



The New South Wales Bar Association

# **NEW SOUTH WALES BARRISTERS' RULES**

**Date 6 January 2014**

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## **PREFACE**

1. These Rules are made pursuant to the *Legal Profession Act 2004* (NSW). They may be cited as the New South Wales Barristers' Rules. These Rules commence on 6 January 2014.
2. The general purpose of these Rules is to provide the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of the administration of justice and in particular to provide common and enforceable rules and standards which require barristers:
  - (a) to be completely independent in conduct and in professional standing as sole practitioners; and
  - (b) to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice.
3. These Rules apply throughout New South Wales to all barristers.

## **NATIONAL RULES**

### **INTRODUCTION**

#### **Objects**

4. The object of these Rules is to ensure that all barristers:
  - (a) act in accordance with the general principles of professional conduct;
  - (b) act independently;
  - (c) recognise and discharge their obligations in relation to the administration of justice; and
  - (d) provide services of the highest standard unaffected by personal interest.

#### **Principles**

5. These Rules are made in the belief that:
  - (a) barristers owe their paramount duty to the administration of justice;
  - (b) barristers must maintain high standards of professional conduct;
  - (c) barristers as specialist advocates in the administration of justice, must act honestly, fairly, skilfully and with competence and diligence;
  - (d) barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues;
  - (e) barristers should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients; and

- (f) the provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
  - (i) must accept briefs to appear regardless of their personal beliefs;
  - (ii) must not refuse briefs to appear except on proper professional grounds; and
  - (iii) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.

### **Interpretation**

- 6. These Rules should be construed to promote the objects and principles expressed in this Introduction.
- 7. General provisions of these Rules should not be read or applied in a limited way by reason of any particular or illustrative provisions.
- 8. Headings in these Rules shall be read as part of these Rules, but shall not be used so as to read or apply any of the Rules in a more limited way than would have been so if the headings were not part of the Rules.

### **Application of Rules**

- 9. Except as otherwise provided these Rules apply to:
  - (a) a barrister who is a local legal practitioner, except to the extent that the conduct of the barrister in relation to practice in another Australian State or Territory is regulated by Barristers' Rules for that State or Territory;
  - (b) a barrister who is an interstate legal practitioner, in relation to practice in this jurisdiction, including work, wherever performed, in relation to such practice; and
  - (c) a barrister who is employed by the Crown or who holds a statutory office save that he or she is exempt from Rules 15- 24B and 95-106 while acting pursuant to that employment or office.
- 10. These Rules are not intended to be a complete or detailed code of conduct for barristers. Other standards for, requirements of and sanctions on the conduct of barristers are found in the inherent disciplinary jurisdiction of the Supreme Court, the *Legal Profession Act 2004* (NSW) and in the general law (including the law relating to contempt of court).

### **Waiver of Rules**

- 11. The Bar Council shall either before or after the event have the power to waive the duty imposed on a barrister to comply with the provisions of these Rules in such

circumstances and to such extent as the Bar Council may think fit and either conditionally or unconditionally.

## **ADVOCACY RULES**

### **General**

12. A barrister must not engage in conduct which is:
  - (a) dishonest or otherwise discreditable to a barrister;
  - (b) prejudicial to the administration of justice; or
  - (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
  
13. A barrister must not engage in another vocation which:
  - (a) is liable to adversely affect the reputation of the legal profession or the barrister's own reputation;
  - (b) is likely to impair or conflict with the barrister's duties to clients; or
  - (c) prejudices a barrister's ability to attend properly to the interests of the barrister's clients.
  
14. A barrister may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances.

### **The Work of a Barrister**

15. Barristers' work consists of:
  - (a) appearing as an advocate;
  - (b) preparing to appear as an advocate;
  - (c) negotiating for a client with an opponent to compromise a case;
  - (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
  - (e) giving legal advice;
  - (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
  - (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
  - (h) such other work as is from time to time commonly carried out by barristers.
  
16. A barrister must be a sole practitioner, and must not:
  - (a) practise in partnership with any person;
  - (b) practise as the employer of any legal practitioner who acts as a legal practitioner in the course of that employment;
  - (c) practise as the employee of any person;

- (d) be a legal practitioner director of an incorporated legal practice; or
  - (e) be a member of a multi-disciplinary partnership.
17. A barrister must not, subject to Rules 18 and 19:
- (a) act as a person's general agent or attorney in that person's business or dealings with others;
  - (b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent;
  - (c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:
    - (i) conferring with the client, the instructing solicitor, prospective witnesses or experts;
    - (ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court;
    - (iii) viewing a place or things by arrangement with the instructing solicitor or the client; or
    - (iv) library research;
  - (d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate;
  - (e) be the address for service of any document or accept service of any document;
  - (f) commence proceedings or file or serve any process of any court;
  - (g) conduct the conveyance of any property for any other person;
  - (h) administer any trust estate or fund for any other person;
  - (i) obtain probate or letters of administration for any other person;
  - (j) incorporate companies or provide shelf companies for any other person;
  - (k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation; or
  - (l) hold, invest or disburse any funds for any other person.
18. A barrister will not have breached Rule 17 by doing any of the matters referred to in that Rule, without fee and as a private person not as a barrister or legal practitioner.
19. A barrister will not have breached Rule 17(a), 17(h) or 17(l) if the barrister becomes such an agent, is appointed so to act or becomes responsible for such funds as a private person and not as a barrister or legal practitioner.
20. A barrister who is asked by any person to do work or engage in conduct which is not barristers' work, or which appears likely to require work to be done which is not barristers' work, must promptly inform that person:
- (a) of the effect of Rules 15, 16 and 17 as they relevantly apply in the circumstances; and
  - (b) that, if it be the case, solicitors are capable of providing those services to that person.

## **Cab-rank principle**

21. A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
  - (a) the brief is within the barrister's capacity, skill and experience;
  - (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;
  - (c) the fee offered on the brief is acceptable to the barrister; and
  - (d) the barrister is not obliged or permitted to refuse the brief under Rules 95, 97, 98 or 99.
  
22. A barrister must not set the level of an acceptable fee, for the purposes of Rule 21(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister.
  
23. A barrister must not require that any other particular legal practitioner be instructed or briefed so as in any way to impose that requirement as a condition of the barrister accepting any brief or instructions.
  
24. A barrister must not make or have any arrangement with any person in connection with any aspect of the barrister's practice which imposes any obligation on the barrister of such a kind as may prevent the barrister from:
  - (a) accepting any brief to appear for reasons other than those provided by the exceptions to the cab-rank principle in Rules 95, 97, 98 or 99; or
  - (b) competing with any other legal practitioner for the work offered by any brief for reasons other than those referred to in Rules 95, 97, 98 or 99.
  
- 24A. Nothing in these Rules shall be taken to oblige a barrister to accept instructions directly from a person who is not a solicitor.
  
- 24B. A barrister who proposes to accept instructions directly from a person who is not a solicitor or officer of a government department or agency whose usual duties include engaging lawyers must:
  - (a) inform the prospective client in writing of:
    - (i) the effect of Rules 15 and 17;
    - (ii) the fact that circumstances may require the client to retain an instructing solicitor at short notice, and possibly during the performance of the work;
    - (iii) any other disadvantage which the barrister believes on reasonable grounds may, as a real possibility, be suffered by the client if the client does not retain an instructing solicitor;

- (iv) the relative capacity of the barrister in performing barristers' work to supply the requested facilities or services to the client compared to the capacity of the barrister together with an instructing solicitor to supply them; and
  - (v) a fair description of the advocacy experience of the barrister; and
- (b) obtain a written acknowledgement, signed by the prospective client, that he or she has been informed of the matters in (a) above.

## **Duty to the Court**

25. A barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.
26. A barrister must not deceive or knowingly or recklessly mislead the Court.
27. A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.
28. A barrister must alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the barrister contrary to the true position and is believed by the barrister to have been made by mistake.
29. A barrister seeking any interlocutory relief in an ex parte application must disclose to the court all factual or legal matters which:
- (a) are within the barrister's knowledge;
  - (b) are not protected by legal professional privilege; and
  - (c) the barrister has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.
30. A barrister who has knowledge of matters which are within Rule 29(c):
- (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege so as to permit the barrister to disclose those matters under Rule 29; and
  - (b) if the client does not waive the privilege as sought by the barrister:
    - (i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequence of not doing so; and
    - (ii) must refuse to appear on the application.
31. A barrister must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:
- (a) any binding authority;
  - (b) where there is no binding authority any authority decided by an Australian appellate court; and



(c) any applicable legislation;  
known to the barrister and which the barrister has reasonable grounds to believe to be directly in point, against the client's case.

32. A barrister need not inform the court of matters within Rule 31 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the barrister to have informed the court of such matters in the ordinary course has already arrived or passed.
33. A barrister who becomes aware of a matter within Rule 31 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:
  - (a) a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or
  - (b) requesting the court to relist the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.
34. A barrister need not inform the court of any matter otherwise within Rule 31 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
35. A barrister who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.
36. A barrister must inform the court of any apparent misapprehension by the court as to the effect of an order which the court is making, as soon as the barrister becomes aware of the misapprehension.

### **Duty to client**

37. A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.
38. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation

39. A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.
40. A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

### **Criminal pleas**

- 40A. It is the duty of a barrister representing a person charged with a criminal offence:
  - (a) to advise the client generally about any plea to the charge; and
  - (b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.
- 40B. For the purpose of fulfilling the duty in rule 40A, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as cooperating in the criminal justice process.
- 40C. Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister;
  - (a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge;
  - (b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence;
  - (c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty; and
  - (d) may otherwise continue to represent the client.

### **Independence**

41. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable.
42. A barrister will not have breached the barrister's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's

wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:

- (a) confine any hearing to those issues which the barrister believes to be the real issues;
- (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
- (c) inform the court of any persuasive authority against the client's case.

- 43. A barrister must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the barrister's personal opinion on the merits of that evidence or issue.
- 44. A barrister must not in the presence of any of the parties or solicitors deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the barrister has special favour with the court.
- 45. A barrister may not give a commission or gift to any person by reason of or in connection with the introduction of professional work by that person to the barrister.
- 46. A barrister must not in any dealings with a client exercise any undue influence intended to dispose the client to benefit the barrister in excess of the barrister's fair remuneration for the legal services provided to the client.
- 47. A barrister must not receive any money or property by way of loan from any client, the relative of a client or a business entity of which a client is a director, partner or manager, during the course of a retainer with that client unless the ordinary business of the client, client's relative or the business entity includes lending money.

### **Duty to the opponent**

- 48. A barrister must not knowingly make a false statement to an opponent in relation to the case (including its compromise).
- 49. A barrister must take all necessary steps to correct any false statement in relation to the case made by the barrister to an opponent as soon as possible after the barrister becomes aware that the statement was false.
- 50. A barrister will not have made a false statement to an opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.
- 51. A barrister must not deal directly with a party other than his or her client who is legally represented unless:
  - (a) the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom;
  - (b) the legal practitioner representing the party has previously consented; or
  - (c) the barrister believes on reasonable grounds that –

- (i) the circumstances are so urgent as to require the barrister to do so; and
  - (ii) the dealing would not be unfair to the party.
- 52. A barrister must not confer with or deal directly with any party who is unrepresented unless the party has signified willingness to that course.
- 53. A barrister must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:
  - (a) the court has first communicated with the barrister in such a way as to require the barrister to respond to the court; or
  - (b) the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister.
- 54. A barrister must promptly tell an opponent what passes between the barrister and a court in a communication referred to in Rule 53.
- 55. A barrister must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 53(b), other than the matters specifically notified by the barrister to the opponent when seeking the consent of the opponent.

### **Efficient administration of justice**

- 56. A barrister:
  - (a) must seek to ensure that the barrister does work which the barrister is briefed to do in sufficient time to enable compliance with orders, directions, Rules or practice notes of the court; and
  - (b) if the barrister has reasonable grounds to believe that the barrister may not complete any such work on time must promptly inform the instructing solicitor or the client.
- 57. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:
  - (a) confine the case to identified issues which are genuinely in dispute;
  - (b) have the case ready to be heard as soon as practicable;
  - (c) present the identified issues in dispute clearly and succinctly;
  - (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
  - (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

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

### **Responsible use of court process and privilege**

59. A barrister must take care to ensure that the barrister's advice to invoke the coercive powers of a court:
- (a) is reasonably justified by the material then available to the barrister;
  - (b) is appropriate for the robust advancement of the client's case on its merits;
  - (c) is not made principally in order to harass or embarrass a person; and
  - (d) is not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court.
60. A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:
- (a) are reasonably justified by the material then available to the barrister;
  - (b) are appropriate for the robust advancement of the client's case on its merits; and
  - (c) are not made principally in order to harass or embarrass a person.
61. Without limiting the generality of Rule 60, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:
- (a) a barrister must not ask that witness a question or pursue a line of questioning of that witness which is intended:
    - (i) to mislead or confuse the witness; or
    - (ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and
  - (b) a barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions that the barrister asks.
62. A barrister will not infringe Rule 61 merely because:
- (a) the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness; or
  - (b) the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.
63. A barrister must not allege any matter of fact in:
- (a) any court document settled by the barrister;
  - (b) any submission during any hearing;
  - (c) the course of an opening address; or
  - (d) the course of a closing address or submission on the evidence;

unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

64. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
  - (a) available material by which the allegation could be supported provides a proper basis for it; and
  - (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.
65. A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 63 and 64 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).
66. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.
67. A barrister who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the barrister believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.

### **Integrity of evidence**

68. A barrister must not:
  - (a) advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or
  - (b) coach a witness by advising what answers the witness should give to questions which might be asked.
69. A barrister will not have breached Rule 68 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.
70. A barrister must not confer with, or condone another legal practitioner conferring with, more than one lay witness including a party or client at the same time:

- (a) about any issue which there are reasonable grounds for the barrister to believe may be contentious at a hearing, and
  - (b) where such conferral could affect evidence to be given by any of those witnesses,
- unless the barrister believes on reasonable grounds that special circumstances require such a conference.

71. A barrister will not have breached Rule 70 by conferring with, or condoning another legal practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.
72. A barrister must not confer with any witness including a party or client called by the barrister on any matter related to the proceedings while that witness remains under cross-examination, unless:
- (a) the cross-examiner has consented beforehand to the barrister doing so; or
  - (b) the barrister -
    - (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
    - (ii) has, if possible, informed the cross-examiner beforehand of the barrister's intention to do so; and
    - (iii) otherwise does inform the cross-examiner as soon as possible of the barrister having done so.
73. A barrister must not take any step to prevent or discourage prospective witnesses from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.
74. A barrister will not have breached Rule 73 simply by telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

### **Media Comment**

75. A barrister must not publish or take any step towards the publication of any material concerning any proceeding which:
- (a) is known to the barrister to be inaccurate;
  - (b) discloses any confidential information; or
  - (c) appears to or does express the opinion of the barrister on the merits of a current or potential proceeding or on any issue arising in such a proceeding, other than in the course of genuine educational or academic discussion on matters of law.
76. A barrister must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, save that:

- (a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case;
- (b) a barrister may, where it is not contrary to legislation or court practice and at the request of the client or instructing solicitor or in response to unsolicited questions supply for publication:
  - (i) copies of pleadings in their current form which have been filed and served in accordance with the court's requirements;
  - (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;
  - (iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court; or
  - (iv) copies of exhibits admitted in open court and without restriction on access.

77. A barrister:

- (a) may if requested advise a client about dealings with the media but not in a manner which is calculated to interfere with the proper administration of justice, and
- (b) will not have breached Rule 75 or Rule 76 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.

### **Delinquent or guilty clients**

78. A barrister who, as a result of information provided by the client or a witness called on behalf of the client, is informed by the client or by the witness during a hearing or after judgment or decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

- (a) has lied in a material particular to the court or has procured another person to lie to the court; or
- (b) has falsified or procured another person to falsify in any way a document which has been tendered; or
- (c) has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;

must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the



barrister to do so but otherwise may not inform the court of the lie, falsification or suppression.

79. A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:
- (a) should, subject to the client accepting the constraints set out in sub-rules (b) to (h) but not otherwise, continue to act in the client's defence;
  - (b) must not falsely suggest that some other person committed the offence charged;
  - (c) must not set up an affirmative case inconsistent with the confession;
  - (d) must ensure that the prosecution is put to proof of its case;
  - (e) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
  - (f) may argue that for some reason of law the client is not guilty of the offence charged;
  - (g) may argue that for any other reason not prohibited by (b) or (c) the client should not be convicted of the offence charged; and
  - (h) must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.
80. A barrister whose client informs the barrister that the client intends to disobey a court's order must:
- (a) advise the client against that course and warn the client of its dangers;
  - (b) not advise the client how to carry out or conceal that course; but
  - (c) not inform the court or the opponent of the client's intention unless -
    - (i) the client has authorised the barrister to do so beforehand; or
    - (ii) the barrister believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.
81. A barrister whose client threatens the safety of any person may, notwithstanding Rule 108, if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities.

### **Prosecutor's duties**

82. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
83. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
84. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

85. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.
86. A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.
87. A prosecutor who has decided not to disclose material to the opponent under Rule 86 must consider whether:
- (a) the charge against the accused to which such material is relevant should be withdrawn; and
  - (b) the accused should be faced only with a lesser charge to which such material would not be so relevant.
88. A prosecutor must call as part of the prosecution's case all witnesses:
- (a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or
  - (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
  - (c) unless:
    - (i) the opponent consents to the prosecutor not calling a particular witness;
    - (ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;
    - (iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses;
    - (iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; or
    - (v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.
- 88A. The prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within rule 88(c) (ii), (iii), (iv) or (v), together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if such grounds were revealed to the opponent.

89. A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully obtained must promptly:
- (a) inform the opponent if the prosecutor intends to use the material; and
  - (b) make available to the opponent a copy of the material if it is in documentary form.
90. A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.
91. A prosecutor must not inform the court or opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.
92. A prosecutor who has informed the court of matters within Rule 91, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.
93. A prosecutor:
- (a) must correct any error made by the opponent in address on sentence;
  - (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
  - (c) must assist the court to avoid appealable error on the issue of sentence;
  - (d) may submit that a custodial or non-custodial sentence is appropriate; and
  - (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant decisions.
94. A barrister who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 82, 84 and 85 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 84.

## **BRIEFS**

### **Briefs which must be refused or must be returned**

95. A barrister must refuse to accept or retain a brief or instructions to appear before a court if:
- (a) the barrister has information which is confidential to any other person in the case other than the prospective client, and -
    - (i) the information may, as a real possibility, be material to the prospective client's case; and

- (ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case;
- (b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate;
- (c) the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer;
- (d) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case;
- (e) the brief is to appear on an appeal and the barrister was a witness in the case at first instance;
- (f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case;
- (g) the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee;
- (h) the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client;
- (i) the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration;
- (j) the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member, unless the hearing is before the High Court of Australia sitting all available judges;
- (k) there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules;
- (l) the barrister has already advised or drawn pleadings for another party to the matter;
- (m) the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises; or
- (n) the brief is to appear before a court of which the barrister was formerly a member or judicial registrar, or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur within 5 years after the barrister ceased to be a member of the court in question where the barrister ceased to be a judge or judicial registrar after the commencement date of this Rule.

96. A barrister need not refuse or return a brief, notwithstanding the application of Rule 95(f) if:

- (a) the barrister believes on reasonable grounds that:

- (i) allegations involving the barrister in such a way as to apply one of those Rules have been raised in order to prevent the barrister from accepting the brief; and
- (ii) those allegations can be met without materially diminishing the barrister's disinterestedness; and
- (b) the President of the Bar Association, or a delegate of the President who is a Senior Counsel, approves of the barrister accepting or retaining the brief after the barrister has informed that person of the circumstances.

97. A barrister must refuse a brief to advise if the barrister has information which is confidential to any person with different interests from those of the prospective client if:
- (a) the information may, as a real possibility, affect the prospective client's interests in the matter on which advice is sought or may be detrimental to the interests of the first person; and
  - (b) the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice.
98. A barrister must not accept a brief to appear on a day when the barrister is already committed to appear or is reasonably likely to be required to appear on another brief if by appearing on one of the briefs the barrister would not in the normal course of events be able to appear on the other brief or briefs.

### **Briefs which may be refused or returned**

99. A barrister may refuse or return a brief to appear before a court:
- (a) if the brief is not offered by a solicitor;
  - (b) if the barrister considers on reasonable grounds that the time or effort required for the brief threatens to prejudice the barrister's practice or other professional or personal engagements;
  - (c) if the instructing solicitor does not agree to be responsible for the payment of the barrister's fee;
  - (d) if the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement;
  - (e) if the brief may, as a real possibility, require the barrister to cross-examine or criticise a friend or relation;
  - (f) if the solicitor does not comply with a request by the barrister for appropriate attendances by the instructing solicitor, solicitor's clerk or client representative for the purposes of:
    - (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief;
    - (ii) ensuring that the client adequately understands the barrister's advice;
    - (iii) avoiding any delay in the conduct of any hearing; and
    - (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused;

- (g) if the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be;
  - (h) if the prospective client is also the prospective instructing solicitor, or a partner, employer or employee of the prospective instructing solicitor, and has refused the barrister's request to be instructed by a solicitor independent of the prospective client and the prospective client's firm;
  - (i) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief does not require the services of a Senior Counsel;
  - (j) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief also requires the services of a junior counsel and none has been briefed;
  - (k) where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party;
  - (l) where the brief is to appear before a judge whose personal or business relationship with the barrister is such as to give rise to the apprehension that there may not be a fair hearing;
  - (m) in accordance with the terms of a costs agreement which provide for return of a brief; or
  - (n) in such other circumstances as may be permitted by the President or a delegate of the President who is a Senior Counsel.
100. A barrister may return a brief accepted under a speculative fee agreement if the barrister considers on reasonable grounds that the client has unreasonably rejected a reasonable offer to compromise contrary to the barrister's advice.
101. A barrister must not return under Rule 99 a brief to defend a charge of a serious criminal offence unless:
- (a) the barrister believes on reasonable grounds that:
    - (i) the circumstances are exceptional and compelling; and
    - (ii) there is enough time for another legal practitioner to take over the case properly before the hearing; or
  - (b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the terms of this Rule.
102. A barrister must not return a brief to appear in order to accept another brief to appear unless the instructing solicitor or the client in the first brief has permitted the barrister to do so beforehand, after the barrister has clearly informed the instructing solicitor or the client of the circumstances in which the barrister wishes to return the brief and of the terms of this Rule and Rule 104.
103. A barrister must not return a brief to appear on a particular date in order to attend a social occasion unless the instructing solicitor or the client has expressly permitted the barrister to do so.

104. A barrister who wishes to return a brief which the barrister is permitted to return must do so in enough time to give another legal practitioner a proper opportunity to take over the case.
105. A barrister must promptly inform the instructing solicitor or the client as soon as the barrister has reasonable grounds to believe that there is a real possibility that the barrister will be unable to appear or to do the work required by the brief in the time stipulated by the brief or within a reasonable time if no time has been stipulated.
106. A barrister must not hand over a brief to another barrister to conduct the case, or any court appearance within the case, unless the instructing solicitor has consented to that course.

### **Devilling**

107. A barrister will not have breached Rule 16 by carrying out a specific task of research or chamber work given to the barrister by another barrister, or by giving such a task to another barrister, so long as:
  - (a) the barrister who was briefed to do the chamber work takes full personal responsibility for the work;
  - (b) the work is delivered under the name of the barrister who was briefed;
  - (c) the arrangement between the barristers does not go beyond an ordinary devilling or reading arrangement and in particular does not involve any standing retainer or employment terms; and
  - (d) the arrangement between the barristers does not provide and is not intended to enable the barrister giving the task to make a profit from the other barrister's work, over and above reasonable remuneration for supervision of and responsibility for the other barrister's work.

### **CONFIDENTIALITY & CONFLICTS**

108. A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep such information confidential unless or until:
  - (a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or
  - (b) the person has consented to the barrister disclosing or using the information generally or on specific terms.
109. A barrister must not disclose (except as compelled by law) or use confidential information under Rule 108(b) in any way other than as permitted by the specific terms of the person's consent.

110. A barrister will not have breached Rules 108 and 109 simply by showing briefs to or disclosing information contained in a brief to the barrister's instructing solicitor in the matter, to a member of the barrister's staff for the purposes of that person undertaking clerical or administrative work in relation to the matter, or to a reader or to another barrister doing work as permitted by Rule 107.
111. A barrister who is shown a brief as a reader or under an arrangement covered by Rule 107 is bound by the same duties of confidentiality which bind the barrister whose brief it is, including the duties imposed by Rule 108 and 109.
112. A barrister must return a brief other than a brief to appear as soon as possible after the barrister becomes aware that the barrister has information confidential to a person other than the client which may, as a real possibility, be material to the client's case or to the advancement of the client's interests, being information which the barrister is prohibited from disclosing or using unless the person entitled to the confidentiality consents to the barrister disclosing or using the information as the barrister thinks fit.
113. A barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for:
  - (a) all the clients in the case of confidentiality to which Rule 108 would apply;  
or
  - (b) one or more of the clients so as to remove that possibility of conflict.
114. A barrister who believes on reasonable grounds that the interests of the client may conflict with the interests of the instructing solicitor, or that the client may have a claim against the instructing solicitor, must:
  - (a) advise the instructing solicitor of the barrister's belief; and
  - (b) if the instructing solicitor does not agree to advise the client of the barrister's belief, seek to advise the client in the presence of the instructing solicitor of the barrister's belief.
115. A barrister shall not give an undertaking to the court on behalf of a solicitor or a client without express authority of the person concerned.
116. A barrister shall not disclose to the court, whether in submissions, examination, cross-examination or otherwise, any communication between the barrister and legal representatives appearing in the proceedings for any other party to the proceedings:
  - (a) except by consent;
  - (b) unless what occurred resulted in the creation of some contractual or other legal relationship; or
  - (c) unless it was expressly stated before or at the commencement of such communication that matters communicated should not be regarded as without prejudice or privileged from use or disclosure; or
  - (d) unless disclosure is required by the Court.



## ANTI-DISCRIMINATION AND HARASSMENT

117. A barrister must not in the course of practice, engage **in conduct which** constitutes:
- (a) discrimination;
  - (b) sexual harassment; or
  - (c) workplace bullying.

## DEFINITIONS

118. Expressions used in these Rules which are also used in the Act have the same meanings as they have in the Act, unless the context requires otherwise. Unless the context requires otherwise, the singular includes the plural and vice versa.
119. Unless the context requires otherwise, the following expressions are defined as follows when used in these Rules:

‘allege’	includes conduct constituted by settling or opening on pleadings, affidavits or witness statements, and reading or tendering affidavits or witness statements filed or prepared for the client (whether or not they were drawn or settled by the barrister).
‘associate’	means a corporation, partnership or trust in which the barrister has a material beneficial interest or a member of the barrister’s immediate family.
‘barristers’ work’	means work permitted by Rule 15.
‘case’	means the litigation or proceedings in which the barrister in question is briefed to appear, or the dispute in which the barrister is advising, as the case may be.
‘client’	means the client of the barrister in question, and for the purposes of Rules 70, 78 and 80 includes those officers, servants or agents of a client which is not a natural person who are responsible for or involved in giving instructions on behalf of the client.
‘court’	means any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a Parliament), Royal Commissions [the Criminal Justice Commission/ICAC or equivalent], arbitrations and

mediations.

‘criminal proceedings’	includes disciplinary proceedings, in which context other expressions appropriate to criminal proceedings include corresponding meanings appropriate to disciplinary proceedings and in particular "a serious criminal offence" includes a disciplinary shortcoming which, if proved, involves the serious possibility of suspension or deregistration (or the equivalent).
‘current proceedings’	means proceedings which have not been determined, including proceedings in which there is still a real possibility of an appeal or other challenge to a decision being filed, heard or decided.
‘devilling’	the activity of undertaking chamber work in connection with briefs held by another barrister.
‘discrimination’	means discrimination that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.
‘ex parte application’	means an application heard in the absence of a party.
‘fee’	includes any payment for the reimbursement of expenses.
‘genuine educational or academic discussion’	means oral or written communications including the publication of notes and articles with members of the legal profession, other profession or group or members thereof which are bona fide for an educational or academic purpose.
‘instructing solicitor’	means the solicitor from whom the barrister in question has accepted a brief or who is instructing that barrister in that brief, as the case may be, but does not include a solicitor appearing with the barrister as a joint advocate; and includes a patent attorney.
‘legal advice’	includes assistance at or presiding over meetings.
‘legislation’	includes delegated legislation.

‘opponent’	means the legal practitioner appearing for the party opposed to the client, or the party opposed to the client if that party is unrepresented, and any other legal practitioner appearing for another party in the matter or any other party if that party is unrepresented.
‘order’	includes a judgement, decision or determination.
‘potential proceeding’	means proceedings which have not been commenced but where there is information which has been publicised that such process is imminent or where there is a very real likelihood that process will be instigated.
‘process of court’	means any originating process, pleading, affidavit or notice filed in court and any document issued by the court but does not include submissions or lists of authorities.
‘Prosecutor’	means a barrister who appears for the complainant or Crown in criminal proceedings.
‘Reader’	means a barrister undertaking a reading program.
‘Senior Counsel’	means Queen’s Counsel and Senior Counsel appointed as such in accordance with the protocol for the appointment of Queen’s Counsel or Senior Counsel duly adopted in each jurisdiction.
‘Sexual harassment’	means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.
‘Workplace bullying’	means behaviour that could reasonably be expected to offend, intimidate, degrade, humiliate, isolate or alienate a person working in a workplace.