



New South Wales

Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022

under the

Legal Profession Uniform Law (NSW)

The Legal Services Council has made the following Rules under the *Legal Profession Uniform Law (NSW)*.

MEGAN PITT
Chief Executive Officer, Legal Services Council

Explanatory note

The objects of these Rules are as follows—

- (a) to clarify confidentiality and conflict of interest requirements, including in short term legal assistance services,
- (b) to harmonise certain provisions of these Rules with the *Legal Profession Uniform Conduct (Barristers) Rules 2015*,
- (c) to make other miscellaneous amendments to improve clarity and update the Rules.

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1 Name of Instrument

These Rules are the *Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022*.

2 Commencement

These Rules commence on 1 April 2022 and are required to be published on the NSW legislation website.

3 Authorising provision

These Rules are made by the Legal Services Council under the *Legal Profession Uniform Law*, Part 9.2.

Schedule 1 Amendment of Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

- [1] **Rule 2 Purpose and effect of the Rules**
Omit “, but cannot be enforced by a third party” from Rule 2.3.
- [2] **Rule 5, heading**
Omit the heading. Insert instead—“**5 Standard of conduct—dishonest or disreputable conduct**”
- [3] **Rule 5.1**
Omit the Rule. Insert instead—
5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which:
5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law, or
5.1.2 is likely to a material degree to:
(i) be prejudicial to, or diminish the public confidence in, the administration of justice, or
(ii) bring the profession into disrepute.
- [4] **Rule 6, heading**
Insert “**in the course of legal practice**” after “**Undertakings**”.
- [5] **Rule 10 Conflicts concerning former clients**
Omit “, except as permitted by Rule 10.2” from Rule 10.1.
- [6] **Rule 10.2.1**
Omit “written consent to the solicitor or law practice so acting”.
Insert instead “consent to the disclosure and use of that information”.
- [7] **Rule 11 Conflict of duties concerning current clients**
Omit “, except where permitted by this Rule” from Rule 11.1.
- [8] **Rule 11.2**
Insert “**Duty of loyalty**” as heading.
- [9] **Rule 11.2**
Omit “Rule 11.3.” Insert instead “Rules 11.3 and 11.4”.
- [10] **Rules 11.4 and 11.5**
Omit the Rules. Insert instead—
11.4 **Duty of confidentiality**
In addition to Rule 11.3, where a solicitor or a law practice acts for two or more clients in the same or related matters and the solicitor or law practice is in, or comes into, possession of information which is confidential to one client (the first client) which might reasonably be concluded to be material to the other client’s or clients’ matter and detrimental to the interests of the first client if

disclosed, the solicitor and the solicitor's law practice may not act or continue to act for the other client or clients unless each client's informed consent:

- 11.4.1 permits the disclosure and use of that information for the benefit of the other client or clients, or
- 11.4.2 requires the establishment and maintenance at all times of an effective information barrier to protect the confidential information of each client.

11.5 Actual conflict arising between current clients in the course of a matter

If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of those clients (or for two or more of those clients between whom there is no conflict) in the following exceptional circumstances:

- 11.5.1 any client for whom the solicitor or law practice ceases to act has given informed consent to the solicitor or law practice continuing to act for the remaining clients, and
- 11.5.2 the duty of confidentiality owed to all of the clients, both those for whom the solicitor or law practice ceases to act and those for whom the solicitor or law practice continues to act, is not put at risk.

[11] Rule 11A

Insert after Rule 11—

11A Short-term legal assistance services

- 11A.1 If a solicitor providing short-term legal assistance services forms a reasonable belief that the solicitor cannot screen for conflicts of interest due to circumstances where it is not reasonably practicable as the time required to do so may result in a real risk of the client being denied access to legal assistance, the solicitor must ensure, to the extent reasonably practicable, that—
 - 11A.1.1 the solicitor has disclosed the nature of the services to the client, and
 - 11A.1.2 there is no actual or potential conflict between the duties owed to the client and one or more other clients, and
 - 11A.1.3 the client has given informed consent to the provision of the services.
- 11A.2 A solicitor must not provide, or continue to provide, short-term legal assistance services to a client if the solicitor:
 - 11A.2.1 is or becomes aware that the interests of the client are adverse to the interests of a current client of the solicitor or the solicitor's law practice, or
 - 11A.2.2 is aware that the solicitor has, or while providing the short-term legal assistance services obtains, confidential information of a current or former client that might reasonably be concluded to be:
 - 11A.2.2.1 material to the client's matter, and
 - 11A.2.2.2 detrimental to the current or former client, if disclosed.
- 11A.3 A solicitor who is a partner, associate, employee, officer or employer in a law practice through which another solicitor is providing short-term legal assistance services, may act for another client of the law practice whose interests are adverse to the interests of the client receiving the services if:
 - 11A.3.1 each client has given informed consent, and

11A.3.2 measures are in place to ensure confidential information will not be disclosed.

11A.4 In this Rule:

short-term legal assistance services means services offered by a solicitor to a client, whether through a legal assistance service provider or on a pro bono basis, with the expectation by the solicitor and the client that the solicitor will not provide continuing legal advice or representation in the matter.

[12] Rule 12 Conflict concerning a solicitor's own interests

Omit Rule 12.2. Insert instead—

12.2 A solicitor must not do anything:

- (i) calculated to dispose a client or third party to confer on the solicitor, either directly or indirectly, any benefit in excess of the solicitor's fair and reasonable remuneration for legal services provided to the client, or
- (ii) that the solicitor knows, or ought reasonably to anticipate, is likely to induce the client or third party to confer such a benefit and is not reasonably incidental to the performance of the retainer.

[13] Rule 12.4.1

Omit "client signs the Will". Insert instead "Will is signed".

[14] Rule 12.4.2(i) and (ia)

Omit paragraph (i). Insert instead—

- (i) a member of the solicitor's immediate family,
- (ia) a member of the immediate family of the solicitor's spouse, or

[15] Rule 14 Client documents

Omit "legislation" from Rule 14.2. Insert instead "legal obligations".

[16] Rule 15, heading

Omit "essential".

[17] Rule 15.1.1

Omit "surrender" from Rule 15.1.1. Insert instead "deliver up".

[18] Rule 15.1.1(i)

Omit "with reasonable". Insert instead "maintains reasonable".

[19] Rule 16 Charging for document storage

Insert "(either physical, electronic or otherwise)" after "storage" in Rule 16.1.1.

[20] Rule 16.1

Omit "agreed in writing". Insert instead "consented".

[21] Rule 17 Independence—avoidance of personal bias

Omit "will not have breached" from Rule 17.2. Insert instead "does not breach".

[22] Rule 19, heading

Omit the heading. Insert instead "**19 Duty to the court**".

[23] Rule 20 Delinquent or guilty clients

Omit Rule 20.1.4.

[24] Rules 20.2.1–20.2.3

Omit the Rules. Insert instead—

- 20.2.1 may, subject to the client accepting the constraints set out in Rules 20.2.2–20.2.8, but not otherwise, continue to act in the client's defence,
- 20.2.2 must not falsely suggest that some other person committed the offence charged,
- 20.2.3 must not set up an affirmative case inconsistent with the confession,
- 20.2.4 must ensure that the prosecution is put to proof on its case,
- 20.2.5 may argue that the evidence as a whole does not prove that the client is guilty of the offence charged,
- 20.2.6 may argue that for some reason of law the client is not guilty of the offence charged,
- 20.2.7 may argue that for another reason not prohibited by Rule 20.2.2 or 20.2.3 the client should not be convicted of the offence charged, and
- 20.2.8 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

[25] Rule 21 Responsible use of court process and privilege

Omit “made” from Rule 21.1.3 and 21.1.4. Insert instead “given”.

[26] Rule 21.1.4

Omit “the instructing solicitor”. Insert instead “a third party”.

[27] Rule 21.6

Omit “21.1, 21.2,”.

[28] Rule 21.8

Insert “domestic or family violence,” before “sexual assault”.

[29] Rule 21.9

Insert after Rule 21.8—

- 21.9 A solicitor does not infringe Rule 21.8 merely because:
 - 21.9.1 the question or questioning challenges the truthfulness of the witness or the consistency or accuracy of a statement made by the witness, or
 - 21.9.2 the question or questioning requires the witness to give evidence that the witness could consider to be offensive, distasteful or private.

[30] Rules 22.1–22.3

Insert “or misleading” after “false” wherever occurring.

[31] Rule 23 Opposition access to witnesses

Omit Rule 23.2. Insert instead—

- 23.2 A solicitor does not breach Rule 23.1 simply by:

- 23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed, or
- 23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality.

[32] Rule 27 Solicitor as material witness in client's case

Omit "may act or continue to act for the client unless" from Rule 27.2.

Insert instead "must not continue to act for the client if".

[33] Rule 29 Prosecutor's duties

Omit Rule 29.7.2. Insert instead—

- 29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue,

UNLESS

- (i) the opponent consents to the prosecutor not calling a particular witness,
- (ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused,
- (iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses,
- (iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, or
- (v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case,

provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii), (iv) or (v) together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if those grounds were revealed to the opponent.

[34] Rule 29.8

Omit "or improperly".

[35] Rule 31 Inadvertent disclosure

Omit Rule 31.2. Insert instead—

- 31.2 A solicitor who reads part or all of the confidential material before becoming aware of its confidential status must:
 - 31.2.1 not disclose or use the material, unless otherwise permitted or compelled by law,
 - 31.2.2 notify the opposing solicitor or the other person immediately, and
 - 31.2.3 not read any more of the material.

[36] Rule 33 Communication with another solicitor's client

Omit "A solicitor must not deal directly with the client or clients of" from Rule 33.1.

Insert instead "In representing a client, a solicitor shall not communicate about the subject of the representation with a person the lawyer knows to be represented by".

[37] Rule 33.1.2(ii)

Omit "dealing". Insert instead "communication".

[38] Rule 33.1.3

Omit "the substance of the dealing". Insert instead "the communication".

[39] Rule 33.1.4

Omit "contact". Insert instead "the communication".

[40] Rule 34, heading

Insert "with" after "Dealing".

[41] Rule 34.1.1

Omit the Rule. Insert instead—

34.1.1 make any statement to another person:

- (i) which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and
- (ii) which misleads or intimidates the other person,

[42] Rule 34.1.2

Insert "a" after "institution of".

[43] Rule 34.1.2

Omit "proceedings". Insert instead "complaint".

[44] Rule 38 Returning judicial officers

Omit Rule 38.1. Insert instead—

38.1 In this Rule:

court does not include a tribunal.

former rules means the rule or rules of conduct, however described, in force immediately before the commencement of these Rules governing the right of a solicitor to appear before a court of which the solicitor was a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices.

judge includes a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices, but does not include a person appointed as a judge before the commencement of these Rules.

tribunal means a tribunal constituted by or under an Act or a disciplinary tribunal.

38.2 A solicitor must refuse to accept or retain a brief or instructions to appear before a court if:

38.2.1 the appearance would be before a court:

- (i) of which the solicitor is or was formerly a judge, or

- (ii) from which appeals lie to a court of which the solicitor is or was formerly a judge, and
- 38.2.2 the appearance would occur less than 5 years after the solicitor ceased to be a judge of the court.
- 38.3 A solicitor must refuse to accept or retain a brief or instructions to appear before a tribunal that does not sit in divisions or lists of matters to which its members are assigned if:
 - 38.3.1 the solicitor is a full time, part time or sessional member of the tribunal, or
 - 38.3.2 the appearance would occur less than 2 years after the solicitor ceased to be a member of the tribunal.
- 38.4 A solicitor must refuse to accept or retain a brief or instructions to appear before a tribunal that sits in divisions or lists of matters to which its members are assigned if:
 - 38.4.1 the appearance would be in a proceeding in a division or list to which the solicitor is assigned as a member of the tribunal, or
 - 38.4.2 the appearance would be in a proceeding in a division or list to which the solicitor was assigned and the appearance would occur less than 2 years after the solicitor ceased to be assigned to the division or list.
- 38.5 The former rules continue to apply to a solicitor who was, before the commencement of these Rules, appointed as a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer, or a person acting in any of those offices.
- 38.6 For the purposes of subrule 38.2.1(ii), an appeal is not to be considered to lie to the Federal Court of Australia from the Supreme Court of a State or Territory.
- 38.7 This rule does not apply in respect of a tribunal if a provision of an Act or a statutory instrument made under an Act prohibits a member or former member of the tribunal from representing a party before the tribunal or prohibits any such representation within a certain period after ceasing to be a member or in certain circumstances.

[45] Rule 39, heading

Omit the heading. Insert instead “**39 Legal and non-legal services**”.

[46] Rule 39.1

Omit Rule 39.1. Insert instead—

- 39.1 Where a solicitor or law practice:
 - 39.1.1 shares an office with or is otherwise affiliated with an entity or business engaged in another calling to provide services other than legal services to a client, and
 - 39.1.2 a client is receiving services concurrently from both the law practice and the other entity,
- the solicitor or law practice, as the case requires, must take all reasonable steps to ensure the client is clearly informed about the nature and the terms of the services being provided to the client by the solicitor or law practice, including (if applicable) that the services provided by the other entity are not provided by the solicitor or law practice as legal services.

[47] Rule 40 Sharing receipts

Insert “, or in connection with,” after “from” in Rule 40.1.

[48] Rule 40.1.2

Omit Rule 40.1.2. Insert instead—

40.1.2 any person:

- (i) who has been found guilty of an indictable offence, or
- (ii) who has had a guilty plea accepted in relation to an indictable offence that involved dishonest conduct, whether or not a conviction was recorded.

[49] Rule 41 Mortgage financing and managed investments

Omit the Rule.

[50] Rule 42 Anti-discrimination and harassment

Omit 42.1. Insert instead—

42.1 A solicitor must not in the course of, or in connection with, legal practice or their profession, engage in conduct which constitutes:

[51] Rule 42.1.2

Omit “or”.

[52] Rule 42.1.3

Omit 42.1.3. Insert instead—

42.1.3 any other form of harassment, or

42.1.4 workplace bullying.

[53] Rule 43 Dealing with the regulatory authority

Insert “timely,” before “open” in Rule 43.1.

[54] Rule 43.2

Omit the Rule.

[55] Glossary of terms

Omit “*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.”.

Insert in alphabetical order—

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.

[56] Glossary of terms, definition of “client documents”

Omit “documents to which a client is entitled”. Insert instead “a document of a client”.

[57] Glossary of terms

Omit the following definitions—

legal services

mortgage financing

serious criminal offence

[58] Glossary of terms

Insert in alphabetical order—

community legal service means an organisation or body that is a community legal service, a community legal centre, or a complying community legal centre for the purposes of the legal profession legislation of a jurisdiction.

document means any record of information, and includes:

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

harassment means harassment that is unlawful under the applicable state, territory or federal anti-discrimination or human rights legislation.

office is not limited to physical business premises and includes the media through which a law practice provides legal services to clients away from a central, physical location.

serious criminal offence means an offence that is:

- (a) an indictable offence against a law of the Commonwealth, a State or a Territory (whether or not the offence is or may be dealt with summarily),
- (b) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth, a State or a Territory if committed in Australia (whether or not the offence could be dealt with summarily if committed in Australia).

[59] Glossary of terms

Omit paragraphs (d) and (e) from the definition of **law practice**.

Insert instead—

- (d) a community legal service,
- (e) an unincorporated legal practice, or
- (f) an incorporated legal practice.

[60] Glossary of terms

Omit the definition of **sexual harassment**. Insert instead—

sexual harassment means an unwelcome sexual advance, request for sexual favours, or otherwise engaging in other unwelcome conduct of a sexual nature to the person harassed in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

[61] Glossary of terms

Omit “who practises as or in the manner of a solicitor, or” from paragraph (a) of the definition of *solicitor*.

Insert instead “whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only, or”.

[62] Glossary of terms

Insert “or constitutes bullying at work under Commonwealth legislation” after “human rights legislation” in the definition of *workplace bullying*.