

LAW INSTITUTE OF VICTORIA LIMITED

Professional Conduct and Practice Rules 2005

(commencement date 30 June 2005)

Reprinted with amendments No. 1/2005
(commencing 30 September 2005)

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INTRODUCTION

These Practice Rules may be cited as the *Professional Conduct and Practice Rules 2005* and are made by Law Institute of Victoria Limited under s72 of the *Legal Practice Act 1996*.

1. Commencement Date

The *Professional Conduct and Practice Rules 2005* come into operation on 30 June 2005.

2. Application of Rules

These rules apply to all regulated practitioners of Law Institute of Victoria Limited.

3. Amendment of *Professional Conduct and Practice (Amendment) Rules 2003*

The *Professional Conduct and Practice (Amendment) Rules 2003* are amended. (The amendments are footnoted throughout these rules.)

With the exception of the rules headed "Advocacy & Litigation Rules", which have specific application to advocates, the rules which follow apply principally to 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 and, where the context requires, to refer to firms. The latter is particularly relevant to solicitors because, unlike barristers, solicitors are frequently employees rather than principals. The rules headed Advocacy & Litigation Rules apply to all practitioners when engaged in advocacy, whether their predominant style of practice is that of a solicitor or a barrister.

The rules are divided into eight categories under the following headings:-

1. Introduction
2. Definitions
3. General principles of professional conduct
4. Relations with clients
5. Advocacy & Litigation Rules
6. Relations with other lawyers
7. Relations with third parties
8. Legal practice

Each of the last five 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 Law Council of Australia model rules upon which these rules are based was intended as a set of model rules which each Constituent Body of the Law Council of Australia might adopt. These rules have followed the model rules with a view to securing uniformity with other states and territories.

DEFINITIONS

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

- "Act" means the *Legal Practice Act 1996*.
- "associate" in reference to a practitioner means-
- (a) a partner, employee, or agent of the practitioner or, in the case of a practitioner not being a firm, 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 practitioner, 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 practitioner or a subsidiary of the corporation.
- “associate”¹ in reference to a principal employer means any body corporate:
- (a) which is related, within the meaning of the Corporations Act to the principal employer;
 - (b) for which the principal employer has agreed to provide or procure legal services or general management services (“managed corporation”) and of which the principal employer, or body corporate which is related within the meaning of the Corporations Act to the principal employer, is a shareholder; or
 - (c) which is involved in a joint venture with:
 - (i) the principal employer;
 - (ii) a body corporate which is related to the principal employer; or
 - (iii) a managed corporation,
if the principal employer has agreed to provide, or procure, legal services or general management services for that joint venture.
- "case" means
- (a) the court proceedings for which the practitioner is engaged, or

¹ Amendment No. 1 – 30/06/05

- (b) the dispute in which the practitioner is advising.
- "client" with respect to a practitioner or a practitioner's firm means a person (not an instructing practitioner) for whom the practitioner is engaged to provide legal services for a matter.
- "complying member" and "complying firm member" of the Managed Mortgages Section of the RPA bear respectively their defined meanings in the Managed Mortgages Rules 2000.
- "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.
- "conditional costs agreement" means a conditional costs agreement referred to in section 97(2) of the Act.
- "Corporations Act"² means the *Corporations Act 2001* (Cth)
- "corporate practising certificate"³ means a practising certificate that is subject to the condition that the holder is authorised to engage in legal practice, as referred to in section 20(2)(b)(iii) of the Act, as a corporate practitioner.
- "corporate practitioner"⁴ means a practitioner who is the holder of a corporate practising certificate.
- "costs" and "legal costs" means all amounts that a person has been or may be charged by, or is or may become liable to pay, a practitioner for the provision of legal services including disbursements but not including interest.
- "costs agreement" means an agreement about the payment of legal costs.
- "court" means
- (a) any body described as such;
 - (b) any tribunal exercising judicial, or quasi-judicial, functions;
 - (c) a professional disciplinary tribunal;

² Amendment No. 1 – 30/06/05

³ Amendment No. 1 – 30/06/05

⁴ Amendment No. 1 – 30/06/05

- (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.

"employee practising certificate"⁵ means a practising certificate that is subject to the condition that the holder is authorised to engage in legal practice, as referred to in section 20(2)(b)(iii) of the Act, as an employee of another legal practitioner or a firm.

"employee practitioner"⁶ means a practitioner who is the holder of an employee practising certificate.

"employer"⁷ in relation to a corporate practitioner means a person or body (not being another legal practitioner or a firm) who or which employs the practitioner whether or not the person or body pays or contributes to the practitioner's salary.

"engagement" means the appointment of a practitioner or of a practitioner's firm to provide legal services for a matter.

"firm" means a firm as defined in the Act and, in relation to a practitioner not being a firm, means:

- (a) a partnership of which the practitioner is a partner; or
- (b) a practitioner, partnership or person (including a corporation) which employs the practitioner.

"forensic judgment" means a decision of a practitioner made in the course of a case, but does not include a decision as to

⁵ Amendment No. 1 – 30/06/05

⁶ Amendment No. 1 – 30/06/05

⁷ Amendment No. 1 – 30/06/05

- (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 a client or an 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 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.

"legal services"

the subject of an engagement, means all services provided or required to be provided by a practitioner or the practitioner's firm to fulfil the engagement provided that at least some of the services are legal in character or are provided, or to be provided, by the practitioner or the practitioner's firm in the capacity of a practitioner and includes all services provided or to be provided by a practitioner or the practitioner's firm incidental to or in connection with an engagement.

"matter"

with respect to an engagement, means any transaction, case or file to which the engagement relates and includes:

- (a) a case;
- (b) a dealing between parties, or a unilateral act, that may affect, create or be related to a status, a right or an entitlement or interest in property of any kind;
- (c) advice on the law; or
- (d) preparation of a document or submission

"opponent"

means

- (a) the practitioner appearing for a party opposed to the client of the practitioner in question; or
- (b) that party, if the party is unrepresented.

"order" includes a judgment, decision or determination.

"practitioner" means a person or corporation entitled to practise the profession of the law and, if the context admits or requires, a firm.

"principal employer"⁸ in relation to a corporate practitioner means the practitioner's employer who or which pays the practitioner's salary or, if more than one person or body contributes to the practitioner's salary, the person or body who or which pays the largest part of that salary.

⁸ Amendment No. 1 – 30/06/05

- “principal practising certificate”⁹ means a practising certificate that is subject to the condition that the holder is authorised to engage in legal practice, as referred to in section 20(2)(b)(i) of the Act, as a principal.
- “principal practitioner”¹⁰ means a practitioner who is the holder of a principal practising certificate.
- "prosecutor" means a practitioner who appears for the complainant or Crown in criminal proceedings.
- "RPA " means Law Institute of Victoria Limited.

⁹ Amendment No. 1 – 30/06/05

¹⁰ Amendment No. 1 – 30/06/05

GENERAL PRINCIPLES OF PROFESSIONAL CONDUCT

(A) Object of Rules

The object of these rules is to ensure that each practitioner:

- (i) acts in accordance with the general principles of professional conduct;
- (ii) discharges that practitioner's obligations in relation to the administration of justice; and
- (iii) supplies to clients legal services of the highest standard unaffected by self interest.

(B) Serving the interests of Justice and complying with the Law

A practitioner must not, in the course of engaging in legal practice, engage in, or assist, conduct which is:

- (i) dishonest or otherwise discreditable to a practitioner;
- (ii) prejudicial to the administration of justice; or
- (iii) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.

(C) Reading down of rules

If, but for this rule, any provision of the foregoing rules or any other rule would be inconsistent with the general principles stated in section 64 of the Act the provision or rule shall be construed so that it is consistent with such general principles.

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 interests of justice or that is otherwise in breach of the law.

1. **Duty to Client**

1.1 **Honesty and Confidentiality**

A practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients' best interests and maintain clients' confidences.

1.2 **Expedition**

A practitioner must, in the course of engaging in legal practice, use the practitioner's best endeavours to complete legal work as soon as reasonably possible.

2. **Agreeing to Act for a Client**

A practitioner should agree to act for a client in a matter only when the practitioner reasonably expects:

- 2.1 to serve the client honestly and fairly, and with competence and diligence; and
- 2.2 to attend to the work required with reasonable promptness.

2A. **Conditional Costs Agreements**

2A.1 In a conditional costs agreement, with respect to a matter, unless some other meaning is clearly stated and the practitioner complies with rule 2A(2)(d):

- (a) "successful outcome", "win", "success" or any similar expression means that the client will receive an amount of money after payment of all liabilities (including tax) the client incurs in the matter to the practitioner and to any other person, including any opposing party;
- (b) "no fee", "no charge" or any similar expression means that the client will not be liable for costs to the practitioner unless the client achieves a successful outcome in the matter.

- 2A.2 A conditional costs agreement must state, in sufficient detail to a client each of the following (in separate paragraphs) to the extent that each is applicable:
- (a) that the client may be liable to meet disbursements or third party payments with, in either case, examples of what disbursements or payments the client might be liable to meet. The practitioner will advise the client if there is any significant change in that liability;
 - (b) that the client may incur a liability for legal costs and disbursements payable to another party to the proceedings.
 - (c) that the client may incur liability in the proceedings to another party for damages in certain circumstances (such as where a counter claim is lodged).; and
 - (d) that if “successful outcome”, “win”, “success” or any similar expression or “no fee”, “no charge” or any similar expression do not bear the respective meanings attributed to them in rule 2A.1, a full statement of what the expression means and how that meaning differs from the meaning set out in rule 2A.1.
- 2A.3 A practitioner who enters into a conditional costs agreement in respect of an engagement must explain the conditional costs agreement to the client and ensure that the client understands the explanation. A statement in writing by the client that the client understands a conditional costs agreement is not conclusive evidence of that fact.

3. **Confidentiality**

- 3.1 A practitioner must never disclose to any person, who is not a partner proprietor director or employee of the practitioner’s firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement, unless -
- 3.1.1 the client authorises disclosure;
 - 3.1.2 the practitioner is 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.

4. **Acting Against a Former Client**

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"):

- (a) for whom the practitioner (or, in the case of a practitioner not being a firm, 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 personally, confidential to the former client and material to the matter; and
- (b) 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**

A practitioner, who is employed by a corporation (not being an incorporated practitioner) 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 services in breach of any of the provisions of the Act 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;
- 6.1.3 the practitioner terminates the engagement for just cause, and on reasonable notice to the client; or
- 6.1.4 in the case of a practitioner not being a firm, the practitioner's engagement is terminated by the practitioner's firm.

6.2 Despite rule 6.1, 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 proceeding may terminate the practitioner's engagement, upon giving reasonable notice in writing to the client of the practitioner's intention to do so, if –

- (a) the client's grant of legal aid is withdrawn or otherwise terminated; and
- (b) 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 Rule 7 applies 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 seven (7) years thereafter;
 - 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 lawful manner.
- 7.3.1 Upon completion or termination of a practitioner's engagement, a practitioner must, when requested to do so by the client or former client, give to
- (a) the client or former client; or
 - (b) another person authorised by the client or former client
- any documents related to the engagement to which the client is entitled, subject to rule 7.3.2.
- 7.3.2 Rule 7.3.1 will not apply where –
- (a) the practitioner claims a lien over the documents for costs due to the practitioner by the client or former client; or
 - (b) in the case of a practitioner not being a firm, the practitioner's firm has terminated the practitioner's engagement.
- 7.4 Despite rule 7.3.2, 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 rule 7, 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 for or on behalf of the client or intended for the use or information of the client, for the purposes of a client's matter.

8. Acting for more than one party

- 8.1 For the purposes of rule 8, "party" includes each one of the persons or corporations who, or which, is jointly a party to any matter.
- 8.1A Nothing in rule 8 shall limit or restrict any common law, equitable or statutory duty or obligation which a practitioner owes.
- 8.1B Nothing in rule 8.1A shall be construed to prohibit the provision of legal services in which a conflict of interest may occur-
- (i) where no material conflict of interest has arisen, and
 - (ii) where the practitioner is permitted to act as provided in rule 8.5 or in other circumstances where the practitioner reasonably believes that the likelihood of a material conflict of interest arising is unlikely.
- 8.2 A practitioner must avoid conflict of interest between two or more clients of the practitioner.
- 8.3 A practitioner who, or whose firm intends to act for a party, to any matter where the practitioner 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:
- (a) may, thereby, be prevented from -
 - (i) disclosing to each party all information relevant to the matter within the practitioner's knowledge; or
 - (ii) giving advice to one party which is contrary to the interests of another; and
 - (b) 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 for more than one party to any matter determines that the practitioner 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 immediately cease to act for all parties.
- 8.5 A practitioner must not act where the practitioner is acting or intending to act:
- 8.5.1 for both vendor and purchaser in connection with the contract for the sale of land or a transfer of land for value at arm's length
 - 8.5.2 for both vendor and purchaser in connection with the contract for the sale of a business at arm's length;

- 8.5.3 for both lessor and lessee in connection with the lease of land or an agreement for the lease of land for value at arm's length;
- 8.5.4 for both financier and borrower in connection with the loan of money or provision of finance or an agreement to lend money or provide finance;
or
- 8.5.5 for both the purchaser of land and the lender of money or provider of finance intended to be secured by a mortgage of that land,

unless and until the practitioner obtains the written acknowledgment and agreement of each party in or to the effect of Form 1 in the Schedule to these rules after first fully informing that party in writing concerning the potential disadvantages to that party of the practitioner so acting.

8.5A Rule 8.5 does not authorise a practitioner to act in the circumstances proscribed by rules 8.6, 8.7 or 8.8 or in breach of any common law, equitable or statutory duty or obligation referred to in rule 8.1A.

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 is also acting in the same transaction for the borrower or the financier. Rule 8.6 does not prohibit the practitioner acting for a borrower and a guarantor if in the same transaction the guarantor is:

- (a) a borrower;
- (b) a director of a borrower;
- (c) a shareholder of a borrower;
- (d) a beneficiary in a trust of which the borrower is the trustee;
- (e) a party holding a beneficial interest in the borrower;
- (f) a body corporate related to a borrower within the meaning of the *Corporations Act*;
- (g) a director of such a related body corporate;
- (h) a shareholder of such a related body corporate; or
- (i) a party holding a beneficial interest in such a related body corporate,

nor does rule 8.6 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*.

For the purpose of rule 8.6 “guarantor” includes indemnifier, surety or a person or company providing security for a loan or finance.

- 8.7 A practitioner must not act in any matter relating to land for a person carrying on business as a builder, developer or subdivider where the practitioner is acting or intending to act for any other party contracting with that person or entity in the course of that business in relation to the land.
- 8.8 A practitioner must not act for a borrower and a financier in connection with the loan of money or provision of finance or an agreement to lend money or provide finance if the financier is held out to the public as being in the business of lending or providing finance and the financier is not-
- (a) a bank;
 - (b) a trustee company as defined in the *Trustee Companies Act* 1984;
 - (c) a practitioner who is a complying member or, as the case may be, a complying firm member of the Managed Mortgages Section of the RPA (or the nominee of the practitioner);
 - (d) a society within the meaning of Part 6 of the *Financial Institutions (Vic) Act* 1992; or
 - (e) the responsible entity or custodian for a managed investment scheme registered under chapter 5C of the *Corporations Act* or a person holding an Australian financial services licence under Part 7.6 of the *Corporations Act*.¹

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 or an associate of 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 or an associate of 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, or the practitioner's firm or associate, to claim commission;

¹ Amendment No. 1/2005 (30 September 2005)

- 10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs 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 rule 10:

"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 Nothing in rule 11.1 prevents a practitioner or an associate borrowing money from a client which is-
- (i) a bank;
 - (ii) a trustee company as defined in the *Trustee Companies Act* 1984;
 - (iii) another practitioner who is a complying member, or as the case may be, a complying firm member of the Managed Mortgages Section of the RPA and who is not an associate of the practitioner;
 - (iv) a society within the meaning of Part 6 of the *Financial Institutions (Vic) Act* 1992;
 - (v) the responsible entity of a managed investment scheme registered under chapter 5C of the *Corporations Act* or a custodian for such a scheme or a person holding an Australian financial services licence under Part 7.6 of the *Corporations Act*²;
 - (vi) an associate of the practitioner and the practitioner is able to discharge the onus of proving that a full written disclosure was made to the client and that the client's interests were fully protected in the circumstances, whether by legal representation or otherwise;
 - (vii) the employer of the practitioner.
- 11.3 Nothing in rule 11.1 shall prevent a practitioner arranging for or permitting a client to lend money or provide finance to:
- (a) an associate of the practitioner, if the practitioner or the practitioner's firm is a complying member, or as the case may be, a complying firm member of the Managed Mortgages Section of the RPA and the practitioner is able to discharge the onus of proving that a full written disclosure statement was made available to the client and that the client's interests were fully protected in the circumstances, whether by separate legal representation or otherwise; or
 - (b) the responsible entity of or custodian trustee for a managed investment scheme registered under chapter 5C of the *Corporations Act* in the normal course of business of the managed investment scheme or a person holding an Australian financial services licence under Part 7.6 of the *Corporations Act*³.

² Amendment No. 1/2005 (30 September 2005)

³ Amendment No. 1/2005 (30 September 2005)

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 20.13 apply to all legal 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, 6.3 and 7.4) also may apply to advocates or in relation to a case in court.

12. Duty to client

12.1 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.

12.2 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.

12.3 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.

12.4 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 any 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 Except where otherwise required by law or a court, 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.
- 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 relevant factual and legal information which:
- 14.4.1 is within the practitioner's knowledge;
 - 14.4.2 is 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 information which is within rule 14.4.3:

- 14.5.1 must seek instructions for the waiver of legal professional privilege, if the information is protected by that privilege, so as to permit the practitioner to disclose that information 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 information which should be disclosed has 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 believes 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:
- 15.1.1A must advise the client that, unless the court is informed of the lie or falsification, the practitioner must not take any further part in the case, and request authority so to inform the court;
 - 15.1.1 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:
 - 15.1.2 must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but
 - 15.1.3 must not otherwise inform the court of the lie or falsification.
- 15.2 A practitioner whose client in criminal proceedings confesses acts alleged by the prosecution 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 acts;
 - (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 not seek to invoke the coercive powers of a court or to make allegations or suggestions in court against any person:
- 16.1.1 not reasonably justified by the material then available to the practitioner;
 - 16.1.2 not appropriate for the robust advancement of the client's case on its merits; or
 - 16.1.3 made principally in order to harass or embarrass the person.
- 16.2 A practitioner must not draw or settle any court document alleging criminality, fraud or other serious misconduct:
- 16.2.1 if the factual material available to the practitioner does not provide a proper basis for the allegation ;
 - 16.2.2 if the evidence by which the allegation is to be made, will be inadmissible in the case;
 - 16.2.3 unless 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 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 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 that affirmative answers to the suggestion would diminish the witness's credibility.
- 16.5 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 that the evidence in the case provides a proper basis for the suggestion.
- 16.6 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 that such disclosure is necessary.
17. **Integrity of evidence**
- 17.1 A practitioner must not advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so.
- 17.2 A practitioner will not have breached rule 17.1 by:
- 17.2.1 expressing a general admonition to tell the truth;
 - 17.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness or by
 - 17.2.3 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.
- 17.3 A practitioner must not prepare a proof of evidence with, or in the presence of, more than one lay witness (including a party or client) at the same time, about any issue that the practitioner believes may be contentious at a hearing unless the practitioner believes that there are special circumstances that require that course.
- 17.4 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:
- 17.4.1 the cross-examiner has consented beforehand to the practitioner doing so; or
 - 17.4.2 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.

17.5 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.

17.6 A practitioner will not have breached rule 17.5:

17.6.1 if the witness or prospective witness is the practitioner's client;

17.6.2 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; or

17.6.3 if there are other proper reasons.

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, 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:
- 18.5.1 the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or
 - 18.5.2 the opponent has consented beforehand to the practitioner communicating with the court in a specific manner notified to the opponent by the practitioner.
- 18.6 A practitioner must promptly tell the opponent what passes between the practitioner and a court in a communication referred to in rule 18.5.
- 18.7 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 18.5.2, 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 which may prejudice a fair trial of those proceedings or prejudice the administration of justice.
- 19.2 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. **Prosecutor's duties**
- 20.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.
- 20.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
- 20.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
- 20.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.
- 20.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection

with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused, unless:

- 20.5.1 such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person; and
 - 20.5.2 the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a legal practitioner, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other person.
- 20.6 A prosecutor who has decided not to disclose material to the opponent under rule 20.5 must consider whether:
- 20.6.1 the defence of the accused could suffer by reason of such non-disclosure;
 - 20.6.2 the charge against the accused to which such material is relevant should be withdrawn; and
 - 20.6.3 the accused should be faced only with a lesser charge to which such material would not be so relevant.
- 20.7 A prosecutor must call as part of the prosecution's case all witnesses:
- 20.7.1 whose testimony is admissible and necessary for the presentation of the whole picture;
 - 20.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
 - 20.7.3 whose testimony or statements were used in the course of any committal proceedings; and
 - 20.7.4 from whom statements have been obtained in the preparation or conduct of the prosecution's case;
- unless:
- (a) the opponent consents to the prosecutor not calling a particular witness;
 - (b) 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; or
 - (c) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses;

provided that:

- (i) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within rules 20.7.1-20.7.4, if the prosecutor believes on reasonable grounds that the testimony of that witness is plainly unreliable by reason of the witness being in the camp of the accused;
- (ii) 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 (a), (b) and (c), together with the grounds on which the prosecutor has reached that decision; and
- (iii) the prosecutor must call any witness whom the prosecutor intends not to call on the ground in (i) if the opponent requests the prosecutor to do so for the purpose of permitting the opponent to cross-examine that witness.

20.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

- 20.8.1 inform the opponent if the prosecutor intends to use the material;
- 20.8.2 make available to the opponent a copy of the material if it is in documentary form; and
- 20.8.3 inform the opponent of the grounds for believing that such material was unlawfully or improperly obtained.

20.9 A prosecutor must not confer with or interview any of the accused except in the presence of the accused's representative.

20.10 A prosecutor must not inform the court or the opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

20.11 A prosecutor who has informed the court of matters within rule 20.10, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

20.12 A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:

- 20.12.1 must correct any error made by the opponent in address on sentence;
- 20.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
- 20.12.3 must assist the court to avoid appealable error on the issue of sentence;

- 20.12.4 may submit that a custodial or non-custodial sentence is appropriate;
and
 - 20.12.5 may inform the court of an appropriate range of severity of penalty,
including a period of imprisonment, by reference to relevant appellate
authority.
- 20.13 A practitioner who appears as counsel assisting an inquisitorial body such as the Australian Crime Commission, the Australian Securities and Investments Commission, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with rules 20.1, 20.2, 20.3 and 20.4 as if the body were the court referred to in those rules and any person whose conduct is in question before the body were the accused referred to in rule 20.3.

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, 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.

22.2A For the purposes of rule 22.1 an undertaking given by an employee of a practitioner, whether or not the employee is a practitioner, shall be deemed to be a personal undertaking given by the employer practitioner unless the employee, being a practitioner, makes expressly clear that the undertaking is the employee's personal undertaking and not that of the employer.

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, rules 23.2-23.5 inclusive 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, which provides 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 including the requirements of section 174(3) of the Act.

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

25.1.2 the other practitioner consents; or

25.1.3 (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

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 matter, 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, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.

27.2 A practitioner must comply with any personal undertaking given by the practitioner, whether or not in the course of, or in connection with, the practitioner engaging in legal practice:

- (a) to a court;
- (b) to the Legal Ombudsman;
- (c) to the Board; and
- (d) to the RPA.

27.3 For the purposes of rule 27.1 and rule 27.2 an undertaking given by an employee of a practitioner, whether or not the employee is a practitioner, shall be deemed to be a personal undertaking given by the employer practitioner unless the employee, being a practitioner, makes expressly clear that the undertaking is the employee's personal undertaking and not that of the employer.

28. Communications

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

- 28.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or
- 28.2 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;
- 28.3 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; or
- 28.4 where the other person is not, to the practitioner's knowledge, represented by another legal practitioner, assert that the other person should submit to a personal interview or do some act that might affect the legal rights of that person without first suggesting that that person seek independent legal advice.

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-
 - (i) any proceedings and
 - (ii) any correspondence or communication with the client and with the client's debtor to which correspondence or communication the practitioner is or purports to be a party

on behalf of the client.

29A. Articled Clerks

- (i) Expressions which have defined meanings in the Legal Practice Admission Rules 1999 ("Admission Rules") bear those meanings in this rule.
- (ii) A practitioner must not enter into articles as a Principal unless the practitioner is authorised to do so under rule 3.10 or rule 3.11 of the Admission Rules and, in the case of rule 3.10 of the Admission Rules, is a person who is engaged in

legal practice in Victoria.

- (iii) A practitioner who is a Principal in respect of an articled clerk must comply with the responsibilities of the Principal set out in the Articles Deed (see schedule 4 of the Admission Rules).

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 practise according to these rules.

31. Disclosure Requirements

31.1 A practitioner must promptly disclose to RPA and the Legal Practice Board 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, as defined in rule 31.4:

31.2.1 inform RPA and the Legal Practice Board in writing of the occurrence of the disclosable event; and

31.2.2 provide RPA and the Legal Practice Board with written details of the circumstances giving rise to the disclosable event sufficient to enable RPA and the Legal Practice Board 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 RPA or the Legal Practice Board to do so, provide such further information concerning the disclosable event or any of the circumstances giving rise to it, as RPA or the Legal Practice Board may require.

- 31.4 In rule 31, 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.

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.
- 32.1A A practitioner, before referring a client of the practitioner or the practitioner's firm, to another business conducted by the practitioner concurrently must first obtain from the client an acknowledgment in the form of Form 2 in the Schedule to these rules.
- 32.1B.1 A practitioner may conduct another business from the same premises as an office of the practitioner's legal business provided that the practitioner ensures that all clients of the other business are informed that the other business is not part of the legal business and sign an acknowledgment in the form of Form 2 in the Schedule to these rules.
- 32.1B.2 RPA may exempt a practitioner from compliance with the requirements of the proviso in rule 32.1B.1 upon being satisfied that there is no reasonable likelihood of

the clients of the other business believing that the other business is part of the legal 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) are disclosed fully in writing to the client before the dealing is commenced.

34. Client referral

A practitioner (“referring practitioner”) who intends to refer a person (“client”), whether or not a client of the practitioner’s firm, to another practitioner (“referee practitioner”) for a particular matter (“matter”) and to accept payment of a fee or commission from the referee practitioner in consideration of the referral must first-

- (a) obtain the client’s written consent in or to the effect of Form 3 in the Schedule;
- (b) advise the client that it would be in the client’s interest if the client were to be referred to the referee practitioner for the matter only;

- * (c) advise the client that, if the client accepts the advice and the matter is referred to the referee practitioner, the referring practitioner will be paid a commission of % of the legal costs charged by the referee practitioner;
 - (d) hand to the client a copy of the Law Institute of Victoria Limited's brochure on legal costs;
 - ** (e) advise the client of the making and content of any agreement between the referring practitioner and the referee practitioner for the referee practitioner to act for the client only in the matter.
- * *complete or vary if a different method or recipient of payment is agreed;*
- ** *include, if applicable, and state specifically what penalty applies if the referee practitioner breaches its agreement to act for the client only in the matter.*

35. Advertising

- 35.1 A practitioner may advertise in connection with the practitioner's practice if the advertising-
- (a) is not false;
 - (b) is not misleading or deceptive, or likely to mislead or deceive;
 - (c) is not prohibited by an order of RPA made pursuant to rule 35.2;
 - (d) is not prohibited by rule 35.5; and
 - (e) does not use the word specialist or a direct derivative of that word except as permitted by rule 35.3.
- 35.2 RPA may, if in its opinion any advertising is undesirable, order a practitioner to cease such advertising or not to use it without amendment. Such an order takes effect when it is communicated to the practitioner.
- 35.3 A practitioner who is an accredited specialist in an area of practice, may use the word 'specialist' or a direct derivative of that word in advertising the area of the practitioner's practice.
- 35.4 A practitioner whose proprietor, partner, director, employee or consultant is an accredited specialist in an area of practice, may use the word "specialist" or a direct derivative of that word in advertising the area of the accredited specialist's practice.
- 35.5. A practitioner must not include in an advertisement seeking to attract clients "no win no fee", "no win no charge" or any similar expression or indicate that the practitioner is willing to enter into a conditional costs agreement unless the advertisement states, and in sufficient detail and prominence to be readily intelligible to a potential client, if conditions apply, the words "conditions apply". An example

of such conditions is “the agreement does not cover the other party’s legal costs or any disbursements incurred” (if such conditions are applicable).

- 35.5.1 A disclosure statement must be given to the client prior to the client engaging the practitioner.

- 35.5.2 A disclosure statement must include a description of all liabilities and obligations that the client may incur.

36. Hours of practice and practice names

- 36.1 A practitioner must ensure that each part of the practitioner's legal practice is, at all times, carried on or effectively supervised by a practitioner.
- 36.2 A practitioner must cause the firm or business name of the practitioner's firm to be mentioned in legible characters on all communications written in the course of legal practice by the practitioner.
- 36.3 A practitioner who carries on legal practice at an office which is closed to the public at any time during normal working hours (9.00 a.m. to 5.00 p.m. on weekdays other than public holidays) must take appropriate steps, whether by notice at the premises or otherwise, to inform members of the public as to:
- (a) contact details for another office of the practitioner which is open at that time;
 - (b) when the office is open to the public; or
 - (c) when the office will next be attended.

37. Storage of client records

A practitioner must not make a charge or attempt to do so-

- (a) for the storage of documents, files or other property on behalf of clients or former clients of the practitioner or its predecessors in practice; or
 - (b) for retrieval from storage of those documents, files or other property-
- unless the client or former client has agreed in writing to such charge being made.

38. Request for itemised bill of costs

- 38.1 A practitioner must comply with a request made pursuant to section 108 of the Act within 60 days of the date of the request.
- 38.2 A practitioner who fails to comply with a request made pursuant to section 108 of the Act within 60 days of the date of the request must, on demand by or on behalf of the client who made the request, pay or deliver to or at the direction of the client any moneys or document the practitioner holds on behalf of the client even though, but for rule 38, the practitioner might be entitled to a lien over those moneys or that document.
- 38.3 Rules 38.1 and 38.2 shall not apply to a practitioner who has a sufficient and

satisfactory reason –

- (a) for not complying with the request made pursuant to section 108 of the Act; or

- (b) for not complying with a request made pursuant to section 108 of the Act within 60 days of the date of the request.

38.4 For the purposes of rule 38, the expression “bill of costs” referred to in section 107 of the Act includes a bill within the meaning of the rules made pursuant to the Family Law Act 1975.

39. **Communication with clients**

39.1 A practitioner, in the course of engaging in legal practice, must communicate effectively and promptly with clients of the practitioner.

39.2 Without limiting rule 39.1 a practitioner must-

- (a) when it is practicable to do so, prior to the settlement of a litigious matter, provide to the client a written estimate of the net amount that the client will receive should the matter be settled in accordance with the proposed settlement; and
- (b) when taking instructions from a client, or as soon as possible thereafter, inform the client of any rights the client may have to apply for legal aid unless there is no real possibility that the client is eligible to receive legal aid.

41.1 **Rights and Duties of Corporate Practitioners**¹¹

41.1.1 A corporate practitioner may perform any legal work on behalf of the practitioner’s employer that a practitioner holding a principal practising certificate may perform and, without limiting the generality of the foregoing, may:

- (a) appear as practitioner on the record in any legal proceedings to which the practitioner’s employer is a party;
- (b) charge and recover from any other person, any costs that the practitioner would be able to recover if the practitioner held a principal practising certificate; and
- (c) perform any legal work on behalf of any person who is an employee, director or office bearer of the practitioner’s employer where the legal work is directly related to the business of the practitioner’s employer.

41.1.2 A corporate practitioner may accept an engagement from an associate of the practitioner’s principal employer. In carrying out that engagement, the practitioner shall be employed by that associate and the associate shall be the practitioner’s employer.

¹¹ Amendment No. 1 – 30/06/05

- 41.1.3 A corporate practitioner must not, without the consent of RPA, engage in legal practice as an employee of, or on behalf of, two or more persons or bodies at the same time, save as permitted in rule 41.1.1 or 41.1.2.

41.2 Rights and Duties of Employee Practitioners¹²

- 41.2.1 An employee practitioner may perform any legal work on behalf of the employee practitioner's employer, being another legal practitioner or a firm, that a practitioner holding a principal practising certificate may perform except as provided in rule 41.2.2, and without limiting the generality of the foregoing, may perform legal work on behalf of clients of the employee practitioner's employer.
- 41.2.2 An employee practitioner must not:
- (a) appear as practitioner on the record in any legal proceedings to which the employee practitioner's employer or a client of the employer is a party (but this paragraph does not prevent the employee practitioner appearing as an advocate); or
 - (b) charge or recover, on the employee practitioner's own account, any costs related to legal work performed by the employee practitioner.
- 41.2.3 An employee practitioner must not, without the consent of RPA, be employed by more than one employer at the same time. The partners of a single firm shall be deemed to be one employer for the purposes of this rule.

¹² Amendment No. 1 – 30/06/05

SCHEDULE

Form 1

Rule 8

ACKNOWLEDGMENT IN ACCORDANCE WITH RULE 8.5

TO: (name and address of client)

RE: (Matter or transaction)

Advice

Please note that [name of practitioner or practitioner's firm] have/has been requested to act for [name of other party] who is a party to the above transaction in respect of which [I/we/the company] also act on your behalf.

[I/we/the company] owe a duty to act in the best interests of each client involved in the transaction and, in the event of a material conflict of interest arising, [I/we/the company am/are/is] bound to cease to act for each party to the transaction.

This authority does not authorise a practitioner to act in the circumstances proscribed by rules 8.6, 8.7 or 8.8 or in breach of any common law, equitable or statutory duty or obligation referred to in rule 8.1A.

(signature of partner or proprietor
of practitioner or firm or
director of incorporated practitioner)

Acknowledgment and Agreement

I, (name of client) acknowledge that I have read and understood the above advice and I agree that you may act for your other client in the above transaction.

(signature of client)

Note - a practitioner must, before obtaining the signature of a client to this form, fully inform that client in writing concerning the potential disadvantages to that client of the practitioner so acting. This information can be included in this form.

Form 2

Rule 32

I/We of

.....
being a client/customer of [name of business] (“the business”) hereby acknowledge that I/we

-

- (1) have been informed that [name of practitioner] (“the practitioner”) has an interest in the business;
- (2) understand that the business is entirely separate from the practitioner’s legal practice;
- (3) understand that [I/we] [am/are] not a client of the practitioner for the purposes of the work to be performed on my/our behalf by the business;
- (4) have been referred to the business by the practitioner.

(Delete if inapplicable)

Dated day of20

Signed:

(Print name of client/s)

CONSENT TO REFERRAL

I,, being a client of
.....
practitioner(s) (“my practitioner”) hereby acknowledge:

- 1. I have instructed my practitioner to act for me in the matter (“matter”) of
.....
- 2. My practitioner has advised me that it would be in my interests if I was to be referred to (“the other practitioner”) for this matter.
- *3. My practitioner has advised me that if I accept the advice and my matter is referred to the other practitioner, my practitioner will be paid a commission of% of the legal costs charged by the other practitioner.
- **4. I also acknowledge that I am aware that under an agreement between my practitioner and the other practitioner, the other practitioner has agreed to act for me in this matter only and that if this agreement is breached. [Here set out the consequences]
- 5. My practitioner has handed me a copy of the Law Institute of Victoria Ltd’s brochure on legal costs.

Datedday of 20

.....
(Signature)

** include, if applicable, and vary if a different method of payment or recipient is agreed*
*** include, if applicable, and state specifically what penalty applies if the referee practitioner breaches its agreement to act for the client only in the client’s matter*