

**LAW SOCIETY NORTHERN TERRITORY**

**Rules  
of  
Professional Conduct and Practice**

**May 2005**

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## INTRODUCTION

The Rules which follow apply to all legal practitioners save for those practising solely as barristers. Annexure "A" hereto contains the Australian Bar Association Rules as adopted by the Northern Territory Bar Association. The rules contained within annexure "A" apply to the conduct of legal practitioners practising solely as barristers.

The term "practitioner" is used throughout to refer to persons practising as legal practitioners other than barristers. The Advocacy Rules apply to all legal practitioners other than those practising solely as barristers when engaged in advocacy.

The Rules are divided into five categories under the following headings:-

1. Relations with clients
2. Duties to the Court
3. Relations with other lawyers
4. Relations with third parties
5. Legal practice

Each of categories 1 to 4 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.

## DEFINITIONS

"associate" a reference to an associate of a practitioner is a reference to-

- (a) a partner, employee, or agent, of the practitioner;
- (b) a corporation or partnership in which the practitioner has a significant beneficial interest;
- (c) in the case of a practitioner corporation, a subsidiary corporation;
- (d) a member of the practitioner's immediate family.

"costs" a reference to costs, unless the context of a rule indicates a contrary intention, includes disbursements.

"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.

"practitioner" means a legal practitioner who holds a current practising certificate and who practises law other than solely as a barrister and includes a practitioner corporation.

For the purposes only of the application of the advocacy rules, the following definitions apply:

"case" means the litigation or proceedings in which the practitioner in question is retained or intending to appear, or the dispute in which the practitioner is advising, as the case may be.

"client" (for the purposes of the advocacy rules) means the client of the practitioner in question and includes a professional acting as such and in Rules 17.18, 17.20 and 17.30 includes those officers, servants or agents of a client, which is not a natural person, who are responsible for or involved in giving instructions on behalf of the client.

"compromise" includes any form of settlement of the case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.

"court" means any body described as such and all other tribunals exercising judicial, or quasi-judicial, functions, and includes professional disciplinary tribunals, industrial and administrative tribunals, statutory or Parliamentary investigations and inquiries, Royal Commissions, arbitrations and mediations.

"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.

"forensic judgments"	do not include decisions as to the commencement of proceedings, the joinder of parties, admissions or concessions of fact, amendments of pleadings or undertakings to a court, or in criminal proceedings as to a plea, but do include advice given to assist the client or the instructing practitioner to make such decisions.
"insurance company"	in Rule 17.40 includes any entity, whether statutory or otherwise, which performs the function of indemnifying in any way civil defendants.
"opponent"	means the practitioner appearing for the party opposed to the client, or the party opposed to the client if that party is unrepresented.
"order"	includes a judgment, decision or determination.
"prosecutor"	means a practitioner who appears for the complainant or Crown in criminal proceedings.

## 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 ends of justice or is otherwise in breach of the law.*

1. Acceptance of Retainer -  
(Instructions to Act or Provide a Legal Service)
  - 1.1 A practitioner must act honestly, fairly, and with competence and diligence in the service of a client, and should accept instructions, and a retainer to act for a client, only when the practitioner can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.
2. Confidentiality
  - 2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -
    - 2.1.1 the client authorises disclosure;
    - 2.1.2 the practitioner is permitted or compelled by law to disclose;
    - or
    - 2.1.3 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 felony.
  - 2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.
3. Restraint on Acting Against a Former Client

Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person -

  - (a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously; and
  - (b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and

that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.

4. Practitioners employed otherwise than by a practitioner

A practitioner, who is employed by a corporation (not being a practitioner corporation) 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 work or service in breach of any of the provisions of the (relevant legislation applicable to practitioners) or these Rules.

5. Termination of Retainer

5.1 A practitioner must complete the work or legal service required by the practitioner's retainer, unless -

5.1.1 the practitioner and the practitioner's client have otherwise agreed;

5.1.2 the practitioner is discharged from the retainer by the client; or

5.1.3 the practitioner terminates the retainer for just cause, and on reasonable notice to the client.

5.2 Despite the above Rule, a practitioner, who has accepted instructions to act for a Defendant required to stand trial in a Supreme Court or Court of Summary Jurisdiction for a criminal offence, must not terminate the retainer and withdraw from the 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, at a time reasonably in advance of the date appointed for the commencement of the trial, or the commencement of the sittings of the Court in which the trial is listed -

5.2.1 served notice in writing on the client of the practitioner's intention to terminate the retainer and withdraw from the 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

5.2.2 delivered a copy of that notice to the Registrar of the Court in which the trial is listed to commence.

5.3 Without limiting the general application of Rule 5.1, a practitioner, who is acting for a legally assisted client in any proceedings, may terminate the practitioner's retainer upon giving reasonable notice in writing to the client of the practitioner's intention so to do, if the client's grant of legal aid is withdrawn, or otherwise, terminated, and 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.

6. Ownership of Clients' Documents - Termination of Retainer

6.1 The following Rules apply subject to any contrary order which may be made in respect of clients' documents by any court of competent jurisdiction.



6.2 A practitioner must retain, securely and confidentially, documents to which a client is entitled, for the duration of the practitioner's retainer and at least six (6) years thereafter, or until such time as the practitioner gives them to the client or another person authorised by the client to receive them, or the client instructs the practitioner to deal with them in some other manner.

6.3 Upon completion or termination of a practitioner's retainer, a practitioner must, when requested so to do by the practitioner's client, give to the client, or another person authorised by the client, any documents related to the retainer to which the client is entitled, unless:-

6.3.1 the practitioner has completed the retainer; or

6.3.2 the client has terminated the practitioner's retainer; or

6.3.3 the practitioner has terminated the retainer for just cause and on reasonable notice; and

the practitioner claims a lien over the documents for costs due to the practitioner by the client.

6.4 Despite Rule 6.3, 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:-

6.4.1 deal with the documents as provided in Rule 21.4, if another lawyer is acting for the client; or

6.4.2 upon receiving satisfactory security for the unpaid costs, deliver the documents to the client.

6.5 For the purposes of the above Rules -

The documents to which a client of a practitioner should be entitled will include:-

6.5.1 documents prepared by a practitioner for the client, or predominantly for the purposes of the client, and for which the client has been, or will be, charged costs by the practitioner; and

6.5.2 documents received by a practitioner from a third party in the course of the practitioner's retainer for or on behalf of the client or for the purposes of a client's business and intended for the use or information of the client.

## 7. Acting for more than one party

7.1 For the purposes of Rules 7.2 and 7.3 -

- "proceedings or transaction" mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.
- "party" includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.

- "practitioner" includes a practitioner's partner or employee and a practitioner's firm.

7.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties 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 be, thereby, prevented from -
  - (i) disclosing to each party all information, relevant to the proceedings or transaction, 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.

7.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, 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 thereupon cease to act for all parties.

## 8. Avoiding Conflict of Interest Between a Client's and a Practitioner's Own Interest

8.1 A practitioner must not, in any dealings with a client -

- 8.1.1 allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;
- 8.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client;

8.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

## 9. A Practitioner Receiving a Benefit under a Will or other Instrument

9.1 A practitioner who receives instructions from a person to draw a Will appointing the practitioner an Executor must inform that person in writing before the client signs the Will -

- 9.1.1 of any entitlement of the practitioner to claim commission;

- 9.1.2 of the inclusion in the Will of any provision entitling the practitioner, or the practitioner's firm, to charge professional fees in relation to the administration of the Estate, and;
- 9.1.3 if the practitioner has an entitlement to claim commission, that the person could appoint as Executor a person who might make no claim for commission.

9.2 A practitioner who receives instructions from a person to -

- 9.2.1 draw a will under which the practitioner or an 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
- 9.2.2 draw any other instrument under which the practitioner or an associate will, or may, receive a substantial benefit in addition to the practitioner's reasonable remuneration, including that payable under a conditional costs agreement,

must decline to act on those instructions and 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:

- 9.2.3 a member of the practitioner's immediate family; or
- 9.2.4 a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.

9.3 For the purposes of this rule:

"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.

## 10. Practitioner and Client - Borrowing Transactions

- 10.1 A practitioner must not borrow any money, nor permit or assist an associate to borrow any money from a person -
  - 10.1.1 who is currently a client of the practitioner, or the practitioner's firm;
  - 10.1.2 for whom the practitioner or practitioner's firm has provided legal services, and who has indicated continuing reliance upon the advice of the practitioner, or practitioner's firm in relation to the investment of money; or
  - 10.1.3 who has sought from the practitioner, or the practitioner's firm, advice in respect of the investment of any money, or the management of the person's financial affairs.
- 10.2 This Rule does not prevent a practitioner or an associate borrowing from a client which is recognised by the practitioner's professional association as a business entity engaged in money lending.

10A Diligence and Efficiency

- 10A.1 A practitioner must keep the client informed at regular intervals, or upon request, of the progress or lack of progress toward resolution of the client's matter.
- 10A.2 A practitioner should ensure that the practitioner does the work they were retained to do, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court.
- 10A.3 A practitioner must inform and advise the client about the alternatives to fully contested adjudication of the case which are reasonably available to the client (unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives) to permit the client to make decisions about the client's best interests in relation to the litigation.
- 10A.4 A practitioner must inform and advise the client of any offers to compromise the client's case and always endeavour to achieve an appropriate resolution of the case at the earliest opportunity.
- 10A.5 A practitioner must seek to ensure that work in relation to a case is done so as to:
- (a) confine the case to identified issues which are genuinely in dispute;
  - (b) have the case ready to be heard as soon as practicable;
  - (c) present the identified issues in dispute clearly and succinctly;
  - (d) limit evidence including cross examination, to that which is reasonably necessary to protect the client's interests which are at stake in the case; and
  - (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.
- 10A.6 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.
- 10A.7 A practitioner must bear in mind the cost and risk to the client of litigating and give advice so as to allow the client to properly appreciate the risks and costs of litigation.

## PRACTITIONERS' DUTIES TO THE COURT

*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.*

### 11. Preparation of Affidavits

#### 11.1 If a practitioner is:

11.1.1 Aware that a client is withholding information required by an order or rule of a court, with the intention of misleading the court; or

11.1.2 Informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular;

and the client will not make the relevant information available, or allow the practitioner to correct the false evidence; the practitioner must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.

#### 11.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:

11.2.1 factual material already available to the practitioner provides a proper basis for the allegation;

11.2.2 the allegation will be material and admissible in the case, as to an issue or as to credit; and

11.2.3 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 if it is not made out.

### 12. Preparation of Court Documents

A practitioner must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the practitioner believes on reasonable grounds that:

12.1 factual material already available to the practitioner provides a proper basis for the allegation if it is made in a pleading;

12.2 the evidence in which the allegation is made, if it is made in evidence, will be admissible in the case, when it is filed; and

12.3 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 if it is not made out.

13. Practitioner a Material Witness in Client's Case

A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, 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.

14. Admission of Guilt

14.1 If a practitioner's client, who is the accused or defendant in criminal proceedings, admits to the practitioner before the commencement of, or during, the proceedings, that the client is guilty of the offence charged, the practitioner must not, whether acting as instructing practitioner or advocate -

14.1.1 put a defence case which is inconsistent with the client's confession;

14.1.2 falsely claim or suggest that another person committed the offence; or

14.1.3 continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

14.2 A practitioner may continue to act for a client who elects to plead "not guilty" after admitting guilt to the practitioner, and in that event, the practitioner must ensure that the prosecution is put to proof of its case, and the practitioner may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the offence by the client.

15. Admission of Perjury

If a practitioner's client admits to the practitioner, during or after any proceedings, while judgment is reserved, that the client has given materially false evidence or tendered a false or misleading document in the proceedings, the practitioner must -

15.1 advise the client that the Court should be informed of the false evidence, and request the client's authority to inform the Court and correct the record; and

15.2 if the client refuses to provide that authority, withdraw from the proceedings immediately, and terminate the retainer.

16. Bail

16.1 A practitioner must not promote, or be a party to, any arrangement whereby the bail provided by a surety is obtained by using the money of the accused person, or by which the surety is given an indemnity by the accused person or a third party acting on behalf of the accused person.

16.2 A practitioner must not become the surety for the practitioner's client's bail.

## 17. ADVOCACY RULES

*Rules 17.1 to 17.58 apply to legal practitioners other than legal practitioners practising solely as barristers when they are acting as advocates.*

### Duty to client

17.1 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.

17.2 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.

### Independence - Avoidance of personal bias

17.3 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 the instructing practitioner's desires where practicable.

17.4 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 desires, simply by choosing, contrary to those desires, to exercise the forensic judgments called for during the case so as to:

- (a) confine any hearing to those issues which the practitioner believes to be the real issues;
- (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or
- (c) inform the court of any persuasive authority against the client's case.

17.5 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.

### Frankness in court

17.6 A practitioner must not knowingly make a misleading statement to a court on any matter.

- 17.7 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.
- 17.8 A practitioner will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.
- 17.9 A practitioner seeking any interlocutory relief in an ex parte application must disclose to the court all matters which:
- (a) are within the practitioner's knowledge;
  - (b) are not protected by legal professional privilege; and
  - (c) the practitioner has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.
- 17.10 A practitioner who has knowledge of matters which are within Rule 17.9(c):
- (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege, so as to permit the practitioner to disclose those matters under Rule 17.9; and
  - (b) if the client does not waive the privilege as sought by the practitioner:
    - (i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and
    - (ii) must inform the court that the practitioner cannot assure the court that all matters which should be disclosed have been disclosed to the court.
- 17.11 A practitioner must, at the appropriate time in the hearing of the case and if the court has not yet been informed of that matter, inform the court of:
- (a) any binding authority;
  - (b) 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;
  - (c) 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
  - (d) any applicable legislation;
- which the practitioner has reasonable grounds to believe to be directly in point, against the client's case.
- 17.12 A practitioner need not inform the court of matters within Rule 17.11 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.

- 17.13 A practitioner who becomes aware of a matter within Rule 17.11 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:
- (a) 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
  - (b) 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.
- 17.14 A practitioner need not inform the court of any matter otherwise within Rule 17.11 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
- 17.15 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.
- 17.16 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.
- 17.17 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.

#### Delinquent or guilty clients

- 17.18 A practitioner whose client informs the practitioner, during a hearing or after judgment or decision is reserved and while it remains pending, 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:
- (a) 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:
  - (b) must promptly inform the court of the lie or falsification upon the client authorising the practitioner to do so; but
  - (c) must not otherwise inform the court of the lie or falsification.

17.19 A practitioner retained to appear in criminal proceedings whose client confesses guilt to the practitioner but maintains a plea of not guilty:

- (a) 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;
- (b) in cases where the practitioner continues to act for the client:
  - (i) must not falsely suggest that some other person committed the offence charged;
  - (ii) must not set up an affirmative case inconsistent with the confession; but
  - (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
  - (iv) may argue that for some reason of law the client is not guilty of the offence charged; or
  - (v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged.

17.20 A practitioner whose client informs the practitioner that the client intends to disobey a court's order must:

- (a) advise the client against that course and warn the client of its dangers;
- (b) not advise the client how to carry out or conceal that course; but
- (c) not inform the court or the opponent of the client's intention unless:
  - (i) the client has authorised the practitioner to do so beforehand; or
  - (ii) the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

#### Responsible use of privilege

17.21 A practitioner must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the practitioner or on the practitioner's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

- (a) are reasonably justified by the material then available to the practitioner;
- (b) are appropriate for the robust advancement of the client's case on its merits;
- (c) are not made principally in order to harass or embarrass the person; and
- (d) are not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court.

- 17.22 A practitioner must not open as a fact any allegation which the practitioner does not then believe on reasonable grounds will be capable of support by the evidence which will be available to support the client's case.
- 17.23 A practitioner must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:
- (a) the practitioner believes on reasonable grounds that the material already available to the practitioner provides a proper basis for the suggestion;
  - (b) in cross-examination going to credit alone, the practitioner believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.
- 17.24 A practitioner may regard the opinion of the instructing practitioner that material which appears to support a suggestion within Rule 17.23 is itself credible as a reasonable ground for holding the belief required by Rule 17.23(a).
- 17.25 A practitioner must make reasonable enquiries to the extent which is practicable before the practitioner can have reasonable grounds for holding the belief required by Rule 17.23(a), unless the practitioner has received and accepted an opinion from the instructing practitioner within Rule 17.24.
- 17.26 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 on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.
- 17.27 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 on reasonable grounds that such disclosure is necessary for the robust defence of the client.

#### Integrity of evidence

- 17.28 A practitioner must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.
- 17.29 A practitioner will not have breached Rule 17.28 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including 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.

- 17.30 A practitioner must not confer with, or condone another practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:
- (a) as to which there are reasonable grounds for the practitioner to believe it may be contentious at a hearing; or
  - (b) which could be affected by, or may affect, evidence to be given by any of those witnesses.
- 17.31 A practitioner will not have breached Rule 17.30 by conferring with, or condoning another practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.
- 17.32 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:
- (a) the cross-examiner has consented beforehand to the practitioner doing so; or
  - (b) the practitioner:
    - (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
    - (ii) has, if possible, informed the cross-examiner beforehand of the practitioner's intention to do so; and
    - (iii) otherwise does inform the cross-examiner as soon as possible of the practitioner having done so.
- 17.33 A practitioner must not take any step to prevent or discourage prospective witnesses or witnesses from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.
- 17.34 A practitioner will not have breached Rule 17.33 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed.

#### Duty to opponent

- 17.35 A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- 17.36 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.
- 17.37 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.

17.38 A practitioner must not deal directly with the opponent's client unless:

- (a) the opponent has previously consented;
- (b) the practitioner believes on reasonable grounds that :
  - (i) the circumstances are so urgent as to require the practitioner to do so; and
  - (ii) the dealing would not be unfair to the opponent's client; or
- (c) the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom.

17.39 Subject to Rule 17.38 a practitioner must not confer with or deal directly with the party opposed to the client unless:

- (a) the party, not being indemnified by an insurance company which is actively engaged in contesting the proceedings, is unrepresented and has signified willingness to that course; or
- (b) the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is otherwise unrepresented and the practitioner:
  - (i) has no reasonable grounds to believe that any statements made by the party to the practitioner may harm the party's interests under the insurance policy; or
  - (ii) has reasonable grounds for the belief referred to in (i) but has clearly informed the party beforehand of that possibility; or
- (c) the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is personally represented but not in the case and the practitioner:
  - (i) has notified the party's representative of the practitioner's intention to do so; and
  - (ii) has allowed enough time for the party to be advised by the party's representative.

17.40 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:

- (a) the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or
- (b) the opponent has consented beforehand to the practitioner dealing with the court in a specific manner notified to the opponent by the practitioner.

17.41 A practitioner must promptly tell the opponent what passes between the practitioner and a court in a communication referred to in Rule 17.40.

17.42 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 17.40(b), other than the matters specifically notified by the practitioner to the opponent when seeking the opponent's consent.

#### Integrity of hearings

17.43 A practitioner must not publish, or take steps towards the publication of, any material concerning current proceedings in which the practitioner is appearing or has appeared, unless:

- (a) the practitioner is merely supplying, with the consent of the instructing practitioner or the client, as the case may be:
  - (i) copies of pleadings or court processes in their current form, which have been filed, and which have been served in accordance with the court's requirements;
  - (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;
  - (iii) copies of the transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court;
  - (iv) copies of exhibits admitted in open court and without restriction on access; or
  - (v) copies of written submissions, which have been given to the court, and which have been served on all other parties; or
  
- (b) the practitioner, with the consent of the instructing practitioner or the client, as the case may be, is answering unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any re-trial and:
  - (i) the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case and the nature of the orders made or judgment given including any reasons given by the court;
  - (ii) the answers are accurate and uncoloured by comment or unnecessary description; and
  - (iii) the answers do not appear to express the practitioner's own opinions on any matters relevant to the case.

17.44 A practitioner will not have breached Rule 17.43 simply by advising the client about whom there has been published a report relating to the case, and who has sought the practitioner's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.

- 17.45 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.

#### Prosecutor's duties

- 17.46 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.
- 17.47 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
- 17.48 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
- 17.49 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.
- 17.50 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:
- (a) 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
  - (b) 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.
- 17.51 A prosecutor who has decided not to disclose material to the opponent under Rule 17.50 must consider whether:
- (a) the defence of the accused could suffer by reason of such non-disclosure;
  - (b) the charge against the accused to which such material is relevant should be withdrawn; and
  - (c) the accused should be faced only with a lesser charge to which such material would not be so relevant.
- 17.52 A prosecutor must call as part of the prosecution's case all witnesses:
- (a) whose testimony is admissible and necessary for the presentation of the whole picture;

- (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
- (c) whose testimony or statements were used in the course of any committal proceedings; and
- (d) from whom statements have been obtained in the preparation or conduct of the prosecution's case;

unless:

- (e) the opponent consents to the prosecutor not calling a particular witness;
- (f) 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
- (g) 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:

- (h) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within (a)-(d), 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;
- (i) 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 (f), (g) and (h), together with the grounds on which the prosecutor has reached that decision; and

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

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

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

17.55 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.

17.56 A prosecutor who has informed the court of matters within Rule 17.55, 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.

- 17.57 A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:
- (a) must correct any error made by the opponent in address on sentence;
  - (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
  - (c) must assist the court to avoid appealable error on the issue of sentence;
  - (d) may submit that a custodial or non-custodial sentence is appropriate; and
  - (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.
- 17.58 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 17.46, 17.48 and 17.49 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 17.48.

## 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.*

### 18. 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.

### 19. Undertakings

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, to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely on it, 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.

19A. 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.

20. 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.

### 21. Taking over a Matter from Another Practitioner

21.1 Where a practitioner's retainer is terminated before the completion of the client's business to which it relates, and the client instructs another practitioner to take over the conduct of the client's business, the following rules 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.

21.2 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 client's business, unless the first practitioner claims a lien over the documents for unpaid costs.

- 21.3 If the client has terminated the first practitioner's retainer, 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.
- 21.4 If the first practitioner has terminated the retainer and the client's documents are essential to the defence or prosecution of proceedings which are continuing before a Court, the practitioner must surrender possession of the documents to the client, upon the terms prescribed in Rule 6.4.2 or to the second practitioner, if so directed by the client, and, provided that the second practitioner -
- 21.4.1 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
  - 21.4.2 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.
- 21.5 A practitioner who receives a client's documents from another practitioner pursuant to an agreement between the client and both practitioners, providing 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 business or proceedings to which the documents relate, must do all things which are reasonably practicable on the practitioner's part to ensure compliance with the agreement.

## 22. Transfer of a Practitioner's Practice

- 22.1 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:
- 22.1.1 of the intended transfer of documents to the practitioner acquiring the practice, unless a contrary direction is received from the client; and
  - 22.1.2 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.
- 22.2 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 -
- 22.2.1 the balance of money held on the client's behalf;
  - 22.2.2 the practitioner's intention to transfer the relevant account to the practitioner acquiring the practice, unless advised by the client to the contrary; and

- 22.2.3 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.
- 22.3 The practitioner, in addition to giving notice to clients as required by paragraphs 22.1 and 22.2, must comply with all other legislative provisions applicable to the trust money or controlled money held by the practitioner.
- 22.4 Paragraphs 22.1, 22.2 and 22.3 do not apply where a new partner is admitted to a partnership which continues to conduct the practice.
- 23. Communicating with Another Practitioner's Client
  - 23.1 A practitioner who is acting on behalf of a party in any proceedings or transaction must not communicate directly with any other party for whom, to the practitioner's knowledge, another practitioner is currently acting, unless -
    - 23.1.1 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;
    - 23.1.2 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
    - 23.1.3 the practitioner, thereafter, notifies the other practitioner of the communication.
  - 23.2 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 former client for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's affairs 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.*

### 24. 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 business, 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.

### 25. Undertakings

A practitioner who, in the course of providing legal services to a client, and for the purposes of the client's business, 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, in circumstances where it might reasonably be expected that the third party will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.

### 26. Communications

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

- 26.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or
- 26.2 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; or
- 26.3 threaten the institution of criminal proceedings against the other person in default of the person's satisfying a concurrent civil liability to the practitioner's client.

### 27. Debt Collection or Mercantile Agencies

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, and a practitioner who receives, from a debt collection or mercantile agent, instructions to act for a client creditor, must ensure that -

- 27.1 the practitioner's relationship to the agent is fully disclosed to the client;

- 27.2 the information required to be disclosed to the client by any relevant legislation and these Rules is communicated to the client;
- 27.3 the practitioner maintains direct control and supervision of any proceedings on behalf of the client; and
- 27.4 that any money recovered on behalf of the client is accounted for by the practitioner.

## LEGAL PRACTICE

### 28. Conducting Another Business

28.1 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 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, and the practitioner must -

28.1.1 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business;

28.1.2 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

28.1.3 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.

28.2 A practitioner will be deemed to be engaged in the conduct of another business where the practitioner, or an associate:

28.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value;

28.2.2 exercises any material control over the conduct and operation of the business; or

28.2.3 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.

### 29. Referral Fees - Taking unfair advantage of potential clients - Commissions

29.1 In the conduct or promotion of a practitioner's practice, the practitioner must not -

29.1.1 accept a retainer or instructions 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

29.1.2 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 practitioner at the time when the instructions are sought.

29.2 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:

- 29.2.1 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;
- 29.2.2 the practitioner's advice is fair and free of any bias caused by the practitioner's relationship with the third party; and
- 29.2.3 the nature and value of any fee, benefit, or reward, which may be received by the practitioner, are fair and reasonable, having regard to objective commercial standards, and are disclosed fully in writing to the client before the dealing is commenced.

### 30. Payment of Counsel's Fees

- 30.1 A practitioner in his capacity as instructing solicitor is personally liable for payment of counsel's proper fees whether or not the money has been received from the client with which to pay them.
- 30.2 A practitioner who receives moneys from a client for the express purpose of paying counsel's fees shall apply the moneys for that and no other purpose.
- 30.3 If a practitioner considers that the fees charged by counsel are in excess of what he is bound, or has agreed, to pay and, after the practitioner's views have been known to counsel, the latter still presses a claim which the practitioner considers unjustified, the practitioner may report the matter to the Society and the President or his nominee shall determine the fees payable, and both the practitioner and counsel shall be bound respectively to pay and accept the fees so determined.
- 30.4 Subject to any specific arrangement struck between the instructing practitioner and counsel, a practitioner who instructs counsel shall endeavour to see to the payment of counsel fees within one month of the delivery of the bill relating to the same and if he fails to do so he shall communicate to counsel the reason for the delay.
- 30.5 Where an account for counsel's fees has been rendered and remains unpaid by a practitioner for more than three months, counsel may report the matter to the Society. If, having sought the views of the practitioner to whom the account was directed the Society considers that there are no exceptional circumstances, it shall call upon that practitioner to pay such fees as it determines are properly payable, and he shall thereupon pay the same.

### 31. Waiver

The Council may waiver or relax any of the rules where it appears proper to do so.

### 32. Dealings with the Law Society

- 32.1 Subject only to his or her duty to the client, a practitioner should be open and frank in his or her dealings with the Law Society.
- 32.2 A practitioner should respond within a reasonable time and in any event within 14 days (or such extended time as the Law Society may allow) to any requirement of the Society for comments or information in



relation to the practitioner's conduct or professional behaviour and in doing so the practitioner should furnish in writing a full and accurate account of his or her conduct in relation to the matter.

## REPEAL AND TRANSITION

33. Repeal and Transition
  - 33.1 Upon the gazettal of these rules the Professional Conduct Rules current as at 26 February 1996 are repealed.
  - 33.2 These rules only apply to conduct commencing after these rules come into force.

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**Ian Morris**

**PRESIDENT**

Signed by President of Law Society Northern Territory pursuant to Section 63 (2) (a) of the *Interpretation Act 1999* on the authority a Council of the Law Society resolution passed on 29 November 2001.