Module 2: Overarching Obligations (OO) in Civil Litigation

***TSC Nominees Pty Ltd v Canham Commercial Interiors* [2017] VSC 86**

- Overarching purpose of CPA = just, efficient, timely, cost-effective resolution, proportionate to complexity/amount in dispute.
- ***Facts:*** *P missed trial → judgment against; applied to set aside 53 days late (14-day limit under SCR 2015).*

Who Do the OO Apply To?

- **S10(1) CPA** (a) any party (b) any legal practitioner/law practice acting for a party (c) any person assisting a party who exercises control/influence (e.g. insurer, litigation funder)
- **s11 CPA** — applies to any aspect of a civil proceeding, incl. interlocutory applications, appeals, ADR.
- "civil proceeding" (**s3 CPA**) = any court proceeding except criminal/quasi-criminal; CPA excludes intervention order proceedings (s4(2)) and VCAT (s4(3))

Interaction: OO vs Other Obligations

Subject to the paramount duty, **OO (ss16–26) prevail** over any inconsistent legal/contractual/other obligation (**s12 CPA**).

Scenario	Rule
Duty to client consistent w/ OO	OO don't override duty to client (s13(1)), but practitioner must still comply with OO over client instructions (s13(2))
Duty to client inconsistent w/ OO	OO prevails; practitioner not required to follow client's instructions (s13(3))
Causing client to breach OO	Prohibited (s14) — e.g. allowing false evidence, not explaining OO to client
Duty to court	Not overridden by OO (s15)

What Are the OO? — ss16–26 (s3)

s	Duty	Key notes / authority
16	Paramount duty → further admin of justice	
17	Act honestly at all times	
18	No frivolous / vexatious / abuse of process / no-proper-basis	Requires "proper basis" cert. on filing (s42). Not engaged by adjournment applications (not

	claims	a "claim")
19	No unnecessary steps — must be necessary to facilitate resolution	Applies after proceeding commenced
20	Cooperate w/ parties & court	Babcock & Brown — firms should try direct contact before litigating
21	No misleading/deceptive conduct	Hudspeth — intent not required
22	Reasonable endeavours to resolve by agreement/ADR	Exceptions: not in interests of justice; or only judicial determination appropriate (e.g. contempt)
23	Narrow issues if can't resolve wholly	Same exceptions as s22
24	Costs reasonable & proportionate to complexity/amount in dispute	Yara v Oswal
25	Act promptly, minimise delay	Kuek v Devflan
26	Disclose existence of critical documents (subject to privilege)	Hudspeth — ongoing duty; no personal-knowledge requirement for supervising solicitor

Hudspeth v Scholastic Cleaning (No 8) [2014] VSC 567 — ss21 & 26

- **✗ SC (Richards):** breach s21 — didn't disclose 3rd expert report version; led evidence on it w/o leave; report undermined P's own case on admissibility; secretary asked to amend report (beyond proper instructing role)
- **✗ SC:** breach s26 — 3rd version was plainly "critical" (invited expert to reconsider on different facts = admission of materiality)
- **✗ Expert (Dohrmann):** breach s21 — stayed silent on materially different signed report version; acted as advocate not impartial witness
- **✗ P's solicitor:** breach s26 — where counsel handles expert dealings on solicitor's behalf, counsel's actual knowledge binds the solicitor
- ***Facts:*** *PI claim; expert produced 3 report versions; 3rd never served on D; SC questioned expert using only 2nd version at trial.*

Babcock & Brown DIF III v Babcock & Brown International [2015] VSC 612 — ss20 & 22

- ✗ **Piper Alderman:** undue delay (Dec–Apr) responding; failed to make direct contact w/ Freehills
- ✗ **Freehills:** didn't warn client of huge cost of application (~$358k, 5 days); failed to reach out to PA's senior members; should've concluded solicitor lacked confidential info
- **Order:** each party bears own costs
- ***Facts:*** *Freehills sought to restrain PA + a lateral-hire solicitor from acting for P over conflict; slow correspondence, no senior-to-senior contact.*
- **Also cited:** *Naumovski v Ugrinovski (ignoring 7 letters = s20 breach → indemnity costs); Liesfield v SPI Electricity ("salvos of emails" ≠ cooperation); Expense Reduction Analysts (avoid unduly technical/costly disputes on non-essentials)*

Yara Australia v Oswal [2013] VSCA 337 — s24

- ✓ **No breach — overrepresentation:** 7 counsel (3 senior) justified; each applicant's interests separate/distinct; litigation immensely complex
- ✗ **Breach — excessive material:** 6 folders, 2700+ pages incl. old pleadings, email swathes, unrelated-proceeding transcripts — mostly peripheral/unnecessary
- **Legal principle:** s24 = flexible test; no fixed costs formula — court weighs costs objectively against complexity/importance/amount in dispute. Duty is non-delegable; client instructions inform but don't determine breach.
- **Order:** P refused indemnity costs; D's practitioners liable for half of D's costs
- ***Facts:*** *D sought security for costs from UAE-based P; order granted then reversed on appeal; P's leave to appeal refused.*

Kuek v Devflan Pty Ltd & Anor [2012] VSC 571 — s25

- ✗ **Breach:** posting a document the day after the filing deadline ≠ prompt action; P (an experienced litigation solicitor) should've known the importance of posting timing, didn't identify who posted it or how, and gave no explanation for the further delay to Feb/March
- ***Obiter:*** *failure to inform court/D of intent to seek review may also breach s20/s21 (cooperation/misleading) — not decided*
- ***Facts:*** *Self-represented P practitioner filed a costs-order review 1 day late per the Rules; further delayed filing until 22 March despite chasing in Feb/Mar.*

Consequences of Contravening the OO

- Court may consider any OO contravention when exercising its powers (s28(1)) or costs discretion (s28(2))
- **s29(1):** court may sanction (on application or own motion — s29(2)) by any order in the interests of justice, incl.: costs order (payable/enforceable immediately); compensation for financial loss (at no/reduced/penalty interest — e.g. stripping

interest from a winning party's judgment sum as a penalty); remedial-steps order; restraining order; or any other order

Certification Requirements

OO Certification

- **s41(1):** each party must personally certify they've read & understood the OO + paramount duty (Form 4A)
- **s41(2):** must be (a) filed with the party's first substantive document (writ/defence/3rd party notice) and (b) otherwise compliant with rules of court (form/time/service)
- **s41(3):** litigation guardian may certify on behalf of a party (e.g. a minor)
- **s41(4):** person in control of proceedings under statute/insurance contract may certify (e.g. an insurer)

Proper Basis Certification

- **s42(1):** practitioner must file (Form 4B) on: (a) first substantive document; (b) any subsequent substantive doc that adds/substitutes a party, claim, defence, or material allegation, or makes a significant amendment; (c) as rules require; (d) as court directs
- **s42(1A)/(1B):** certifies each factual allegation/denial/non-admission has a proper basis, and the claim/response/question posed has a proper basis, on available factual/legal material
- **s42(1C):** not required where rules exempt admin-only documents (e.g. registering a judgment)
- **s42(3):** practitioner's determination must be based on reasonable belief as to truth/untruth of the allegation (or, for non-admissions, genuine lack of knowledge)
- **s42(4):** unrepresented party must self-certify, same obligations as a practitioner
- ***Note:*** *filing where no proper basis exists isn't itself automatically a s42 breach — more likely a breach of the OO*
- **s44** — urgent filing: doc may be filed without certification if urgent (e.g. limitation period about to expire, freezing/search orders); certification must follow as soon as practicable
- **s46** — court may weigh any certification failure in costs, procedural orders, or other orders

Rule 4.09 (OO certificate, Form 4A) / Rule 4.10 (proper basis certificate, Form 4B) — Supreme, County & Magistrates' Courts

Other definitions (s3):

- **"appropriate dispute resolution"** = process to negotiate settlement / resolve or narrow issues, incl. mediation, conciliation, early neutral evaluation, expert determination, judicial resolution/settlement conference, arbitration
- **"party"** = party to a civil proceeding

- **"substantive document"** = originating motion; writ (statement of claim or equivalent); defence/notice of defence; reply; counterclaim; answer to counterclaim

Module 3: Fundamental Duties to the Client / Duty of Confidentiality

Can Practitioners Act for a Person Close to Them?

- **General rule:** No rule against acting for a relative or close friend, but cases repeatedly warn it is **not advisable**.

Temby & Anor v Chambers Investment Planners [2010] FMCA 783 — restrained

- 🚫 **Restrained:** solicitor was the client's son (litigation matter) — personal interest of the "closest kind"; danger the practitioner lacks objectivity/independence, esp. in discretionary litigation judgments (settlement, risk advice)
- **Grounds for restraint:** (a) danger of misuse of confidential information (b) breach of fiduciary duty of loyalty not to act against a client/former client (c) court's inherent jurisdiction over practitioners as officers of the court
- **Legal test:** would a fair-minded, reasonably informed member of the public conclude the proper administration of justice warrants restraint? Exceptional jurisdiction, exercised with caution (*Canberra Residential Developments*)
- ***Facts:*** *Son-solicitor acted for his parents in litigation; D applied to restrain the firm from continuing to act.*

Schueler v Smith [2010] FMCA 777 — restrained

- 🚫 **Restrained:** solicitor was de facto partner of an applicant — risk professional impartiality lost; not a stranger to the parties (met at solicitor's home, songs composed there, she provided band-performance worksheets); also a potential witness — would have to cease acting if called (Rule 27 SR)
- ***Facts:*** *Solicitor's de facto partner was an applicant in a copyright dispute between former bandmates over public performance of songs.*

Re Wombat Securities Pty Ltd [2011] NSWSC 194 — not restrained

- ✓ **Not restrained:** no evidence solicitor benefits beyond ordinary fees; father's shareholding ≠ son's financial interest; accepting D's argument would bar a practitioner from ever acting for a parent; father was only a witness, not a party
- **Discretionary factor:** application made ~1 week before trial — cost/inconvenience of compelling a change of solicitors this late weighed heavily against restraint
- ***Facts:*** *Solicitor acted for a company; his father (a director/shareholder via a family trust) was the company's principal witness.*

Legal Services Commissioner v Lynch **[2015] VCAT 772 — illustrative, not restraint**

- **Illustrative case:** correspondence to the client was "frequently hectoring, aggressive, disrespectful and abusive in tone," informal, unprofessional, peppered with profanities — held up as illustrating why acting professionally for friends is inadvisable
- ***Facts:*** *Solicitor had a prior personal relationship with the client's family before acting for the client.*

Duties Under the Solicitors' Conduct Rules 2015 (SR)

Rule	Duty	Key notes
1.1	Application	Applies to all solicitors in the jurisdiction, incl. Australian-registered foreign lawyers acting as a solicitor
3.1	Duty to court paramount	Prevails to the extent of inconsistency with any other duty
5.1	Fit & proper person; don't diminish public confidence / bring profession into disrepute	See LSC v Paric (Module 9)
4.1.1	Act in client's best interests	
4.1.2	Honesty & courtesy in all dealings	Read with s17 CPA; see LSC v Paric
4.1.3	Competence, diligence, reasonable promptness	
4.1.5	Comply with the Rules and the law	Catch-all for breach of any SR rule
7.1	Clear, timely advice so client can make informed choices	Practitioner assists the client to decide — doesn't decide for them
7.2	Inform client of ADR alternatives to full contest	Unless client already understands them; read with ss22–23 CPA
8.1	Follow client's lawful, proper, competent instructions	Not obliged to follow lawful-but-improper instructions; read with SR 4.1.4 & 17.1
4.1.4	Maintain professional independence, avoid	Professional distance needed — mustn't pursue client's goals at expense of court obligations

	compromising integrity	
17.1	Not a mere mouthpiece — exercise independent forensic judgment	May ignore particular instructions after due consideration (ss12–13 CPA); e.g. no delaying tactics or unmeritorious applications
12.1	No conflict between own interest and client's best interests (duty of loyalty)	E.g. secret commission on referral; undisclosed financial interest in referred provider; personal interest in outcome; board-member conflict
12.2	No undue influence for benefit beyond fair remuneration	
12.3	No borrowing from a client	Unless client is a bank/trustee co./managed scheme/employer/associate AND full disclosure AND client's interests protected
12.4	Wills, benefits & referral commissions	Disclose right to executor's commission; decline substantial personal benefit unless client is family; disclose referral commissions and get informed consent
13.1	Complete accepted work	Unless: client agreed otherwise; discharged by client; terminated for just cause + reasonable notice; ends by operation of law
9.1	Confidentiality — don't disclose client's confidential information	Outside the practice/engaged barrister; survives the retainer, continues after work completed
9.2	Exceptions to 9.1	(1) client authorises (2) permitted/compelled by law (3) confidential setting, sole purpose own legal/ethical advice (4) avoid probable serious criminal offence (5) prevent imminent serious physical harm (6) disclosure to practice's insurer

Legal Services Commissioner v Moir [2014] VCAT 1087 — rr 12.1, 12.2 & 12.3

- **✗ Breach — 12.1, 12.2 & 12.3:** family solicitor borrowed $200,000 from elderly, trusting clients for a purported investment, promising high returns, without advising them to get independent legal advice; money went to his own practice debts; only a fraction repaid
- **Reasoning:** clients trusted him to act in their interests, not bring those interests into conflict with his — conflict arose the moment he asked to borrow $200k at short notice without security; he exercised undue influence and abused his position of trust
- ***Facts:*** *Long-time family solicitor to an elderly couple borrowed heavily from them without independent advice; used funds for his own debts.*

Module 4: Legal Professional Privilege / Client Legal Privilege

Overview

- **LPP (common law) / CLP (uniform evidence legislation):** protects confidential lawyer-client communications (oral or written) from disclosure, if made for the dominant purpose of seeking/giving legal advice or for existing/anticipated legal proceedings
- **Cannot be required to be disclosed to:** a court (evidence, discovery, subpoena, notice to produce — CLP) or a regulator/investigator (LPP)
- **3 elements:** (1) confidential (2) made in the lawyer-client relationship (3) for the dominant purpose of legal advice or existing/anticipated proceedings
- **All privileged communications are confidential, but not all confidential communications are privileged —** e.g. a valuation report given to a practitioner solely for conveyancing may be confidential but isn't privileged (not for legal advice/litigation)

Legal Professional Privilege (LPP)

- **Common law right;** covers investigations, searches, pre-trial stages, and proceedings outside court (incl. tribunals)
- **CLP under Evidence Act 2008:** ss118–119 preserve the common law LPP doctrine for court proceedings; s120 extends protection to unrepresented parties; ss122–126 deal with loss of privilege

Baker v Campbell (1983) 153 CLR 52 — LPP is substantive, not just evidentiary

- **Held:** LPP is a substantive common law right, not merely a rule of evidence — can be invoked outside adversarial litigation (e.g. against coercive statutory powers or a search warrant)
- **Courts uphold privilege** against statutory provisions purporting to override it, except by express language or clear and unmistakable implication; courts avoid an overly narrow/technical approach to what falls within LPP

Element 1: Confidential Communications

- Private lawyer-client communications are assumed confidential.
- **Lost if made in the presence of a 3rd party** who isn't the lawyer's employee/agent (*R v Braham and Mason* [1976] VR 547) — the client's intention as to confidentiality is also relevant

Element 3: Dominant Purpose

- **Test:** would the communication/document have been made if the suggested dominant purpose hadn't existed? If yes → test not satisfied; if no → satisfied, even with an ancillary purpose

- **If multiple purposes and it's unclear which is dominant,** the test is NOT satisfied even if legal advice/litigation was an important purpose

Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122 — privileged

- ✓ **Privileged:** LPP extends to communications with 3rd parties commissioned by the client (or lawyer on the client's behalf) for the dominant purpose of legal advice — a document attracts privilege if prepared for that purpose even if never actually used that way
- **Test is functional, not relational:** what matters is the function the 3rd party performed for the client, not their relationship to the client
- **Harder to establish where:** 3rd party gives commercially advantageous structuring advice merely routed to lawyers for comment; documents lodged with lawyers just to obtain immunity from production; or the client filters/adapts the 3rd party's document before passing it on (suggests the document was for informing the client, not communicating with the lawyer)
- ***Facts:*** *P sought tax advice; lawyers had P instruct an independent accounting firm to prepare a briefing paper for the purpose of obtaining that legal advice; the firm sent it to P, who forwarded it to the lawyers.*

Esso Australia Resources Ltd v Commissioner of Taxation (1999) 201 CLR 49 — dominant purpose test confirmed

- **Held:** dominant purpose = the ruling, prevailing, most influential purpose (a primary or substantial purpose isn't enough); objective test, but the preparer's subjective intention carries weight
- **Sole purpose test rejected:** too narrow (any second purpose defeats privilege) — dominant purpose test preferred, balances privilege against unfettered access to information, and aligns Australia with UK/NZ/Ireland/Canada

Sydney Airports Corp Ltd v Singapore Airlines Ltd [2005] NSWCA 47 — not privileged

- ✗ **Not privileged:** SACL failed to show anticipated litigation was the dominant purpose — report was commissioned for 4 purposes (litigation, understanding the cause, allaying regulator concerns, operational fixes); even if litigation was the most important single factor to the individual in-house lawyer, that doesn't establish it was SACL's dominant purpose overall
- **In-house lawyers more likely to act for non-litigation purposes** than external lawyers — their status is relevant to assessing dominant purpose
- ***Facts:*** *SACL's in-house lawyer commissioned an expert report after an aerobridge malfunction, marked confidential and for anticipated litigation; other purposes existed too.*

Commonwealth & Vance [2005] ACTCA 35 — practising certificate not conclusive

- **Held:** holding a practising certificate is an important but not conclusive factor for the dominant-purpose requirement — a certificate holder can still act inconsistently with privilege, and a non-holder can still generate privilege by acting professionally
- **Organisational culture matters:** a hierarchical structure (e.g. RAAF) can raise real questions about a lawyer's independence
- ***Facts:*** *Defence Legal Office employees (admitted but without practising certificates) prepared documents; privilege claimed over them in an employment dispute.*
- **Legal advice privilege:** covers advice on the law AND on what action to take (*AWB Ltd v Cole* (2006) 152 FCR 38)
- **Litigation privilege:** confidential communications (lawyer-client, or lawyer-client-3rd party) for the dominant purpose of existing/anticipated proceedings — litigation need not be on foot, but there must be a real prospect, not a mere possibility (*Mitsubishi Electric v Victorian WorkCover* (2002) 4 VR 332)

Element 2: Lawyer-Client Relationship — Independence of In-House Counsel

- **Privilege requires the lawyer to be acting in a professional capacity —** turns on the lawyer's independence from the client

Waterford v Commonwealth of Australia (1987) 163 CLR 54 — independence is essential

- **Held:** legal adviser must be competent AND independent — personal loyalties/duties/interests mustn't influence the advice given; extended LPP to government legal officers (in-house lawyers)

Seven Network Ltd v News Ltd [2005] FCA 142 — not privileged (17 of 22 docs)

- **✗ Not privileged (17/22 docs):** dominant purpose test failed even though some documents were labelled "Privileged — contains legal advice"; the Chief General Counsel was actively engaged in commercial decisions (options grants, negotiations, sat on the Partnership Executive Committee)
- **A label isn't enough —** courts look at substance (content, context, evidence, form); in-house lawyers are more exposed to commercial participation than external lawyers, so employment alone doesn't establish independence
- ***Facts:*** *News Ltd claimed privilege over internal communications between executives and its Chief General Counsel.*
- **s38 LPUL:** an Australian legal practitioner providing services as an officer/director/partner/employee of a practice, or as corporate/government legal practitioner, does NOT lose professional privileges merely because of that capacity — privilege law isn't excluded or affected by it

Loss of Privilege

- **Privilege depends on confidentiality —** lost once confidentiality is lost (e.g. public domain) or a confidentiality exception is invoked
- **May be abrogated by legislation** expressly or by necessary implication
- **Never attaches where the communication involves/invites illegality,** or furthers an illegal act or fraud — confidentiality can't shield advice that facilitates crime

Fraud or Crime Exception

Australian Wheat Board Ltd v Cole (No 5) [2006] FCA 1234 — not privileged (fraud exception)

- ✗ **Not privileged:** documents were created in furtherance of an improper/dishonest purpose (inflating contract prices to extract UN escrow funds) — the fraud exception applies
- **Fraud exception principles:** covers a wide range of fraud/criminal/improper-purpose conduct, incl. trickery and shams; sufficiently flexible on public-policy grounds; the fraud need NOT be known to the lawyer or client and may be a 3rd party's fraud
- ***Facts:*** *AWB claimed privilege over ~900 documents sought by a Royal Commission investigating its wheat sales to Iraq under the UN Oil-for-Food Programme.*

Expense Reduction Analysts v Armstrong Strategic Management (2013) 250 CLR 303 — privilege NOT lost

- ✓ **Privilege not lost:** privileged documents mistakenly disclosed in discovery — an inadvertent, unintentional mistake, promptly correctable; no waiver arises where the privilege-holder acted promptly and the other party isn't unfairly prejudiced by returning the documents
- ***Facts:*** *Privileged documents were mistakenly listed as non-privileged and produced; when discovered, the disclosing party demanded their return, which was refused.*

Module 5: Waiver to Privilege

Implied Waiver Exception to Privilege

- **Privilege belongs to the client** — only the client can waive it
- **Express waiver:** disclosure of the privileged communication/document with the intention of giving up confidentiality
- **Implied (imputed) waiver — examples:** legal advice referred to in communications with a 3rd party to support/advance the privilege-holder's position; referred to in press/ASX releases; discussed in board papers later circulated to 3rd parties
- **Test (Mann v Carnell):** is the conduct of the party entitled to privilege (or their adviser) inconsistent with the confidence the privilege protects? Can occur even without subjective intent to waive

Mann v Carnell [1999] HCA 66 — no waiver — public interest

- ✓ **No waiver:** disclosure was for a particular purpose (enabling an MLA to assess whether public money was properly used in a litigation settlement) — that purpose was not, by itself, inconsistent with also wanting to maintain privilege
- **Key principles:** waiver turns on inconsistency between the client's conduct and maintaining confidentiality — not a free-standing fairness principle; consequences don't depend on the party's subjective intent
  - e.g. *Benecke v National Australia Bank* (1993) — client waived by giving evidence about instructions to a barrister, even though she believed she could still stop the barrister giving his own account
- ***Facts:*** *ACT Chief Minister conveyed confidential legal advice to an MLA so he could assess whether the government properly used public money settling litigation.*

British American Tobacco Australia Services v Cowell (McCabe Estate) [2002] VSCA 197 — no wider waiver

- ✓ **No wider waiver:** express waiver over 2 letters didn't extend to earlier associated advice — the 2 letters didn't create an "inaccurate perception" of the wider communications
- **Rule:** waiver of one piece of advice extends to another piece ONLY IF that other piece is necessary to a proper understanding of the first — using privileged material merely to formulate a pleading isn't itself a waiver
- ***Facts:*** *BATAS expressly waived privilege over 2 letters exhibited in an affidavit; the estate argued this impliedly waived privilege over earlier, related legal advice too.*

Bennett v CEO of the Australian Customs Service [2004] FCAFC 237 — waiver found

- ✗ **Waiver found:** disclosing the substance/conclusion of legal advice (to emphasise the strength of the case against Bennett) was inconsistent with then maintaining privilege over that advice
- **Distinction:** merely asserting that advice was taken and considered (without disclosing its substance) would NOT waive privilege — it's disclosing the conclusion/effect that triggers waiver
- ***Facts:*** *The AGS wrote to Bennett's solicitors conveying the substance of legal advice given to Customs, asserting Bennett's position was legally incorrect.*

Switchcorp Pty Ltd v Multiemedia Ltd [2005] VSC 425 — waiver found

- ✗ **Waiver found:** ASX statement disclosed the gist/conclusion of legal advice ("lawyers... advised that the plaintiff's claim will not succeed") — clear, deliberate disclosure of the conclusion
- **Distinction:** a statement revealing the contents of advice (even summarised or by conclusion only) will likely waive privilege; a statement merely referring to advice being taken, without revealing content, likely will not
- ***Facts:*** *Multiemedia's ASX statement said its lawyers had advised the plaintiff's claim would fail; the other side sought the underlying advice documents.*

Macquarie Bank Ltd v B & Anor [2006] FamCA 1052 — waiver found — content put in issue

- ✗ **Waiver found:** respondent's affidavit put the content of her solicitor's advice in issue (explaining delay in bringing a property application) — privilege may be waived where confidential communication content is put in issue by the privilege holder
- Key factors (from *Australian Agricultural Co v AMP Life* **[2006] FCA 371):** an identified issue must require determination; disclosed evidence must relate to privileged communications; disclosure can occur via pleading, affidavit, oral evidence or produced documents; the disclosure must be relevant to the issue; and it must show inconsistency between maintaining privilege on some related communications but not others
- ***Facts:*** *Macquarie Bank sought to set aside consent orders; the respondent's affidavit explained delay by reference to advice from her former solicitor.*

Osland v Secretary to the Department of Justice [2008] HCA 37 — no waiver — public interest

- ✓ **No waiver:** press release disclosing the conclusion of a mercy-petition advice (denial recommended) was for the purpose of showing due process was followed, not to gain an advantage — no inconsistency or unfairness
- **Key principles:** disclosing a conclusion/gist doesn't necessarily disclose the underlying confidential content — no necessary inconsistency between the two;

waiver questions are matters of fact and degree, informed by the disclosure's purpose

- ***Facts:*** *The AG's press release disclosed that a QC panel's advice recommended denying a pardon petition, after the petition was refused.*

Dreyfus v Attorney-General (Cth) [2021] AATA 249 — waiver found — political advantage

- **✗ Waiver found:** disclosing part of the advice via media release/interviews for the partial purpose of political advantage was inconsistent with maintaining privilege — distinct from Osland because the AG used the advice to lend legitimacy to criticism of an opponent
- **Determinative factor:** the partial purpose behind the disclosure — merely referring to having taken/considered advice, without more, wouldn't be enough
  - *Ampolex v Perpetual Trustee* [1996] HCA 15
- ***Facts:*** *The AG disclosed the substance of legal advice on the Medivac legislation in a media release and interviews, criticising the Shadow AG; FOI access to the underlying advice was sought.*

Disclosure by Mistake / Inadvertence

- **General rule:** unintentional disclosure by accident/mischance (wrong recipient, wrong bundle) does NOT necessarily waive privilege; discovered documents disclosed by obvious mistake generally aren't waived either

Expense Reduction Analysts v Armstrong Strategic Management [2013] HCA 46 — no waiver — inadvertent disclosure

- **✓ No waiver:** privileged documents inadvertently disclosed during court-ordered discovery, contrary to instructions — discovery isn't meant to affect confidentiality entitlements; courts should ordinarily allow correction and order return of mistakenly-disclosed documents
- **Rule 31 SR:** a solicitor who knows/reasonably suspects a disclosure was inadvertent must notify the other solicitor and return the material
- ***Facts:*** *Appellant's solicitor mistakenly disclosed privileged documents during discovery; respondents' solicitors refused to return them, arguing waiver.*

Privilege and Waiver over Expert's Reports

ASIC v Southcorp Ltd [2003] FCA 804 — summary of principles

- **Confidential briefing/instructing of an expert** by a prospective litigant's lawyers, for a report to be used in anticipated litigation, attracts privilege — as do copies made for that confidential communication

- **Documents unilaterally generated by the expert** (working/field notes, own report drafts) do NOT attract privilege — they aren't communications
- **Disclosing the expert's report for reliance in litigation** ordinarily impliedly waives privilege over the brief/instructions/documents that influenced its content — unfair to rely on the report without disclosing what shaped it
- **Documents an expert used to form an opinion/write a report** cannot retain privilege, regardless of how the expert obtained them
- **Specific findings:** an unannotated draft report reflecting only the expert's own thinking — not privileged; but annotations recording the expert's understanding of communications with the client's lawyers/counsel, including legal opinion — privileged and not waived; mark-up/tracking that is itself a confidential solicitor-counsel communication — privileged

Module 6: Cost Disclosures / Cost Agreements

Retainer vs Cost Disclosure vs Cost Agreement

Retainer	Cost Disclosure	Cost Agreement
Contract for legal services (common law); express/implied; can be partly written/oral; sets scope of work + remuneration. No legal requirement to be in writing.	Mandatory by statute (LPUL), subject to exceptions. Must be provided in writing.	Not mandatory — but if entered into, must conform to statutory requirements (LPUL).

Cost Disclosures

- **s174(1)(a):** when/as soon as practicable after instructions given, must provide the basis for charging costs + an estimate of total costs
- **s174(2)(a):** must also disclose the client's rights to: negotiate a costs agreement; negotiate the billing method; receive a bill (incl. itemised); seek help from the regulatory authority on a costs dispute
- **s174(1)(b):** on significant change to previous disclosures (or ASAP), must inform the client of the change
- **s174(2)(b):** must give sufficient/reasonable info on the change's cost impact so the client can decide how to proceed (stay, switch, walk away)
- **s174(3):** must take reasonable steps to be satisfied the client understands and consents to the proposed conduct and costs
- **s174(6):** disclosure must be written — but written disclosure alone doesn't satisfy s174(3)'s understanding/consent requirement
- **s177 — settling a litigious matter:** before executing settlement, must disclose (a) estimate of costs payable by the client (incl. another party's costs, if applicable) and (b) estimate of contributions likely received from another party
- **s175 — retaining another practice on the client's behalf:** first practice must make similar disclosures re: the second practice; second practice need not disclose directly but must give the first practice the info needed
- **s176 — third-party payer:** similar disclosure owed to an associated third-party payer, limited to what's relevant to them
- **"third-party payer" (s171(1)):** person under legal obligation to pay for the client's legal services (or who already has) — associated if obligation owed to the practice; non-associated if owed only to the client/another person

Exceptions to the Duty to Make Disclosures

- **s174(4) — lower threshold ($750 excl. GST):** no cost disclosure required if total costs unlikely to exceed $750 — but client must still be informed of their rights
- **s174(5) — higher threshold ($3,000 excl. GST):** if unlikely to exceed $3,000, may use the uniform standard disclosure form instead (Form 1, r72 General Rules)
- **s170 — commercial/government clients:** Part 4.3 doesn't apply where the client is e.g. a law practice, public/large proprietary company, foreign company, government authority, financial service licensee, or a party who agreed to pay costs on a tender basis

Non-Compliance with Disclosure Requirements

- **s178 consequences:** (a) the costs agreement (if any) is void (b) client/third-party payer needn't pay until costs are assessed (c) practitioner can't commence/maintain recovery proceedings until assessed (d) may amount to unsatisfactory professional conduct or professional misconduct

Victorian Legal Services Commissioner v James [2017] VCAT 368 — breach — s174(1)(a) & (2)(a)

- **✗ Breach:** no cost disclosure at all in one matter (client had little idea what fees would be); in another, disclosure sent 10 months after instructions, by which time $24,240 had already been received
- **Held:** breached fundamental duties; could give the practitioner unfair leverage as the client becomes more dependent over time; impairs the client's ability to make strategic decisions — found guilty of professional misconduct (with other breaches)

Victorian Legal Services Commissioner v Ng [2016] VCAT 12367 — breach — s174(1)(b) & (2)(b)

- **✗ Breach:** practitioner charged undisclosed "establishment, annual and additional service fees" ($118,900 in 2013, ~$96,000 in 2014) on a client with mild dementia — an "updated" disclosure letter was drafted but never actually sent
- **Held:** failure of fiduciary duty + breach of statutory disclosure duty; part of a broader "matrix of deception" — serious breach of professional standards
- ***Facts:*** *Practitioner had an ongoing retainer managing a client's financial affairs; initial disclosure estimated $5,000–6,000/year, later replaced with much higher undisclosed commission-based fees.*

Cost Agreements

Standard Agreement	Conditional Costs Agreement
Practitioner gets paid professional fees regardless of outcome.	"No win, no fee" (s181(1)) — whole/part of fees conditional on a successful outcome; may combine a guaranteed portion with an outcome-dependent portion.

- **s179:** client has the right to require a negotiated costs agreement
- **s180:** must be written or evidenced in writing; may be a written offer accepted in writing or (except conditional agreements) by conduct; cannot exclude costs assessment
- **Disbursements** are usually borne by the client regardless of agreement type

Conditional Cost Agreements (ss181–182)

- **s181(2)(a):** must be written, in plain English
- **s181(2)(b):** must define what a "successful outcome" is
- **s181(3):** must be signed by the client + include a statement that the client was informed of the right to seek independent legal advice first
- **s181(4):** must include a 5+ business-day cooling-off period (written termination); if terminated within it, only pre-termination work done on the client's instructions/knowledge is recoverable, and NO uplift fee (s181(5))
- **s181(7):** cannot relate to criminal proceedings, Family Law Act proceedings, or other excluded proceedings
- **s181(8):** contravention may amount to misconduct
- **Uplift fee (s182):** additional fee payable on success; must set out how it's calculated (s182(3)(a)) and give an estimate or range + key variables (s182(3)(b))
- **For litigious matters:** uplift only allowed if success is reasonably likely (s182(2)(a)), and capped at 25% of costs excl. disbursements (s182(2)(b))
- **Breach consequences:** 100 penalty units (s182(4)); uplift fee not recoverable and must be repaid (s185(3))

Uplift Fees vs Contingency Fees

- **Uplift fee:** calculated as a % of the practitioner's normal rate
- **Contingency fee:** calculated by reference to the amount awarded/settled or value of property recovered (s183(1)) — **prohibited**
- **Contravention consequences (s183/s185):** civil penalty of 100 penalty units; the whole agreement is void; no costs recoverable even for work done, and any costs received must be repaid (client may recover as a debt if not repaid); may amount to misconduct

Victorian Legal Services Commissioner v Johansson [2015] VCAT 2034 — breach — s182(2)(b) uplift cap

- ✗ **Breach:** uplift fee charged at ~100% (cap is 25%) in a litigious matter — applicant (40 years' experience) pleaded guilty
- ***Facts:*** *Practitioner's client recovered $100,000 from an estate claim without proceedings/mediation; practitioner charged $34,424.42 in fees.*

Legal Services Commissioner v Barrett [2012] VCAT 1800 — breach — s183(1) contingency fee

- ✗ **Breach:** agreement charged a $10,000 + GST retainer plus 10% of damages and 10% of costs awarded/settled — a prohibited contingency fee, even though the amount charged was reasonable and only charged once
- **Disclosure statements also failed to cover:** client's right to a bill/itemised bill/notice of substantial changes; cost estimate/major variables; billing intervals; dispute avenues and time limits
- **Held:** prohibition on contingency fees is fundamental — lawyers' primary duty is to the court/legal system, secondary to the client; contingency fees risk conflicting lawyers' own interests with that duty — found guilty of professional misconduct
- ***Facts:*** *35-year practitioner agreed a PI-claim fee structure with a contingency component; practitioner said he wasn't aware this was prohibited.*

Non-Compliance with Cost Agreement Requirements

- **s185(1):** a contravening costs agreement is void — practitioner must apply for a costs assessment (s172: considers complexity, practitioner's seniority/experience) to recover anything
- **s200:** assessor considers fairness/reasonableness, incl. compliance with the Uniform Law, adequacy of disclosures, and advertising re: costs/skill
- **s185(2):** recovery capped at what would've been recoverable under the (void) agreement — excess must be repaid
- **s185(4)–(5):** contingency-fee agreements recover nothing at all, even for work done — amounts received must be repaid, recoverable by the client as a debt if not

Module 7: Avoiding Successive Conflict Between Clients

Conflicts Concerning Former Clients

- **Rule 10.1 SR:** must avoid conflicts between duties owed to current and former clients, except as permitted by Rule 10.2
- **Rule 10.2 SR:** must not act for a current client if in possession of a former client's confidential information that (a) might reasonably be material to the current matter and (b) detrimental to the former client if disclosed — UNLESS (10.2.1) former client gives informed written consent, or (10.2.2) an effective information barrier is established
- **Key elements:** confidential info of a former client + material to the current matter + disclosure would be detrimental

Information Barrier

- **Permanent measures** within a practice preventing information flow between sections, assuring the former client their information won't be used for a new client's benefit to their detriment

Mallesons Stephen Jaques v KPMG Peat Marwick & Others [1990] WASC 550 — injunction granted

- **✗ Injunction granted:** a partner's knowledge is imputed to the whole firm (partnership/agency law) — can't divorce one partner's knowledge/duties from the rest of the firm's
- **Test:** injunction lies if there's a real and sensible possibility the solicitor's interest in advancing the new client's case might conflict with the duty to keep the former client's information confidential
- **Firm size isn't a defence:** a large firm presents a united, quasi-corporate front to clients — no departure from the ordinary rule just because the firm is big
- ***Facts:*** *Mallesons previously advised accountant firms KPMG/Hungerfords on confidential audit matters, then was retained by a Commissioner to prosecute a partner of those firms on related conduct.*

Cairndale Country Club v Rowan Astill & Ors [1993] FCA 218 — injunction granted

- **✗ Injunction granted:** would a reasonable observer, aware of the facts, think there's a real (not theoretical) possibility the solicitor might use the former client's confidential info to advance a new client's interests to the former client's detriment?
- **Detriment must be shown** — core requirement from *Rakusen*; if the confidential info relates only to matters remote from the new retainer, no injunction
- ***Facts:*** *A partner who'd acted for, and been a director of, Carindale Estate later acted against it for a couple suing over an alleged misrepresentation about lot sizes.*

Bolkiah v KPMG [1999] 2 AC 222 (House of Lords) — injunction granted — no effective Chinese wall

- ✗ **Injunction granted:** the Chinese walls were erected ad hoc within a single department with rotating staff — not an established part of the firm's organisational structure, and forensic accountants are used to freely sharing information/expertise
- **2-part test:** (i) is the solicitor in possession of confidential info not consented to disclosure, and (ii) is that info relevant to a new matter where the new client's interest may be adverse to the former client's?
- **Duty to preserve confidentiality is unqualified** — not just "reasonable steps"; former client is entitled to avoid even the risk of inadvertent disclosure; the risk must be real, not fanciful, but need not be substantial
- **Effective Chinese wall factors:** physical separation of departments; recurring education programmes; strict wall-crossing procedures with records; compliance monitoring; disciplinary sanctions for breaches
- ***Facts:*** *KPMG previously did forensic accounting/litigation support for Bolkiah personally, then was engaged by the Brunei government agency to investigate assets possibly misused by him; KPMG set up an internal Chinese wall.*

Yunghanns v Elfic Ltd unreported, SC (Vic) 1998 — injunction granted — "get to know you" factors

- ✗ **Injunction granted:** real and sensible risk of misuse — the firm had 20+ years' intimate knowledge of Yunghanns' thinking, tactics, and attitude to litigation, from acting for both Yunghanns and the now-opposing party
- **"Get to know you" factors:** confidential information isn't limited to specific facts — includes a solicitor's accumulated understanding of a client's reasoning, tactics, strengths/weaknesses, and reactions to pressure
- ***Facts:*** *A firm acted for Yunghanns and his corporate group for 20+ years, and also for their joint-venture partner Elfic; when the JV soured, the firm acted for Elfic against Yunghanns.*

World Medical Manufacturing Corp v Phillips Ormonde & Fitzpatrick Lawyers [2000] VSC 196 — injunction refused

- ✓ **Injunction refused:** the information in question was either not relevant, no longer confidential (exposed in the Federal Court proceeding), or was information any experienced patent attorney could have worked out independently
- **5-part test (affirming Bolkiah):** (i) is confidential info held that the former client hasn't consented to disclose? (ii) may it be relevant to the new, adverse matter? (iii) if yes to both, is there a real (not fanciful) risk of disclosure? (iv) if so, can the provider discharge the heavy burden of showing no risk (e.g. Chinese wall, rarely sufficient)? (v) should a permanent injunction be granted?
- **No "getting to know you" contact:** all dealings were by correspondence only — no meetings/calls through which the firm could have learned the client's attitudes or tactics

- ***Facts:*** *Related firms POF Lawyers and POF Attorneys (same building, some shared partners) acted for World Medical on a patent application while also acting for a competitor, Cook Inc, on related infringement litigation.*

Spincode Pty Ltd v Look Software Pty Ltd & Ors [2001] VSCA 248 — injunction granted

- **✗ Injunction granted:** the appellant failed to show there was no real risk of misuse — solicitors had discussed shareholder agreement terms directly with/in front of the former client contact, on matters likely to be investigated in the new litigation, incl. software copyright ownership
- ***Facts:*** *Solicitors previously engaged by a company to help resolve internal shareholder disputes later acted against a participant in litigation touching the same disputed matters.*

Successive Conflict — Worked Examples

- **Example 1:** James v Bond dispute — a practitioner who acted for James at M Law Practice moves to Q Lawyers, which acts for Bond. Even with zero involvement in the matter, there's a potential conflict — the practitioner may have had access to James's information at M, now usable for Bond's benefit at Q.
- **Example 2:** Rumpole (who acted for George in a completed criminal matter) and Atticus are colleagues. George's wife Mildred approaches Atticus for a family-law matter against George. Potential conflict — Rumpole may hold confidential info about George that could benefit Mildred via Atticus.
- **Example 3:** Shylock (formerly acted for Antonio, matter completed) and Portia are colleagues. Lorenzo approaches Portia on an unrelated claim, but advancing it may expose Antonio to liability. If Shylock holds confidential, material info and Antonio could reasonably conclude it may be used to his detriment, Portia cannot act for Lorenzo — the firm is conflicted between confidentiality to Antonio and advancing Lorenzo's interests.

Module 8: Avoiding Concurrent Conflicts Between Clients

Overview

- **Example:** solicitor acts for both buyer and seller in a property sale with informed consent — but if the purchase is subject to finance, positions may diverge (buyer needs more time; seller gets a better offer). If the solicitor drops Client A to keep acting for B, A may seek an injunction if there's a risk of breach of duty to A.

Rule 11.1 SR

- **Must avoid conflicts** between duties owed to 2+ current clients, except as permitted by this Rule
- **Clients needn't start out adverse** — a future conflict often isn't foreseeable when retainers are first accepted; a conflict can emerge later (e.g. the solicitor acquires one client's confidential information)

Rule 11.2 SR

- **Must not act** where clients in the same/related matters have adverse interests and there's a conflict/potential conflict of duty to act in each one's best interests — except under Rules 11.3 and 11.4
- **Example — vendor & purchaser:** interests are naturally opposed (price, settlement timing) — but if all terms are pre-agreed and both are ready to complete, the solicitor may act with informed consent, since timely completion serves both

Rule 11.3 SR

- **Exception to 11.2:** may act if each client (11.3.1) knows the solicitor is also acting for the other, and (11.3.2) gives informed consent — always subject to being able to discharge the duty to each client's best interests
- **Informed consent requires the client to understand:** the existence/potential for conflict; its potential/actual disadvantages (and any advantages); that alternative representation is probably available; and how the solicitor plans to manage the conflict
- **Unsophisticated/lay clients:** a prudent solicitor should urge them to get independent legal advice before consenting

Rule 11.4 SR — Conflict from Confidential Information

- **Applies where:** the solicitor holds Client A's confidential info that's reasonably material to Client B's matter and would be detrimental to A if disclosed — even if A and B engaged the solicitor independently on unrelated matters
- **11.4.1 exception:** both clients informed and give informed consent (incl. permission to disclose A's info to B) — but hard to see how the solicitor can still discharge the duty to A if disclosure would harm A

- **11.4.2 exception (law practices):** each client represented by a different solicitor within the practice; an effective information barrier is established; and each solicitor can discharge their own duty — in practice, only realistic if the barrier already existed before both clients were taken on

Rule 11.5 SR — Actual Conflict Arising Mid-Matter

- **Where an actual conflict arises** while acting for 2+ clients in one matter, may continue for only one client (or a non-conflicted group) IF (11.5.1) the client(s) stepped away from give informed consent to continuing, AND (11.5.2) confidentiality to all clients — outgoing and remaining — isn't put at risk
- **In practice:** the remaining client's file would typically need to move to a different solicitor within the practice, with an information barrier already in place
- **Example — 2 directors, shared then diverging defence:** Director A wants to shift blame to B; B wants to maintain a joint defence — solicitor can't act for both once this actual conflict emerges. Continuing for A alone requires moving A's file to another section with confidentiality protections for B already in place
- **Rare in practice:** usually the solicitor must cease acting for everyone — the safe default is to withdraw entirely rather than risk an injunction

Wan v McDonald (1992) 3 FCR 491 — solo solicitor vs law practice distinction

- **Principle:** where one solicitor acted for both parties and then wants to act against a former client (of that same joint retainer) in litigation arising from the very same matter, that will only be permitted in rare and special cases — regardless of whether confidential information is actually in issue

Legal Services Commissioner v Blaker [2013] VCAT 87 — conflict — Rule 11.5

- **✗ Breach:** solicitor knew (or ought to have known) the purchasers were in financial difficulty but kept acting for both vendor and purchasers preparing refinancing arrangements; conceded he was wrong to think the absence of litigation meant there was no conflict
- **Held:** that the clients were neighbours in a small community, which pressured the practitioner to keep acting, made the professional failure worse, not better — they were no less entitled to full professional care
- ***Facts:*** *Vendor and purchasers of a holiday-camp property had a related loan agreement; the same solicitor kept acting for both after the purchasers ran into financial difficulty.*

Legal Services Commissioner v El-Hissi [2013] VCAT 325 — conflict — Rule 11.5, guilty of misconduct

- **✗ Breach:** continued acting for both families in a joint property development after one family's finance application was rejected and the other's succeeded, restructuring the purchase without advising the rejected family to get independent legal advice

- **Held:** interests conflicted from the moment one party's finance application was rejected; guilty of professional misconduct
- ***Facts:*** *Practitioner acted for his parents' associated company and a family friend's company on a joint property purchase; when one party's finance fell through, he restructured the deal without independent advice for that party.*

Module 9: Duty to Fellow-Practitioners and Others

Duty Not to Mislead Fellow Practitioners

- **SR 4.1.2:** must be honest and courteous in all dealings
- **SR 22.1:** must not knowingly make a false/misleading statement to an opponent (incl. re: compromise)
- **SR 22.2:** must take all necessary steps to correct any false/misleading statement made, as soon as possible after becoming aware
- **SR 22.3:** NOT false/misleading simply by failing to correct an opponent's own error (see SR 30)
- **SR 22.4:** must not deal with a party represented/indemnified by an insurer unless both are willing
- **SR 22.5–22.6:** must not communicate with the court in the opponent's absence (outside ex parte/properly noticed hearings) unless the court requires a response or the opponent consented beforehand — and must promptly tell the opponent what passed
- **SR 22.7:** where the opponent consented to a specific communication, must not raise any other matter
- **SR 22.8:** must inform the opponent ASAP of an intended adjournment application and its grounds

Duty Not to Communicate with Another Practitioner's Client

- **SR 33:** must not communicate with another practitioner's client unless: (a) that practitioner previously consented; (b) circumstances are urgent AND it wouldn't be unfair to the other client; (c) solely to ask whether they're represented and by whom; or (d) notice of intent to communicate was given and the other practitioner failed to respond within a reasonable time with a reasonable basis to proceed

Legal Services Commissioner v Paric (correction) [2015] VCAT 703 — breach — SR 33.1, 4.1.2 & 5

- **✗ Breach:** sent multiple emails directly to the opposing (vendor's) representative despite 5 separate warnings from the vendor's solicitor and a call from the Legal Services Commissioner drawing attention to SR 33.1 — serious given her 12 years' experience
- **Also breach — discourtesy (SR 4.1.2) / public confidence (SR 5):** sent emails to third parties (not just the opposing solicitor) making critical, personal allegations about the opposing solicitor's competence and conduct
- ***Facts:*** *Frustrated by a stalled conveyancing matter, a purchaser's solicitor emailed the vendor's own representative directly multiple times, and separately sent emails critical of the vendor's solicitor to third parties.*

Duty Not to Take Unfair Advantage of an Opponent's Obvious Error

- **SR 30.1:** must not take unfair advantage of another solicitor/person's obvious error to obtain a client benefit with no supportable foundation in law or fact

Chamberlain v Law Society of the ACT (1993) 118 ALR 54 — breach — misconduct, suspended

- **✗ Breach:** practitioner knew the ATO had mistakenly claimed $25,557.92 instead of $255,557.92, and deliberately prepared settlement/consent-judgment documents designed to lock in the error for tactical advantage (incl. a future estoppel argument) — suspended for professional misconduct
- **Key distinction:** taking advantage of a genuine procedural/formal mistake can be acceptable — but inducing or fostering the mistake (rather than staying passive) crosses the line, and can shade into misrepresentation
- **Dissent (Jenkinson J):** forensic culture still tolerates procedural manoeuvre and taking advantage of an opponent's error — the error here was one of calculation, not law
- ***Facts:*** *A tax debtor's lawyer engineered a consent judgment locking in the ATO's tenfold miscalculation of the amount owed.*

Other Duties to Opponents

- **SR 31 — inadvertently disclosed confidential material:** must not use it; must return/destroy/delete it immediately on realising the disclosure was inadvertent, and notify the disclosing side of the steps taken. If already partly read before realising: stop reading, don't use/disclose, and notify immediately. Must refuse a client's instruction to read such material.
- **SR 32.1:** must not allege unsatisfactory professional conduct/misconduct against another practitioner unless made bona fide with a reasonable, evidence-based basis
- **SR 34.1:** must not grossly exceed the client's legitimate rights in a way that misleads/intimidates another person (e.g. claiming costs for work not actually done in debt collection); must not threaten criminal/disciplinary proceedings as leverage in a civil matter; must not use tactics designed primarily to embarrass or frustrate another person
- **SR 34.2:** must not solicit instructions in a way likely to oppress/harass someone at a significant disadvantage due to recent trauma, injury, or other circumstances
- **SR 35.1:** if instructing a third party on the client's behalf without intending personal liability for their fees, must advise the third party of this in advance
- **SR 6.1:** must honour undertakings given in practice, with timely/effective performance, unless released by the recipient or a court
- **SR 6.2:** must not seek an undertaking from another solicitor that would require a non-party third person's cooperation

Module 9A: Duties to the Court and Admin of Justice

Basis for Duties to the Court

- **s25 LPUL:** an Australian lawyer is an officer of the Supreme Court
- **s6 LPUL:** "Australian lawyer" = admitted to the Australian legal profession anywhere; "Australian legal practitioner" = an Australian lawyer holding a current practising certificate
- **s264(1) LPUL:** expressly preserves the Supreme Court's inherent jurisdiction to control/discipline Australian lawyers
- **Rationale:** the court decides on the evidence put before it, so it depends on the honesty and integrity of its officers
- **SR 3.1:** duty to the court and administration of justice is paramount — prevails over any inconsistent duty

Duty Not to Diminish Public Confidence

- **SR 5.1:** must not engage in conduct (in practice or otherwise) that demonstrates unfitness to practise, or is likely to materially prejudice/diminish public confidence in the administration of justice, or bring the profession into disrepute

Duty to Obey the Law

- **SR 4.1.5:** must comply with the SR and the law
- **SR 24.1.1:** must not advise/suggest a witness give false or misleading evidence, nor condone another person doing so
- **SR 24.1.2:** must not coach a witness by advising what answers to give to anticipated questions

Duty of Honesty and Disclosure

- **SR 20.3 — client intends to disobey a court order:** must advise against it and warn of the dangers; must NOT advise how to carry it out or conceal it; must NOT inform the court/opponent of the client's intention unless the client authorised this beforehand, or there's a reasonable-grounds belief of a threat to anyone's safety
- **SR 19.1:** must not deceive or knowingly/recklessly mislead the court
- **SR 19.2:** must take all necessary steps to correct a misleading statement made to the court, as soon as possible after becoming aware
- **SR 19.3:** NOT misleading simply by failing to correct an opponent's own error to the court

Vernon v Bosley (No 2) (1999) QB 18 (UK) — duty to correct the court's understanding

- **Held:** the party's practitioner failed to advise the client to disclose a material change in circumstances affecting the claim's quantum — there's a continuing obligation not to let the court remain under a misapprehension as to material facts until judgment is given

Not to Take Advantage of Mistakes by Opponent or Court

- **SR 19.11:** must inform the court of any misapprehension it has as to the effect of an order it's making, as soon as aware
- **SR 19.12:** must alert the opponent (and inform the court if needed) if the opponent makes an express concession about evidence/law in a civil trial that the solicitor knows is contrary to the true position and believes was made by mistake

Assisting the Court in Ex Parte Applications

- **SR 19.4:** in an ex parte interlocutory application, must disclose to the court all factual/legal matters that are (a) within the solicitor's knowledge, (b) not privileged, and (c) reasonably believed to support an argument against granting the relief, or limiting its terms
- **Rationale:** the practitioner is both the client's advocate and an officer of the court — the court only hears one side and is entitled to be assisted with all relevant matters
- **SR 19.5:** for privileged matters within 19.4, must seek instructions to waive privilege; if the client refuses, must inform the client of their responsibility and the consequences, and must tell the court that not all relevant matters have been disclosed

Assisting the Court on the Law (Even Against the Client)

- **SR 19.6:** if the court isn't already aware, must inform it of any binding authority (or, absent that, Australian appellate authority) and applicable legislation reasonably believed to be directly in point against the client's own case
- **SR 19.8:** if such matters come to light after judgment is reserved but still pending, must inform the court — via a letter copied to the opponent, or by requesting relisting for further argument after notifying the opponent

Duty to Use Court Process Responsibly / Not to Abuse Process

- **SR 21.1:** advice to invoke a court's coercive powers must be reasonably justified by the material available, appropriate for robustly advancing the case, and not principally to harass/embarrass someone or gain a collateral advantage
- **SR 21.2:** decisions to make privileged allegations/suggestions against any person must meet the same reasonable-justification and non-harassment standard
- **SR 21.3:** must not allege any factual matter in a court document, submission, or address without a reasonable-grounds proper basis

- **SR 21.4:** must not allege criminality/fraud/serious misconduct without a proper basis AND the client's wish to make it, after being advised of its seriousness and possible consequences
- **Cross-ref — s18 CPA:** must not make a claim/response that's frivolous, vexatious, an abuse of process, or lacking proper basis

Levick v Deputy Commissioner of Taxation (2000) FCA 674 — abuse of process

- ✗ **Abuse of process:** the practitioners thought up untenable legal points themselves (not on client instructions) to delay a sequestration order, with no rational basis they might succeed — ordered to personally pay part of the costs
- **Test:** not necessary to be satisfied the points would succeed, but there must be a rational basis they might — this differs from a case where a difficult argument was brought to the practitioners by the client, or where the practitioner had to present a case on instructions believed bound to fail

White Industries (Qld) v Flower & Hart (a firm) [1998] FCA 806 — abuse of process — costs against the firm personally

- ✗ **Abuse of process:** the firm instituted proceedings it privately assessed as unwinnable, purely to gain a "temporary bargaining stance" and delay the other side's legitimate claim — ordered to pay costs on an indemnity basis
- **Test:** not enough that a claim has no/substantially no prospects — there must be something more: acting unreasonably, e.g. a deliberate decision unrelated to the merits, made either knowing there's no chance of success (ulterior purpose) or with disregard for the prospects of success
- **Reliance on specialist advice is not a defence in itself:** a practitioner may generally rely on properly instructed specialist advice, but not blindly — must exercise independent judgment and reject advice that's obviously/glaringly wrong
- ***Facts:*** *Facing an imminent, well-founded debt claim, a firm advised its client to pre-emptively sue the creditor on a weak claim purely to gain leverage and delay having to pay.*

Duty to Be Efficient and Expeditious

- **s20 CPA:** obligation to cooperate with the other party and the court
- **ss22–23 CPA:** obligation to use reasonable endeavours to resolve, or narrow, the dispute by agreement/ADR
- **s25 CPA:** obligation to use reasonable endeavours to act promptly and minimise delay

Duty to Maintain Independence

- **SR 17.1:** must not act as a mere mouthpiece of the client — must exercise forensic judgment independently, after appropriately considering the client's instructions

- **SR 17.2:** does NOT breach the duty to the client (or fail to give due consideration to instructions) merely by choosing, contrary to instructions, to: confine the hearing to the real issues; present the case quickly/simply; or inform the court of persuasive authority against the client

Duty When Client Has Given False Evidence or Suppressed Material

- **SR 20.1:** on learning the client (or a witness called for them) lied materially to the court, procured a lie, falsified a tendered document, or suppressed evidence subject to a positive disclosure duty — must refuse to take any further part in the case UNLESS the client authorises disclosing the lie/falsification/suppression to the court, in which case must promptly inform the court
- **Cannot disclose without authorisation** — the solicitor's only options are to get authorisation to disclose, or withdraw from further participation

Particular Duties in Criminal Proceedings

- **SR 20.2 — client confesses guilt but maintains a not-guilty plea:** may withdraw if another solicitor can properly take over in time and the client doesn't object; otherwise may continue to defend, subject to constraints
- **Must NOT:** falsely suggest someone else committed the offence, or set up an affirmative case inconsistent with the confession
- **MAY:** put the prosecution to proof; argue the evidence as a whole doesn't prove guilt; argue the client isn't guilty for some reason of law; or argue any other reason (not otherwise prohibited) that the client shouldn't be convicted
- **Must cease acting** if the client insists on giving evidence denying guilt, or requires a statement asserting innocence