Law Council
OF AUSTRALIA

National Legal Profession Anti-Money Laundering & Counter-Terrorism Financing Guidance

Guidance Note No 3 – What Are My Professional Obligations?

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What Are My Professional Obligations?

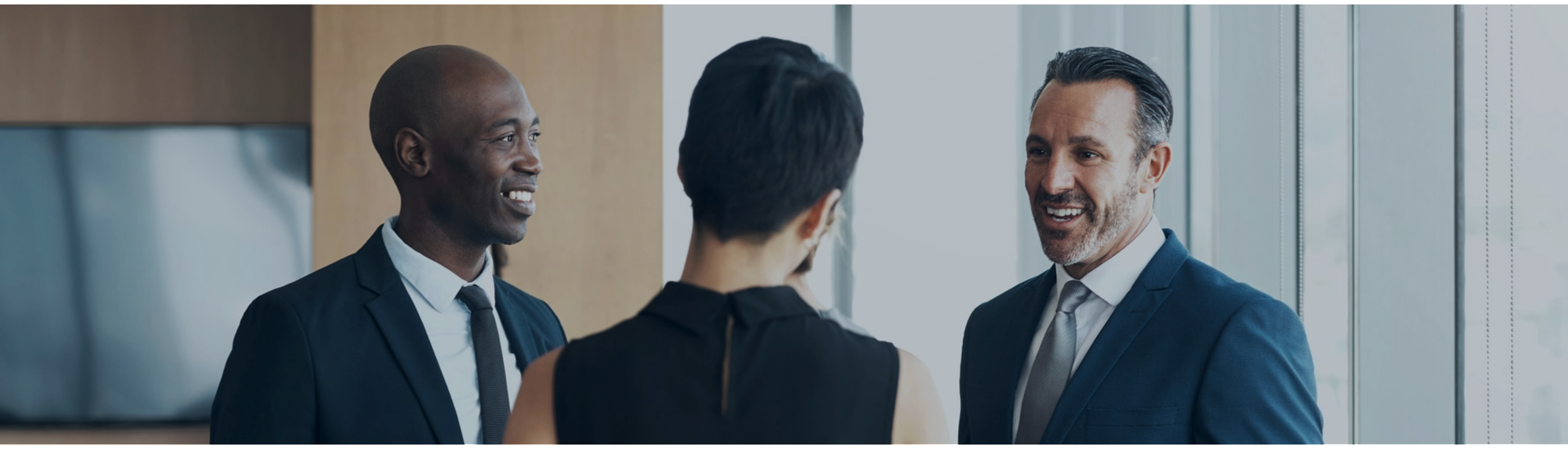
Legal practitioners in Australia are bound by rules of professional conduct and other professional obligations set out in laws that regulate the legal profession. These apply equally to Australian-registered foreign lawyers.[1] Outlined below are the statutory and common law obligations and professional responsibilities (including ethical duties) of solicitors that also serve to mitigate and help manage money laundering and terrorism financing risk.

Statutory Obligations

Responsibilities of Principals and Non-Principal Legal Practitioners

The laws that regulate the legal profession and the provision of legal services are laws of the states and territories. They address the risks of a legal practitioner unwittingly being involved in money laundering or terrorism financing in the context of the management of a law practice and the provision of legal services. Under, for example, the *Legal Profession Uniform Law* (**Uniform Law**) (which applies in New South Wales, Victoria and Western Australia[2]):

- Each principal of a law practice is responsible for ensuring that reasonable steps are taken to ensure that all legal practitioner associates of the law practice comply with, and that the legal services provided by the law practice are provided in accordance with, the Uniform Law, rules made under the Uniform Law (**Uniform Rules**) and other professional obligations.[3]
- The supervisory responsibility of the principal over employed solicitors and non-professional staff is fundamental. If a law practice contravenes a provision of the Uniform Law or Uniform Rules that imposes an obligation on a law practice, a principal of the law practice is taken to have contravened the same provision if the principal knowingly authorised or permitted the contravention, or if the principal was in, or ought reasonably to have been in, a position to influence the conduct of the law practice and failed to take reasonable steps to prevent the contravention.[4]
- A law practice must not engage, without the special approval of the designated regulatory authority, a 'lay associate' whom any principal or other legal practitioner associate of the law practice knows to be a disqualified person[5] or a person convicted of a serious offence.[6] A disqualified person is required to inform a law practice of their disqualification.[7]
- Law practices that maintain trust accounts also have extensive trust money and account controls (see below) including limits upon who is permitted to authorise transactions on the trust account.



Trust Accounting

Restricted to Legal Services for Identified Persons

The use of solicitors' trust accounts is restricted by statute to matters or transactions in relation to which legal services are provided. This is made clear from the definition of trust money, namely 'money entrusted to a law practice in the course of or in connection with the provision of legal services'.[8] This means a solicitor **cannot accept money into trust except in the course of or in connection to underlying legal services**. Common law duties associated with the provision of those services are set out below. These include to 'establish with clarity the identities of the persons'[9] to whom legal services are to be provided.

The manner in which a law practice is required to open, operate and maintain its trust accounts and records, including receipting, documenting, accounting for and disbursing trust money, is prescribed by detailed regulations or rules.[10]

Reporting and Governance

A law practice may only open a trust account with a designated authorised deposit-taking institution (**ADI**). ADIs are 'reporting entities' under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). ADIs are also required under the Uniform Law to report any irregularity in a trust account to the legal regulator in the relevant jurisdiction.[11]

A law practice must not mix trust money with other money unless authorised to do so by the legal regulator in their jurisdiction.[12]

Legal practitioners must report any irregularity by written notice to their legal regulator[13] and the Uniform Law restricts to whom a law practice may grant authority within the practice to operate the trust account.[14]

Trust accounting record-keeping is subject to detailed regulation under the Uniform Law and Uniform Rules[15] and corresponding regulations or rules in each of the other states and territories where the Uniform Law does not apply.

A law practice must comply with all prescribed requirements for compiling and maintaining files, registers of files opened, registers of safe custody documents and records of financial interests.[16]

Trust accounts and records are subject to a mandatory yearly examination by an external examiner.[17]

Common Law

Your Obligation to Establish the Identity of the Client

Legal practitioners are expected 'to establish with clarity the identity of the persons to whom they are giving advice, not least because they owe professional duties to clients, which affect the nature and extent of their legal liabilities.'[18] Uncertainty about who is actually the client can lead to significant problems, as illustrated in *Ford v Financial Services Authority* as well as other cases.[19] Perpetrators of money laundering and terrorism financing purposefully seek to hide or obscure the actual persons or entities ultimately intended to benefit from the legal services to be provided.

Legal practitioners must therefore undertake client identification as a necessary incident of their duties:

- under the general law to be competent and not compromise their integrity;[20]
- to satisfy statutory duties (summarised above);[21]
- to avoid conflicts of interest between both current and former clients and between current clients[22] (for which identity checking is vital); and
- to avoid the risk that the legal services sought may be to further an unlawful purpose.[23]

The failure to check the identity of the client or the authority of the person providing instructions directly with the client has been found to be likely to constitute unsatisfactory professional conduct.[24] Acting on the instructions of someone who does not themselves have an authority is likely to be professional negligence and possibly constitute unsatisfactory professional conduct or professional misconduct.[25]

The failure to verify the authenticity of an appointment for a person purporting to act on behalf of a client is likely to constitute professional negligence.[26]

Verification of identity is not limited to circumstances where there is a transfer of funds involved in giving effect to a client's instructions, but also flows from requirements that a legal practitioner:

- provide clear and timely advice to assist a client understand relevant legal issues and to make informed choices about action to be taken during the course of a matter; and
- avoid any compromise to their professional integrity and professional independence.

Your Obligation When Dealing with Trust Monies

Misuse of trust accounts attracts strong judicial criticism and significant disciplinary consequences. For example, in *Barwick v Council of the Law Society of New South Wales* the Court of Appeal said:[27]

> The trust and confidence which clients place in their solicitors are a basic element of the administration of justice in this country. Violations by legal practitioners of trust accounts betray that trust and harms public confidence in the legal system.

Practitioners' Professional Responsibilities Under the Australian Solicitors' Conduct Rules

The Australian Solicitors' Conduct Rules (**ASCR**) are professional conduct rules collaboratively developed by the law societies and other constituent bodies of the Law Council of Australia, which represents all state and territory law societies and bar associations and Law Firms Australia. They apply as the professional conduct rules for solicitors in South Australia,[28] Queensland,[29] New South Wales, Victoria,[30] Western Australia,[31] the Australian Capital Territory,[32] and Tasmania[33], while solicitors practising in the Northern Territory are governed by the professional conduct rules set out in the *Rules of Professional Conduct and Practice*.[34]

The ASCR have been revised on a number of occasions and the latest version is available here, with Commentary.

The ASCR act as a guide to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and as articulated by the rules. That is, the ASCR are principles-based statements of legal practitioners' ethical obligations and a standard against which to consider whether a solicitor's conduct amounts to unsatisfactory professional conduct or professional misconduct. While the ASCR are designed to 'guide' solicitors, they are legally binding. Unsatisfactory professional conduct, and the more serious professional misconduct, constitute contraventions of Uniform Rules made under Part 9.2 of the Uniform Law, and sanctions follow.

While the obligations that underpin the ASCR are interrelated, a number of Rules are specifically relevant to the context of money laundering or enabling terrorism financing. The principles require practitioners to manage their law practices and provide legal services in such a way that does not allow furtherance of a client's unlawful objectives (including by way of money laundering or other unlawful purpose).

In particular:

- **Rule 3** emphasises the paramount duty of an Australian solicitor to the court and the due administration of justice. This duty applies not only in a litigation context, but underpins all actions taken by a solicitor, including that legal services are provided in a way that minimises the risk that those services may facilitate an illegal purpose, thereby undermining the administration of justice.

- **Rule 4** requires, among other things, that a solicitor must deliver legal services competently and diligently and avoid compromise to their integrity or professional independence. This would include avoiding risks that the law practice and legal practitioners may be used wittingly or unwittingly to facilitate money laundering or enable the financing of terrorism.

- **Rule 5** requires that a solicitor must not engage in conduct, in the course of legal practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practice law, or which is likely to a material degree to be prejudicial to, or diminish, public confidence in the administration of justice, or bring the profession into disrepute.

- **Rule 8** requires that a solicitor must follow a client's lawful, proper and competent instructions. Rule 8 requires a solicitor to take reasonable steps and make reasonable enquiries to establish the bona fides of the client and the lawful purpose of the client's instructions to ensure that legal services are not unwittingly used as instruments of criminality.

- **Rule 37** requires a solicitor with designated responsibility for a matter to exercise reasonable supervision over solicitors and all other employees engaged in the provision of legal services for the matter.

As noted above, a breach of a rule of professional conduct is capable of amounting to unsatisfactory professional conduct or professional misconduct, and resulting in disciplinary action. This is separate from any civil action or criminal prosecution arising from a contravention of a law occasioned by the conduct involved. If there is a finding that a legal practitioner's conduct constitutes unsatisfactory professional conduct or the more serious finding of professional misconduct, a range of sanctions may be imposed, including:

- removing the practitioner's name from the roll of practitioners;
- suspending, cancelling, or imposing conditions upon the practitioner's practising certificate;
- cautioning or issuing a reprimand to the practitioner; and/or
- fining the practitioner, maximum fine ranging $10,000 to $100,000.

See also:
Guidance Note No 11 – Ceasing or Declining to Act
Guidance Workshop Notes: Case Studies

References

1. Barristers are subject to conduct rules specific to their practice at the Bar (see 'Barristers', p 3).
2. Solicitors in the Australian Capital Territory are subject to the *Legal Profession Act 2006* (ACT); Northern Territory – Legal Profession Act 2006 (NT); South Australia – *Legal Practitioners Act 1981* (SA); Queensland – *Legal Profession Act 2007* (Qld); Tasmania – *Legal Profession Act 2007* (TAS).
3. Uniform Law, s 34.
4. Uniform Law, s 35. This is reinforced by Rule 37 of the Australian Solicitors Conduct Rules: 'A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.'
5. That is, a person about whom a disqualification order has been made under Div 3 Pt 3.9 of the Uniform Law.
6. Uniform Law, s 121.
7. Uniform Law, s 122.
8. Uniform Law, s 129. Trust money includes controlled money (Uniform Law, s 139(1)(2); Uniform Rules Ch 4 Pt 2 Div 3), transit money (Uniform Law, s 140), written direction money (s 137(a), ss 142, 143) and power money (s 141), each of which are subject to specific restrictions on handling. Managed investment schemes are financial services separately regulated by the Australian Securities and Investments Commission. Residual, narrow exceptions to the prohibition on the promotion or operation of managed investment schemes are found in s 258 of the Uniform Law.
9. *Ford v Financial Services Authority* [2012] 1 All ER 1238 at [39].
10. See, for example, Uniform Rules, Pt 4.2 (Trust money and trust accounts) and *Legal Profession Regulation 2017* (Qld), Pt 3.3.
11. Uniform Law, s 154(1).
12. Uniform Law, s 146.
13. Uniform Law, s 154(1).
14. Uniform Rules, r 43, r 50(2) (notice to the legal regulator), r 63 (controlled money).
15. Uniform Law, s 147(2); Uniform Rules, rr 36-49, 52.
16. Uniform Rules, rr91E–95A.
17. Uniform Law, s 155(1).
18. see *Ford v Financial Services Authority* [2012] 1 All ER 1238 at [39], cited.
19. see for example *DHC Assets Ltd v Arnerich* [2018] NZHC 1865.
20. ASCR r 4.3. See also GE Dal Pont, *Lawyers' Professional Responsibility* (2021) 7th ed at [4.10], [4.20].

21. In addition, a specific regime of prescriptive client due diligence applies to conveyancing transactions in jurisdictions that have adopted the *Electronic Conveyancing National Law* and conduct those transactions through an Electronic Lodgment Network that complies with the participation rules set by the Australian Registrars' National Electronic Conveyancing Council.
22. ASCR r 10 and r 11; Barristers' Rules r 114 and r 115.
23. ASCR r 8.
24. *Youssef v NSW Legal Services Commissioner* [2020] NSWCATOD 85; *Council of the Law Society of NSW v Webb* [2012] NSWADT 114.
25. Uniform Law, s 296-298.
26. *Chandra v Perpetual Trustees Victoria Ltd* (2007) 13 BPR 24,675; [2007] NSWSC 694, at [106].
27. [2004] NSWCA 32 [118].
28. Effective from July 2011 as the *Law Society of South Australia, Australian Solicitors' Conduct Rules*.
29. Effective from June 2012, as the *Australian Solicitors' Conduct Rules 2012*.
30. Effective 1 July 2015, as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.
31. Effective 1 July 2022 as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.
32. Effective 1 January 2016, as the *Legal Profession (Solicitors) Conduct Rules 2015*.
33. The *Rules of Professional Conduct and Practice* (effective from 10 April 2002).
34. Effective 10 April 2020 as the *Law Society Northern Territory Rules of Professional Conduct and Practice.*

This Guidance Note was produced on 28 June 2024 and is current at the time of publication.