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SAMPLE FORMATTING PICTURED BELOW

DUTY TO OTHER LAWYERS: NEGOTIATION

ASCR

34 Dealing other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person,

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied, or

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions 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 solicitor at the time when the instructions are sought.

- Negotiations are held outside the courtroom and are therefore not subject to the same sort of scrutiny as representations made before a court.
- Lies, exaggerations and half-truths should not be condoned in negotiation settings.
- These are without prejudice meetings. The information revealed here cannot be used in trial, should the case get to that stage.

DUTY TO OTHER LAWYERS: UNDERTAKINGS

ASCR 6 Undertakings

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.

- Dictionary pp. 734: "A solicitor's [or barrister's] undertaking is a binding promise, beyond ordinary legal requirements. It is a solemn promise, an assurance is made in the course of a legal transaction or court proceeding by a legal practitioner, on which the other party may place absolute reliance; it may even be implied by silence: *Grogan v Orr* [2001] NSWCA 114."
- "A practitioner must never give an undertaking unless it is within his or her personal power to do the thing... A breach of undertaking may be redressed by disciplinary proceedings for professional misconduct pursuant to the summary

jurisdiction that is an inherent power of the Supreme Court; the Court will in clear cases compel compliance.”

- LLM pp. 359. “...the lawyer remains liable to comply with the undertaking, unless released from doing so by the person to whom the undertaking was given. Thus, an undertaking should never be given unless the lawyer has complete control over the subject of the undertaking.”

DUTY TO OTHER LAWYERS: COMMUNICATION WITH THEIR CLIENTS

ASCR

33 Communication with another solicitor's client

33.1 A solicitor must not deal directly with the client or clients of another practitioner unless:

33.1.1 the other practitioner has previously consented,

33.1.2 the solicitor believes on reasonable grounds that:

- (i) the circumstances are so urgent as to require the solicitor to do so, and
- (ii) the dealing would not be unfair to the opponent's client,

33.1.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom, or

33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

- Rule 33.1.4: this provision allows for direct contact with the other lawyer's client when the lawyer has failed to respond to communication forwarded to them. Before this happens, the other lawyer must be given adequate notice of their intention to directly contact their client. In this scenario, communication with the other client is strictly limited to informing the client that their lawyer is not responding.

DUTY TO OTHER LAWYERS: COMPLAINTS AGAINST OTHER LAWYERS

ASCR

32 Unfounded allegations

32.1 A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.

DUTY TO OTHER LAWYERS: MISTAKES BY OTHER LAWYERS /GOVT. AUTHORITY

- There is no explicit duty to assist the opposition due to the adversary nature of our legal system.
- However, we do have a duty to act with 'fairness and courtesy' under ASCR rule 4.1.2. Therefore, 'exploiting an opponent's mistake is not always appropriate and justifiable, and may even give rise to disciplinary sanction' (LLM pp. 360).
- Cannot take unfair advantage or their decision, and don't even have to point out the mistake sometimes.

- If the mistake could potentially delay court proceedings, or if it is likely to be allowed by the courts to be corrected (like a document error), then it might be more appropriate to point out that mistake. This would be consistent with the duty to the client (minimising extra costs and saving time), and the duty to the proper and efficient administration of justice. It may also be seen as cooperative between the teams and help reach settlement.

DUTY TO OTHER LAWYERS: TRANSFER OF CLIENT

- When one lawyer takes over a matter from another lawyer, the relevant rules deal chiefly with the transfer of documents and the protection of costs.
- When a client is the one who terminates the retainer, the first lawyer should not seek to win the client back, but cooperate with the new lawyer and, out of courtesy, inform them of urgent issues or pending work on the file.
- The general rules of most jurisdictions are (LLM pp. 362):
 - When the first lawyer receives a direction from the second, the first lawyer should promptly provide to the second all documents and other information necessary to the proper conduct of the matter.
 - That obligation is, of course, subject to any lien claimed for unpaid costs, which the second lawyer has an obligation to secure on behalf of the first lawyer.
 - Where the client terminates the engagement, the lawyer is entitled to retain possession of the documents until any outstanding costs are paid or their payment satisfactorily secured.
 - Where the lawyer terminates the engagement and there are court proceedings continuing, the lawyer must forward all essential documents to the client or second lawyer (if so directed), provided the second lawyer agrees to hold those documents subject to any lien and provides reasonable security or reaches agreement with the first lawyer for payment of outstanding costs.
 - If any such agreement provides for the first lawyer's costs to be paid from the proceeds of any money received by the second lawyer on behalf of the client, the second lawyer 'must do all things which are reasonably practical... to ensure compliance with the agreement'.