TOPICAL ETHICS

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TOPICS IN SOLICITORS' ETHICS

This paper endeavours to address some disparate but currently relevant issues in legal ethics for solicitors.

1. BREAKING CONFIDENTIALITY

Confidentiality is at the heart of the relationship between solicitor and client. Clients believe, rightly, that they can communicate sensitive personal or business information to their solicitor without risking its disclosure to anyone: whether family members, friends, rivals or opponents. The centrality of the duty of confidentiality is part of the common law and is protected by the law of legal professional privilege. It finds statutory form in Rule 9.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, which provides (with some exceptions) that:

> "A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement…"

Some of the exceptions to this rule are set out in Rule 9.2. The exceptions include (with my underlining) disclosing information[1]:

> "for the sole purpose of avoiding the probable commission of a serious criminal offence"

and disclosing information[2]:

> "for the purpose of preventing imminent serious physical harm to the client or to another person."

[1] Rule 9.2.4 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[2] Rule 9.2.5 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

1.1 Avoiding the Commission of a Crime

If a client tells his or her solicitor that the client is intending to do something which would constitute "a serious criminal offence", a difficult ethical issue may arise. "Serious criminal offence" means an indictable offence against a law of the Commonwealth or any State or Territory or an offence against the law of a foreign country that would be an indictable offence were it to be committed in Victoria.[3] The expression includes indictable offences which may be dealt with summarily. It includes, therefore, all assaults and all thefts, as well as even more serious offences.

The problematic aspect of the definition is the reference to the probable commission of a serious criminal offence. It is commonplace that distressed or angry clients may make wild or intemperate threats and even that calm and law abiding clients will sometimes use words which, although literally indicating an intent to commit a serious crime, are not, in fact, intended to convey any such meaning. The question for the solicitor is whether, on the basis of the information provided to and other knowledge held by the solicitor, the commission of a serious criminal offence is "probable". Depending on the circumstances, the information and knowledge available to the solicitor will include knowledge of the character, disposition, capacity and resolve of the client, which may assist in the assessment of the probability of the commission of the relevant crime.

[3] See Rule 1.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and the definition in the Glossary to be found at the end of the Rules.

The ethical issue can be problematic because, on the one hand, a solicitor, like every citizen, has a duty to report to the Police or other relevant authorities information which suggests that a serious crime may be committed but, on the other hand, a solicitor is precluded by statute and common law from disclosing a client's information unless the disclosure is of the "probable" commission of a serious criminal offence and the disclosure is for the "sole purpose" of avoiding the commission of that offence. The assessment of the probability of the commission of the offence will often be difficult. Making such assessments is, however, sometimes a necessary part of the ethical practice of the law.

It should not be thought that a report to the Police or other authorities of a credible threat to commit a serious criminal offence will always be necessary or appropriate. In some circumstances, the solicitor may be able to avoid the commission of the relevant offence or render its commission improbable by appropriately counselling the client or taking some other measure which avoids the commission of the offence. In some circumstances, for example, a solicitor might avoid the commission of a proposed theft by a client by contriving to safeguard the relevant property from the client.

1.2 Serious Physical Harm

In many cases, a threat by a client to do serious physical harm to another person will be disclosable to avoid the probable commission of a serious criminal offence, as discussed in section 1.1 above. As the difference in language between Rules 9.2.4 and

9.2.5 shows[4], the question in relation to serious physical harm is whether the disclosure is for "the purpose of preventing imminent serious physical harm". The absence of the word "probable" coupled with the context suggests that a solicitor would be justified in breaking confidentiality in the case of an apprehension of imminent serious physical harm without an assessment that that harm was "probable".

Rule 9.2.5 covers the case of imminent serious physical harm to the client as well as to another person. Perhaps the most probable example of apprehended imminent serious physical harm to the client rather than to another person would arise in the case of threats of suicide or the provision of information suggesting that the client would imminently attempt suicide. It is suggested that where a client makes a credible threat to commit or attempt to commit suicide, the solicitor may need to communicate that threat to an appropriate person. The question of what person is appropriate will vary according to the circumstances. If the client is, at the time, under the care of a psychiatrist or a capable general medical practitioner familiar with the client's mental condition, it may be sufficient to communicate the apprehension to that practitioner. In other circumstances, an immediate report to a public hospital Crisis Assessment and Treatment Team (CAT Team) may be necessary.[5]

It will be noticed that both Rules 9.2.4 and 9.2.5 are permissive in the sense that on their face, they permit but do not compel the solicitor to disclose the relevant information. In the case of serious criminal offences and imminent serious physical

[4] Quoted on page 3 above.

[5] See http://www.health.vic.gov.au/mentalhealthservices/adult/index.htm for CAT Team contact details.

harm to persons other than the client, the solicitor's duty, whether arising from moral, ethical or legal obligations, may require the disclosure of the information in circumstances where the relevant statutory rules do not prevent such disclosure. In the case where imminent serious physical harm to the client (and not to another person) is apprehended, the solicitor's duty may be harder to assess. Much might depend upon the solicitor's knowledge of the character and condition of the client. For example, if the solicitor has been retained to obtain compensation for the psychiatric injury of the client, the question of the client's competence will have been considered in the context of capacity to give instructions and conduct litigation. Information from treating and forensic psychiatrists may be in the possession of the solicitor. A credible threat of suicide by a client whose mental condition is known by the solicitor to be problematic would require action on the part of the solicitor. On the other hand, a credible threat of suicide by a client known or believed (on reasonable grounds having regard to the seriousness of the matter) to have made a well considered, rational, fixed and free determination to end his or her life might properly be respected by the solicitor who, in such circumstances, could ethically and legally refrain from disclosing information for the purpose of preventing the client from taking the threatened action.

1.3 Protection of Children

Legal practitioners <u>are not</u> subject to the mandatory reporting regime relating to actual or apprehended child abuse which is contained in Part 4.4 of the Children,

Youth and Families Act 2005.[6] The general obligation of all adults in Victoria to report sexual offences committed by adults against children under the age of sixteen does not apply in relation to information given to a legal practitioner which is the subject of client legal privilege under Part 3.10 of the Evidence Act 2008.[7]

On the other hand, section 183 of the Children, Youth and Families Act 2005 provides (with my underlining) that:

> "Any person who believes on reasonable grounds that a child is in need of protection may report to a protective intervener that belief and the reasonable grounds for it."

Protective interveners are the Secretary of the Department of Human Services and all police officers.[8] The concept of "need of protection" is defined in section 162 of the Act and includes abandonment by parents as well as the failure or inability of parents to protect a child from actual or apprehended child abuse. A report made by a solicitor in good faith about a child for the purposes of section 183 of the Act does not constitute unprofessional conduct or a breach of professional ethics and does not make the solicitor subject to any liability in respect of that report.[9]

2. CONFLICT

As a general rule, a solicitor must avoid actual conflicts or potential conflicts between the duties owed by him or her to current clients.[10] So far as the Conduct Rules are

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[6] Legal practitioners are not in the list of mandatory reporters in section 182 of the Children, Youth and Families Act 2005. The list includes medical practitioners, nurses, psychologists, teachers, qualified child care workers and police officers.

[7] See section 327(7)(b) of the Crimes Act 1958.

[8] See section 181 of the Children, Youth and Families Act 2005.

[9] See section 189 of the Children, Youth and Families Act 2005.

[10] See Rule 11.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

concerned, a solicitor may act for several clients with actually or potentially adverse interests if each client is aware that the solicitor is so acting and has given informed consent thereto.[11]

Similarly, a solicitor must avoid conflict between the duties owed to current and former clients.[12] The focus of the Conduct Rules in relation to a conflict between the duties owed to current and former clients is on the possession of confidential information; so far as the Rules are concerned, the only bar to acting against a former client relates to the confidential information (if any) of the former client held by the solicitor — see section 2.1 below.[13]

2.1 Confidential Information Under the Conduct Rules

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 specifically address the question of confidential information in the case where current clients or current and former clients have adverse interests.[14] In relation to conflicts between the interests of current and former clients, and as a separate rule, in relation to conflicts between the interests of current clients, a solicitor in possession of significant confidential information must not act unless:

(a) the relevant clients have given informed consent to the solicitor so acting; or

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[11] See Rule 11.3 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. See generally section 2.3 below but see section 2.5 in relation to terms contracts for the sale of land in Victoria.

[12] See Rule 10.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[13] See Rule 10.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. But see also section 2.2 below in relation to the common law position.

[14] See section 2.2 below in relation to the common law position.

(b) there is an effective information barrier.[15]

2.2 Injunctions Against Acting Against Former Clients

There are three recognized grounds for a Court restraining a lawyer from acting against a former client:

(a) the possession of relevant confidential information belonging to the former client;

(b) the duty of loyalty owed by a legal practitioner to a former client, which precludes the practitioner from choosing to act for that former client's opponent; and

(c) the requirement not to act where doing so might impinge upon the integrity of the judicial process or the administration of justice.

The first of these grounds is the most straightforward and also the one most frequently applied in practice. Its application is simple, except in cases where because of the merger of law firms, solicitors find themselves notionally acting against former clients in circumstances where the adequacy of information barriers is not accepted by the Court for either theoretical or practical reasons.

The duty of loyalty owed by a legal practitioner to a former client is, according to the Court of Appeal of the Supreme Court of Victoria, an obligation imposed upon lawyers which is separate from any question of confidential information or the proper

[15] See Rules 11.4 and 10.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

administration of justice: see the analysis of Brooking J.A. in *Spincode Pty Ltd v Look Software Pty Ltd*[16] and the decision of the Court of Appeal of the Supreme Court in *McVeigh v Linen House Pty Ltd*[17]. *McVeigh v Linen House Pty Ltd* was recently held to be binding on Victorian courts.[18] It represents the law in Victoria despite its rejection by Beach J. in the Federal Court in *Dealer Support Services Pty Ltd v Motor Trades Association Australia Limited*.[19]

In *Spincode Pty Ltd v Look Software Pty Ltd*, a firm of solicitors had acted for a company. Disputes then arose between that company's shareholders. The firm of solicitors then acted for one set of shareholders against the other shareholders and against the company itself in proceedings where the remedies sought included winding up and relief from oppression. The loyalty obligation was expressed in the following way by Brooking J.A. at [53] (with my underlining):

> "But why should we not say that 'loyalty' imposes an abiding negative obligation not to act against the former client in the same matter? The wider view, and the one which commends itself to me as fair and just, is that the equitable obligation of 'loyalty' is not observed by a solicitor who acts against a former client in the same matter."

The third ground is quite different. According to Beach J. in *Dealer Support Services Pty Ltd v Motor Trades Association Australia Limited* at [94] in relation to the administration of justice:

> "the test to be applied is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice."

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[16] (2001) 4 V.R. 501, [2001] VSCA 248 at [53] to [56].

[17] [1999] 3 V.R. 394, [1999] VSCA 138 at [24] to [26].

[18] *ACN 092 675 164 Pty Ltd v Suckling* [2018] VSC 620 at [66] per Riordan J.

[19] (2014) 228 F.C.R. 252, [2014] FCA 1065 at [42] The criticisms by Beach J. of the independent duty of loyalty doctrine are summarized at [89] after detailed analysis from [43] to [88].

According to Beach J. at [96], this disqualification does not depend upon private fiduciary relationships or obligations:

> "but rather the administration of justice, the public interest and the appearance of propriety of officers of the court."

It follows that the mere consent of former clients or opposing parties (were it to exist) is not sufficient to permit a practitioner to act where this public interest basis for the disqualification exists.

2.3 Acting for Clients with Adverse Interests

Despite the specific authorization by the Conduct Rules of acting in a matter where a number of clients have adverse or potentially adverse interests but give informed consent to a solicitor so acting, such conflict situations are fraught with difficulty and risk. The question of what amounts to informed consent is likely to depend on the capacity of the client and the nature of the dispute, as well as on the information and explanation provided by the solicitor.[20]

In a non-contentious commercial context, one can understand, that well-informed clients with adverse interests who want to save money on legal costs and who think they have reached agreement might ask a common solicitor to document their contract for them. Whether or not, because of informed consent, a solicitor might ethically do so, the risk to one client or another, in the event of a later dispute, or to the solicitor in terms of liability in tort or contract to a dissatisfied client, is such that

[20] See G.E. Dal Pont, *Lawyers' Professional Responsibility*, Sixth Edition, 2017, at [6.25], [7.20], [7.30] and [7.80] and the comments of the Law Institute of Victoria in Ethics Guidelines 27 October 2017, *Guidelines for the Representation of Co-Defendants In Criminal Proceedings*, which may be found on the internet at https://www.liv.asn.au/Professional-Practice/Ethics/Ethics-Guidelines.

such situations should be avoided.[21] The risk may be reduced, although not eliminated, in the case where individual solicitors within a particular firm (again with informed consent) act for separate clients to all intents as if they were separate law practices.

2.4 Litigation

It goes without saying that a more restrictive conflict rule applies in relation to litigation. In litigation, parties on opposite sides of the record must be represented by separate solicitors. The public interest disqualification from acting discussed in section 2.2 beginning on page 11 above is also likely to be much more significant in litigious matters than in non-litigious matters. It will often preclude the joint representation of defendants with adverse interests. In some cases, however, the administration of justice is sufficiently protected if the one solicitor briefs separate counsel for various defendants.[22]

In addition the solicitor's duty to the Court in litigation may require great circumspection in relation to potential conflicts, given that delay and wasted costs are likely if a late change of representation (probably of all affected clients) occurs because a potential conflict becomes actual. The countervailing consideration in terms of duty to the Court is, of course, that separate representation normally

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[21] See Dal Pont, op. cit. at [7.120] to [7.130].

[22] *Re Burton: Danby v Burton* [1901] W.N. 202 and *Re Morgan: Brown v Jones* (1927) 71 Sol. Jo. 650 at 651, cited with approval by Young C.J. in *Nangus Pty. Ltd. v Charles Donovan Pty. Ltd.* [1989] V.R. 184 at 185 to 186. The Law Institute does not regard the briefing of separate counsel by the one solicitor as acceptable in criminal proceedings: see the comments in *Guidelines for the Representation of Co-Defendants In Criminal Proceedings*, supra note 20.

increases the costs, length of trial and complexity of litigation. This potential problem will be acute in criminal cases where the joint representation of defendants is desired for economic or tactical reasons but the potential for developing conflict is likely to be high and the sophistication of the client often low.[23]

2.5 Victorian Sale of Land Act

A solicitor or firm whose place of business is within fifty kilometres of the intersection of Elizabeth and Bourke Streets, Melbourne may not act for both vendor and purchaser under a terms contract of sale of Victorian land.[24] The prohibition does not apply where the vendor and purchaser are natural persons who are married to each other or are domestic partners or are closely related to each other.[25] It does apply, however, where the vendor and purchaser are related companies.

A breach by a solicitor of this prohibition is a criminal offence.[26] Curiously, the civil consequence of breaching the prohibition, that the purchaser has a right of rescission[27], does not arise if the Court finds that the solicitor has acted honestly and ought reasonably to be excused and that the purchaser has not been prejudiced[28], but the solicitor is not thereby saved from criminal liability nor, a fortiori, from

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[23] See both Dal Pont, op. cit. at [7.100] and the Law Institute's *Guidelines for the Representation of Co-Defendants In Criminal Proceedings*, supra note 20.

[24] See section 29W(1) of the Sale of Land Act 1962. Section 29W(2) extends the prohibition to the solicitor's partners and employees.

[25] See section 29W(7) of the Sale of Land Act 1962. The relationship must be closer than that of cousins.

[26] See sections 29W(1) and 29W(2) of the Sale of Land Act 1962.

[27] See section 29W(3) of the Sale of Land Act 1962.

[28] See section 29W(4) of the Sale of Land Act 1962.

professional liability, although the excusability of the conduct would, no doubt, critically affect the penalty.

3. THREATS AND DEMANDS

A solicitor may not:

(a) make a statement which grossly exceeds the legitimate assertion of the rights or entitlements of the client, and which misleads or intimidates the opposite party;

(b) threaten criminal or disciplinary proceedings against the opposite party if a civil liability to the client is not satisfied; or

(c) use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person.[29]

3.1 Misleading and Deceptive Demands

A demand containing misleading and deceptive statements will involve a breach of the above-mentioned requirements of the Conduct Rules. In addition, a solicitor making demands on behalf of a client is acting in trade or commerce and is, therefore, obliged to comply with section 18(1) of the Australian Consumer Law[30], which provides that:

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[29] See Rule 34.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[30] The Australian Consumer Law is Schedule 2 to the Competition and Consumer Act 2010 of the Commonwealth and applies as federal law to the extent of the constitutional competence of the Parliament of the Commonwealth. The same text applies as State law in Victoria, under the name the Australian Consumer Law (Victoria), pursuant to section 8 of the Australian Consumer Law and Fair Trading Act 2012 of Victoria.

> "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

It follows, for example, that a solicitor should not, in a letter of demand, state or imply that a debtor is liable for costs or interest in the absence of either a Court order or a contractual obligation of the debtor to pay costs or interest to the creditor. Similarly, a solicitor should not, in a letter of demand, imply that obtaining a default judgment against a debtor is a matter within the discretion of the solicitor or the creditor, nor should a solicitor's letter of demand misleadingly take the form of a Court document or have enclosed with it a document which misleadingly appears to be a Court document. Breaching these rules may amount to professional misconduct or unsatisfactory conduct or result in penalties or damages under State or Federal law in connection with the Australian Consumer Law.[31] The Victorian Legal Services Commissioner and the Law Institute of Victoria have published a Fact Sheet and Ethics Guidelines respectively about these matters.[32]

3.2 Unwarranted Threats

As mentioned on page 15 above, a solicitor may not threaten criminal or disciplinary proceedings against the opposite party if a civil liability to the client is not satisfied.[33] Although not specifically prohibited by the Conduct Rules, other threats of a kind

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[31] See, for example, *Legal Services Commissioner v Sampson* [2013] VCAT 1439 and *Australian Competition and Consumer Commission v Sampson* (2011) A.T.P.R. ¶42-374, [2011] FCA 1165.

[32] See Victorian Legal Services Commissioner, Fact Sheet November 2015, *Letters of demand: Traps for lawyers*, at http://www.lsbc.vic.gov.au/documents/Fact_sheet-Letters_of_demand-Traps_for_lawyers-2015.pdf and Law Institute of Victoria, Ethics Guidelines 15 October 2015, *Letters of Demand Guidelines* at https://www.liv.asn.au/Professional-Practice/Ethics/Ethics-Guidelines. It should be noted that the Victorian Legal Services Commissioner Fact Sheet does not accurately state the effect of Rule 34 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and reference should be made to the Rules themselves.

[33] See Rule 34.1.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

collateral to the civil liability sought to be enforced are likely to be unlawful. For example, a threat made by a solicitor at a mediation to bring an opposing party's allegedly incorrect tax deductions to the attention of the Australian Taxation Office if a particular offer to settle legal proceedings were not accepted would constitute:

(a) an unwarranted demand with menaces with a view to gain for the solicitor's client and involve, therefore, the offence of blackmail[34];

(b) an attempt to intimidate or coerce the opposite party in relation to his, her or its conduct of the proceeding and involve, therefore, a contempt of court[35]; and

(c) professional misconduct on the part of the solicitor[36].

In most of the cases concerned with unwarranted threats, the threatened action is lawful in itself. It goes without saying that a report to the Police or other prosecuting authorities of the occurrence of criminal conduct is in itself both proper and desirable for the enforcement of the criminal law. Similarly, tax law contains provisions encouraging the public to report instances of tax evasion. It is desirable, in the public interest, that instances of social security fraud be brought to the attention of the proper authorities. What is wrong is to threaten to make such a report unless some civil liability is discharged or satisfied. The proper course, in the public interest, is to make the report regardless of the private rights of the informant. The principle is that only appropriate threats should be made in relation to the enforcement of a client's contractual and proprietary rights. The classically proper threat is a threat to

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[34] See section 87 of the Crimes Act 1958.

[35] See Thomson Reuters, *The Laws of Australia* at [10.11.1230] 14 March 2019.

[36] See *Legal Services Commissioner v Logan* [2014] VCAT 345 at [6]. In that case, the threat was to make a report to Centrelink about an opposing party's activities such that his entitlement to social security benefits might be suspended and benefits received by him might have to be repaid if he did not cease to interfere with the business of the solicitor's client.

commence proceedings to vindicate and enforce the relevant right. There will, in addition, be many cases where a threat concerning the way in which the solicitor's client will conduct business in relation to the opposite party would be entirely proper. For example, and in the absence of particular statutory or contractual provisions to the contrary, a threat to cease supplying goods or services unless outstanding debts from past supplies were paid would usually be proper.

4. WITNESSES

Problematic ethical issues often arise for solicitors in relation to preparing the evidence of witnesses, both lay and expert, and where the solicitor himself or herself is to give evidence.

4.1 Influencing Witnesses

Rule 24 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 is concerned with influencing witnesses. A solicitor may not advise or suggest to a witness that false or misleading evidence be given nor may a solicitor advise what answers should be given by a witness.[37] On the other hand, the Conduct Rules expressly permit a solicitor to advise a witness to tell the truth. A solicitor is also permitted to question and test in conference a witness's evidence and may point out inconsistencies or other difficulties with the evidence.[38]

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[37] See Rule 24.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[38] See Rule 24.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

A further rule to the same end prohibits a solicitor, in the absence of special circumstances, from conferring with or condoning a client conferring with more than one lay witness at the same time if the relevant evidence is likely to be contentious and such conferral could affect the witnesses' evidence.[39] This rule about joint conferences with lay witnesses applies where the relevant witnesses are parties (and therefore the solicitor's clients). Thus conferences with lay witnesses relating to evidence should not, in the absence of special circumstances, be held with the client present, unless the client is not to be a witness. Similarly, if there is more than one client and more than one of the clients are to give evidence, conferences with a client witness should be conducted in the absence of other client witnesses.

4.2 Expert Witnesses

Special care needs to be taken by solicitors in relation to expert witnesses. The primary duty of an expert witness is to the Court.[40] Most of the overarching obligations of legal practitioners apply to expert witnesses as well.[41] Each of the Supreme Court of Victoria, the County Court and the Magistrates' Court includes an Expert Witness Code of Conduct in its Rules.[42] Expert witnesses are required to agree to be bound by the Code of Conduct, which imposes on each expert witness:

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[39] See Rule 25 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[40] See section 65F(c) of the Civil Procedure Act 2010.

[41] See section 10(3) of the Civil Procedure Act 2010.

[42] See Rule 44.03 and Form 44A of Chapter I of each of the Rules of the Supreme Court, the Rules of the County Court, and the Rules of the Magistrates' Court of Victoria. In the federal context, the relevant Federal Court Practice Note is equivalent to the Expert Witness Code of Conduct and is given statutory force in relation to the Federal Court and the Federal Circuit Court by rule 23.12 of the Federal Court Rules 2011 and rule 15.07 of the Federal Circuit Court Rules 2001 respectively. Similar obligations are imposed on experts in the Family Court by Divisions 15.5.4, 15.5.5 and 15.5.6 of the Family Law Rules 2004.

> "an overriding duty to assist the Court impartially"

and also provides that:

> "An expert witness is not an advocate for a party."

The law of client legal privilege is complex in its application to expert witnesses. It may be said in summary, however, that an expert witness's engagement and instruction documents, field notes and working drafts are not privileged or will cease to be privileged once the expert witness report is filed or served[43]. It follows that an opposing party will be able to compare draft and final versions of an expert witness report.

A solicitor should not settle an expert witness report. According to Dixon J. in the Supreme Court of Victoria (with my underlining)[44]:

> "lawyers should not 'settle' the evidence of experts, who must remain true to the Expert Code. The undisclosed settling of an expert's report by a lawyer could place the expert in breach of the Expert Code, and the lawyer in breach of his or her duty to the court, if the expert's evidence was changed or modified in a material respect."

On the other hand, according to Lindgren J. in the Federal Court, lawyers should be involved in the writing of reports but not in reaching the relevant opinions[45]:

> " Lawyers **should** be involved in the writing of reports by experts: **not**, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed."

Again according to Lindgren J., solicitors should not cease their involvement once the expert has been instructed (with my underlining)[46]:

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[43] See Lexis-Nexis, *Civil Procedure – Victoria* at [I 44.01.40].

[44] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 8)* [2014] VSC 567 at [167].

[45] *Harrington-Smith and Others on behalf of the Wongatha People v State of Western Australia and Others (No. 2)* (2003) 130 F.C.R. 424, [2003] FCA 893 at [19].

[46] Ibid. at [27].

> "My impression is that in some cases, beyond the writing of an initial letter of instructions to the expert, lawyers have left the task of writing the reports entirely to the expert, even though he or she cannot reasonably be expected to understand the applicable evidentiary requirements. Such a course may have been followed because of a commendable desire to avoid any possibility of suggestion of improper influence on the author. But I suggest that the distinction between permissible guidance as to form and as to the requirements of s 56 and 79 of the Evidence Act, on the one hand, and impermissible influence as to the content of a report on the other hand, is not too difficult to observe."

Although Lindgren J. regards the distinction between permissible and, indeed, sometimes necessary guidance on the one hand and improper influence on the other hand as "not too difficult to observe", the need for great care to take the right course in circumstances which are necessarily litigious, if not always highly contentious, is obvious.

4.3 Solicitors As Witnesses

A solicitor may not appear as an advocate in a matter where it is known or becomes apparent that the solicitor will be required to give evidence concerning a contested issue.[47] On the other hand, unless the administration of justice requires the contrary, a solicitor, and the solicitor's law practice, may continue to act for a client notwithstanding that the solicitor will be a material witness in relation to a contested issue.[48] Difficulties are most likely to arise in relation to the administration of justice and more generally if a solicitor continues to act where the contested issue about which the solicitor will give evidence is such that the conduct or liability of the solicitor may be called into question depending on what view is taken of the contested issue.

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[47] See Rule 27.1 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[48] See Rule 27.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

5. ILLEGAL CLAIMS

A solicitor should not assist a client in the enforcement of illegal claims. Similarly, a solicitor should not assist a client to obtain the profits of a fraudulent or criminal conspiracy. In this connection the *Highwayman's Case*[49] is good law. In that case, one highwayman sought from another an account of the profits of the partnership they carried on at Hounslow Heath and elsewhere. The bill was dismissed with costs and the plaintiff's solicitors were fined for contempt and committed to the Fleet prison until the fines were paid. The plaintiff's counsel was ordered to pay the costs personally. The partners were later hanged: the plaintiff at Tyburn in 1730 and the defendant at Maidstone in 1727.

[49] *Everet v Williams* (1725) reported at (1893) 9 L.Q.R. 197. Sir Frederick Pollock thought in April 1893 that the legendary case was a jest or hoax (9 L.Q.R. 106) but had confirmed its truth by July 1893 from Court records (9 L.Q.R. 197).