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Fundamentals of Ethical Practice for Solicitors

ETHICS SERIES | WEDNESDAY 6 NOVEMBER

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Acknowledgment of Country

We begin today by acknowledging the traditional custodians of the land where we are meeting, the Ngunnawal and Ngambri peoples. We pay respects to their Elders past, present, and emerging, and also to all Aboriginal and Torres Strait Islander peoples here today.

ACT Legal Profession (Solicitors) Conduct Rules 2015

Applies to:

- Australian legal practitioners who hold a practising certificate (private and government lawyers)
- Australian-registered foreign lawyers
- Legal practitioners in an incorporated legal practice or multi-disciplinary partnership

Purpose (Rule 2)

- To assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and the Rules
- A breach of the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary actions

Characterisation of breaches of the Rules and common law

Unsatisfactory professional conduct

- Conduct happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner

Professional misconduct

- Unsatisfactory professional conduct if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- Conduct whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice; and
- Conduct which would be regarded as disgraceful or dishonourable by one's professional peers – see *Allinson v General Council of Medical Education and Registration* [1984] 1 QB 750 (cf *Council of the New South Wales Bar Association v EFA* [2021] NSWCA 339)

Rule 3 – Paramount duty to the Court and the administration of justice

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

Observance of this Rule is essential to maintain and justify the confidence that every court necessarily puts in lawyers who appear before it.

***Rondel v Worsley*
[1969] 1 AC 191 at
227 per Lord Reid**

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

Examples where a practitioner could find themselves in breach of Rule 3

***Legal Profession
Board Of Tasmania
v W [2023] TASFC 1***

- The practitioner was found guilty of unprofessional conduct at first instance
- On appeal the finding of unprofessional conduct was set aside and a declaration of professional misconduct was made

Estcourt J

Whatever his client's instructions were and no matter what his belief in those instructions was, the respondent's conduct had a tendency to prevent or defeat the due course of justice or the administration of the law.

Examples where a practitioner could find themselves in breach of Rule 3

***Victorian Legal
Services Commissioner
v R (Legal Practice)
[2023] VCAT 409***

- The practitioner was found guilty of professional misconduct relating to four separate acts
- The practitioner was found guilty of unsatisfactory professional conduct relating to two other acts
- The findings related primarily to failings in the administration of justice

Examples where a practitioner could find themselves in breach of Rule 3

- Bringing proceedings or arguing a matter before the Court knowing the proceedings/arguments have no reasonable prospects of success
- Advancing a position on behalf of a client if you reasonably believe, or have reasons to suspect, the instructions to be untrue
- Knowingly misleading the court
- Failing to comply with court orders

Rule 4 – Other fundamental ethical duties

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client.

- This duty is vital and prevails except to the extent it conflicts with Rule 3

Examples where a practitioner could find themselves in breach of Rule 4.1.1

***Council Of The Law Society
of the ACT v Legal
Practitioner LP 202012
(Occupational Discipline)
[2024] ACAT 11***

- This proceeding related to numerous breaches of Rule 4.1.1 and various other Rules.
- The practitioner was found to be permanently unfit to engage in legal practice.
- The Tribunal recommended that the practitioner's name be removed from the roll of legal practitioners kept by the Supreme Court of the Australian Capital Territory

Examples where a practitioner could find themselves in breach of Rule 4.1.1

- Failing to comply with Court orders
- Failing to communicate or adequately communicate with the client
- Accepting instructions to act in a matter in which the practitioner has no experience
- Failing to act on proper instructions
- Acting contrary to instructions
- Breaching the client's confidentiality in communications with another lawyer or third party
- Acting for two clients in the same transaction in circumstances where to do so creates a conflict of interest
- Failing to provide costs disclosure to your client
- Charging excessive legal fees or charging contrary to the costs agreement

Rule 4 — Other fundamental ethical duties

4.1 A solicitor must also:

4.1.2 be honest and courteous in all dealings in the course of legal practice.

Failure to be courteous

- *Council of the Law Society of New South Wales v A Legal Practitioner* [2024] NSWCATOD 3

Failure to be honest

- *Council of the Law Society of the ACT v Legal Practitioner 202111* [2024] ACAT 66
- *A Legal Practitioner v Legal Profession Complaints Committee* [2013] WASCA 108
- *Bolton v Law Society* [1994] 2 All ER 486

Rule 4 – Other fundamental ethical duties

4.1 A solicitor must also:

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible.

- *Legal Services Commissioner v A Legal Practitioner* [2019] QCAT 192 – failing to respond to correspondence, comply with court orders and to promptly set aside default judgment
- *Council of the Law Society of the ACT v Legal Practitioner LP202012* [2024] ACAT 11 – making an application with no prospects of success
- *Victorian Legal Services Commissioner v Knight* [2024] VCAT 887 – failing to appear at a hearing

Rule 4 – Other fundamental ethical duties

4.1 A solicitor must also:

4.1.4 avoid any compromise to their integrity and professional independence.

- *Victorian Legal Services Commissioner v A Legal Practitioner [2022] VCAT 353 – taking a loan from a client*
- *Victorian Legal Services Commissioner v A Legal Practitioner [2022] VCAT 1333 – continuing to act following termination of retainer*
- *Victorian Legal Services Commissioner v A Legal Practitioner [2024] VCAT 834 – failing to advise clients of interest in business*

Rule 4 – Other fundamental ethical duties

4.1 A solicitor must also:

4.1.5 comply with these Rules and the law.

- *Victorian Legal Services Commissioner v A Legal Practitioner [2020] VCAT 409 (see also section 389 of the Legal Profession Act 2006 (ACT))*
- *Council of the Law Society of the ACT v A Legal Practitioner [2024] ACAT 58*

Key Takeaways

- The rules are aimed to guide and assist practitioners
- The disciplinary jurisdiction is aimed at protection of the public rather than punishment
- Co-operative approaches should be taken to complaints and disciplinary proceedings
- Practitioners are to be afforded procedural fairness throughout complaint process
- Utilise s 55 of the ACAT Act 2008 (ACT) where possible
- Take advice before and after you are faced with a complaint

Questions?



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