.1 As soon as reasonably practicable after accepting instructions from a client, a practitioner must provide the client with a brief written statement setting out:
- (1) the basis of calculating the practitioner's costs; and
 - (2) the basis of calculating disbursement charges (for example, search fees, facsimile transmissions, photocopying and telephone calls); and
 - (3) the client's right to receive an itemised statement of the practitioner's costs; and
 - (4) the billing arrangements; and
 - (5) the provisions of section 221 of the Act (if applicable); and
 - (6) the client's right to a review of costs by taxation; and
 - (7) any other matter required by law to be disclosed to a client.
- 18.2 The disclosure required under rule 18.1 may be contained in a printed brochure or leaflet.

- 18.3 As soon as reasonably practicable after accepting instructions from a client, a practitioner must give the client a written disclosure statement setting out:
- (1) the total costs, if known, or an estimate of costs, or a range of estimates if it is not reasonably practicable to provide an estimate which will be charged to the client; and
 - (2) an estimate of likely disbursements; and
 - (3) the name of the practitioner who will have primary conduct of the matter and whether that person is a principal or employee.
- 18.4 The disclosure requirements in rules 18.1 and 18.3 above may be combined in one document given to the client.
- 18.5 Acceptance by the client may be signified in writing or by other conduct.
- 18.6 The disclosure requirements in rules 18.1 and 18.3 above are not required if:
- (1) the work is urgent and a significant part of the work was performed before it was reasonably practicable to provide disclosure; or
 - (2) the costs, excluding disbursements, are or are estimated to be no more than \$1,500; or
 - (3) the client is a public company or its subsidiary, a foreign company or its subsidiary, or a registered Australian body (as that term is defined in the *Corporations Act 2001*); or
 - (4) the client is a Minister (acting in the capacity of Minister), a government department, or a public authority; or
 - (5) the practitioner accepts work from a regular client to whom an initial disclosure has already been made, either under this rule or by reason of the acceptance of a tender for legal services, and instructions are accepted on the same basis.
- 18.7 A disclosure statement which provides that a practitioner may choose not to enforce the practitioner's right to be paid unless the client is successful in the litigation, must contain a statement indicating that the client may be liable for the costs of the other party if the client is unsuccessful in the litigation.
- 18.8 A practitioner who accepts instructions from another practitioner is taken to have complied with this rule if the practitioner:
- (1) provides the hourly and daily rates to the second practitioner before accepting the instructions; or
 - (2) complies with any costs disclosure rule in the Conduct Rules of the Western Australian Bar Association Inc.
- 18.9 This rule 18 does not apply to a practitioner who accepts instructions directly from a client of another practitioner.

19. Termination of retainer

- 19.1 A client is entitled to change the client's legal adviser at any time without giving a reason and a practitioner must (subject to the satisfaction of any lien the practitioner may have) take all reasonable steps to facilitate the change should the client request.
- 19.2 If a client changes to another practitioner in a matter and if the practitioner last engaged forms the opinion that the conduct of the previous practitioner in the matter warrants the making of a complaint to the Society or Complaints Committee, the practitioner last engaged must advise the client of that opinion.
- 19.3 Subject to rules 13.3 and 19.4, a practitioner may cease to represent the client:
- (1) at any time and for any reason if this will cause no significant harm to the client's interests and the client is fully informed of the consequences and agrees to the practitioner ceasing to act; or
 - (2) if the practitioner reasonably believes that continuing to represent the client would be likely to have a seriously adverse effect on the practitioner's health; or
 - (3) if the client commits a significant breach of a written agreement regarding fees or expenses; or
 - (4) if the client materially misrepresents the facts of the case or the matter; or
 - (5) if the practitioner has an interest in the case or the matter which is adverse to that of the client; or
 - (6) if necessary to avoid breaching these rules; or
 - (7) if a grant of legal aid to the client is withdrawn or an existing grant is not extended by the Legal Aid Commission and:
 - (a) the practitioner gives reasonable notice to the client of the intention to withdraw; and
 - (b) the client is unable to make any other arrangement for the payment of the practitioner's fees satisfactory to the practitioner; or
 - (8) if any other good cause exists, as long as the practitioner takes reasonable care to avoid foreseeable harm to the client, including giving reasonable notice to the client, allowing reasonable time for the engagement of a new practitioner, co-operating with the new practitioner and (subject to the satisfaction of any lien the practitioner may have) promptly handing over all papers and property to the client or the new practitioner and paying to the client or the new practitioner any money held on behalf of the client.
- 19.4 Counsel may return a brief for the defence of a person charged with a serious criminal offence only in the most exceptional circumstances and then only if sufficient time remains for another counsel to master the case.
- 19.5 If because of a conflict of interest a practitioner recommends that the client seek alternate legal representation, the practitioner may charge only for those items which it is clear a new practitioner will not need to duplicate.

20. Professional courtesy

- 20.1 A practitioner must treat professional colleagues with the utmost courtesy and fairness.
- 20.2 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 must not do or say anything to induce or foster that mistake or oversight, but must draw the attention of the other practitioner to that mistake or oversight, unless doing so might prejudice the practitioner's own client.
- 20.3 A practitioner may communicate with a person who the practitioner knows is represented in relation to that matter by another practitioner only in the most exceptional circumstances.
- 20.4 A practitioner who, on receiving instructions, realises that accepting the instructions would amount to replacing another practitioner who has previously been instructed in the same matter, must inform the other practitioner of receipt of those instructions.
- 20.5 A practitioner must not discriminate against any other practitioner by reason of the colour, race, ethnic or national origins, gender, sexual orientation, marital status, physical impairment or religious beliefs of the other practitioner or any other ground provided for by State or Commonwealth legislation.
- 20.6 A practitioner must not, in the course of legal practice, sexually harass any person. A practitioner is taken to sexually harass another person if the practitioner makes an unwelcome sexual advance, or an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature and the other person has a reasonable basis for believing that by rejecting the advance, refusing the request or taking objection to the conduct, the other person will be disadvantaged in some way.
- 20.7 A practitioner must not, in the course of legal practice, engage in conduct which is not directed towards a specific person, but is offensive or is likely to offend a reasonable person because of its sexual nature.

21. Conduct of practice

- 21.1 A practitioner who carries on a legal practice must ensure that the practice is efficiently and properly administered and must take all reasonable and practicable steps to ensure that professional engagements are fulfilled or that early notice is given if they cannot be fulfilled.
- 21.2 A practitioner who carries on a legal practice must ensure a practitioner is supervising that legal practice at its main place of business whenever that practice is open for business.
- 21.3 The practitioner must also ensure that a practitioner is supervising at any branch of the practice whenever the branch office is open for business.
- 21.4 Without limiting rules 21.2 and 21.3, a practitioner must ensure that adequate and regular supervision is provided for all professional business conducted at any office of the practice.

22. Conduct of other business

- 22.1 A practitioner who carries on a legal practice may not carry on another business unless:
- (1) the other business does not detract from the dignity of the legal profession; and
 - (2) the practitioner keeps the conduct of that other business entirely separate from the legal practice insofar as correspondence, accounts and presentation to the public are concerned; and
 - (3) the carrying on of the other business is not calculated to attract professional business to the practitioner or likely to lead to any other infringement of the Act or these rules.
- 22.2 For the purpose of rule 22.1, a practitioner is taken to be carrying on another business if that business is conducted by a company but is substantially under the practitioner's direction or control.

23. Firms

- 23.1 A practitioner must not falsely represent that a person is or was the practitioner's partner or former partner (as the case may be).
- 23.2 A practitioner must not allow the name of any person to appear on any sign in relation to the practitioner's practice or on the practitioner's stationery unless the name forms part of the firm name under which the practitioner practises or the name is that of a practitioner who is:
- (1) a partner; or
 - (2) a consultant or associate and the word "Consultant" or "Associate" appears in conjunction with the name.

24. Practitioner employed by a person other than a legal practice

- 24.1 In this rule 24, a reference to an employed practitioner means a practitioner who is employed other than by a practitioner or a partnership of practitioners.
- 24.2 Notwithstanding that a practitioner is employed other than by a legal firm the practitioner must comply with these rules except as stated in this rule 24.
- 24.3 Employed practitioners may perform their legal functions in their own name and may also, with the consent of the employer, use the letterhead of the employer in appropriate cases including while performing legal functions.
- 24.4 An employed practitioner may appear on the record before a court for their employer.
- 24.5 All fees charged by an employed practitioner must be charged to the person or entity for whom or for which the services were performed. An employed practitioner may in any financial year allow in their accounts for the recoupment to the employer of their salary and office expenses and overheads. If the fees exceed the aggregate of those

amounts in the relevant financial year, the excess must be paid by the employed practitioner or by another person or body if allowed by law.

25. Agent's and counsel's fees

- 25.1 If not otherwise agreed, a practitioner who instructs another practitioner (including an interstate practitioner) to advise on or to assist in a matter is responsible for the payment of the other practitioner's fees.
- 25.2 A practitioner who directs the client to another practitioner is not responsible for the payment of the other practitioner's fees.

26. Undertakings

A practitioner must honour any personal undertaking given by the practitioner when acting professionally for a client whether the undertaking is to the client, a third person or a court.

27. Tax avoidance

- 27.1 A practitioner must not promote or market or intentionally assist, by the giving of advice or otherwise, in the promotion or marketing of a tax scheme or arrangement which has the predominant purpose of avoidance of tax by the exploitation of revenue law.
- 27.2 A practitioner must not have a financial interest in a business organisation (whether incorporated or otherwise) which promotes or markets any tax scheme or arrangement described in rule 27.1.

28. Solicitors advising on loan or security documents

28.1 Purpose of Rule

The purpose of this Rule is to state the approved practice to be followed by a solicitor (whether a principal or an employee) when engaged to advise a proposed signatory on loan or security documents ("the documents").

28.2 Application of this Rule

28.2.1 This Rule applies where the solicitor is engaged to give advice to a proposed signatory that will be:

- a borrower, or a security provider referred to as a borrower ("a borrower") in the documents; or
- a third party mortgagor, guarantor, surety mortgagor or indemnifier ("a guarantor") providing security for the borrower.
- whether or not the documents relate to the provision of credit to which the Consumer Credit (Western Australia) Code applies.

28.2.2 This Rule applies only where the solicitor has been asked to provide evidence of advice.

28.3 Independence of the Advising Solicitor

28.3.1 The solicitor must not act for the lender in the transaction to which the documents relate.

28.3.2 The solicitor must not advise a proposed signatory in any circumstances where the interests of any signatory or proposed signatory conflict with those of the solicitor, or with those of any other client of the solicitor.

28.3.3 The solicitor's advice can be given to a proposed signatory, who is either a natural person, or a corporation subject to paras 28.3.5 and 28.3.6 of this Rule.

28.3.4 The solicitor must not advise a proposed signatory in the presence of any other signatory or proposed signatory of the documents, or in any circumstances where the interests of any signatory or proposed signatory of the documents conflict with those of any other such signatory or proposed signatory, except in accordance with the following principles laid down by the Privy Council in *Clark Boyce v Mouat* [1994] 1 AC 428 at 437:

- that where the interests of the parties to the transaction may conflict the solicitor may only act for more than one such party provided he/she has obtained the informed consent in writing of those parties to the solicitor acting for them,
- such consent being given in the knowledge that there is or may be a conflict between the parties, and as a result
- that the solicitor may be disabled from disclosing to each party the full knowledge which he/she possesses as to the transaction, or
- that the solicitor may be disabled from giving advice to one party which conflicts with the interests of the other or others.

28.3.5 Where the solicitor's advice is given to a proposed signatory who is a natural person, the solicitor must not act for, or give advice to, any other signatory or proposed signatory except with the written consent of all signatories or proposed signatories given in accordance with the principles specified in paragraph 28.3.4 of this Rule.

28.3.6 Where the solicitor's advice is given to a proposed signatory that is a corporation, the solicitor must not act for, or give advice to, any other signatory or proposed signatory apart from a related corporation within the meaning of the Corporations Law, or a person who is the sole director or sole member of the signatory corporation, or otherwise except with the written consent of all signatories or proposed signatories given in accordance with the principles specified in paragraph 28.3.4 of this Rule.

28.4 Identification of Proposed Signatories of Documents

28.4.1 The solicitor must identify the proposed signatory as the person described by reference to one of the following documents means:

- (a) Passport
- (b) Driving Licence
- (c) Medicare Card

- (d) Credit Card
- (e) Rate Notice
- (f) Other.

28.5 Advice

28.5.1 The solicitor should advise a proposed signatory of those matters that the solicitor, in exercising the professional skill and judgment called for in the circumstances of the particular case, considers appropriate.

28.5.2 Without limiting the generality of 28.5.1, when advising a borrower, the solicitor should, where necessary, advise the borrower that:

28.5.2.1 by signing the documents the borrower will be liable for regular payments of interest and repayment of the amount of the loan at the due date;

28.5.2.2 if the borrower fails to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;

28.5.2.3 if the borrower fails to comply with any of the terms and conditions of the loan including the obligations to pay principal or interest,

- the lender can sue the borrower personally; and
- the lender may take possession of the borrower's property; and
- after notice, sell it to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and
- if the proceeds of sale of the borrower's property are insufficient to satisfy the debt to the lender, the lender can sue the borrower for the deficit; and

28.5.2.4 If the Consumer Credit (Western Australia) Code applies, any additional obligations, rights and remedies that may apply as set out in the loan documents.

28.5.3 Without limiting the generality of 28.5.1, when advising a guarantor, the solicitor should, where necessary, advise the guarantor that:

28.5.3.1 if the borrower fails to make any payment on time, the guarantor will be liable to remedy that failure, and that could involve the guarantor in payment to the lender of all amounts owed by the borrower to the lender including principal, interest, default interest and the lender's costs of rectifying the default;

28.5.3.2 if the guarantor fails to remedy any failure by the borrower to comply with the terms and conditions of the loan in any way, including the obligation to pay principal, interest, default interest, or other charges,

- the lender can sue the guarantor personally; and

- can take possession of the guarantor’s property secured to the lender and sell it to recover the amount owing together with interest and other costs, including solicitor’s costs, the costs of selling the property and the costs of maintaining the property; and
- if the proceeds of sale of the guarantor’s property are insufficient to satisfy the debt to the lender, the lender can sue the guarantor for the deficit;

28.5.3.3 if the guarantor is a proposed signatory to documents under which the guarantor’s liability can be increased, that fact, and the extent of the possible increase, and of any restriction or limitation of the guarantor’s rights or obligations in relation to the security and any other party to the documents;

28.5.3.4 the lender can exercise its rights against the guarantor even if it has not pursued the borrower;

28.5.3.5 the liability of the guarantor is limited to a specified sum, or is unlimited (whichever is the case) and may be affected by cross guarantees; and

28.5.3.6 if the Consumer Credit (Western Australia) Code applies, additional obligations, rights and remedies may apply as set out in the loan documents.

28.5.4 In any case, the solicitor must advise the proposed signatory that:

28.5.4.1 the solicitor does not profess any qualification to give financial (as distinct from legal) advice; and

28.5.4.2 if the proposed signatory has any questions about any financial aspect of the transaction or the documents, the proposed signatory should consult an accountant or other financial counsellor of the proposed signatory’s choice before signing the documents.

28.6 Evidence of Advice

28.6.1 Any Statutory Declaration, in evidence of independent advice, provided by the borrower must be in the form of Schedules 1 or 1A or where provided by a borrower/trustee in the form of Schedule 1B.

28.6.2 Any Statutory Declaration, in evidence of independent advice, provided by a guarantor must be in the form of Schedules 2 or 2A.

28.6.3 A solicitor (e.g. a solicitor acting for the lender) must not aid, abet, counsel or procure any other solicitor to tender evidence otherwise than in conformity with this Rule.

28.6.4 Where an interpreter is present at the conference when a signatory is advised by a solicitor instructed independently of the lender, the name of the interpreter must be included in the Statutory Declaration, and the interpreter must be asked to complete a certificate in the form of Schedule 3 before the conference is concluded.

28.7 Acknowledgment by Signatory

28.7.1 The solicitor giving the independent advice must obtain an acknowledgment, in the form set out in Schedules 4 or 4A (or in the case of a borrower/trustee Schedule 4B or 4C) below for retention on the solicitor's file (not to be sent to the lender or the lender's solicitor) together with a copy of the Statutory Declaration and a comprehensive list of the loan and security documents.

28.8 Consent by Signatory to Advice

28.8.1 If the solicitor is aware of a possible conflict of interest between the parties to the transaction, the solicitor must, before advising more than one of such parties, obtain the informed consent of each such party in writing in the form of Schedule 5 before such advice is given.

Schedule 1 to Rule 28: Declaration by Borrower

I, _____(declarant)
of _____

DO SOLEMNLY AND SINCERELY DECLARE AS FOLLOWS:

1. I am the borrower named in certain loan and security documents in favour
of _____(lender)

relating to property located at

2. I have received independent legal advice regarding the loan and security documents
referred to in paragraph 1.

3. After receiving that advice I have freely and voluntarily signed the following
documents:
(Specify the documents produced for signature)

(a) _____

(b) _____

(c) _____

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the contents to be
true and by virtue of the *Oaths, Affidavits and Statutory Declarations Act 2005*.

MADE AND SUBSCRIBED by) _____

the said Declarant at) _____

the _____ day of

_____ 20..

(Signatory)

Before me: _____

Schedule 1A to Rule 28: Declaration by Borrower (Corporation)

I, _____(declarant)

of, _____

DO SOLEMNLY AND SINCERELY DECLARE AS FOLLOWS:

1. I am

- an officer of the borrower
- a person involved in the management of the borrower

(delete inapplicable reference)

named in certain loan and security documents in favour of _____(lender)

relating to property located at _____

2. I have received independent legal advice regarding the loan and security documents referred to in paragraph 1.

3. After receiving that advice as

- an officer of the borrower
- a person involved in the management of the borrower

(delete inapplicable reference)

the borrower has signed the following documents:
(Specify the documents produced for signature)

(a) _____

(b) _____

(c) _____

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the contents to be true and by virtue of the *Oaths, Affidavits and Statutory Declarations Act 2005*.

MADE AND SUBSCRIBED by) _____

the said Declarant at) _____

the _____ day of

_____ 20..

(Signatory)

Before me: _____

Schedule 1B to Rule 28: Declaration by Borrower/Trustee

I, _____ (declarant)

of, _____

DO SOLEMNLY AND SINCERELY DECLARE AS FOLLOWS:

1. I am

- the borrower
- an officer of the borrower
- a person involved in the management of the borrower

(delete inapplicable reference)

named in certain loan and security documents in favour of _____ (lender) relating to _____ property located at _____

being property vested in me/the borrower as duly appointed Trustee* of the _____ Trust pursuant to a duly constituted and subsisting Deed of Trust dated _____ or* as duly appointed Trustee of the Estate of _____ to whom a Grant of Probate/Letters of Administration* was made on _____

* Delete words that do not apply.

2. I have received independent legal advice regarding the loan and security documents referred to in paragraph 1 which I declare that I am/the borrower is legally entitled and authorised to execute as Trustee under such Trust/Grant of Probate/Letters of Administration and pursuant to the provisions of the *Trustees Act 1962*.

*Delete words that do not apply.

3. After receiving that advice I have/the borrower has freely and voluntarily signed the following documents:

(Specify the documents produced for signature)

(a) _____

(b) _____

(c) _____

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the contents to be true and by virtue of the *Oaths, Affidavits and Statutory Declarations Act 2005*.

MADE AND SUBSCRIBED by _____

the said Declarant at _____

the _____ day of _____ 20..

Before me:

Schedule 2 to Rule 28: Declaration by Third Party Mortgagor, Guarantor, Surety Mortgagor or Indemnifier for the Borrower

I, _____ (declarant)

of, _____

DO SOLEMNLY AND SINCERELY DECLARE AS FOLLOWS:

1. I am the Third Party Mortgagor, Guarantor, Surety Mortgagor, Indemnifier for the Borrower (delete inapplicable reference) named in certain loan and security documents

between _____ (borrower)

and _____ (lender)

relating to property located at _____

2. I have received independent legal advice regarding the loan and security documents referred to in paragraph 1.

3. After receiving that advice I have freely and voluntarily signed the following documents: (Specify the documents produced for signature)

(a) _____

(b) _____

(c) _____

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the contents to be true and by virtue of the *Oaths, Affidavits and Statutory Declarations Act 2005*.

MADE AND SUBSCRIBED by _____

the said Declarant at _____

the _____ day of

_____ 20..

(Signatory)

Before me: _____

Schedule 2A to Rule 28: Declaration by Third Party Mortgagor, Guarantor, Surety Mortgagor or Indemnifier for the Borrower (Corporation)

I, _____(declarant)

of, _____

DO SOLEMNLY AND SINCERELY DECLARE AS FOLLOWS:

1. I am
 - an officer of, or
 - a person involved in the management of
 - ◇ the Third Party Mortgagor
 - ◇ the Surety Mortgagor
 - ◇ the Indemnifier for the Borrower
 - ◇ the Guarantor

(delete inapplicable reference) named in certain loan and security documents

between _____(borrower)

and _____(lender)

relating to property located

at _____

2. I have received independent legal advice regarding the loan and security documents referred to in paragraph 1.

3. After receiving that advice I have freely and voluntarily signed the following documents:

(Specify the documents produced for signature)

(a) _____

(b) _____

(c) _____

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the contents to be true and by virtue of the *Oaths, Affidavits and Statutory Declarations Act 2005*.

MADE AND SUBSCRIBED by _____

the said Declarant at _____

the _____ day of

_____ 20..

(Signatory)

Before me:

Schedule 3 to Rule 28: Interpreter's Certificate

1. This Certificate is provided by:

Name: _____

Address: _____

Occupation: _____

2. On the _____ day of _____ 20..,

I attended a conference at the office of

_____ ("the Solicitor")

at _____

3. Present at the conference were

_____ (the borrower/guarantor*)

and _____

The duration of the conference was _____

4. I spoke to the borrower/guarantor*

in the _____ language

and I established that is his/her customary language.

5. I am fluent in the English language and in the

_____ language

and I am competent to translate between both those languages.

6. During the conference and before any documents were signed, I translated all statements made by the solicitor and _____

from the English language to the

_____ language

and I translated all statements made by the borrower/guarantor* from the _____ language

to the English language.

7. I am not related to the borrower/guarantor*.

8. Other than payment for my professional service I receive no financial benefit from the transaction to which the documents relate.

*Delete word that does not apply.

DATE: _____

SIGNED: _____

(Signatory)

Schedule 4 to Rule 28 Part 1: Acknowledgment of Legal Advice by Proposed Borrower

I, _____(signatory)
acknowledge that,

1. I have instructed
_____(name of Solicitor)
(my solicitor) to give me legal advice concerning the
following loan and security documents:

(i) Loan agreement/offer of loan
between _____(the lender)

and _____(the borrower)

(ii) Mortgage over property situated
at _____

(iii) Memorandum registered number _____

(iv) Charge over _____

(v) Other _____
(the loan documents)

2. I produced to my solicitor the following evidence as to my identity:

- (a) Passport
- (b) Driving Licence
- (c) Medicare Card
- (d) Credit Card
- (e) Rate Notice
- (f) Other

3. The advice given to me by my solicitor included that:

- (a) by signing the loan documents I will be liable for regular payments of interest and repayment of the amount of the loan at the due date;
- (b) if I fail to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;
- (c) if I fail to comply with any of the terms and conditions of the loan documents including the obligations to pay principal or interest,

- the lender can sue me personally; and
 - the lender may take possession of my property; and
 - after notice, sell my property to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and
 - if the proceeds of the sale of my property are insufficient to satisfy the debt to the lender, the lender can sue me for the deficit; and
- (d) the additional obligations, rights and remedies set out in the loan documents if the Consumer Credit (Western Australia) Code applies;
- (e) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an oath which can be relied upon by the lender.
4. Generally, in relation to the proposed transaction my solicitor advised me that:
- he/she does not profess any qualification to give financial (as distinct from legal) advice; and
 - if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before signing the documents.
5. After receiving the above advice I freely and voluntarily signed the loan documents.

DATE: _____

SIGNED: _____
(Signatory)

Schedule 4 to Rule 28 Part 2: Acknowledgment of Legal Advice by Proposed Guarantor

I, _____ (signatory)
acknowledge that,

1. I have instructed
_____ (name of Solicitor)

(my solicitor) to give me legal advice concerning the
following loan and security documents:

(i) Loan agreement/offer of loan
between _____ (the lender)
and _____ the borrower

(ii) Mortgage over property situated
at _____

(iii) Memorandum registered number _____

(iv) Charge over _____

(v) Other _____
(the loan documents)

2. I produced to my solicitor the following evidence as to my identity:

- (a) Passport
- (b) Driving Licence
- (c) Medicare Card
- (d) Credit Card
- (e) Rate Notice
- (f) Other

3. The advice given to me by my solicitor included that:

- (a) if the borrower fails to make any payment on time, I as the guarantor will be liable to remedy that failure, and that could involve me in payment to the lender of all amounts owed by the borrower to the lender including principal, interest, default interest and the lender's costs of rectifying the default;
- (b) if as the guarantor I fail to remedy any failure by the borrower to comply with the terms and conditions of the loan in any way, including the obligation to pay principal, interest, default interest, or other charges,

- the lender can sue me personally; and
 - can take possession of my property secured to the lender and sell it to recover the amount owing together with interest and other costs, including solicitor’s costs, the costs of selling the property and the costs of maintaining the property; and
 - if the proceeds of sale from my property are insufficient to satisfy the debt to the lender, the lender can sue me for the deficit;
- (c) my liability under the loan documents can be increased (set out the facts regarding the extent of the possible increase, and of any restriction or limitation of the guarantor’s rights or obligations in relation to the security and any other party to the documents);
- (d) the lender can exercise its rights against me as the guarantor even if it has not pursued the borrower;
- (e) my liability under the loan documents is (eg limited to a specified sum, or is unlimited (whichever is the case) and may be affected by cross guarantees; and
- (f) the additional obligations, rights and remedies set out in the loan documents if the Consumer Credit (Western Australia) Code applies;
- (g) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an oath which can be relied upon by the lender.
4. Generally, in relation to the proposed transaction my solicitor advised me that:
- he/she does not profess any qualification to give financial (as distinct from legal) advice; and
 - if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before signing the documents.
5. After receiving the above advice I freely and voluntarily signed the loan documents.

DATE: _____

SIGNED: _____
(Signatory)

Schedule 4A to Rule 28 Part 1: Acknowledgment of Legal Advice by Proposed Borrower (Corporation)

I, _____(signatory)

acknowledge that,

1. I am

- an officer of the borrower
- a person involved in the management of the borrower

and have instructed

_____ (name of Solicitor)

(my solicitor) to give me legal advice concerning the following loan and security documents:

(i) Loan _____ agreement/offer _____ of _____ loan
between _____ (the lender)

and _____ (the borrower)

(ii) Mortgage over property situated
at _____

(iii) Memorandum registered number _____

(iv) Charge over _____

(v) Other _____
(the loan documents)

2. I produced to my solicitor the following evidence as to my identity:

- (a) Passport
- (b) Driving Licence
- (c) Medicare Card
- (d) Credit Card
- (e) Rate Notice
- (f) Other

3. The advice given to me by my solicitor included that:

(a) by signing the loan documents the borrower will be liable for regular payments of interest and repayment of the amount of the loan at the due date;

(b) if the borrower fails to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;

- (c) if the borrower fails to comply with any of the terms and conditions of the loan documents including the obligations to pay principal or interest,
- the lender can sue the borrower personally; and
 - the lender may take possession of the borrower’s property; and
 - after notice, sell the borrower’s property to recover the amount owing together with interest and other costs including solicitor’s costs, the costs of selling the property and the costs of maintaining the property; and
 - if the proceeds of the sale of the borrower’s property are insufficient to satisfy the debt to the lender, the lender can sue the borrower for the deficit; and
- (d) the additional obligations, rights and remedies set out in the loan documents, if the Consumer Credit (Western Australia) Code applies.
- (e) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an oath which can be relied upon by the lender.

4. Generally, in relation to the proposed transaction my solicitor advised me that:
- he/she does not profess any qualification to give financial (as distinct from legal) advice; and
 - if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before signing the documents.

5. After receiving the above advice I freely and voluntarily signed the loan documents.

DATE: _____

SIGNED: _____
(Signatory)

Schedule 4A to Rule 28 Part 2: Acknowledgment of Legal Advice by Proposed Guarantor (Corporation)

I, _____ (signatory)
acknowledge that,

1. I am:

- an officer of the guarantor
- a person involved in the management of the guarantor

2. I have instructed

_____ (name of Solicitor)

(my solicitor) to give me legal advice concerning the following loan and security documents:

(i) Loan _____ agreement/offer _____ of _____ loan
between _____ (the lender)
and _____ (the borrower)

(ii) Mortgage _____ over _____ property _____ situated
at _____

(iii) Memorandum registered number _____

(iv) Charge over _____

(v) Other _____
(the loan documents)

3. I produced to my solicitor the following evidence as to my identity:

- (a) Passport
- (b) Driving Licence
- (c) Medicare Card
- (d) Credit Card
- (e) Rate Notice
- (f) Other

4. The advice given to me by my solicitor included that:
- (a) if the borrower fails to make any payment on time, the guarantor will be liable to remedy that failure, and that could involve payment by the guarantor to the lender of all amounts owed by the borrower to the lender including principal, interest, default interest and the lender's costs of rectifying the default;
 - (b) if the guarantor fails to remedy any failure by the borrower to comply with the terms and conditions of the loan in any way, including the obligation to pay principal, interest, default interest, or other charges,
 - the lender can sue the guarantor; and
 - can take possession of the guarantor's property secured to the lender and sell it to recover the amount owing together with interest and other costs, including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and
 - if the proceeds of sale from the guarantor's property are insufficient to satisfy the debt to the lender, the lender can sue the guarantor for the deficit;
 - (c) the guarantor's liability under the loan documents can be increased (set out the facts regarding the extent of the possible increase, and of any restriction or limitation of the guarantor's rights or obligations in relation to the security and any other party to the documents);
 - (d) the lender can exercise its rights against the guarantor even if it has not pursued the borrower;
 - (e) the guarantor's liability under the loan documents is (eg limited to a specified sum, or is unlimited (whichever is the case) and may be affected by cross guarantees; and
 - (f) the additional obligations, rights and remedies set out in the loan documents if the Consumer Credit (Western Australia) Code applies;
 - (g) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an oath which can be relied upon by the lender.

5. Generally, in relation to the proposed transaction my solicitor advised me that:
 - he/she does not profess any qualification to give financial (as distinct from legal) advice; and
 - if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before signing the documents.

6. After receiving the above advice I freely and voluntarily signed the loan documents.

DATE: _____

SIGNED: _____
(Signatory)

Schedule 4B to Rule 28 Part 1: Acknowledgment of Legal Advice by Proposed Borrower/Trustee

I, _____ (signatory)

acknowledge that, as duly appointed Trustee*

of the _____ Trust,

pursuant to a duly constituted and subsisting Deed of Trust

dated _____ or * as duly appointed Trustee

of the Estate of _____

to whom a grant of Probate/Letters of Administration was made on

* Delete words that do not apply

1. I have instructed _____ (name of Solicitor)

(my solicitor) to give me legal advice concerning the following

loan and security documents:

(i) Loan agreement/Offer of loan between _____

(the lender) and the borrower

(ii) Mortgage over trust property situated at _____

(iii) Memorandum registered number

(iv) Charge over

(v) Other (the loan documents)

2. I produced to my solicitor the following evidence as to my

identity and legal authority as Trustee:

(a) Passport

(b) Driving Licence

(c) Medicare Card

(d) Credit Card

(e) Rate Notice

(f) Deed of Trust or Grant of Probate/Letters of Administration*

dated _____

(g) Other _____

* Delete words that do not apply.

3. The advice given to me by my solicitor included that:

(a) As Trustee I have a duty to the beneficiaries of

the _____ trust/estate

of _____ under

the *Trustees Act 1962* and under the Trust/Will/Estate

of _____

* Delete words that do not apply.

Provided that there are no unsatisfied claims by the said beneficiaries or litigation concerning their interests affecting the said trust/estate, and subject to the powers and authorities contained in the said trust instrument/Will of the deceased, I am as Trustee legally empowered to enter into such loan/security documents on behalf of and for the benefit of the beneficiaries of the _____

Trust/Will/Estate* of _____

(c) by signing the loan documents I will be liable for regular payments of interest and repayment of the amount of the loan at the due date;

(d) if I fail to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;

(e) if I fail to comply with any of the terms and conditions of the loan documents including the obligations to pay principal or interest, the lender can sue me personally; and the lender may take possession of the trust property; and after notice, sell the trust property to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the property; and if the proceeds of the sale of the trust property are insufficient to satisfy the debt to the lender, the lender can sue me for the deficit; and regarding

(f) the additional obligations, rights and remedies set out in the loan documents if the Consumer Credit (Western Australia) Code applies; and that

(g) I owe a professional duty of care as a trustee towards the persons entitled as beneficiaries under such Deed of Trust/Grant of Probate/Letters of Administration*; and that

(h) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an oath which can be relied upon by the lender.

* Delete words that do not apply

4. Generally, in relation to the proposed transaction my solicitor advised me that:

he/she does not profess any qualification to give financial (as distinct from legal) advice; and if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before signing the documents.

5. After receiving the above advice I freely and voluntarily signed the loan documents.

DATED: _____

SIGNED: _____

Schedule 4C to Rule 28: Acknowledgment of Legal Advice by Proposed Borrower/Trustee (Corporation)

I, _____ (signatory)

acknowledge that, as

- an officer of
- a person involved in the management of the

duly appointed Trustee*

of the _____ Trust, pursuant to a
duly constituted and subsisting Deed of Trust
dated _____ or * as

- an officer of
- a person involved in the management of the

duly appointed Trustee

of the Estate of _____

to whom a grant of Probate/Letters of Administration was made on

* Delete words that do not apply

1. I have instructed _____ (name of Solicitor)
(my solicitor) to give me legal advice concerning the following loan and
security documents:

(i) Loan agreement/Offer of loan between _____
(the lender) and the borrower

(ii) Mortgage over trust property situated at _____

(iii) Memorandum registered number

(iv) Charge over

(v) Other(the loan documents)

2. I produced to my solicitor the following evidence as to my identity and legal
authority as:

- officer of the Trustee
- person involved in the management of the Trustee

- (a) Passport
- (b) Driving Licence
- (c) Medicare Card
- (d) Credit Card
- (e) Rate Notice
- (f) Deed of Trust or Grant of Probate/Letters of Administration* dated _____

(g) Other

* Delete words that do not apply.

3. The advice given to me by my solicitor included that:

(a) The Trustee has a duty to the beneficiaries of the _____ trust/estate of _____ under the *Trustees Act 1962* and under the Trust/Will/Estate of _____

* Delete words that do not apply.

(b) Provided that there are no unsatisfied claims by the said beneficiaries or litigation concerning their interests affecting the said trust/estate, and subject to the powers and authorities contained in the said trust instrument/Will of the deceased, the Trustee is legally empowered to enter into such loan/security documents on behalf of and for the benefit of the beneficiaries of the _____ Trust/Will/Estate* of _____

(c) by signing the loan documents the Trustee will be liable for regular payments of interest and repayment of the amount of the loan at the due date;

(d) if the Trustee fails to make any payment on time, the lender can charge a higher rate of interest, and the lender's costs of rectifying that failure;

(e) if the Trustee fails to comply with any of the terms and conditions of the loan documents including the obligations to pay principal or interest, the lender can sue the Trustee; and the lender may take possession of the trust property; and after notice, sell the trust property to recover the amount owing together with interest and other costs including solicitor's costs, the costs of selling the property and the costs of maintaining the

property; and if the proceeds of the sale of the trust property are insufficient to satisfy the debt to the lender, the lender can sue the Trustee for the deficit; and regarding

- (f) the additional obligations, rights and remedies set out in the loan documents if the Consumer Credit (Western Australia) Code applies; and that
- (g) The Trustee owes a professional duty of care as a trustee towards the persons entitled as beneficiaries under such Deed of Trust/Grant of Probate/Letters of Administration*; and that
- (h) by making a Statutory Declaration verifying the giving of the advice I am making a statement having the force of an oath which can be relied upon by the lender.

* Delete words that do not apply

- 4. Generally, in relation to the proposed transaction my solicitor advised me that:

he/she does not profess any qualification to give financial (as distinct from legal) advice; and

if I have any questions about any financial aspect of the transaction or the documents, I should consult an accountant or other financial counsellor of my choice before signing the documents.
- 5. After receiving the above advice I freely and voluntarily signed the loan documents.

DATED: _____

SIGNED: _____

Schedule 5 to Rule 28: Consent by *Borrower/Trustee/Guarantor to Legal Advice

I, _____(Signatory)

acknowledge that

Mr/Ms _____(name of solicitor)

(my solicitor) has been requested to advise me regarding certain loan or security documents between

_____ (borrower/trustee)

and _____(lender)

relating to property located at _____

*in company with my co-borrower(s), sureties or co-guarantors,

namely _____

and _____

* Delete words that do not apply

1. My Solicitor has informed me, before giving such advice:

- that where the interests of the parties to the transaction may conflict the solicitor may only act for more than one such party provided he/she has obtained the informed consent in writing of those parties to the solicitor acting for them,
- such consent being given in the knowledge that there is or may be a conflict between the parties, and as a result
- that the solicitor may be disabled from disclosing to each party the full knowledge which he/she possesses as to the transaction, or
- that the solicitor may be disabled from giving advice to one party which is contrary to or conflicts with the interests of the other or others.

I hereby confirm my consent to the solicitor advising me together with the abovenamed other parties to the transaction notwithstanding the possible conflict between the interests of the parties to the transaction.

Dated this _____ day of _____ 20..

Signed _____

SCHEDULE 1

Independence - connection with client

The following are examples of the application of the first limb of rule 10.1 of these Rules.

(1) Membership of or connection with various bodies

(a) Members of Parliament

A practitioner who is a Member of Parliament shall not appear as counsel before a Committee of Parliament, in the practitioner's professional capacity.

(b) Local Authorities

A practitioner who is a member of a local authority shall not appear as counsel in any case where the affairs of the local authority are likely to arise.

(c) Companies

A practitioner who is a director or the secretary of any public company shall not appear as counsel for or against the company.

A practitioner who has been but has ceased to be a director or the secretary of any public company shall not appear as counsel, whether for the company or any other person, in any matter connected with or arising out of affairs relating to a company which were current while the practitioner was a director or the secretary of that company.

(2) Deputations

Counsel who accept a brief to speak for a deputation shall make it clear at the outset of proceedings that he or she is appearing as counsel and not as a member of the deputation and the counsel shall abide by the decision of the authority receiving the deputation as to whether or not he or she can be heard as counsel.

(3) Legal Aid scheme

Counsel shall not appear against an assisted person to whom legal aid has been granted or denied by a Legal Aid Committee of which the counsel is a participating member.

SCHEDULE 2

Independence - connection with court

The following are examples of the application of the second limb of rule 10.1 of these Rules.

(1) **Justice of the Peace**

Counsel who is a Justice of the Peace shall avoid any risk of a clash between their duties as a Justice and duties as Counsel. Counsel shall refrain from any professional activities which might create in the minds of members of the public confusion between their position as Counsel and their position as a Justice or suspicion that influence or favour in their practice may be derived from their official position.

(2) **Arbitration**

Counsel who has acted in an arbitration for the Arbitrator either in advising the arbitrator on points of law arising during the arbitration or on the form of the award, shall not advise or appear for one of the parties in the arbitration in any proceedings relating to the arbitration or the award.

(3) **Appearance before relatives**

Counsel shall not habitually practise in any Court of which one of their parents or a near relative is the sole judicial officer; but there is no objection to Counsel participating in a court where a parent or near relative is one of several judicial officers.

SCHEDULE 3

Guidelines for the advertising of legal services

Advertising is one important way that consumers find out about goods and services that they may wish to purchase or use. Information provided in an advertisement can assist consumers to make the most appropriate purchasing decision.

The Australian legal services sector, like many other sections of the economy, underwent important and far-reaching reforms in the 1990's. Part of those reforms meant that restrictions on the ability of lawyers and other providers of legal services to advertise their services were significantly relaxed. Recently, there has been a concern that advertising has fostered an excessive level of litigation, particularly in relation to personal injuries claims. As a result, the West Australian Parliament has imposed restrictions on advertising in relation to claims for damages or compensation for personal injury.

Subject to the restrictions in relation to personal injuries claims, lawyers and other providers of legal services in most parts of Australia are now able to advertise in much the same way as other providers of goods or services, either in their own capacity or through an agency arrangement. At the time that the prohibition on advertising was removed throughout Australia, the Federal government, in consultation with representatives of the Law Council of Australia, State and Territory Justice and Attorneys-General departments, the Consumers Federation of Australia and the Australian Consumers Association, produced guidelines to ensure that the transition to consumer orientated advertising was made smoothly and with a minimum of harm to consumers. A public consultation process sought comment on those guidelines.

The primary purpose of the guidelines was to assist lawyers and other legal service providers. The guidelines were, however, framed broadly enough to have relevance for other organisations and individuals with an interest in the advertising of legal services.

The guidelines sought to achieve three objectives.

First, the guidelines aimed to assist lawyers and other providers of legal services to frame advertisements that best met the needs of consumers and to avoid any charge of being misleading and deceptive.

Second, the guidelines recognised that advertising for lawyers should be closely risk managed to take account of the prospective audience.

Third, the guidelines were aimed at assisting consumers to better understand advertisements for legal services by encouraging advertisers to place advertisements comprising clear and understandable information upon which consumers could base purchasing decisions.

From January 2003 sections 17 and 18 of the *Civil Liability Act 2002* came into operation.

These guidelines do not have the force of law. Where doubt arises about the misleading and deceptive nature of an advertisement or about what is permitted

under the *Civil Liability Act 2002*, expert advice should be sought before the advertisement is published.

These guidelines aim to foster the publication and broadcast of advertising for legal services to the extent permitted by law that:

- is informative;
- is fair;
- has regard to the knowledge level of the target audience;
- contains information which discourages misinterpretation; and
- is advantageous to both consumers and legal service providers.

Qualifications of legal service providers

1. Can any persons describe themselves as a lawyer in an advertisement?

No. To practise as a lawyer, persons must be qualified to do so and permitted to call themselves a lawyer (barrister and/or solicitor) by law. Non-lawyers are not permitted to hold themselves out as lawyers and it would be misleading for them to do so.

In some States and Territories, only lawyers can carry out legal work. In other States and Territories, non-lawyers are able to carry out some legal work such as conveyancing and other routine legal transactions.

Consumers specifically seeking the services of a barrister or a solicitor, and who are unsure about the qualifications of the person advertising, may seek clarification from the person advertising or, in Western Australia from the Legal Practice Board, and in other States or Territories from the Law Society or Bar Association.

2. What is the difference between a lawyer and a non-lawyer?

A lawyer is a person who has completed a necessary course of study and has been admitted to practise as a lawyer by a court. Technically, a lawyer is “admitted” as an officer of a court (usually the Supreme Court of a State or Territory or the High Court of Australia) and, as such, owes particular duties to the court as well as to clients. Appearance in court on behalf of clients, particularly higher courts, is work that generally is specifically reserved to lawyers by law.

Lawyers do, however, carry out a diverse range of other tasks connected with the provision of legal advice and legal services.

A non-lawyer providing legal services is usually a person who does not possess the qualifications that are required for formal admission as a lawyer. However, non-lawyers may possess particular qualifications relevant to their field of practice.

Non-lawyers should also be encouraged to give full details of professional memberships rather than using initials only, as few consumers would know what initials actually signify.

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

In simple terms, 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.

Expertise

4. **Can lawyers or other providers of legal services describe themselves as experts?**

The use of the term “expert” is an area of potential risk for advertisers of legal services as it is difficult to define strictly and can mean different things to different people. As long as such a claim is well founded, there is usually no problem with lawyers or other persons advertising themselves as experts. In simple terms, best practice in this area would dictate that lawyers and other legal service providers should not claim in advertisements to have any capabilities that they do not in fact have.

5. **Is it plausible to claim expertise in all areas of the law?**

Probably not. Although conceivable, it would be difficult for any law firm (or other legal service provider) to claim comprehensive knowledge and practice in absolutely every area of the law. The law is simply too big and complex.

Consequently, there may be circumstances where advertising expertise in “all areas of the law” could be misleading, particularly when an objective assessment of the firm’s or the individual’s expertise does not support such a claim.

Where doubt arises, it would be preferable for advertisements to accurately reflect the nature of the expertise held by referring to a list of those topics most commonly, or most capably, handled by a particular legal service provider.

Care should also be taken to ensure that an advertisement does not create an unrealistic expectation of the capacity of a given lawyer or legal service provider to accept and pursue a matter.

Specialisation

6. **How should the term “specialist” be handled in an advertisement?**

Misuse of the term “specialist” is another area of risk for advertisers of legal services. Like the term “expert”, the term “specialist” can be different things to different people. Consumers may construe this term in its broadest sense, as implying expertise, as opposed to a preferred area of practice. In some States and Territories there are no specific restrictions on the use of the term “specialist”.

In some States and Territories, lawyers can call themselves specialists on the basis of a particular experience. In other States and Territories, lawyers are permitted to call themselves specialists only after completing special programs of study and obtaining particular experience. Further, in some States and Territories, lawyers who meet these requirements are recognised as “accredited specialists”. In Western Australia, accreditation is given only to practitioners in the area of family law.

In all jurisdictions claims of being a specialist should not be misrepresented in an advertisement. Any claim to specialisation should be genuine. Further, claims of membership of professional associations should not be fictitious.

Representation of rates of prior success

7. **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 are likely to be misleading and deceptive and should be avoided.

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 chance of success with disclaimers and qualifications.

At the same time, 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.

However, in relation to personal injury claims, section 17 of the *Civil Liability Act 2002* does not permit a lawyer or a person acting for a lawyer:

“to publish or cause to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person –

- *to make a claim under any Act or law for compensation or damages for a personal injury; or*
- *to use the services of the legal practitioner, or another named legal practitioner or a named firm of legal practitioners in connection with the making of a claim mentioned in paragraph (a), except if section 18 allows publication of the statement”.*

Section 18(1):

“allows a statement that includes the name of the lawyer or firm of lawyers, contact details and any area of practice, speciality or accreditation to be advertised.

Expectations of results in a legal matter

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

Yes. It is potentially misleading to advertise in terms of “win” or “loss”. The use in advertising of terms such as “win” or “loss” should be handled carefully to ensure that it does not create the impression that the result of any given case is a foregone conclusion. What is considered a win by one person, may not necessarily be the same to the next person. Many cases are settled out of court and such settlements are difficult to classify as either a win or loss.

In many instances the outcome of a case is complex and not easily expressed in simple win or loss terms, particularly in an advertisement. For instance, 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.

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

Comparative advertising

9. 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 its 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:

- (i) be accurate;
- (ii) disclose any basis for the comparison;
- (iii) only compare like with like; and
- (iv) make claims that will be current for the life of the advertisement (eg. 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.

Fee Advertising

10. 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.

Insofar as an advertisement can be placed in relation to practising in personal injuries, no mention should be made of the cost of legal services.

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

On the face of it, these expressions appear to refer to those circumstances where lawyers or other legal service providers agree to waive their professional fees in the event that legal action is unsuccessful. There does not appear to be an obvious distinction between the two terms and in practise they are often used interchangeably.

For consumers, however, these expressions could have the affect of implying that a legal transaction is entirely free of charge. This is almost never the case because there are often disbursements and other costs that are payable by the consumer even in the event of a win. If a case is lost, the costs to the consumer may be even higher, with the possibility of the losing party being saddled with the other party's costs. Care should be taken to ensure that fees that could be payable regardless of the outcome of a case (in particular the possibility of liability for disbursements and the other party's costs) are clearly disclosed in advertisements that use the terms “No Win - No Fee” and “No Win - No Pay” or similar terms.

Insofar as an advertisement can be placed in relation to practising in personal injuries, no advertisement should make mention of “No Win - No Fee” and “No Win - No Pay”.

Testimonials and endorsements

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

The answer to this question lies in the amount of trust an individual is willing to place in a testimonial or endorsement in an advertisement.

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, and in the case of advertising, usually by a celebrity.

Accurate and credible testimonials or endorsements can be useful advertising tools. However, the use of testimonials or endorsements does come with a certain amount of risk for advertisers and great care should be taken with their use.

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 text of legitimate clients is manipulated, when the claim itself is not legitimate, and/or where someone is falsely attributed as having used the service in question.

Other guidelines in this document 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.

Identification of advertisements

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

An advertisement will ultimately 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.

Methods of publication of advertisements

14. 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.

Referral agents

15. Does the advertisement 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.

Rule 17.2 of these Rules does not permit practitioners, in the course of practice, to give an allowance in the nature of an introduction fee or spotter's fee to any person for introducing professional business to them and shall not receive or agree to receive a similar allowance from any person for introducing or recommending clients to that person.

Misleading and deceptive advertisements

16. 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 *Trade Practices Act 1974* or a State or Territory *Fair Trading Act* can be subject to heavy 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.

17. 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.

Further Information

18. **Where can I obtain further information or advice?**

Further information about the advertising of legal services can be obtained from the Law Society or Australian Competition and Consumer Commission office in your State and Territory.

SCHEDULE 4

Guidelines - leaving firms and contacting clients

The Society, through its Ethics Committee, has considered the issue of solicitors, both partners and employees, leaving firms, and the manner in which their departure should be communicated to clients of the firm for whom the solicitor was acting while a partner or employee.

Issues to consider

The Committee believes, that in all cases, the primary consideration must be the interests of the client. It must also be appreciated that the clients are the clients of the firm and that the firm has the right to retain them. In addition, regard must be had to the duties which the departing solicitor owes the firm. The clients must not be misled by any suggestion that they have an obligation to follow the departing solicitor, or that they have an obligation to stay with the firm.

In most cases, it is in the interests of all parties involved (the firm, the departing solicitor and the clients) that the clients be told the solicitor is leaving, that the firm will continue to act for them and that a nominated person will be responsible for the client's matter.

Ideally, the issue of communication to clients of a solicitor's departure should be something agreed upon at the time the solicitor is admitted to partnership or commences employment with the firm. However, if agreement is not reached at that time, it is imperative that when solicitors announce to the firm their intention to leave, discussions take place as to the method of communication with clients.

When a departure becomes acrimonious, most firms would take the view that the departing solicitor should make no contact with the clients and the firm should deal with all communications. However, this can create confusion for some clients and might be unfair to the departing solicitor. Notwithstanding, the Committee believes, in such circumstances, the firm has the right to take any action it deems to be appropriate to prevent solicitors from communicating to the firm's clients their intention to leave or the fact of their departure. For example, there may be situations where the firm believes the solicitor has acted improperly and as a consequence no contact with clients should be made.

Unless there has been agreement between the solicitor and the firm, the solicitor should not remove lists of clients' names and addresses. The firm should ensure that the solicitor acknowledges an obligation to respect the confidentiality of the information gained while in the employ of the firm. Any undertaking a solicitor has given not to contact clients of the firm in the course of leaving should be strictly honoured. Even if there is no such undertaking, the departing solicitor, while remaining with the firm, must not solicit the firm's clients with a view to persuading the clients to leave the firm.

The appropriate procedure

In summary, the Committee suggests that the following matters be borne in mind when a solicitor is departing a firm.

- The solicitor departing must ensure the firm is the first party to be advised of the proposed departure.
- The firm is entitled to meet with and/or write to clients (and should do so) informing them of the departure and the new arrangements for conduct of their matters.
- If any client expresses a wish to transfer instructions from the firm to the departing solicitor then the transfer of files should be facilitated by the firm subject to the usual conditions concerning payment of the firm's fees and disbursements. It is essential that the clients be protected from any acrimony which may exist between the firm and the departing solicitor.
- Employed solicitors owe various fiduciary duties to the firm. Both employed solicitors and partners may be under various contractual obligations to the firm. Care should be taken that departing solicitors do not mislead clients into believing they have an obligation to instruct them. Nor should they undermine existing solicitor/client relationships between the firm and its clients.
- Departing solicitors should ensure that the rules relating to confidentiality are strictly adhered to.

The following is a sample letter which can be used by firms to inform clients when solicitors leave:

SAMPLE LETTER

Dear (Name of client)

(Name of solicitor) who has been handling your matter(s) has resigned from this firm/has given notice of intention to retire as a partner of this firm to (provide details of future practise eg. practise on his/her own account, commence employment with another firm, become a partner of another firm).

(Name of solicitor) will leave this firm on (date).

We can assure you that (name of solicitor) departure will make no difference to the level of service which you receive from this firm. We value you as a client and assure you we will continue to provide you with legal services while you remain our client.

Prior to his/her departure, (name of solicitor) will pass conduct of your matter(s) to (name of new solicitor). (There could be included some details of the nature of the practice and experience of the new solicitor). While it may take (name of new solicitor) some short time to familiarise himself/herself with the matter, we can assure you that you will not be charged for the time spent on that familiarisation.

We look forward to our continuing relationship on this new basis.

Yours sincerely

SCHEDULE 5

Equality of opportunity model briefing policy

A lawyer in Western Australia “*shall not discriminate against any practitioner by reason of the colour, race, ethnic or national origins, gender, sexual orientation, marital status, physical impairment or religious beliefs of that other practitioner.*” (Professional Conduct Rule 20.5).

Discriminatory briefing practices limit choices for lawyers and their clients, preclude lawyers from using the full resources of the Bar, and may cause lawyers to miss opportunities for engaging the most suitable barrister in a particular manner.

Discriminatory briefing practices limit opportunities for barristers, particularly for women in the legal profession, and unfairly impede the progress of women and other barristers in the law, the judiciary, and the wider community.

1. All barristers should be selected for their skills and competence independently of their gender or other arbitrary or prejudicial factors.
2. If there are two equally meritorious barristers available for a brief, the person responsible for selecting the barrister should ensure that arbitrary and prejudicial factors do not operate to exclude the engagement of the barrister; for example, that a female barrister is not briefed solely because of her gender.
3. Lawyers are encouraged to become familiar with the Directory at the Western Australian Bar, which is available on the Internet at www.wabar.asn.au. The Directory contains information about barristers, including an indication of those areas of practice in which they would wish to work. The directory provides a reliable resource for those wishing to brief barristers.
4. Lawyers should avoid stereotypical assumptions about the capacities and aptitude of barristers by reference to gender or any other arbitrary or prejudicial factor.
5. Lawyers are encouraged to identify the particular skills required of counsel, regardless of gender or any other arbitrary or prejudicial factor.
6. If a briefing firm relies upon a list of preferred barristers circulated throughout the firm, the firm is encouraged to regularly review the list. In reviewing the list and in briefing barristers, firms are encouraged to recognise that discriminatory briefing practices limit opportunities for barristers.
7. If there are areas of practice or jurisdictions in which, for example, there are no women’s names, or a very small percentage of women’s names, then those responsible for circulating the list within the firm should attempt to supplement the list with additional names of female barristers. Monitoring of the list should occur so that female barristers are regularly afforded opportunities to be included in the list. The list should also be reviewed from time to time to ensure that barristers are not being discriminated against on any other arbitrary or prejudicial ground.

SCHEDULE 6

Guide to hand over of documents on termination of retainer (civil and criminal matters)

Introduction

A solicitor acts as adviser to and agent for the client. Furthermore, the relationship between solicitor and client is “*one of the most important fiduciary relations known to our law*” (*Re Van Laun* [1907] 2 KB at 29). Both agency principles and fiduciary obligations have application to the hand over of files.

Documents in existence prior to the commencement of the retainer

Documents in existence prior to the commencement of the retainer provided to the solicitor by the client or by a third party, are held by the solicitor as agent. On termination of the retainer, these documents must be handed over (subject to any lien the solicitor may have) as directed by the client or the third party.

Documents which come into existence during the currency of the retainer

Documents which come into existence during the currency of the retainer fall into four broad categories (*Cordery’s Law Relating to Solicitors*).

1. Files other than criminal law files

“Documents” includes computer files.

(i) Documents prepared by the solicitor for the benefit of the client

These documents belong to the client.

They include all draft documents, letters, briefs in contentious matters and deeds and documents in non-contentious matters, the cost of which is charged to the client.

(ii) Documents prepared by the solicitor for his or her benefit or protection

These documents, **not chargeable to the client**, belong to the solicitor.

They include copies of letters written to the client, entries of attendances, interoffice memoranda, entries in diaries, time sheets, computerised records, office journals and books of account.

- (iii) **Documents provided by the client to the solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the solicitor**

These documents belong to the solicitor.

They include letters, authorities and instructions written or given by the client to the solicitor.

- (iv) **Documents prepared by a third party during the course of the retainer and provided to the solicitor, other than at the solicitor's expense**

These documents belong to the client.

They include letters, receipts and vouchers for disbursements etc.

2. Criminal law files

"Documents" includes computer files.

- (i) **Documents prepared by the solicitor for the benefit of the client**

These documents include a proof of evidence of the client and any witness statements and could also include a draft closing address and legal research, the cost of which is charged to the client.

These documents belong to the solicitor (but see below, "Criminal files – exception to the general rule" under "Solicitor's Lien".)

- (ii) **Documents prepared by the solicitor for his or her benefit or protection**

These documents, not chargeable to the client, belong to the solicitor.

They include copies of letters written to the client, entries of attendances, interoffice memoranda, entries in diaries, time sheets, computerised records, office journals and books of account.

- (iii) **Documents provided by the client to the solicitor during the course of the retainer, and**
- (iv) **Documents prepared by a third party during the course of the retainer and provided to the solicitor**

Generally, the documents on a criminal law file will not belong to the solicitor.

The majority of the documents on a criminal law file will not have been prepared by the solicitor but will have been received by the solicitor from the client or from a third party.

For example:

- Witness depositions and exhibits are usually given to the solicitor by the client, who will have received them from the police. In serious matters the solicitor may receive them direct from the Director of Public Prosecutions (“DPP”).

In any event, the client is entitled to witness depositions under section 745 of the *Criminal Code* and exhibits usually remain the property of the police.

- Video records of interview of the accused are provided to the solicitor by the police. Possession by an unauthorised person of a video record of interview is an offence under section 570B(2) of the *Criminal Code*.
- An “authorised person” includes the accused’s solicitor but he/she would cease to be an authorised person on a termination of the retainer.
- Transcripts of prior court proceedings are the property of the Attorney General.
- The indictment and other Crown documents are the property of the Crown.

Solicitor's lien

As a general rule:

- Where the retainer is terminated by the solicitor, the solicitor may be ordered to hand over the documents the subject of a lien to the client's new solicitors, provided that the new solicitor undertakes to preserve the original solicitor's lien and return the papers to the original solicitor at the end of the action. A statement of the relevant principles can be found in *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1981] WLR 614, particularly at 624/5;
- Where the retainer is terminated by the client, the solicitor is ordinarily entitled to maintain possession of the documents the subject of a lien. However, a solicitor cannot maintain the solicitor's lien where the retainer has been terminated by the client as a consequence of the solicitor's negligence or other misconduct. 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).

Criminal law files – exception to the general rule

A solicitor cannot seek to exercise a lien if refusal to hand over documents could impact on the client's ability to defend him or herself or require the court to vacate a court listing.

Obligation to Advise of Impending Work

When handing over a file to another solicitor or to the client, a solicitor should clearly indicate the impending work required to be done (including any impending limitation periods). If the file is handed over to the client, the client should also be informed as to the likely consequences of a failure to promptly attend to such matters and advised to seek alternate legal representation as soon as possible. Ideally, this should be done in writing.

Risk Management/Taxation of Costs

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 solicitor so that:

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

Photocopying costs

Although it is recommended that the solicitor copy documents to be handed over to the client, the cost of photocopying documents that belong to the client cannot be charged to the client.

Archived files

If client request that their file be handed over after the file has been closed and archived, photocopying costs remain the responsibility of the solicitor.

The solicitor should not charge clients for professional fees associated with the retrieval of files or for storage costs. However, the cost payable to the storage house to retrieve files, or part thereof, is a disbursement chargeable to the client if the file has been retrieved at the request of the client.