



THE LAW SOCIETY OF
SOUTH AUSTRALIA

Rules of Professional Conduct & Practice

Based upon

THE MODEL RULES OF THE



Effective 1 March 2003

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INTRODUCTION

The Model Rules of Professional Conduct and Practice of the Law Council of Australia were originally promulgated in February 1997.

Over a two year period to March 2002, the Rules were the subject of extensive consideration by a small working group whose task was to simplify the Rules where possible, to express them in plainer English and to eliminate duplication between the Rules of general application and the Advocacy and Litigation Rules. In addition, the category relating to Legal Practice was expanded to incorporate a general standard of conduct expected of a practitioner and to provide for a new disclosure rule. The working group also considered the recommendations about the Rules made by the Australian Law Reform Commission in its February 2000 "*Managing Justice*" Report (ALRC 89).

Revised Rules were adopted by the Law Council at its meeting on 16 March 2002.

With the exception of the Rules headed "Advocacy & Litigation Rules", which have specific application to advocates, the Rules apply principally to legal practitioners practising as solicitors, or as solicitors and barristers.

The term "practitioner" is used throughout to refer to persons practising as solicitors, or as barristers, or as barristers and solicitors. The Rules headed Advocacy & Litigation Rules apply to all practitioners when engaged in advocacy, whether or not their predominant style of practice is that of a solicitor or a barrister.

The Rules are divided into five major categories. Each of the categories is preceded by a statement of general principle, which is not intended to constitute by itself a rule, but is intended to describe the underlying principles and objectives of the Rules which follow.

The Council of the Law Society of South Australia reviewed the Rules in detail on several occasions throughout 2002. While adopting the vast majority of the Model Conduct Rules, Council deleted a small number considered inappropriate for this jurisdiction and has added several 'local' Rules which have been in operation in this State and which were not included in the 'model' Rules.

The numbering and presentation of the Rules which follow accords with the Rules adopted by most Australian jurisdictions.

These Rules came into effect on 1 March 2003.

DEFINITIONS

In these Rules unless the context requires otherwise the following terms have the following meaning:

- "associate" in reference to a practitioner means
- (a) a partner, employee, or agent of the practitioner or of the practitioner's firm;
 - (b) a corporation or partnership in which the practitioner has a material beneficial interest;
 - (c) in the case of an incorporated legal practice, a director of the corporation or of a subsidiary of the corporation;
 - (d) a member of the practitioner's immediate family; or
 - (e) a member of the immediate family of a partner of the practitioner's firm or of the immediate family of a director of an incorporated legal practice or a subsidiary of the corporation.
- "case" means
- (a) the court proceedings for which the practitioner is engaged; or
 - (b) the dispute in which the practitioner is advising.
- "client" with respect to the practitioner or the practitioner's firm means a person (not an instructing practitioner) for whom the practitioner is engaged to provide legal services for a matter.
- "compromise" includes any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.
- "costs" includes disbursements.
- "court" means
- (a) any body described as such;
 - (b) any tribunal exercising judicial, or quasi-judicial, functions;
 - (c) a professional disciplinary tribunal;
 - (d) an industrial tribunal;
 - (e) an administrative tribunal;
 - (f) an investigation or inquiry established or conducted under statute or by a Parliament;
 - (g) a Royal Commission;
 - (h) an arbitration or mediation or any other form of dispute resolution.

- "current proceedings" means proceedings which have not been determined, including proceedings in which there is still the real possibility of an appeal or other challenge to a decision being filed, heard or decided.
- "engagement" means the appointment of the practitioner or of the practitioner's firm to provide legal services for a matter.
- "firm" in relation to a practitioner means:
- (a) a partnership of which the practitioner is a partner; or
 - (b) a practitioner, partnership or corporation which employs the practitioner.
- "forensic judgments" means a decision of the practitioner made in the course of a case, but does not include a decision as to
- (a) the commencement of proceedings;
 - (b) the joinder of parties;
 - (c) admissions or concessions of fact;
 - (d) amendments of pleadings;
 - (e) undertakings to a court;
 - (f) a plea in criminal proceedings,
- but does include advice given to assist the client or the instructing practitioner to make such decisions.
- "immediate family" means the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a practitioner.
- "instructing practitioner" means a practitioner or firm who engages another practitioner to provide legal services for a client for a matter.
- "insurance company" includes any entity, whether statutory or otherwise, which indemnifies persons against civil claims.
- "matter" means any legal service the subject of an engagement or required to be provided by the practitioner or the practitioner's firm to fulfil an engagement and includes services provided for:
- (a) a case;
 - (b) a dealing between parties that may affect, create or be related to a right, entitlement or interest in property of any kind; or
 - (c) advice on the law.

"opponent" Amended by SA 3 Feb 2003	means the person appearing as advocate for a party whether barrister or solicitor, or other representative of the party, or the party appearing in person
"order"	includes a judgment, decision or determination.
"practitioner"	means a person or corporation entitled to practise the profession of the law.
"prosecutor"	means a practitioner who appears for the complainant, informant or Crown in criminal proceedings.
"publish: Inserted by SA 3 Feb 2003	means to convey information by any means to the public or a section of the public.
"publication" Inserted by SA 3 Feb 2003	means the process of conveying information to the public or a section of the public by any means.

RELATIONS WITH CLIENTS

Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

1. Duty to Client

- 1.1 A practitioner must act honestly and fairly, and with competence and diligence, in the service of a client.

2. Agreeing to Act for a Client

- 2.1 A practitioner should agree to act for a client in a matter only when the practitioner reasonably expects:
- 2.1.1 to serve the client honestly and fairly, and with competence and diligence; and
 - 2.1.2 to attend to the work required with reasonable promptness.

See also Local Rule 34 Legal Assistance

3. Confidentiality

- 3.1 A practitioner must never disclose to any person, who is not a partner director or employee of the practitioner's firm any information, which is confidential to a client and acquired by the practitioner or by the practitioner's firm during the client's engagement, unless:
- 3.1.1 the client authorises disclosure;
 - 3.1.2 the practitioner is permitted or compelled by law to disclose;
 - 3.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence;
 - 3.1.4 the information has lost its confidentiality; or
 - 3.1.5 the practitioner obtains the information from another person who is not bound by the confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.
 - 3.1.6 In the practitioner's opinion the disclosure of the information is required to prevent imminent serious physical harm to the client or to a third party.

4. Acting Against a Former Client

4.1 A practitioner must not accept an engagement to act for another person in any matter against, or in opposition to, the interest of a person ("the former client"):

4.1.1 for whom the practitioner or the practitioner's current or former firm or the former firm of a partner, director or employee of the practitioner or of the practitioner's firm has acted previously and has thereby acquired information confidential to the former client and material to the matter; and

4.1.2 if the former client might reasonably conclude that there is a real possibility the information will be used to the former client's detriment.

5. Practitioners Employed Otherwise Than by a Practitioner

5.1 A practitioner, who is employed by a corporation (not being an incorporated practice) or by any other person who is not a practitioner, must not, despite any contrary direction from the practitioner's employer, act as a practitioner in the performance of any legal service in breach of any of the provisions of the Legal Practitioners Act 1981 as amended or these rules.

6. Termination of Engagement

6.1 A practitioner must complete the legal services required by the practitioner's engagement, unless:

6.1.1 the practitioner and the practitioner's client have otherwise agreed;

6.1.2 the practitioner is discharged from the engagement by the client; or

6.1.3 the practitioner terminates the engagement for just cause, and on reasonable notice to the client.

6.2 Despite the above Rule, a practitioner, who is engaged to act for a client required to stand trial for a serious criminal offence, must not terminate the engagement and withdraw from the current proceedings on the ground that the client has failed to make arrangements satisfactory to the practitioner for payment of the practitioner's costs, unless the practitioner has, a reasonable time before the date appointed for the commencement of the trial, or the commencement of the sittings of the Court in which the trial is listed:

6.2.1 served notice in writing on the client of the practitioner's intention to terminate the engagement and withdraw from the current proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the practitioner's costs; and

6.2.2 given appropriate notice to the Registrar of the Court in which the trial is listed to commence.

- 6.3 Without limiting the general application of Rule 6.1, a practitioner, who is acting for a legally assisted client in any current proceedings, may terminate the practitioner's engagement upon giving reasonable notice in writing to the client of the practitioner's intention so to do, if the client's grant of legal aid is withdrawn, or otherwise terminated, and the client is unable to make any other satisfactory arrangements for payment of the practitioner's costs which would be incurred if the retainer continued.

7. Ownership of Clients' Documents - Termination of Engagement

- 7.1 The following Rules apply subject to any contrary order which may be made in respect of a client's documents by any court of competent jurisdiction.
- 7.2 A practitioner must retain, securely and confidentially, documents relating to a particular matter and to which a client is entitled:
- 7.2.1 during the practitioner's engagement for that matter and at least six (6) years thereafter; or
 - 7.2.2 until the practitioner gives them to the client or a person authorised by the client; or
 - 7.2.3 until the client instructs the practitioner to deal with them in some other manner.
- 7.3 Upon completion or termination of a practitioner's engagement, a practitioner must, when requested so to do by the practitioner's client, give to the client, or another person authorised by the client, any documents related to the engagement to which the client is entitled, unless:
- 7.3.1 the practitioner has completed the engagement; or
 - 7.3.2 the client has terminated the practitioner's engagement; or
 - 7.3.3 the practitioner has terminated the engagement for just cause and on reasonable notice; and
- the practitioner claims a lien over the documents for costs due to the practitioner by the client.
- 7.4 Despite Rule 7.3, a practitioner who claims to exercise a lien for unpaid costs over a client's documents which are essential to the client's defence or prosecution of current proceedings, must:
- 7.4.1 deal with the documents as provided in Rule 23.4, if another practitioner is acting for the client; or
 - 7.4.2 upon receiving satisfactory security for the unpaid costs, deliver the documents to the client.
- 7.5 For the purposes of the above Rules the documents to which a client of a practitioner is entitled include:

- 7.5.1 documents prepared by a practitioner for the client, or predominantly for the purposes of the client, for the purposes of the client's matter; and
- 7.5.2 documents received by a practitioner from a third party in the course of the practitioner's engagement for or on behalf of the client or for the purposes of a client's matter and intended for the use or information of the client.

8. Acting for More than One Party

- 8.1 For the purposes of Rules 8.2-8.7 inclusive:
 - 8.1.1 "party" includes each one of the persons or corporations who, or which, is jointly a party to any matter.
 - 8.1.2 "practitioner" includes a practitioner's partner, fellow director, employee or firm.
- 8.2 A practitioner must avoid conflict of interest between two or more clients of the practitioner or of the practitioner's firm.
- 8.3 A practitioner who or whose firm intends to act for a party to any matter where the practitioner or the practitioner's firm is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting an engagement to act, that each party is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:
 - 8.3.1 may be, thereby, prevented from -
 - (a) disclosing to each party all information relevant to the matter within the practitioner's knowledge; or
 - (b) giving advice to one party which is contrary to the interests of another; and
 - 8.3.2 will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.
- 8.4 If a practitioner who is acting or whose firm is acting for more than one party to any matter determines that the practitioner or the practitioner's firm cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.
- 8.5 *not adopted in South Australia*
- 8.6 A practitioner must not act for a guarantor in connection with the loan of money or the provision of finance or an agreement to lend money or provide finance where the practitioner or the practitioner's firm is also acting in the same transaction for the borrower or the financier. This sub-rule does not prohibit the practitioner acting for a borrower and a guarantor if in the same transaction the guarantor is:

- 8.6.1 a borrower;
- 8.6.2 a director of a borrower;
- 8.6.3 a shareholder of a borrower;
- 8.6.4 a beneficiary in a trust of which the borrower is the trustee;
- 8.6.5 a party holding a beneficial interest in the borrower;
- 8.6.6 a body corporate related to a borrower within the meaning of the Corporations Act;
- 8.6.7 a director of such a related body corporate;
- 8.6.8 a shareholder of such a related body corporate; or
- 8.6.9 a party holding a beneficial interest in such a related body corporate,

nor does this Rule prohibit the practitioner acting for both the financier and the guarantor in the same transaction if they are related bodies corporate within the meaning of the *Corporations Act*.

8.7 *not adopted in South Australia.*

9. Avoiding Conflict of Interest (where practitioner's own interest involved)

- 9.1 A practitioner must not, in any dealings with a client:
 - 9.1.1 allow an interest of the practitioner or an associate of the practitioner to conflict with the client's interest;
 - 9.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client.
- 9.2 A practitioner must not accept instructions to act or continue to act for a person in any matter when the practitioner is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

10. Receiving a Benefit under a Will or other Instrument

- 10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner an executor must inform the client in writing before the client signs the will:
 - 10.1.1 of any entitlement of the practitioner, of the practitioner's firm or associate, to claim commission;
 - 10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge professional fees in relation to the administration of the estate; and

10.1.3 if the practitioner or the practitioner's firm or associate has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.

10.2 A practitioner who receives instructions from a person to:

10.2.1 draw a will under which the practitioner or the practitioner's firm or associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the practitioner is also to be appointed executor) and the reasonable professional fees of the practitioner or the practitioner's firm; or

10.2.2 draw any other instrument under which the practitioner or the practitioner's firm or associate will, or may, receive a substantial benefit in addition to the reasonable remuneration, including that payable under a conditional costs agreement,

must:

- (a) decline to act on those instructions; and
- (b) offer to refer the person, for advice, to another practitioner who is not an associate of the practitioner;

unless the person instructing the practitioner is either:

- (i) a member of the practitioner's immediate family; or
- (ii) a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.

10.3 For the purposes of this Rule:

"substantial benefit" means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

11. Practitioner and Client - Borrowing Transactions

11.1 A practitioner must not borrow any money, nor permit or assist an associate to borrow any money from:

11.1.1 a client of the practitioner, or the practitioner's firm;

11.1.2 a former client of the practitioner or practitioner's firm who has indicated continuing reliance upon the advice of the practitioner or the practitioner's firm in relation to the investment of money; or

11.1.3 a person who has sought from the practitioner, or the practitioner's firm, advice in relation to the investment of money or the management of the person's financial affairs.

11.2 This Rule does not prevent a practitioner or an associate borrowing from a client which is recognised by the practitioner's professional association as a business entity engaged in money lending.

ADVOCACY AND LITIGATION RULES

Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.

Rules 12.1 to 19.4 apply to all practitioners (whatever may be their predominant style of practice) when they are acting as advocates or as a solicitor in relation to a case in court. Other rules (eg rules 6.2 and 6.3) also may apply to advocates or in relation to a case in court.

12. Duty to Client

A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these Rules.

- 12.1 A practitioner must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.
- 12.2 A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner 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.
- 12.3 A practitioner must (unless circumstances warrant otherwise in the practitioner'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.

13. Independence - Avoidance of Personal Bias

- 13.1 A practitioner must not act as the mere mouthpiece of the client or of the instructing practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing practitioner's wishes, where practicable.
- 13.2 A practitioner will not have breached the practitioner's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing practitioner's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
 - 13.2.1 confine any hearing to those issues which the practitioner believes to be the real issues;

13.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or

13.2.3 inform the court of any persuasive authority against the client's case.

13.3 A practitioner must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the practitioner's personal opinion on the merits of that evidence or issue.

13.4 A practitioner must not unless exceptional circumstances warrant otherwise in the practitioner's considered opinion:

13.4.1 appear for a client at any hearing, or

13.4.2 continue to act for a client,

in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court. Exceptional circumstances will not usually warrant otherwise unless the practitioner has also consulted a senior practitioner who has approved the proposed appearance or continued acting.

13.5 A practitioner must not become the surety for the client's bail.

14. Frankness in Court

14.1 A practitioner must not knowingly make a misleading statement to a court.

14.2 A practitioner must take all necessary steps to correct any misleading statement made by the practitioner to a court as soon as possible after the practitioner becomes aware that the statement was misleading.

14.3 A practitioner will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

14.4 A practitioner seeking any interlocutory relief in an ex parte application must disclose to the court all factual and legal matters which:

14.4.1 are within the practitioner's knowledge;

14.4.2 are not protected by legal professional privilege; and

14.4.3 the practitioner has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

14.5 A practitioner who has knowledge of matters which are within Rule 14.4.3:

14.5.1 must seek instructions for the waiver of legal professional privilege, if the matters are protected by that privilege, so as to permit the practitioner to disclose those matters under Rule 14.4; and

14.5.2 if the client does not waive the privilege as sought by the practitioner:

- (a) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and
 - (b) must inform the court that the practitioner cannot assure the court that all matters which should be disclosed have been disclosed to the court.
- 14.6 A practitioner must, at the appropriate time in the hearing of the case and if the court has not yet been so informed, inform the court of:
 - 14.6.1 any binding authority;
 - 14.6.2 any authority decided by the Full Court of the Federal Court of Australia, a Court of Appeal of a Supreme Court or a Full Court of a Supreme Court;
 - 14.6.3 any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved; or
 - 14.6.4 any applicable legislation,which the practitioner has reasonable grounds to believe to be directly in point, against the client's case.
- 14.7 A practitioner need not inform the court of matters within Rule 14.6 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 practitioner to have informed the court of such matters in the ordinary course has already arrived or passed.
- 14.8 A practitioner who becomes aware of matters within Rule 14.6 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:
 - 14.8.1 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
 - 14.8.2 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.
- 14.9 A practitioner need not inform the court of any matter otherwise within Rule 14.6 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
- 14.10 A practitioner will not have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning those matters to the court, and those statements are not themselves misleading.

14.11 A practitioner 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.

14.12 A practitioner must inform the court in civil proceedings of any misapprehension by the court as to the effect of an order which the court is making, as soon as the practitioner becomes aware of the misapprehension.

15. Delinquent or Guilty Clients

15.1 A practitioner whose client informs the practitioner, before judgment or decision that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:

15.1.1 must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court;

15.1.2 must refuse to take any further part in the case unless the client authorises the practitioner to inform the court of the lie or falsification:

15.1.3 must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but

15.1.4 must not otherwise inform the court of the lie or falsification.

15.2 A practitioner whose client in criminal proceedings confesses guilt to the practitioner but maintains a plea of not guilty:

15.2.1 may cease to act, if there is enough time for another practitioner to take over the case properly before the hearing, and the client does not insist on the practitioner continuing to appear for the client;

15.2.2 in cases where the practitioner continues to act for the client:

(a) must not falsely suggest that some other person committed the offence charged;

(b) must not set up an affirmative case inconsistent with the confession;

(c) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;

(d) may argue that for some reason of law the client is not guilty of the offence charged; or

(e) may argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged.

15.3 A practitioner whose client informs the practitioner that the client intends to disobey a court's order must:

15.3.1 advise the client against that course and warn the client of its dangers;

15.3.2 not advise the client how to carry out or conceal that course;

15.3.3 not inform the court or the opponent of the client's intention unless:

- (a) the client has authorised the practitioner to do so beforehand; or
- (b) the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

16. Responsible use of Privilege

16.1 A practitioner must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the practitioner or on the practitioner's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

16.1.1 are reasonably justified by the material then available to the practitioner;

16.1.2 are appropriate for the robust advancement of the client's case on its merits;

16.1.3 are not made principally in order to harass or embarrass the person; and

16.1.4 are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court.

16.2 A practitioner must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the practitioner believes on reasonable grounds that:

16.2.1 factual material already available to the practitioner provides a proper basis for the allegation;

16.2.2 the evidence by which the allegation is made will be admissible in the case; and

16.2.3 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.

16.3 A practitioner must not open as a fact any allegation which the practitioner does not then believe on reasonable grounds will be capable of support by the evidence which will be available to support the client's case.

16.4 A practitioner must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:

16.4.1 the practitioner believes on reasonable grounds that the material already available to the practitioner provides a proper basis for the suggestion; and

16.4.2 in cross-examination going to credit alone, the practitioner believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.

- 16.5 A practitioner may regard the opinion of an instructing practitioner that material exists which appears to support a suggestion or allegation to which Rules 16.1, 16.2, 16.3 and 16.4 applies 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.
- 16.6 A practitioner must make reasonable enquiries to the extent which is practicable before the practitioner can have reasonable grounds for holding the belief required by Rules 16.1, 16.2, 16.3 and 16.4, unless the practitioner has received and accepted an opinion from the instructing practitioner within Rule 16.5.
- 16.7 A practitioner must not suggest criminality, fraud or other serious misconduct against any person in the course of the practitioner's address on the evidence unless the practitioner believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.
- 16.8 A practitioner who has instructions which justify submissions for the client in mitigation of the client's criminality and 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 practitioner believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.

17. Integrity of Evidence

- 17.1 A practitioner shall not advise or suggest to a witness that false evidence should be given.
- 17.2 A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.
- 17.3 A practitioner will not have breached Rules 17.1 or 17.2 by:
- 17.3.1 expressing a general admonition to tell the truth;
 - 17.3.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or
 - 17.3.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence,
- but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.
- 17.4 A practitioner must not confer with, or condone another practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:
- 17.4.1 as to which there are reasonable grounds for the practitioner to believe it may be contentious at a hearing; or
 - 17.4.2 which could be affected by, or may affect, evidence to be given by any of those witnesses,
- unless the practitioner believes on reasonable grounds that special circumstances require such a conference.

- 17.5 A practitioner will not have breached Rule 17.4 by conferring with, or condoning another practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.
- 17.6 A practitioner must not confer with any witness (including a party or client) called by the practitioner on any matter related to the proceedings while that witness remains under cross-examination, unless:
- 17.6.1 the cross-examiner has consented beforehand to the practitioner doing so; or
- 17.6.2 the practitioner:
- (a) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
 - (b) has, if possible, informed the cross-examiner beforehand of the practitioner's intention to do so; and
 - (c) otherwise does inform the cross-examiner as soon as possible of the practitioner having done so.
- 17.7 A practitioner must not take any step to prevent or discourage a prospective witness or a witness from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.
- 17.8 A practitioner will not have breached Rule 17.7 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

See also Local Rule 35.

18. Communications with Opponent

- 18.1 A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- 18.2 A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.
- 18.3 A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.
- 18.4 A practitioner must not deal directly with the opponent's client in relation to the case for which the opponent is instructed unless:
- 18.4.1 the opponent has previously consented;
- 18.4.2 the practitioner believes on reasonable grounds that :
- (a) the circumstances are so urgent as to require the practitioner to do so; and

(b) the dealing would not be unfair to the opponent's client; or

18.4.3 the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom.

18.5 A practitioner must not confer or deal directly with the party opposed to the practitioner's client in relation to the case for which the practitioner is instructed, where that party is not represented by a practitioner for the case, unless:

18.5.1 the party is not being indemnified by an insurance company which is actively engaged in contesting the proceedings; or

18.5.2 the party is being indemnified by an insurance company which is actively engaged in contesting the proceedings and the practitioner:

(a) has no reasonable grounds to believe that any statements made by the party to the practitioner may harm the party's interests under the insurance policy; or

(b) has reasonable grounds for the belief referred to in (a) but has clearly informed the party beforehand of that possibility; or

18.5.3 the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is personally represented but not in the case and the practitioner:

(a) has notified the party's representative of the practitioner's intention to do so; and

(b) has allowed enough time for the party to be advised by the party's representative.

18.6 A practitioner must not, outside an ex parte application or a hearing of which the 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:

18.6.1 the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or

18.6.2 the opponent has consented beforehand to the practitioner communicating with the court in a specific manner notified to the opponent by the practitioner.

18.7 A practitioner must promptly tell the opponent what passes between the practitioner and a court in a communication referred to in Rule 18.6.

18.8 A practitioner must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under Rule 18.6.2, other than the matters specifically notified by the practitioner to the opponent when seeking the opponent's consent.

19. Integrity of Hearings

19.1 A practitioner must not publish, or take steps towards the publication of, any material concerning current proceedings for which the practitioner is engaged, unless:

19.1.1 the practitioner is merely supplying, with the consent of the instructing practitioner or the client:

- (a) copies of pleadings or court processes in their current form, which have been filed, and which have been served in accordance with the court's requirements;
- (b) 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;
- (c) copies of the 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;
- (d) copies of exhibits admitted in open court and without restriction on access;
- (e) copies of written submissions, which have been given to the court, and which have been served on all other parties; or
- (f) objective information as to the status of the proceedings

19.1.2 the practitioner, with the consent of the instructing practitioner or the client as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or of any re-trial of the case before a jury and:

- (a) 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 evidence in the case, the status of the proceedings and the nature of the orders made or judgment given including any reasons given by the court;
- (b) the answers are accurate and uncoloured by comment or unnecessary description; and
- (c) the answers do not appear to express the practitioner's own opinions on any matters relevant to the case; or

19.1.3 the practitioner, with the consent of the client, is stating the client's position concerning proceedings in which there is no possibility of a jury ever hearing the case or of any retrial of the case before a jury, and:

- (a) *not adopted in South Australia;*

- (b) the practitioner's considered judgment is that because of prior or reasonably anticipated publicity about the case the interests of the client require the practitioner, and not the client, to make such statement;
 - (c) the statements are accurate and uncoloured by comment or unnecessary description; and
 - (d) the statements do not appear to express the practitioner's own opinions on any matters relevant to the case.
- 19.2 A practitioner must not publish, or take steps towards the publication of, any material concerning any current or potential proceedings including proceedings for which the practitioner is engaged or seeks to be engaged which:
- 19.2.1 is inaccurate or coloured by comment or unnecessary description;
 - 19.2.2 identifies the practitioner as a practitioner and appears to express the practitioner's own opinions on any matters relevant to the case (other than in an article or case note in a publication circulating primarily to other practitioners or legal academics); or
 - 19.2.3 is calculated or likely to a material degree to be prejudicial to, or to diminish public confidence in, the administration of justice.
- 19.3 A practitioner will not have breached Rule 19.1 simply by advising the client about whom there has been published a report relating to the case, and who has sought the practitioner's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.
- 19.4 A practitioner must not in the presence of any of the parties or practitioners deal with a court, or deal with any practitioner appearing before the practitioner when the practitioner is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the practitioner has special favour with the court or towards the practitioner.

20. Prosecutors' Duties *not adopted in South Australia*

RELATIONS WITH OTHER PRACTITIONERS

In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.

21. Communications

A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct.

22. Undertakings

- 22.1 A practitioner who, in the course of the practitioner's practice, communicates with another practitioner orally, or in writing, in terms which expressly, or by necessary implication, constitute an undertaking on the part of the practitioner personally to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely on it must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time.
- 22.2 A practitioner must not give to another practitioner an undertaking compliance with which requires the co-operation of a third party, who is not a party to the undertaking, and whose co-operation cannot be guaranteed by the practitioner.
- 22.3 A practitioner must not, in the course of the practitioner's practice, seek from another practitioner or that practitioner's employee, an undertaking, compliance with which would require the co-operation of a third party who is not a party to the undertaking, and whose co-operation could not be guaranteed by the practitioner or employee asked to give the undertaking.

23. Taking over a Matter from Another Practitioner

- 23.1 Where a practitioner's engagement is terminated before the completion of the matter, and the client instructs another practitioner to take over the conduct of the matter the following rules shall apply, subject to any orders which may be made by a court of competent jurisdiction in respect of the delivery of the client's documents.
- 23.2 The first practitioner must promptly, on receipt of a direction in writing from the client, deliver to the second practitioner all relevant documents to which the client is entitled and any information which is necessary for the proper conduct of the matter, unless the first practitioner claims a lien over the documents for unpaid costs.
- 23.3 If the client has terminated the first practitioner's engagement, the first practitioner may retain possession of the documents until the practitioner's costs are paid, or their payment to the practitioner is satisfactorily secured.

- 23.4 If the first practitioner has terminated the engagement and the client's documents are essential to the defence or prosecution of current proceedings which are continuing before a court, the practitioner must surrender possession of the documents to the client, upon receiving satisfactory security for the unpaid costs, or to the second practitioner, if so directed by the client, and, provided that the second practitioner:
- 23.4.1 holds the documents subject to the first practitioner's lien, if that is practicable, and provides reasonable security for the payment of the first practitioner's costs; or
 - 23.4.2 enters into an agreement with the client and the first practitioner to procure payment of the first practitioner's costs upon completion of the relevant proceedings.
- 23.5 A practitioner who receives a client's documents from another practitioner pursuant to an agreement between the client and both practitioners, providing that the practitioner receiving the documents will pay the first practitioner's costs from money recovered on the client's behalf in respect of the matter to which the documents relate, must do all things which are reasonably practicable on the practitioner's part to ensure compliance with the agreement.

24. Transfer of a Practitioner's Practice

- 24.1 When a practitioner intends to transfer to another practitioner the whole or part of the practitioner's practice, including clients' work in progress, and to put the other practitioner in possession of the documents held by the practitioner on behalf of clients, the practitioner must give to each client, fourteen (14) days (or such other period as may be reasonable in the circumstances), before the practitioner delivers possession of the practice to the practitioner acquiring it, notice in writing:
- 24.1.1 of the intended transfer of documents to the practitioner acquiring the practice, unless a contrary direction is received from the client; and
 - 24.1.2 of the client's right to give to the practitioner a contrary direction in relation to the conduct of the client's affairs and the delivery of the client's documents.
- 24.2 The notice which is sent to any client, on whose behalf the practitioner holds money in trust or under the practitioner's control, must advise the client of:
- 24.2.1 the balance of money held on the client's behalf;
 - 24.2.2 the practitioner's intention to transfer the relevant account to the practitioner acquiring the practice, unless advised by the client to the contrary; and
 - 24.2.3 the client's right to give to the practitioner a contrary direction as to the manner in which the practitioner should deal with the account on the client's behalf.

24.3 The practitioner, in addition to giving notice to clients as required by Rules 24.1 and 24.2, must comply with all other legislative provisions applicable to the trust money or controlled money held by the practitioner.

24.4 Rules 24.1, 24.2 and 24.3 do not apply where a new partner is admitted to a partnership which continues to conduct the practice.

25. Communicating with Another Practitioner's Client

25.1 A practitioner who is acting on behalf of a party in any matter other than in relation to a case in court (which matters are governed by Rules 18.4 and 18.5) must not communicate directly with any other party for whom, to the practitioner's knowledge, another practitioner is currently acting, unless -

25.1.1 (a) notice of the practitioner's intention to communicate with the other party, in default of a reply from the other practitioner, has been given to that practitioner, who has failed, after a reasonable time, to reply;

(b) the communication is made for the sole purpose of informing the other party that the practitioner has been unable to obtain a reply from that party's practitioner and requests that party to contact the practitioner; and

(c) the practitioner, thereafter, notifies the other practitioner of the communication; or

25.1.1 the other practitioner consents; or

25.1.2 (a) the circumstances are so urgent as to require the practitioner to do so; and

(b) the communication would not be unfair to the other party.

25.2 A practitioner who receives notice from another practitioner that the practitioner's client has instructed or retained that practitioner may, after notifying the other practitioner, communicate with the client for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's matters to the other practitioner.

RELATIONS WITH THIRD PARTIES

Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.

26. Contracting for Services

26.1 A practitioner who deals with a third party on behalf of a client for the purpose of obtaining some service in respect of the client's matters, must inform the third party when the service is requested, that the practitioner will accept personal liability for payment of the fees to be charged for the service or, if the practitioner is not to accept personal liability, the practitioner must inform the third party of the arrangements intended to be made for payment of the fees.

27. Undertakings

27.1 A practitioner who, in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.

28. Communications

28.1 A practitioner must not, in any communication with another person on behalf of a client:

28.1.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or

28.1.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client; or

28.1.3 threaten the institution of criminal or disciplinary proceedings against the other person in default of the person's satisfying a concurrent civil liability to the practitioner's client.

29. Debt Collection or Mercantile Agencies

29.1 A practitioner must not allow the practitioner's business name or stationery to be used by a debt collection, or mercantile, agent in a manner that is likely to mislead the public.

29.2 A practitioner who receives, from a debt collection or mercantile agent, instructions to act for a client creditor, must ensure that:

29.2.1 the practitioner's relationship to the agent is fully disclosed to the client;

- 29.2.2 the information required to be disclosed to the client by any relevant legislation and these Rules is communicated to the client;
- 29.2.3 the practitioner maintains direct control and supervision of any proceedings on behalf of the client; and
- 29.2.4 that any money recovered on behalf of the client is accounted for by the practitioner.

N.B. See also Local Rule 46 in relation to fee disputes between solicitor and counsel.

LEGAL PRACTICE

A practitioner is endowed by law with considerable privileges, including exclusive entitlement to appear in some courts and tribunals, exclusive entitlement to conduct some transactions and draw some documents, and special protection against disclosure of client confidences. These privileges require that the community has confidence that a practitioner must at all times be fit to enjoy those privileges. A practitioner ought also to act in ways which uphold the system of administration of justice in relation to which those privileges are conferred.

30. Standard of Conduct

30.1 A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is:

30.1.1 dishonest;

30.1.2 calculated, or likely to a material degree, to:

(a) be prejudicial to the administration of justice;

(b) diminish public confidence in the administration of justice;

(c) adversely prejudice a practitioner's ability to practice according to these rules.

31. Disclosure Requirements

31.1 A practitioner must promptly disclose to the practitioner's professional regulatory body the occurrence of any conduct which is contrary to Rule 30.1 and any conduct or event which may reasonably be regarded as adversely prejudicing a practitioner's ability to practise according to these rules.

31.2 A practitioner must within 28 days after the occurrence of a disclosable event:

31.2.1 inform the professional regulatory body in writing of the occurrence of the disclosable event; and

31.2.2 provide the professional regulatory body with written details of the circumstances giving rise to the disclosable event sufficient to enable the professional regulatory body to determine whether the occurrence of the disclosable event in relation to the practitioner, or any of the circumstances giving rise to it, may affect the practitioner's suitability to engage in legal practice as a practitioner.

31.3 A practitioner in relation to whom a disclosable event occurs must, within 14 days after receiving a written request from the professional regulatory body to do so, provide such further information concerning the disclosable event or any of the circumstances giving rise to it, as the professional regulatory body may require.

31.4 In this Rule, a "disclosable event" in relation to a practitioner means:

31.4.1 the making of a sequestration order against the practitioner pursuant to the Bankruptcy Act 1966 (Cth);

- 31.4.2 the entry by a practitioner into a debt agreement pursuant to Part IX of the Bankruptcy Act 1966 (Cth), or an agreement or arrangement pursuant to part X of that Act;
 - 31.4.3 the disqualification of a practitioner from managing or being involved in the management of any body corporate under any law in force in any jurisdiction within Australia, including disqualification from managing corporations under Part 2D.6 of the Corporations Act; or
 - 31.4.4 the conviction of a practitioner of an offence under any law in force in Australia or in any overseas country, or the offence is found proved, where the maximum penalty for the offence is a term of imprisonment of more than 12 months, or where fraud or dishonesty is an element of the offence.
- 31.5 In this Rule, "professional regulatory body" means the body lawfully entitled to regulate the entitlement of the practitioner to engage in legal practice.

32. Conducting Another Business

- 32.1 A practitioner who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the practitioner's legal practice must:
- 32.1.1 ensure that the other business is not of such a nature that the practitioner's involvement in it would be likely to impair, or conflict with, the practitioner's duties to clients in the conduct of the practice;
 - 32.1.2 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business;
 - 32.1.3 disclose to any client of the practitioner, who, in the course of dealing with the practitioner, deals with the other business, the practitioner's financial or other interest in that business; and
 - 32.1.4 cease to act for the client if the practitioner's independent service of the client's interest is reasonably likely to be affected by the practitioner's interest in the other business.
- 32.2 A practitioner will be deemed to be engaged in the conduct of another business where the practitioner, or an associate:
- 32.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value;
 - 32.2.2 exercises any material control over the conduct and operation of the business; or
 - 32.2.3 has an entitlement to a share of the income of the business which is substantial, having regard to the total income which is derived from it.

33. Referral Fees - Taking unfair advantage of potential clients – Commissions

- 33.1 In the conduct or promotion of a practitioner's practice, the practitioner must not -
- 33.1.1 accept an engagement to provide legal services to a person, who has been introduced or referred to the practitioner by a third party to whom the practitioner has given or offered to provide a fee, benefit or reward for the referral of clients or potential clients, unless the practitioner has first disclosed to the person referred the practitioner's arrangement with the third party; or
 - 33.1.2 seek an engagement for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the practitioner at the time when the engagement is sought.
- 33.2 A practitioner must not act for a client in any dealing with a third party from whom the practitioner may receive, directly or indirectly, any fee, benefit or reward in respect of that dealing unless:
- 33.2.1 the practitioner is able to advise and, in fact, advises the client free of any constraint or influence which might be imposed on the practitioner by the third party;
 - 33.2.2 the practitioner's advice is fair and free of any bias caused by the practitioner's relationship with the third party; and
 - 33.2.3 the nature and value of any fee, benefit, or reward, which may be received by the practitioner, are:
 - (a) fair and reasonable, having regard to objective commercial standards; and
 - (b) disclosed fully in writing to the client before the dealing is commenced.

ADDITIONAL LOCAL RULES APPLICABLE IN SOUTH AUSTRALIA**34. Legal Assistance**

- 34.1 A practitioner has an obligation to inform clients as to their eligibility for legal aid either by way of assistance from the Legal Services Commission or the Litigation Assistance Fund, and/or any other scheme for delivering aid or legal assistance to members of the community where that practitioner has reason to believe that such a client may be so eligible.
- 34.2 A practitioner shall give such assistance as may be reasonably necessary to a client in the making of an application for legal aid.
- 34.3 Subject to any requirements of any legal aid agency:
- (a) a practitioner who forms the view that a client in receipt of legal aid no longer has a reasonable prospect of success, the practitioner shall inform the legal aid agency accordingly and take such steps as may reasonably be necessary to ensure that the furnishing of aid is either terminated or reduced to reflect the opinion so formed;
 - (b) if a practitioner acting in a matter the subject of a grant of legal aid, becomes aware of any change in the financial position or other circumstances of the client, and if such change may be relevant to the continuing grant of aid or the terms upon which such aid may be continued, the legal aid agency shall be informed by the practitioner forthwith of such change;
 - (c) a practitioner who communicates matters pursuant to Sub-rules (a) and (b) hereof to the Legal Services Commission or any other legal aid agency shall inform the assisted person of the matters communicated.
- 34.4 A practitioner shall not disclose to the Court or to any third person including any opposing practitioner or party that a client is assisted by the grant of legal aid or that an application for such a grant has been or will be made, except:
- (a) upon the express instructions of the client and when such disclosure is necessary for the proper conduct of the matter; or
 - (b) as required by order of the Court or by statute.
- 34.5 A practitioner shall not communicate with the Legal Services Commission with a view to dissuading the Commission from granting or continuing to grant legal assistance to another party involved in any matter, where opposition to the grant of legal aid is advanced simply on grounds relating to the overall merits of the matter or by general comment as to the eligibility of the other party for aid.
- 34.6 If there is good reason to believe that the Commission may be unaware of any specific objective fact or facts clearly pertinent to the question of whether aid should be granted or continue to be granted the opposing practitioner may write to the Commission drawing attention to such fact or facts, but shall not urge that aid should not be granted.

35. Instructing Agent

35.1 A practitioner may instruct an agent to make observations of an opposing party if such observations are directed towards the ascertainment of evidence which might be tendered at the trial of a matter but a practitioner shall not instruct an agent:

- (a) to communicate with such a party with a view to obtaining any admissions contrary to the case of that party;
- (b) to commit any illegal act; or
- (c) to do anything which would be improper for the practitioner to do.

36. Advertising

36.1 Legal practitioners may advertise in connection with their practice if the advertising -

- (a) is not false;
- (b) is not misleading or deceptive, or likely to mislead or deceive;
- (c) is not in the opinion of the Society likely to bring a practitioner, the legal profession, or the legal system into disrepute;
- (d) is not defamatory of another practitioner.

36.2 There is an onus upon any practitioner advertising or otherwise claiming to be 'expert' or 'specialist' in a particular field to prove, if required, that such a claim is not false, misleading or deceptive.

The following factors relating to that field of practice will be taken into account:

- academic qualifications
- experience
- extent and recency of CLE attendance or involvement
- proportion of working time involved in that field
- level of success achieved
- significance of the matters in the field involving the practitioner
- any formal interstate accreditation in that field
- assessment by a number of peers to establish whether or not the practitioner is regarded as having special expertise in the field of practice
- such other matters as are relevant.

37. Business Names and Professional Description

37.1 Practitioners shall not describe themselves in connection with their profession as other than a legal practitioner, lawyer, barrister, solicitor or where so commissioned or otherwise licensed, as a Queen's Counsel, notary public, tax agent or land broker, mediator, conciliator, arbitrator or migration agent.

- 37.2 Practitioners may practise as a member of more than one firm of practitioners or on their own account and as a member of a firm of practitioners provided that there is no reasonable possibility that any client, the public or other practitioners may be confused as to the capacity in which the practitioner is acting at any one time or in relation to any other matter.
- 37.3 Subject to Rule 37.4 a practitioner may carry on business under any name that is not misleading or deceptive or likely to mislead or deceive the public, the profession or the court and provided that such name is of such a nature that it would not be likely, in the opinion of the Society, to bring the legal profession or the legal system into disrepute.
- 37.4 Where a practitioner wishes to practise under a name other than those referred to in (a) to (f) below the practitioner must first obtain the approval of the Society:
- (a) the practitioner's own name;
 - (b) the practitioner's own name and the name of any other practitioner with whom he is carrying on business as a practitioner;
 - (c) the name of any other practitioner or the names of any other practitioners with whom he is carrying on business;
 - (d) the name of a former practitioner or the names of former practitioners with whom the practitioner was carrying on business before the former practitioner or former practitioners retired, resigned or died;
 - (e) the name of a former practitioner;
 - (f) the name in which another practitioner was or other practitioners were carrying on business before the practitioner purchased the business being carried on in the name provided that such name complied with paragraphs (a) to (e) above before the date of purchase.
- 37.5 Subject to Rule 36, a practitioner may include on professional stationery the names of persons who are partners of or otherwise employed by the practitioner providing that such professional stationery is not capable of misleading or deceiving the practitioner's clients, the public, the profession or the court.
- 37.6 For the purpose of signing any summons, writ, or other process a solicitor may use a rubber stamp or other substitute for the normal signature, provided that the same is affixed or applied by the solicitor personally.

38. Letterhead

- 38.1 Unless granted exemption by the Law Society from this rule, a practitioner must place in legible form on any letterhead of the practitioner's practice the name under which the practitioner practises, the address of the practitioner's principal place of practice, the practitioner's telephone number and, if appropriate, any document exchange number, any e-mail address and any facsimile number.
- 38.2 In any written communication by a practitioner with clients or other parties, the author of that communication must be identified by name.

39. Sharing Fees

A practitioner shall not share or agree to share fees derived from his or her practice with a person who is not a practitioner, other than as may be permitted by the Act.

40. Charging for Issue of a Summons

A practitioner may agree to charge less than the scale fee for the issue of a summons or a flat fee for such service, provided that the actual fee to be charged is shown on the face of the summons and the practitioner does not, directly or indirectly, seek to recover a fee in excess of the amount shown on the face of the said summons.

41. Communicating with Clients on Costs

41.1 It is a practitioner's duty to communicate effectively and promptly with clients.

41.2 Without limiting sub-rule 41.1 the practitioner shall unless it is unreasonable or inappropriate in the circumstances so to do:

- (a) as soon as practicable after first taking instructions from a client provide to the client written advice as to the reasonably estimated range of costs and disbursements the client may incur by pursuing the legal activity and the method of calculation of those costs;
- (b) provide to the client as soon as practicable after taking instructions written advice as to the basis upon which the practitioner accepts the client's retainer and in particular setting out the basis upon which the practitioner intends to charge the client for the services rendered and the current rates that apply to such charges; provided that such advice will not be required where there exists an applicable prior agreement by which all work done by the solicitor for that client or all work of a certain kind is subject to an agreed charging rate;
- (c) provide to the client as and when reasonably requested, a review of the estimated costs and disbursements and the reasons therefore;
- (d) provide to the client prior to the settlement of a litigious matter negotiated by the practitioner, advice as to the likely minimum net amount that the client will receive should the matter be settled in accordance with the proposed settlement and should payments due from such settlement be no more than those of which the practitioner is reasonably aware at the time of the settlement.

Nothing in this rule shall oblige a practitioner to provide the required advice if the practitioner has previously provided that written advice to the client.

42. Contingency Fees

42.1 A practitioner or firm of practitioners must not enter into a costs agreement under which the amount payable, or any part of the amount payable, to the practitioner or firm of practitioners is calculated by reference to a percentage of any judgment, settlement or monetary sum to be recovered by the client.

42.2 A practitioner or firm of practitioners shall not charge fees which are unfair or unreasonable or enter into a costs agreement the terms of which are unfair or unreasonable. In considering whether the fees or the terms of a cost agreement are unfair or unreasonable regard shall be had to:-

- (a) the nature of the matter;
- (b) the amount at stake in the matter;
- (c) the jurisdiction involved;
- (d) the urgency of the matter;
- (e) the ability of the client to understand and appreciate the terms of the agreement;
- (f) the knowledge, experience and position of the client;
- (g) whether the client has received independent advice about the fees or the agreement;
- (h) whether the practitioner or firm has explained to the client any difference between the costs provided for by the agreement and the costs provided for by any relevant scale and the effect thereof on what can be recovered on a costs order;
- (i) whether the costs agreement is a complying contingency costs agreement as defined below. A complying contingency costs agreement which provides for a solicitor/client fee which constitutes up to double the fees to which the firm or practitioner would otherwise be entitled if those fees were charged according to the scale contained in the current applicable schedule to the rules of the Supreme Court will be regarded as prima facie fair and reasonable;
- (j) the experience, reputation and ability of the lawyer or lawyers performing the services;
- (k) any other relevant matter.

A complying contingency costs agreement is one:-

- (a) which relates to a litigious matter other than a criminal or matrimonial matter;
- (b) which is entered into either at the commencement of the practitioner's retainer from the client or after initial investigation of the matter;
- (c) which provides that in the event of the action being unsuccessful the practitioner either:-
 - (i) will not charge the client, or
 - (ii) will charge the client only disbursements or some defined amount or proportion of disbursements;
- (d) which relates to a matter where in the professional judgment of the practitioner the client's claim has some prospect of success but where the risk of the claim failing and of the client having to meet his or her own costs is significant;
- (e) where the practitioner has before the signing of the agreement informed the client of the client's right to obtain independent legal advice and of the right to have the agreement reviewed by the Supreme Court pursuant to section 42(7) of the Legal Practitioners Act and of the right to have the fees charged reviewed by the Conduct Board under section 77A of the Legal Practitioners Act the agreement specifically records this;

- (f) which:-
- (i) is in writing and in plain English and sets out clearly the terms of the agreement and is signed by the client;
 - (ii) contains the provision that the client shall have a cooling off period of five clear business days from the signing of the contract during which he or she may, by giving notice in writing to the practitioner, terminate the contingency fee agreement.

43. Duty Solicitor and Advisory Services

Practitioners participating in duty solicitor and advisory services conducted by or in conjunction with the Society shall:

- (a) comply with the guidelines being Attachment 1 to these Rules;
- (b) before taking part in a duty solicitor service or an advisory service, execute and lodge with the Society an application in the form prescribed by the Society.

44. Discrimination, Sexual Harassment and Racial Vilification

44.1 Definitions

For the purpose of this Rule:

discrimination shall have the same meaning as it does in:

- sections 5, 6 7 and 7A of the Sex Discrimination Act 1984 (Cth);
- section 9 of the Racial Discrimination Act 1975 (Cth);
- section 5-9 inclusive of the Disability Discrimination Act 1992 (Cth); and
- section 3 of the Human Rights and Equal Opportunity Act 1986 (Cth).

racial vilification shall have the same meaning as it does in section 28A of the Sex Discrimination Act 1996 (SA).

sexual harassment shall have the same meaning as it does in Section 28A of the Sex Discrimination Act 1984 (Cth).

44.2 Prohibited Conduct

A practitioner must not in any professional context engage in conduct which amounts to discrimination, sexual harassment or racial vilification as defined.

44.3 Complaints Procedure

44.3.1 A person ('the complainant') who alleges any breach by a practitioner ('the practitioner') of paragraph 2 of this Rule may lodge a complaint in writing with any one of the persons appointed from time to time by the Law Society as a conciliator for complaints under this Rule ('the conciliator').

44.3.2 The conciliator who receives a complaint shall treat the complaint and any response as confidential, but may do any one or more of the following:

- (a) provide the complainant with counselling and advice;
- (b) inform the practitioner concerned of the complaint;
- (c) provide the practitioner with an opportunity to respond to the complaint;
- (d) provide the practitioner with the opportunity to be counselled or advised on a confidential basis in respect of the complaint;
- (e) arrange for the complaint to be conciliated on a confidential basis by the conciliator acting alone or with another conciliator.

The steps referred to in (a), (b), (c) and (d) shall only be taken with the consent of the complainant. The step referred to in (e) shall only be taken with the consent of both parties.

44.3.3 Nothing in these Rules shall prevent the complainant from lodging a complaint alleging a breach of this Rule and having such complaint treated as any other complaint by the prevailing disciplinary procedure applying to the legal profession in South Australia.

45. Judges and Magistrates Returning to Practice

45.1 A practitioner who is a former judicial officer shall not appear as counsel nor as instructing solicitor in:

- (i) any court or before any officer exercising judicial or quasi-judicial functions if the practitioner has been a member of or presided in such court; or
- (ii) any court or tribunal from which appeals to any court or tribunal of which the judicial officer was formerly a member may be made or brought;
- (iii) any court of equal status to the court over which that judicial officer has presided,

for a period of three years following the practitioner's retirement from the bench.

45.2 A magistrate who has retired from the bench should not appear in a court of summary jurisdiction until the lapse of at least twelve months after that retirement.

45.3 The above rules also apply to a former judicial officer or former Magistrate who held an acting appointment only, but do not apply to such person unless the acting appointment was for a period of one year or more.

45.4 The Council may at any time vary the application of this Rule or dispense with its compliance in special circumstances.

46. Dealings between Solicitor and Counsel – Fee Disputes

46.1 Practitioners in their capacity as solicitor in dealings with counsel instructed in a matter shall endeavour to perform and discharge all the work properly within the scope of work to be done by an instructing solicitor.

- 46.2 A practitioner in the capacity as instructing solicitor is personally liable for payment of counsel's proper fees whether or not money has been received from the client with which to pay them.
- 46.3 A practitioner who receives moneys from a client for the express purpose of paying counsel's fees shall apply the moneys for that and no other purpose.
- 46.4 A practitioner in the capacity of instructing solicitor must inform counsel of any dispute concerning or failure to accept counsel's fees within a reasonable time, and in any event within three months, of the delivery of a bill from counsel.
- 46.5 There shall be a standing Adjudication Panel comprising such persons appointed to it as have been nominated jointly by the President of the Society and the President of the South Australian Bar Association (who shall jointly review members at least every two years) and who have accepted such nomination and remain upon the Panel ("Adjudicators").
- 46.6 Either an instructing solicitor or counsel may request the President of the Society to appoint an Adjudicator to determine any dispute or potential dispute relating to counsel fees.
- 46.7 If both the relevant instructing solicitor and counsel consent in writing to be bound by the determination of an Adjudicator, the President of the Society shall appoint an Adjudicator selected from the panel for that purpose.
- 46.8 The Adjudicator so appointed may conduct the adjudication as he or she considers appropriate, and the adjudication shall be binding on both parties.

GUIDELINES FOR DUTY SOLICITOR AND ADVISORY SERVICES

- (1) Subject to Rule (2) and (3) hereof, practitioners may, - in respect of any person who consults them as a member of an Advisory Service or as Duty Solicitor -
 - (a) accept any assignment from the Legal Services Commission;
 - (b) act for that person privately;
 - (c) recommend any practitioner or firm of practitioners to act either privately or on assignment from the Legal Services Commission.
- (2) Practitioners shall not suggest to any person who consults them as members of an Advisory Service or as Duty Solicitor that such person should engage them or any firm of which they may be a member or any partner in any such firm to act privately or by assignment from the Legal Services Commission for such person either in the matter the subject of such consultation or any other matter, or otherwise encourage such person to do so.
- (3) If persons asks to be recommended a practitioner to act for them, either privately or on assignment from the Legal Services Commission, practitioners may give to the person their name, address and telephone number but must also give to the person the names, addresses and telephone numbers of two other practitioners or firms of practitioners, but which list shall not include the names of more than one practitioner from any one firm.
- (4) If requested, the practitioner may assist the person to complete an application to the Legal Services Commission for legal aid.
- (5) Any practitioner seeking to be placed on the roster for any Advisory Service or Duty Solicitor scheme must sign an undertaking to accept and abide by these guidelines.
- (6) A practitioner should not seek to give advice or to become involved in a matter which appears to involve a complaint of improper or unprofessional conduct by a practitioner. Any person seeking advice in respect of such a matter should be referred to the Legal Practitioners Conduct Board the telephone number of which is 8212 7924.
- (7) If a practitioner is consulted on a matter which appears to involve a complaint about inefficiency or slow service or poor communication, any specific comment on the propriety of the conduct of the practitioner concerned should be avoided. The person seeking advice may be informed of that person's right to instruct another solicitor. If the complaint appears to be one of significant delay or of a significant departure from ordinary standards of efficiency the person concerned should be advised to make contact with the Legal Practitioners Conduct Board.
- (8) Practitioners should avoid giving a second opinion if it is disclosed to them that the matter in respect of which advice is being sought is one already being handled by another solicitor. It is permissible to give general advice on some short or simple point where to do so would avoid some misunderstanding between solicitors.

GUIDELINES FOR LEGAL PRACTITIONERS**ACTING AS MEDIATORS OR ACTING AS ADVISERS TO PARTIES IN MEDIATION**

Including amendments up to 25 November 2002

1. Interpretation

- 1.1 "Mediator" means the person who either alone or with another conducts mediation;
- 1.2 "Parties" means any number of persons or entities who/which undertake mediation;
- 1.3 "Practitioner" means a legal practitioner;
- 1.4 In these guidelines the singular word is to be read (where appropriate) as including the plural and vice-versa.

2. Introduction

For the purposes of these guidelines, any reference to "mediator" shall be deemed to be a reference to a practitioner acting as mediator.

3. Definition Of Mediation

- 3.1 Conventional mediation is a voluntary process in which the mediator who is totally impartial and independent of the parties facilitate the parties in the negotiation by them of their own solution to their dispute by assisting the parties to isolate the issues, to develop options for the issues resolution and to reach an agreement which accommodates the interests and needs of the parties.

The mediator does not impose a solution upon the parties. It is not the function of mediation for the mediator to attempt to coerce the parties into agreement nor should any mediator make any decision for the parties. The mediator may only raise with and help the parties to explore options for an eventual agreement. The mediator shall not give legal advice to the parties.

- 3.2 Flexible mediation includes processes where the mediator, with the prior express agreement of the parties, provides an evaluation, either pursuant any Rules of Court or Guidelines of any Court, of the issues at mediation and/or recommends a basis for resolution and/or proceeds to arbitrate or conciliate one or more issues arising in the mediation.

4. Recommended Duties of the Mediator

(These provisions apply to conventional mediation and, unless contrary to the process used, to flexible mediation).

- 4.1 The mediator and the parties shall enter into a written agreement regulating their respective rights, duties, obligations and liabilities.
- 4.2 The mediator shall take such measures as are necessary to ensure the effective participation of parties. This shall include:

- considering the level of understanding by the parties of the issues and implications of possible outcomes;
 - considering the possibility of any undue influence on a party by the other party or by any other outside involvements;
 - considering whether mediation is the appropriate process to resolve the parties' dispute;
 - considering the parties' reasons for involvement in the mediation process and whether such reasons are appropriate to the process and whether the parties' participation is in good faith;
 - ascertaining whether the parties are able to negotiate effectively in the process.
- 4.3 The mediator is obliged to define and describe the process of mediation that is to be used.
- 4.4 The mediator shall explain the fees to be charged for mediation and any related costs and shall agree with the parties on how the fees will be shared and the manner of payment. No commissions, rebates or similar forms of remuneration shall be given or received for referral of the parties for mediation services.
- 4.5 The mediator shall as and when the mediator thinks fit obtain sufficient information from the parties so that they can mutually define and agree on the issues to be resolved in mediation.
- 4.6 The mediator shall give an overview of the process, assess the appropriateness of mediation for the parties and ascertain that each party gives free and informed consent to participate in the mediation process.
- 4.7 The mediator shall stress that the process is "without prejudice" and that unless both parties consent, unless otherwise required by law no information disclosed during the course of the mediation process should be disclosed in legal proceedings.
- 4.8 The mediator shall advise the parties that decisions are to be made voluntarily.
- 4.9 The mediator shall inform the parties that any of them or the mediator has the right to suspend or terminate the process of mediation at any time.
- 4.10 The mediator shall explain to the parties that there may be consultation between the mediator and each of them in separate sessions and that information divulged during any separate session will be kept confidential in the absence of that party's specific agreement to disclose the information to the other.
- 4.11 The mediator at the commencement of the mediation, shall establish rules with the parties as to the conduct of each party with respect to each other and the mediator during the mediation process.
- 4.12 The mediator shall inform the parties that they have the right at any time to obtain and may need to obtain independent legal advice during the mediation process.
- 4.13 The mediator shall encourage the parties to consider the impact of any agreement they make on others and the impact of relevant other parties on their agreement.

5. Recommended Duties of the Legal Practitioner as an Adviser

- 5.1 The legal practitioner shall at all times during any mediation process recognise that the mediator occupies a position not dissimilar to that of a Judge or Arbitrator. The legal practitioner shall observe similar proprieties with regard to honesty and candour and should not mislead the mediator.
- 5.2 Subject to the requirements of the law a legal practitioner must maintain confidentiality as required by the parties.

6. Impartiality and Neutrality

- 6.1 The mediator shall at times during any mediation process maintain impartiality towards the parties but this shall not prevent the mediator engaging in flexible mediation.
- 6.2 The mediator shall before and during the mediation process disclose to the parties any circumstances which may cause or have any tendency to cause a conflict of interest.
- 6.3 A mediator who is a partner, employer or fellow employee of any practitioner, legal counsel or law clerk retained by either of the parties shall not act as mediator for the parties.
- 6.4 A mediator shall not act in any capacity for either of the parties upon the conclusion of the mediation process save and except in situations which do not relate to the issues mediated between the parties and to which the parties agree.

7. Confidentiality

- 7.1 The mediator shall observe and explain confidentiality. The mediator shall address parties' expectations regarding the extent and limits of confidentiality.
- 7.2 Subject to the requirements of the law, the mediator shall not disclose information received or obtained during the mediation process without the prior written consent of the parties.
- 7.3 The obligations of a practitioner relating to confidentiality and any limits on confidentiality as between practitioner and client shall apply between the mediator and the parties.
- 7.4 If subpoenaed or otherwise given notice or requested to testify the mediator shall inform the remaining party or parties immediately in writing.
- 7.5 Information received by the mediator in separate sessions shall not be revealed to the other party or parties without prior permission from the party from whom the information was received.

8. Termination of Mediation

- 8.1 The mediator shall discourage parties from abandoning the mediation process when the mediator believes an agreement is possible.
- 8.2 The mediator shall terminate the mediation when it is recognised that there is no reasonable prospect of continuing negotiation.
- 8.3 The mediator shall terminate the mediation when to continue the mediation could result in some harm to any of the parties.
- 8.4 In appropriate circumstances the mediator may abandon (or threaten to abandon) the mediation process in order to induce agreement.

9. Responsibilities of Mediator Upon An Agreement Being/Not Being Reached

- 9.1 Where the parties have reached an agreement the mediator should endeavour to ensure that the agreement be reduced to writing and signed by the parties. If required by the express agreement of the parties or otherwise at law, a mediator involved in flexible mediation shall provide an appropriate written outcome such as an award, an opinion or an evaluation.
- 9.2 An accurate record shall also be kept upon an agreement not being reached and the mediator shall make any further appropriate referrals.
- 9.3 The mediator shall ensure that all parties to an agreement clearly understand the agreement, and their roles and responsibilities in it.
- 9.4 The agreement shall be tested at this stage for its workability and durability.

10. Responsibilities to Other Mediators and to the Parties

A mediator may co-mediate with any person whether or not that person is a mediator as defined in these guidelines.

11. List of Mediators

- 11.1 The Law Society may maintain a list of members who wish to act as mediators and who
- 11.1.1 have undertaken an approved course; and
- 11.1.2 have been admitted as a legal practitioner in Australia.

11.2 Approved course

An "approved course" is one that meets the following minimum criteria:

- 11.2.1 comprises at least three days of training
- 11.2.2 includes a theoretical background to mediation and negotiation as well as practical training sessions
- 11.2.3 provides the opportunity for each participant to undertake at least two simulated exercises as mediator with one of those exercises being assessed by a trained mediator who provides direct written feedback to the mediator on their performance

and is approved by the Council of the Law Society upon application in writing to the Society.

11.3 Currently approved courses:

University of South Australia -

- Graduate Certificate in Mediation (Family)
- Graduate Certificate in Mediation (Workplace Relations)
- Graduate Diploma in Conflict Management
- Master of Conflict Management

Adelaide University/IAMA

- Three day Basic Mediation Workshop and Mediation Accreditation session (as an adjunct to the Professional Certificate in Arbitration and Mediation)

LEADR

- Four day mediation workshop

Bond University:-

- Three day Basic Mediation Course

The Accord Group:-

- Four day Commercial Mediation Training Course

The Institute of Arbitrators and Mediators:-

- National Mediation and Conciliation Course

- 11.4 Mediators who undertook courses approved under the previous guidelines
Legal practitioners who undertook a course which was approved under
previous guidelines are eligible to remain on the List of Mediators
maintained by the Society.