



# *The Victorian Bar Incorporated Practice Rules*

RULES OF CONDUCT AND COMPULSORY CONTINUING  
PROFESSIONAL DEVELOPMENT RULES

Effective 22 September 2009

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# PART I - PRELIMINARY

## Authority

1. These Rules are made on 23 September 1997 by the Bar Council as practice rules on matters of professional conduct and practice pursuant to clauses 16.2(b) and 16.3 of the constitution of the Victorian Bar and for the purposes of sections 64 and 72 of the Legal Practice Act 1996. For those purposes these Rules replace all previous rulings and practice rules of the Bar Council. These Rules will come into force on 2 February 1998.

*[Editor's Note: Rules 92, 92A and 92B were amended on 23 November 2000; Rules 75 and 197 were amended on 1 July 2001; Rule 197(a) was amended on 1 February 2002; Rules 5A, 198, 199, 200 and 201 were inserted, Rules 60 and 61 were deleted and Rules 9, 58, 59, 98, and 197 amended on 1 July 2002; The CLE Rules were inserted 1 February 2004 and on 23 August 2004 CLE Rules 7 and 9 were amended and Rule 19 inserted; Rules 127(i), 170, 171 and 197(a) were amended on 1 August 2005; Rules 92A, 92B, 165, 188 and 188A were inserted on 1 August 2005 and Rule 166 was deleted on 1 August 2005. Rule 197 was deleted on 22 September 2009.]*

## Object of the Rules

2. The object of these rules is to ensure that all regulated practitioners of the Bar ("barristers") act in accordance with the general principles of professional conduct, act independently, recognise and discharge their obligations in relation to the administration of justice, and give to clients who choose their services of the highest standard unaffected by personal interest.

## General Principles of Professional Conduct

3. A barrister 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 barrister can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.
4. A barrister must not engage in conduct which is -
  - (a) dishonest or otherwise discreditable to a barrister;
  - (b) prejudicial to the administration of justice; or
  - (c) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.

## Application of Rules

5. Except as is otherwise provided, these Rules apply to and bind all barristers.
- 5A. The following rules do not apply to a barrister when acting as a mediator:
  - (a) Rules 10-73;
  - (b) Rules 84-112;
  - (c) Rules 126-192.

6. A barrister appearing as or providing legal services as a barrister outside his or her home state shall:
- (a) observe so far as is practicable the rules of professional conduct applicable to local practitioners; and
  - (b) save as provided in (a), remain subject to these Rules.

#### Dispensation from Operation of Rules

- 7.
- (a) In special circumstances the Bar Council or the Ethics Committee may grant a dispensation from the operation of a certain rule or rules by declaring that a barrister (or class of barristers):
    - (i) is not bound to observe a certain rule or rules; or
    - (ii) is bound to observe a rule or rules in a modified form;and may, in either of the above cases, impose special conditions upon the barrister (or class of barristers).
  - (b) Any request for such dispensation should normally be made and confirmed in writing, and shall set out the reasons for the request.
  - (c) In cases of urgency an application may be made to the investigations officer or any member of the Ethics Committee. Any response so obtained shall operate unless the Ethics Committee or the Bar Council varies or terminates that response.

#### Ethics Committee

- 8.
- (a) Should a situation concerning a matter of professional conduct and practice arise not specifically covered by these Rules a barrister should seek a ruling from the Ethics Committee;
  - (b) In any case if there is any doubt a barrister should seek a ruling from the Ethics Committee;
  - (c) In cases of urgency a ruling may be sought from a member of the Ethics Committee. Any ruling so obtained shall operate unless the Ethics Committee varies or terminates that ruling.

#### Interpretation

- 9.
- (a) These Rules are not, and should not be read as if they were, a complete or detailed code of conduct for barristers. Other standards for, requirements of and sanctions on the conduct of barristers are found in the inherent disciplinary jurisdiction of the Supreme Court, in the Legal Practice Act and in the general law (including the law relating to contempt of court).
  - (b) These Rules should be read and applied so as most effectively to attain the objects and uphold the values expressed in their Preamble.
  - (c) General provisions of these Rules should not be read or applied in a limited way by reason of any particular or illustrative provisions.

- (d) Headings in these Rules shall be read as part of these Rules, but shall not be used so as to read or apply any of the Rules in a more limited way than would have been so if the headings were not part of the Rules.
- (e) Expressions used in these Rules which are also used in the Act have the same meanings as they are used in the Act, unless the context requires otherwise.
- (f) Unless the context requires otherwise, the following expressions are defined as follows when used in these Rules:

“Bar”	means the Victorian Bar Inc.
“Bar Council”	means The Victorian Bar Council, a committee established under the Constitution of the Victorian Bar Inc.
“Barrister”	means a regulated practitioner of The Victorian Bar Inc.
“case”	means the litigation or proceedings in which the barrister in question is briefed to appear, or the dispute in which the barrister is advising, as the case may be.
“client”	means the client of the practitioner in question and includes a professional acting as such and 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.
“conditional fee agreement”	means an agreement whereby a brief is accepted on the basis that the barrister will not be paid any fee unless the client succeeds to an extent set forth in the agreement being an agreement that conforms with the requirements of the Legal Practice Act 1996 relating to conditional fee agreements.
“court”	means any body described as such and all other judicial tribunals, all statutory tribunals and disciplinary tribunals and all statutory or Parliamentary investigations and inquiries, Royal Commissions, arbitrations and mediations.
“criminal proceedings”	includes disciplinary proceedings, in which context other expressions appropriate to criminal proceedings include corresponding meanings appropriate to disciplinary proceedings and in particular “a serious criminal offence” includes a disciplinary shortcoming which, if proved, involves the serious possibility of suspension or deregistration (or the equivalent).
“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.
“ethics committee”	means the committee so described and appointed by the Bar Council pursuant to clause 15 of the Constitution.
“Chief Executive Officer”	means the Chief Executive Officer of the Victorian Bar Inc.

“fee”	means legal costs within the meaning of the Legal Practice Act 1996.
“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 solicitor to make such decisions.
“home State”	means Victoria.
“instructing solicitor”	means the solicitor from whom the barrister in question has accepted a brief or who is instructing that barrister in that brief, as the case may be.
“insurance company”	includes any entity, whether statutory or otherwise, which performs the function of indemnifying in any way civil defendants.
“Judge”	includes, as the context requires, a Magistrate, Registrar, Arbitrator, member of a tribunal and other judicial or quasi-judicial officer.
“legal advice”	includes assistance at or presiding over meetings.
“opponent”	means the legal 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.
“professional”	when used as a noun means a person actively engaged in an occupation generally recognised as being a profession, and includes accountants, architects, engineers, surveyors, town planners and valuers.
“potential proceeding”	means proceedings which have not been commenced but where there is information which has been publicised that such process is imminent or where there is a very real likelihood that process will be instigated.
“prosecutor”	means a barrister who appears for the complainant or Crown in criminal proceedings.
“regulated practitioner”	means a legal practitioner or a registered interstate practitioner who has been allocated to the Bar by the Legal Practice Board pursuant to Part 2 of the Legal Practice Act 1996.
“representative”	means the barrister or, if no barrister, the solicitor who is retained by the party in question.

## PART II - ADVOCACY RULES

### Duty to Client

10. A barrister has the privilege of asserting and defending a client's rights and of protecting the client's liberty or life by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately lead to that end according to the principles and practice of the law.
11. A barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these Rules.
12. A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the barrister 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.
13. A barrister shall not give an undertaking to the court on behalf of a solicitor or lay client without the express authority of the person concerned.
14. A barrister must take all reasonable and practicable steps to ensure that professional commitments are fulfilled, or that early notice is given if they cannot be fulfilled.
15. A barrister who has accepted a brief to appear alone at a hearing and has not returned the brief shall be present in court ready to represent the client on each occasion on which the hearing proceeds. Where two or more barristers are briefed to appear the senior of them shall ensure that one at least of them shall be so present in court.

### Duty to Court, Conduct in Court

16. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing solicitor's desires where practicable.
17. A barrister will not have breached the barrister's duty to the client, and will not have failed to give reasonable consideration to the client's or the instructing solicitor'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 barrister 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.
18. A barrister 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 barrister's opinion on the merits of that evidence or issue.
19. A barrister must not knowingly make a misleading statement to a court on any matter.
20. A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading.

21. A barrister 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.
22. A barrister seeking any interlocutory relief in an ex parte application must disclose to the court all matters which:
  - (a) are within the barrister's knowledge;
  - (b) are not protected by legal professional privilege; and
  - (c) the barrister has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.
23. A barrister who has knowledge of matters which are within Rule 22:
  - (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege so as to permit the barrister to disclose those matters under Rule 22; and
  - (b) if the client does not waive the privilege as sought by the barrister:
    - (i) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and
    - (ii) cease to act in relation to the application.
24. A barrister must, at an 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 an Australian appellate 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 barrister has reasonable grounds to believe to be directly in point against the client's case.
25. A barrister need not inform the court of matters within Rule 24 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 barrister to have informed the court of such matters in the ordinary course has already arrived or passed.
26. A barrister who becomes aware of a matter within Rule 24 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 re-list 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.

27. A barrister need not inform the court of any matter otherwise within Rule 24 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
28. A barrister 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 barrister becomes aware of the misapprehension while at the same time respecting the confidences and the interests of the client as far as that is possible.
29. A barrister who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:
- (a) has lied in a material particular to the court or has procured another person to lie to the court; or
  - (b) has falsified or procured another person to falsify in any way a document which has been tendered; or
  - (c) has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court:
    - (i) must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie or falsification or suppression;
    - (ii) must promptly inform the court of the lie or falsification or suppression upon the client authorising the barrister to do so; but
    - (iii) must not otherwise inform the court of the lie or falsification or suppression.
30. A barrister whose client informs the barrister 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 barrister to do so beforehand; or
    - (ii) the barrister believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.
31. A barrister must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the barrister or on the barrister'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 barrister;
  - (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 barrister or the instructing solicitor out of court.

32. When drawing or settling a pleading or affidavit, a barrister shall not include an allegation which is not supported by facts contained in instructions, or by facts which the barrister otherwise reasonably believes to exist.
33. Where a barrister is instructed to draw a subsequent pleading in an action and finds that the client has no answer to the allegations made in the earlier pleading, it is permissible to settle a pleading which merely denies, or does not admit, those allegations; providing that nothing in this rule permits drawing or settling a pleading which is to be verified on affidavit otherwise than in accordance with instructions.
34. A barrister must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the barrister believes on reasonable grounds that:
  - (a) factual material already available to the barrister provides a proper basis for the allegation if it is made in a pleading;
  - (b) 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
  - (c) 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.
35. A barrister must not open as a fact any allegation which the barrister does not then believe on reasonable grounds will be capable of support by the evidence which will be available to be presented to support the client's case.
36. No barrister is bound to withdraw any charge which is the necessary outcome of material facts sworn to by or on behalf of a client, or is a fair inference from the evidence in the case, unless expressly instructed to do so by the client.
37. In any proceedings, a barrister shall not permit himself or herself to be made the instrument by which publicity is obtained for allegations which are scandalous or calculated to vilify, insult or injure the commercial or personal reputation of another person or corporation.
38. A barrister must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:
  - (a) the barrister believes on reasonable grounds that the material already available to the barrister provides a proper basis for the suggestion;
  - (b) in cross-examination going to a fact in issue, the suggestion is part of the case for the client; or
  - (c) in cross-examination going to credit alone, the barrister believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.
39. A barrister may regard the opinion of the instructing solicitor that material which appears to support a suggestion within Rule 38 is itself credible as a reasonable ground for holding the belief required by Rule 38(a).
40. A barrister must make reasonable inquiries to the extent which is practicable before the barrister can have reasonable grounds for holding the belief required by Rule 38(a), unless the barrister has received and accepted an opinion from the instructing solicitor within Rule 39.

41. A barrister shall not in questioning a witness use any document or thing so as to induce a belief in the mind of a witness, jury or court that there is documentary information to support the substance of the suggestion conveyed by a question when the document or thing does not support such suggestion.
42. A barrister must not suggest criminality, fraud or other serious misconduct against any person in the course of the barrister's address on the evidence unless:
- (a) the barrister believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion;
  - (b) there are reasonable grounds for believing that such matters are both well founded and also relevant; and
  - (c) the imputations are put in language which is no stronger than the needs of the case require.
43. A barrister who has instructions which justify submissions for the client 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 barrister believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.
- 44.
- (a) Under no circumstances shall a barrister advise or suggest to a witness that false evidence should be given.
  - (b) A barrister shall not coach a witness by advising what answers the witness should give to questions which might be asked.
45. A barrister will not have breached Rule 44 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.
46. A barrister must not confer with any witness (including a party or client) called by the barrister on any matter related to the proceedings while that witness remains under cross-examination, unless:
- (a) the cross-examiner has consented beforehand to the barrister doing so; or
  - (b) the barrister:
    - (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference; and
    - (ii) has, if possible, informed the cross-examiner beforehand of the barrister's intention to do so; and
    - (iii) otherwise does inform the cross-examiner as soon as possible of the barrister having done so.
47. A barrister 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.

48. A barrister will not have breached Rule 47 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed.

### Communications

49. A barrister must not, in any communication with another person on behalf of a client threaten the institution of criminal or disciplinary proceedings against the other person in default of the person's satisfying a concurrent civil liability to the barrister's client.
50. A barrister must not knowingly make a false statement to the opponent concerning the facts of, evidence in support of or law applicable to the client's case.
51. A barrister must take all necessary steps to correct any false statement of the kind referred to in Rule 50 unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.
52. A barrister must not deal directly with the opponent's solicitor or client other than through the barrister's own instructing solicitor unless:
- (a) the opponent has previously consented;
  - (b) the barrister believes on reasonable grounds that:
    - (i) the circumstances are so urgent as to require the barrister 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 inquire whether the opposing party is represented and, if so, by whom.
53. A barrister must not confer with or deal directly with the party opposed to his or her 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 barrister:
    - (i) has no reasonable grounds to believe that any statements made by the party to the barrister 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 barrister:
    - (i) has notified the party's representative of the barrister's intention to do so; and
    - (ii) has allowed enough time for the party to be advised by the party's representative.
54. A barrister 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 barrister in such a way as to require the barrister to respond to the court; or
  - (b) the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister and has an opportunity to participate.
55. A barrister must promptly tell the opponent what passes between the barrister and a court in a communication referred to in Rule 54.
56. A barrister must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under Rule 54(b), other than the matters specifically notified by the barrister to the opponent when seeking the opponent's consent.
57. A barrister shall not disclose to the court, whether in examination, cross-examination or otherwise, any communication between the barrister and legal representatives appearing in the proceedings for any other party to the proceedings:
- (a) except by consent;
  - (b) unless what occurred resulted in the creation of some contractual or other legal relationship; or
  - (c) unless it was expressly stated before or at the commencement of such communication that matters communicated should not be regarded as without prejudice or privileged from use or disclosure.

## Media

- 58.
- (a) A barrister must not publish or take any step towards the publication of any material concerning any current or potential proceeding which:
    - (i) is inaccurate;
    - (ii) discloses any confidential information;
    - (iii) appears to or does express the opinion of the barrister on the merits of the current or potential proceeding or on any issue arising in the proceeding, other than in the course of genuine educational or academic discussion on matters of law.
  - (b) Subject to sub-rule (a) and any court rule or order to the contrary a barrister may publish or assist the publishing of material concerning a current proceeding by supplying only:
    - (i) copies of pleadings or court documents 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 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;
    - (v) answers to unsolicited questions concerning the current proceeding and 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, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case;

provided that where the barrister is engaged in the current proceeding, the barrister does so only with the consent of the client first obtained.

59. A barrister will not have breached Rule 58 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication
60. [Deleted 1/7/2002]
61. [Deleted 1/7/2002]

### **Confidentiality and Conflicts**

62. A barrister'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 barrister and client.
63. A barrister must not disclose (except as compelled by law) or use in any way whether during or after the cessation of the relationship of barrister and client, confidential information obtained by the barrister concerning any persons' business or personal affairs unless or until:
  - (a) the information has been published so as to become public knowledge;
  - (b) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or
  - (c) the person has consented to the barrister disclosing or using the information generally or on specific terms.
64. A barrister must not disclose (except as compelled by law) or use confidential information under Rule 63(c) in any way other than as permitted by the specific terms of the person's consent.
65. A barrister will not have breached Rules 63 and 64 simply by showing briefs to a reader or to another barrister doing work as permitted by Rule 115 or to another barrister for the purpose of obtaining assistance, so long as the barrister has reminded the pupil or the other barrister of barristers' duties of confidentiality including Rules 63 and 64.
66. A barrister who is shown a brief pursuant to rule 65 is bound by the same duties of confidentiality which bind the barrister whose brief it is, including the duties imposed by Rules 63 and 64.
67. A barrister who has accepted a brief must return the brief as soon as possible after the barrister becomes aware that the barrister has information confidential to a person other than the client which may, as a real possibility, be helpful to the client's case or to the advancement of the client's interests or material to the proceedings, being information which the barrister is prohibited from disclosing or using by Rules 63, 64 or 66, unless the person entitled to the confidentiality consents to the barrister disclosing or using the information as the barrister thinks fit.
68. A barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for:

- (a) all the clients in the case of confidentiality to which Rule 63 would apply; or
  - (b) in other cases, one or more of the clients:
    - (i) giving preference to the earliest brief if the barrister was briefed at different times; and
    - (ii) so as to remove that possibility of conflict.
69. A barrister who, during the hearing of the case, becomes aware that the interests of the clients or some of them do or may, as a real possibility, conflict, must return the brief for:
- (a) all the clients in the case of confidentiality to which Rule 63 would apply; or
  - (b) in other cases, one or more of the clients:
    - (i) giving preference to the earliest brief if the barrister was briefed at different times; and
    - (ii) so as to remove that possibility of conflict.
70. A barrister need not return any briefs to appear under Rules 68 or 69, if the barrister has informed the instructing solicitor or the clients, as the case may be, of the barrister's view as to the clients' conflicting interests, and the instructing solicitor or the clients, as the case may be, inform the barrister that all the clients nonetheless wish the barrister to continue to appear for them.
71. Where it is necessary for the proper examination of a complaint made against a barrister, a barrister may disclose to the Ethics Committee or a disciplinary tribunal information which would otherwise be confidential within the meaning of these Rules. <sup>1</sup>
- 72.
- (a) A barrister must not in any dealings with a client:
    - (i) allow the interests of the barrister or a member of the barrister's immediate family to conflict with those of the client;
    - (ii) exercise any undue influence intended to dispose the client to benefit the barrister in excess of the barrister's fair remuneration for the legal services provided to the client.
  - (b) a barrister 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 barrister is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the barrister's own interest or the interest of a member of the barrister's immediate family.
73. A barrister who believes on reasonable grounds that the interests of the client may conflict with the interests of the instructing solicitor, or that the client may have a claim against the instructing solicitor, must:
- (a) advise the instructing solicitor of the barrister's belief in writing; and
  - (b) if the instructing solicitor does not agree to advise the client of the barrister's belief, seek to advise the client in conference in the presence of the instructing solicitor of the barrister's belief;

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<sup>1</sup> See also s. 149 of the *Legal Practice Act*

provided that if such a conference has not or cannot be held, or if the solicitor refuses to pass on the advice, the barrister should consult the Ethics Committee for the appropriate procedure to be followed.

### **Relations with Bar Council**

74.

- (a) A barrister shall respond forthwith to any requirement from any disciplinary body, the Legal Ombudsman, the Ethics Committee, or from the Bar Council, for comments or information relating to a complaint or relating to the barrister's conduct;
- (b) a barrister shall reply to correspondence from the Ethics Committee and the Bar Council when asked to do so;
- (c) if required to do so a barrister shall attend any inquiry or proceedings of the Ethics Committee, the Bar Council, or any disciplinary body.

75. [Deleted 1 July 2001]

76. A barrister who is found to have committed a disciplinary offence must advise the Governing Bodies of the ABA of which the barrister is a member.

77. A barrister shall pay in the manner and within the time required the amount of any fine or order for compensation imposed on him or her for a disciplinary offence.

### **Insurance**

78. No barrister shall engage in legal practice unless he or she maintains professional indemnity insurance in accordance with Part 8 of the Legal Practice Act 1996.

### **Facilities**

79. The general purposes of Rule 80 are:

- (a) to ensure that Barristers conduct their practices in such a manner as to enable them properly to discharge their professional duties to their clients, their instructing solicitors, and the Court;
- (b) to ensure that Barristers conduct their practices in such a manner as not to bring them or the Victorian Bar into disrepute.

80. A Barrister must conduct his or her practice from such chambers and by the use of such facilities as are reasonably necessary to enable him or her to discharge his or her duties and obligations properly and in a professional manner, having regard to the nature, size and circumstances of his or her practice.

81. For the purposes of providing guidance in respect of the requirements of Rule 80, the Bar Council may, from time to time, issue guidelines, compliance with which shall be taken to meet those requirements.

### **Impugning the Dignity of Profession**

82. A barrister shall not publish, orally, in writing or otherwise, an opinion of the professional characteristics of fellow barristers or any of them in such a way or in such circumstances as to impugn the dignity and high standing of the profession.

### **Miscellaneous**

83. A barrister must not in the presence of any of the parties or solicitors deal with a court, or deal with any

legal practitioner appearing before the barrister when the barrister is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the barrister has special favour with the court or towards the legal practitioner.

84. Where a barrister wishes to make representations to the effect that a judge should not sit on a case by reason of bias, interest or the like, then (whether such representations are to be made directly or indirectly to the judge, or to some other person having influence or control over the matter), he or she should give notice to all other parties interested and afford them a reasonable opportunity to make representations in the matter.
85. If a barrister intends to rely on an unreported decision then, before doing so, it should be brought to the attention of opposing counsel, and if necessary a copy supplied in sufficient time for proper consideration of it.

## PART III - BRIEFS AND RETAINERS

### Cab-rank Principle

86. A barrister must accept a brief from a solicitor to appear before a court, to advise or to draw pleadings or any other document in a field in which the barrister practises or professes to practise if:
- (a) the brief is within the barrister's capacity, skill and experience;
  - (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;
  - (c) the fee offered on the brief is acceptable to the barrister; and
  - (d) the barrister is not obliged or permitted to refuse to accept or retain the brief under Rules 92, 94, 95, 96, 98, 99, 100 or 101.
87. A barrister who is generally available to accept a brief shall not discriminate, in any way, for or against a client, or class of clients.
88. A barrister must not set the level of an acceptable fee, for the purposes of Rule 86(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister.
- 89.
- (a) Queen's Counsel may accept instructions in any matter without a junior.
  - (b) Queen's Counsel shall refuse to accept instructions in a matter without a junior if the interests of the client require that more than one counsel be instructed.
  - (c) Nothing in these Rules shall be taken to oblige a Queen's Counsel to accept a brief without a junior.
- 90.
- (a) A barrister shall not impose as a condition of acceptance of a brief that a particular barrister be briefed as a leader or junior in the matter or proceedings but:
    - (i) it is not improper for a barrister to decline a brief in any matter on the ground that the junior briefed or to be briefed in the matter will not afford such assistance as he or she considers desirable in all the circumstances;
    - (ii) save where a brief has been declined under (i), it is not improper for a barrister to indicate the name of any other barrister or the names of other barristers (whether junior or senior) whom he or she considers that it would be desirable to be briefed along with or in place of the original barrister;
  - (b) The above sub-rule does not prevent a barrister recommending other barristers to a solicitor who asks for such advice.

## Requirement of Separate Briefs

91.

- (a) Subject to this rule, a barrister who has been or is to be briefed to appear in separate proceedings must have a separate brief separately marked in respect of each proceeding.
- (b) Where a barrister is briefed to negotiate on behalf of several plaintiffs in respect of their actions against a single defendant, he or she may accept a single brief to negotiate on behalf of all those plaintiffs and, subject to the agreement of the barrister, such brief may be marked with a single or composite fee.
- (c) Where a barrister is briefed by the same solicitor or firm of solicitors to appear in two or more related proceedings, he or she may accept a single brief to appear in such proceedings and, subject to the agreement of the barrister, such brief may be marked with a single or composite fee.
- (d) For the purpose of this rule, proceedings are related proceedings where:
  - (i) each of the proceedings is brought by or against the same person, and the proceedings are likely to be heard either concurrently or one immediately after the other; or
  - (ii) the same issues or substantially the same issues arise for determination in each of the proceedings and the proceedings are likely to be heard either concurrently or one immediately after another; or
  - (iii) the barrister is briefed for a prosecuting authority or informant, and the proceedings are likely to be heard either concurrently or one immediately after another; or
  - (iv) the barrister is briefed for a complainant or a number of complainants in simple debt collecting cases, and the proceedings are listed for hearing on the one day.

## Briefs which must be Refused <sup>2)</sup>

92. A barrister must refuse to accept or retain a brief or instructions to appear before a court:

- (a) if the barrister has information which is confidential to any other party in the case other than the prospective client, and
  - (i) the information may, as a real possibility, be material to the prospective client's case; and
  - (ii) the party entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case;
- (b) if the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer;
- (c) if the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case;
- (d) if the barrister was a witness in the court below in the case of an appellate brief;

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<sup>2</sup> See also particular rules in cases of conflict of interest or involving confidentiality (rules 68 and 69) and also in criminal matters rules 162, 163 and 164

- (e) if the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case;
- (f) if the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee;
- (g) if the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client;
- (h) if the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration;
- (i) if the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member (unless the hearing is before the High Court of Australia sitting all available judges) or before a judge whose relationship with the barrister is such as to make such appearance undesirable - unless, upon discovering that circumstance, the barrister cannot retire without jeopardising the client's interest;
- (j) [Deleted]
- (k) if there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules;
- (l) where the barrister has already advised or drawn pleadings and is then offered a brief from the other side in the matter, unless the first client, on being informed of the offer of the brief by the other side, states that there is no objection to the barrister accepting the brief;
- (m) where by reason of any connection with the client, it would be difficult for the barrister to maintain professional independence;
- (n) where the complexity of the matter is such that the barrister considers it to be beyond his or her capacity;
- (o) where the barrister has already discussed in any detail, even on an informal basis, with another party to the proceedings the facts out of which the proceedings arise, except with the latter's consent;
- (p) with respect to the internal affairs of a company which the barrister has investigated under statutory provisions at any time within the preceding six years;
- (q) where to do so would compromise the barrister's independence, involve the barrister in a conflict of interest, or otherwise be detrimental to the administration of justice;
- (r) where the barrister is a member of a local council and the brief relates to a case in which the affairs of the council are likely to arise in any material manner;
- (s) where the barrister is a member of a local council and the brief is to appear in any court for or against such council;
- (t) where the barrister is a director of a company or a member of the committee or council of an organisation and the brief is for or against the company or organisation (whether to appear, advise, settle documents or otherwise): provided that such barrister may give legal advice at board meetings

or committee meetings or council meetings while not accepting any remuneration in respect of such advice beyond that payable in the capacity of director or committee or council member;

- (u) where the barrister is a member of parliament or of a local authority and is pursuing or has pursued a matter by political action and the brief relates to the same matter;
- (v) for the plaintiff against a defendant who is insured by a company of which the barrister is a director;
- (w) for a defendant to an originating summons issued by trustees where the barrister holds a brief for the trustees, notwithstanding that they are adopting an impartial attitude and are not opposed to the barrister holding the second brief;
- (x) save where the refusal or return of the brief would not be proper having regard to the whole of the circumstances, where a conference with the lay client or a witness is necessary for the proper preparation for or conduct of the proceedings, but the barrister's instructing solicitor by endorsement on the brief or otherwise has refused the opportunity for such a conference;
- (y) on an appeal from a decision in a proceeding in which the barrister has been briefed, without first giving the party by whom he or she was briefed in such proceeding the opportunity of delivering a brief to him or her for such appeal.

92A.

- (a) For the purposes of Rule 92A –

“court” means any body described as such.

“Judge” includes a judge, justice, magistrate, coroner, master, prothonotary, registrar or other judicial officer and anyone holding any such office on an acting basis.

- (b) Without limiting the generality of Rule 92, a barrister must refuse to accept or retain a brief or instructions to appear before a court if the brief is to appear before a court of which the barrister is or was formerly a Judge or before a court from which appeals lay to a court of which the barrister is or was formerly a Judge (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur:
  - (i) while the barrister is a Judge of the court in question;
  - (ii) within 2 years after the barrister ceased to be a Judge of the court in question, if the barrister was a Judge of the court for less than 2 years;
  - (iii) within a period after the barrister ceased to be a Judge of the court in question equivalent to the period for which the barrister was a Judge of the court, if the barrister was a Judge of the court for 2 years or more but less than 5 years; or
  - (iv) within 5 years after the barrister ceased to be a Judge of the court in question, if the barrister was a Judge of the court for 5 years or more.

92B.

- (a) For the purposes of Rule 92B, “tribunal” means a statutory tribunal or disciplinary tribunal other than:
  - (i) a tribunal to which a statutory provision applies that prohibits a member or former member from representing a party within a certain time, or in certain circumstances, or absolutely <sup>3</sup>; or
  - (ii) a tribunal constituted pursuant to the provisions of the Defence Force Discipline Act 1982 (Commonwealth) as amended or substituted from time to time.
- (b)
  - (i) This paragraph applies to a brief or instructions to appear in a proceeding before a tribunal which does not sit in divisions or lists to which its members are assigned.
  - (ii) Without limiting the generality of Rule 92, a barrister must refuse to accept or retain a brief or instructions to which this paragraph applies if the appearance would occur:
    - (A) while the barrister is a member of the tribunal; or
    - (B) within two years after the barrister ceased to be a member of the tribunal.
- (c)
  - (i) This paragraph applies to a brief or instructions to appear before a tribunal which sits in divisions or lists to which its members are assigned, in a proceeding in a particular division or list of the tribunal.
  - (ii) Without limiting the generality of Rule 92, a barrister must refuse to accept or retain a brief or instructions to which this paragraph applies if the appearance would occur-
    - (A) while the barrister is a member of the tribunal assigned to the division or list in question; or
    - (B) within two years after the barrister ceased to be a member of the tribunal assigned to the division or list in question.

93. A barrister need not refuse a brief to appear before a court notwithstanding the application of Rules 92(c), (d) or (e) if:

- (a) the barrister believes on reasonable grounds that:
  - (i) allegations involving the barrister in such a way as to apply one of those Rules have been raised in order to prevent the barrister from accepting the brief; and
  - (ii) those allegations can be met without materially diminishing the barrister’s disinterestedness; and

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<sup>3</sup> See, for example, s25A of the Victorian Civil and Administrative Tribunal Act which provides that:  
“Member or former member may not represent a party If the rules provide for proceedings to be entered in or transferred to lists of the Tribunal and for members to be assigned to those lists –  
(a) a member must not represent a party in any proceeding that has been entered in or transferred to a list to which the member has been assigned;  
(b) for a period of 2 years after a member ceases to be a member, he or she must not represent a party in any proceeding that has been entered in or transferred to a list to which the former member was assigned.”

- (b) a member of the Ethics Committee approves of the barrister accepting the brief after the barrister has informed that member of the circumstances.
94. A barrister must refuse a brief to advise if the barrister has information which is confidential to any person with different interests from those of the prospective client if:
- (a) the information may, as a real possibility affect the prospective client's interests in the matter on which advice is sought or may be detrimental to the interests of the first person; and
  - (b) the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice.
95. A barrister must not accept a brief to appear on a day when the barrister is already committed to appear or is reasonably likely to be required to appear on another brief unless:
- (a) the person offering the later brief has expressly permitted the barrister to do so; and
  - (b) the instructing solicitor in the earlier brief has been informed beforehand of the barrister's intention to accept the later brief.

#### **Briefs which may be Refused**

96. A barrister may refuse to accept or retain a brief from a solicitor to appear before a court if:
- (a) the barrister considers on reasonable grounds that the time or effort required for the brief threatens seriously to prejudice the barrister's practice or other professional or personal engagements;
  - (b) the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with any agreement as to costs made with the solicitor or client;
  - (c) the instructing solicitor does not agree to be responsible for the payment of the barrister's fee;
  - (d) the brief may, as a real possibility, require the barrister to cross-examine or criticise a friend or relation;
  - (e) the solicitor does not agree to a request by the barrister that appropriate attendances by the instructing solicitor, solicitor's clerk or client representative will be arranged from time to time for the purposes of:
    - (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief;
    - (ii) ensuring that the client adequately understands the barrister's advice;
    - (iii) avoiding any delay in the conduct of any hearing or compromise negotiations; and
    - (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused;
  - (f) the prospective client is also the prospective instructing solicitor, or a partner, employer or employee of the prospective instructing solicitor, and has refused the barrister's request to be instructed by a solicitor independent of the prospective client and the prospective client's firm;
  - (g) the barrister, being of Queen's Counsel, considers on reasonable grounds that the case does not require the services of Queen's Counsel;

- (h) where the fee offered to the barrister or marked on the brief is not the barrister's usual fee for a matter of the kind to which the brief relates; or
- (i) where past experience of the particular client or an essential witness is such as to give good reason to believe and the barrister does in fact believe that his or her performance in the conduct of the proceedings would be adversely affected.
- (j) where the barrister considers that having regard to other commitments, professional or otherwise, he or she may have insufficient time to give proper attention to the brief;
- (k) where the barrister has some special knowledge of the other party's case by reason of participation in some other litigation;
- (l) where there is a direct or indirect personal relationship between the barrister and a party or a witness in the prospective proceedings which is sufficient to cause embarrassment to the barrister were the brief to be accepted;
- (m) where the barrister has been a witness in related proceedings;
- (n) where the barrister knows or has reason to believe that his or her own professional conduct is likely to be impugned in relation to matters out of which the action arises;
- (o) where the barrister finds his or her own professional conduct being impugned in the course of the proceedings to which the brief relates, unless in his or her opinion a retirement therefrom at that stage would jeopardise the interests of the client;
- (p) in such other circumstances as may be permitted by the Ethics Committee.

97. A barrister may regard the current listing of a solicitor by the Bar Council as one who has failed to pay another barrister's fee without reasonable excuse as a reasonable ground for the doubt referred to in Rule 96(b).

98. A barrister may return a brief if, after acceptance of the brief:

- (a) the barrister's request that appropriate attendances by the instructing solicitor, solicitor's clerk or client representative will be arranged from time to time for the purposes of:
  - (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief;
  - (ii) ensuring that the client adequately understands the barrister's advice;
  - (iii) avoiding any delay in the conduct of any hearing or compromise negotiations; or
  - (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused;

has been refused;

- (b) subject to para (d) the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be; or

- (c) fees have not been paid reasonably promptly or in accordance with any agreement as to costs, and have remained unpaid after reasonable notice by the barrister to the instructing solicitor or client, as the case may be, of the barrister's intention to return the brief for that reason.
  - (d) the provisions of rule 200 relating to Conditional Fee Agreements applies.
- 99. A barrister who has reasonable grounds to believe that there is a real possibility that the barrister may cease to be solely a disinterested advocate by becoming also a witness in the case or a defender of the barrister's own personal or professional conduct against criticism must return the brief as soon as it is possible to do so without unduly endangering the client's interests, unless:
  - (a) the barrister believes on reasonable grounds that:
    - (i) allegations which involve the barrister in that way have been raised in order to remove the barrister from the case; and
    - (ii) those allegations can be met without materially diminishing the barrister's disinterestedness; and
  - (b) a member of the Ethics Committee approves of the barrister keeping the brief after the barrister has informed that member of the circumstances.
- 100. A barrister must return a brief to appear in a contested hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, unless:
  - (a) the barrister learns of the identity of the person or persons constituting the court so close to the hearing date that return of the brief would not give another legal practitioner enough time to take over the case properly before the hearing; and
  - (b) the barrister has sought to draw the circumstances to the court's attention so as to permit the constitution of the court to be changed.
- 101. A barrister must not return a brief to defend a charge of a serious criminal offence unless:
  - (a) the barrister believes on reasonable grounds that:
    - (i) the circumstances are exceptional and compelling; and
    - (ii) there is enough time for another legal practitioner to take over the case properly before the hearing; or
  - (b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the terms of this Rule and Rule 105.
- 102. A barrister must not return a brief to appear in order to accept another brief to appear unless the instructing solicitor or the client, in the first brief has permitted the barrister to do so beforehand, after the barrister has clearly informed the instructing solicitor or the client, as the case may be, of the circumstances in which the barrister wishes to return the brief and of the terms of this Rule and Rule 105.
- 103. This rule applies subject to exceptional circumstances, and subject to any special agreement or reservation to the contrary made with the solicitor who has delivered the brief which would, pursuant to this rule, be retained. Where it appears to the barrister holding two or more briefs that the hearing of proceedings to which they relate may clash in point of time, the barrister shall determine which brief to

retain. In so doing the barrister shall take into account the following circumstances and generally accord weight to them in the order in which they appear below:

- (a) whether the brief relates to a proceeding which is and will be part heard and running from day to day both at the time when the likelihood of the clash arises and at the time of the clash;
- (b) whether the brief relates to a part heard proceeding in which the barrister appeared at the previous hearing or, if there are two or more such briefs, which relates to the proceedings for which the date for the resumed hearing was notified to the barrister first;
- (c) whether the brief relates to a proceeding in which the barrister has agreed to appear on the date in question;
- (d) which brief would be the more difficult for another barrister to master in the available time;
- (e) which brief was accepted first.

104. A barrister must not return a brief to appear on a particular date in order to attend a social occasion unless the instructing solicitor or the client, as the case may be, has expressly permitted the barrister to do so.

105. A barrister who wishes to return a brief which the barrister is permitted to return must do so in enough time to give another legal practitioner a proper opportunity to take over the case.

106. A barrister must promptly inform the instructing solicitor or the client, as the case may be, as soon as the barrister has reasonable grounds to believe that there is a real possibility that the barrister will be unable to appear or to do the work required by the brief in the time stipulated by the brief or within a reasonable time if no time has been stipulated.

107. A barrister shall not communicate to the media any reasons for declining to accept or retain a brief.

#### **Handing Brief over to another Barrister**

108. A barrister shall not hand over a brief to another barrister to conduct the case unless the instructing solicitor has consented to that course.

#### **Advices**

109.

- (a) Where a barrister has been asked to advise a client who is not identified, he or she should insist on being informed whether the advice is sought by or for the benefit of a particular client or clients, or for any and what wider purpose;
- (b) Whether or not the client is identified, if the barrister apprehends that a written advice is sought for some wider purpose than the affairs of a client, the barrister should seek and obtain a satisfactory assurance that the written advice:
  - (i) will not be published or supplied by the solicitor or the client to other persons for the purpose of promoting or soliciting business for the solicitor or the client with those other persons without the consent of the barrister to the particular use proposed (which consent should not be given where there is any doubt as to the propriety of the proposed use of the advice);

- (ii) will not be used by the solicitor or the client for circulation to the other persons to invite or encourage them to enter into artificial or contrived arrangements or schemes for the purpose of avoiding the operation of the law;
- (c) Whether or not the client is identified, if the barrister apprehends that his or her name may be used for the purpose of promoting or soliciting business for the solicitor or the client with other persons, the barrister should seek and obtain an assurance that his or her name will not be used for such purpose without the supply of the full written advice or the supply of the whole or the relevant part thereof to such persons and then only subject to paragraph (b) thereof.
- (d) Without derogating from common law principles and all statutory provisions governing the involvement of legal advisers in advice with respect to possible breaches of the law by a client, a barrister should adhere to the principles that a legal adviser may not advise clients as to the ways in which unlawful purposes may be achieved and should not be involved in suggesting or proposing methods of breaking the law (including methods of evading revenue laws);
- (e) A barrister may charge a proper fee for any advice commensurate with seniority, experience, skill, time, difficulty and responsibility and all other relevant matters, but it is a breach of ethics for the barrister to fix a fee for the advice based upon the possible entrepreneurial value of such advice to the solicitor or the client;
- (f) This rule does not detract from the primary duty of a barrister to advise clients as to their legal rights to the best of the barrister's skill and ability uninfluenced by his or her own personal views (if any) of the client or of the client's activities.

## Retainers

110.

- (a) (a) A barrister may accept a retainer only from:
  - (i) a solicitor; or
  - (ii) in relation to any matter or matters in which a patent attorney can instruct the barrister without the intervention of a solicitor, a patent attorney;
- (b) A retainer is the retainer of the lay client;
- (c) When a barrister has held a brief for any party in any proceeding he or she shall not accept a retainer on an appeal from any decision in such proceeding for any other party without giving the original client the opportunity of retaining or briefing him or her for such appeal;
- (d) Subject to these Rules, the acceptance of a retainer precludes a barrister from appearing in the courts of a State, Nation or Territory in an interest adverse to that of the client retaining him notwithstanding that at the date of the acceptance of the retainer the barrister had no right of audience in the courts of relevant State, Nation or Territory, but such acceptance does not compel the barrister retained to seek admission to practise in the courts of some other State, Nation, or Territory if at the first mentioned date he or she had no right of audience in the courts of that State, Nation or Territory;
- (e) Acceptance of a retainer confers no authority on the barrister: a brief must be delivered in order to authorise the barrister to take any step in a proceeding.

## General Retainers

111.

- (a) A general retainer is an arrangement whereby a barrister undertakes to the person by whom he or she is retained, subject to these Rules, not to accept a brief to appear for any other person or party in any proceeding in the courts or tribunals, or in the matters or classes of matters, to which the retainer relates, being a proceeding in which the person by whom the barrister has been retained is, or is proposed to be, a party, without first giving that person the opportunity to brief him or her in the proceeding;
- (b) A general retainer may relate to:
  - (i) all courts and tribunals;
  - (ii) those courts and/or tribunals specified in the retainer;
  - (iii) all matters;
  - (iv) those matters, or classes of matters specified in the retainer; or
  - (v) any combination of the above; and in any event must specify the courts, tribunals or matters to which it applies;
- (c) A general retainer shall extend only to the courts, tribunals, matters or classes of matters specified in it, notwithstanding that a proceeding which is covered by the retainer gives rise to an appeal or associated proceeding in a court or tribunal or involving matters or classes of matters not specified in the retainer;
- (d) A barrister is not bound to accept a general retainer and shall, when considering whether or not to accept a retainer, observe the provisions of these Rules as to confidentiality and as to the circumstances when it would not be proper for him or her to accept or retain a brief;
- (e) A general retainer may be accepted which is delivered on behalf of a company and its named subsidiaries. Subject to this provision, a general retainer, on behalf of a body corporate or unincorporate does not apply to a subsidiary or individual members or a member of the body;
- (f) A general retainer shall rank for priority according to the date of acceptance; provided that a general retainer which has been renewed shall rank according to the date of its original acceptance;
- (g) Where a barrister holds a general retainer from both sides in pending litigation he or she is precluded from acting for either party in the dispute;
- (h) A general retainer delivered to a junior barrister who is appointed silk continues to operate until it expires or until the expiration of 12 months after his or her appointment as silk, whichever shall first occur;
- (i) A general retainer shall last for such period, or until such date, as is specified in it, and if no such period or date is specified, it shall last for 12 months from the date of acceptance;
- (j) A barrister may treat a general retainer as determined and accept a brief or retainer from another party where, after the institution of any proceeding to which the general retainer relates:
  - (i) no brief or special retainer is delivered to the barrister within a reasonable time; or

- (ii) the barrister has enquired of the solicitor or attorney acting for the lay client in that proceeding whether he or she is to receive a brief or special retainer and has not received a brief or special retainer within 3 days, or has received an answer in the negative;

provided that -

- (A) the non-delivery of a brief or special retainer to a Queen's Counsel holding a general retainer on any occasion on which it is usual to instruct a junior counsel only, and where a junior counsel has in fact been instructed, shall not operate to determine the general retainer of the Queen's Counsel;
- (B) when more than one junior counsel hold general retainers, the delivery of a brief or special retainer to one only of them on any occasion on which it is usual to instruct one junior counsel only, and one junior counsel is in fact instructed, shall not determine the general retainer of the other or others of such counsel;
- (C) the non-delivery of a brief or special retainer which the barrister has intimated that he or she cannot or ought not to accept, shall not operate to determine a general retainer.

## Special Retainers

112.

- (a) A special retainer is the engagement of a barrister for a particular party in particular proceedings, either existing or threatened;
- (b) Subject to the provisions of these Rules with respect to the acceptance of briefs, and to the payment of the fee for the retainer, a special retainer is binding when delivered;
- (c) The proceeding to which a special retainer relates shall be taken to include every hearing, application, appeal and other step in or in relation to that proceeding within the one court or tribunal, but shall not include an appeal to another court or tribunal, or any separate proceeding (such as a proceeding in bankruptcy or criminal proceeding) arising out of the proceeding to which the retainer relates;
- (d)
  - (i) A special retainer in any proceedings gives the client a right to the services of the barrister retained during the whole progress of the proceedings;
  - (ii) A special retainer does not entitle a Queen's Counsel to delivery of a brief on occasions during the proceedings where it is usual to instruct a junior barrister only;
  - (iii) Where a team of barristers has been retained including more than one junior barrister, only one of such junior barristers is entitled to the delivery of a brief on occasions during proceedings when it is usual to instruct one junior barrister only;
- (e) A barrister who has received a special retainer is entitled to consider himself or herself not bound by the retainer in the event that he or she is not briefed in the proceedings to which the special retainer applies.

## PART IV - INDEPENDENCE

### Sole Practitioner

113. A barrister must not make or have any arrangement with any person in connection with any aspect of the barrister's practice which imposes any obligation on the barrister of such a kind as may prevent the barrister from:

- (a) accepting any brief to appear for reasons other than those provided by the exceptions to the cab-rank principle in Rules 92 and 96 or by the retainer Rules in Rules 111 and 112; or
- (b) competing with any other legal practitioner for the work offered by any brief for reasons other than those expressly referred to in these Rules.

114. A barrister must be a sole practitioner, and must not practise:

- (a) in partnership with any person;
- (b) as the employer of any legal practitioner who is in active practice; or
- (c) as the employee of any person;

provided that:

two or more practising barristers may agree to share professional expenses, either in proportion to their receipts or in any other way; but they may not agree to share professional receipts or agree (save as provided in these Rules) that any one barrister shall assume responsibility for the professional work of another.

115. A barrister will not have breached Rules 113 and 114 by carrying out a specific task of research or other paper work in chambers given to the barrister by another barrister, or by giving such a task to another barrister, so long as:

- (a) the barrister who was briefed to do the chamber work takes full personal responsibility for the work unless the instructing solicitor otherwise consents;
- (b) the work is delivered under the name of the barrister who was briefed;
- (c) the arrangement between the barristers does not go beyond an ordinary devilling or pupillage arrangement and in particular does not involve any standing retainer or employment terms; and
- (d) the arrangement between the barristers does not provide and is not intended to enable the barrister giving the task to make a profit from the other barrister's work, over and above reasonable remuneration for supervision of and responsibility for the other barrister's work.

116. A barrister may not give a commission or present to any person by reason of or in connection with the introduction of professional work by that person to the barrister.

117. A barrister shall not have or make any agreement, arrangement or understanding with any solicitor concerning any sharing of costs, fees or profits.

118. A barrister shall not be engaged in any vocation incompatible either with his or her position as, or with the proper discharge of his or her duties as, a barrister. In engaging in another vocation, the barrister should have regard to the following considerations:

- (a) another vocation must not be such that a barrister's association with it may adversely affect the reputation of the Bar or the barrister's own reputation;
  - (b) another vocation must not prejudice a barrister's ability to attend properly to the interests of his or her clients.
119. A barrister may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances.
120. A barrister shall not act as, or perform the work of, a solicitor, save as permitted by these Rules.
121. A barrister shall not, save in urgent or exceptional circumstances, engross documents for a solicitor on the solicitor's professional stationery.
122. A barrister shall not collect from a client money for solicitors' costs or enter into any contract or arrangement with a client that has that effect.

### **Selection of Solicitor**

123. A barrister shall not, save in urgent and exceptional circumstances, retain a solicitor on behalf of any person.
124. A barrister must not require that any other particular legal practitioner be instructed or briefed, as the case may be, so as in any way to impose that requirement as a condition of the barrister accepting any brief or instructions.
125. It is improper for a barrister to offer unsolicited advice in relation to the selection of solicitors by a lay person. When such advice is sought it is not improper for the barrister to give such advice, but it is desirable that the names of at least three solicitors from different firms who are, in the opinion of the barrister, competent and possessed of any necessary special expertise or experience, should be put forward.

### **Instructed by Solicitor**

126. Subject to rule 127 and the Direct Access Rules in Part VI, a barrister shall not advise or act in a professional capacity in any matter, whether contentious or otherwise, unless the barrister is instructed by:
- (a) a solicitor entitled to practise in the home state;
  - (b) in the case of a brief to appear at a hearing at a place within Australia but outside the home state, a legal practitioner entitled to practise as a solicitor in that place;
  - (c) in the case of a brief to appear (whether in the home state or otherwise) in a federal court or in a court exercising federal jurisdiction, a legal practitioner entitled to practise as a solicitor in that court;
  - (d) in the case of a brief to appear at a place outside Australia, a legal practitioner entitled to practise in that place;
  - (e) in the case of a brief to advise, a solicitor or legal practitioner entitled to practise in any relevant jurisdiction.
127. A barrister may advise or act in a professional capacity without the intervention of an instructing solicitor:

- (a) where the barrister is instructed by a patent attorney to appear before a Commissioner of Patents, a Registrar of Trade Marks or other officer having jurisdiction in connection with patents, trade marks or designs, or to give advice in relation to any matter within the jurisdiction of such Commissioner, Registrar or officer, or in relation to the validity or infringement of any patent, trade mark or design and any related matter;
- (b) where the barrister is a member of the Defence Force Reserve and is appearing before a service tribunal or inquiry, Defence Force Magistrate, Court Martial Appeal or Court Martial Appeal Tribunal or is acting as a Defence Force Magistrate, a Judge Advocate or a Reviewing Authority;
- (c) where the barrister is advising or acting as the Defence Force Advocate;
- (d) where the barrister is providing voluntary and unpaid assistance at a legal advice centre or charitable organisation in accordance with Part VII;
- (e) where the barrister is giving free legal advice to a friend or relative;
- (f) in an emergency, where a lay person would be gravely disadvantaged if the barrister did not forthwith advise and if necessary commence to act, provided that the barrister shall not continue to act or to accept instructions from the lay person once sufficient time has elapsed for the lay person to instruct a solicitor;
- (g) when acting in the course of his or her duties as a member of the defence forces;
- (h) when acting as counsel assisting a commission or inquiry or when counsel is appointed as Royal Commission commissioner or person appointed by the Government to conduct an inquiry;
- (i) where the barrister is briefed or instructed to advise by the Crown or by any government department or agency.

#### **Referral to Solicitor**

128. A barrister who is asked by any person to do work or engage in conduct which is not barristers' work, or which appears likely to require work to be done which is not barristers' work, must promptly inform that person:

- (a) of the effect of Rule 120; and

129. A barrister who provides information under Rule 128 to a person must not inform the person that the barrister will perform barristers' work for that person on condition that a particular solicitor briefs the barrister to do so.

#### **Appearance with Others not in Independent Practice**

130. Subject to these Rules, in order to maintain professional independence, a barrister shall not appear in any court with a person who is not either a barrister or practising as a member of an independent Bar, provided that this rule does not apply to an appearance outside Victoria where:

- (a) such other person is a Law Officer of the Crown, the Public Defender or an Assistant Public Defender, the Director of Prosecutions, or the Director of Public Prosecutions; or
- (b) in criminal proceedings such other person is a Crown Prosecutor; or
- (c) the prior permission of the Ethics Committee has been obtained.

## Co-Advocacy

131. Notwithstanding the provisions of Rule 130, a barrister may, but is not bound to, accept a brief to appear with a practitioner who is not either a barrister or practising as a member of an independent Bar (“the proposed co-advocate”) if:
- (a) the member of the Bar considers:
    - (i) the complexity of the case requires two advocates; and
    - (ii) the proposed co-advocate has sufficient relevant advocacy experience;
  - (b) except where the barrister is briefed to prosecute on behalf of the Director of Public Prosecutions for Victoria or the Commonwealth, the barrister has been advised by the instructing solicitor that the instructing solicitor has in writing:
    - (i) advised the client that the instructing solicitor considers the complexity of the case requires the appearance of two advocates;
    - (ii) advised the client of the relevant advocacy experience of the proposed co-advocate; and
    - (iii) given to the client an estimate of the likely cost of engaging either an appropriate barrister or an appropriate member of an independent Bar, and has given to the client a comparison between that estimate and an estimate of the likely cost of engaging the proposed co-advocate; and
  - (c) there is, in addition to the proposed co-advocate, a solicitor to instruct, as necessary, at the hearing of the case.

## Appearance with Persons from another State or Territory

132.

- (a) A barrister may appear in a court in his or her home state with any legal practitioner (not being a solicitor resident in his or her home state) who practises in another state or territory if that practitioner has appeared in the same cause or matter in that other State or Territory.
- (b) For this purpose, any application for leave or special leave to appeal, or any appeal, to the Federal Court or the High Court or to any Judge thereof shall be treated as the same cause or matter as that which gave rise to such application or appeal.

133. A barrister is entitled to appear in a court or tribunal in another State or Territory with an amalgam resident in that State or Territory, unless there is in existence a separate Bar in that State or Territory under the rules of which a member of that Bar would not be entitled to appear with an amalgam resident in that state or territory in like circumstances.

## PART V - PARTICULAR DUTIES IN CRIMINAL MATTERS

### Prosecutor's Duties

134. 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.
135. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
136. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
137. 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.
138. A prosecutor has a duty to consider whether the evidence proposed to be called is capable as a matter of law of supporting a conviction. If the evidence on any view is incapable of supporting a conviction, the prosecutor is under a duty to so advise the prosecuting authority. If it is not possible to come to an agreed view on the matter, the barrister may return the brief. If circumstances arise during the conduct of a prosecution which cause the prosecutor to conclude that the matter should not proceed further, the prosecutor is under a duty to seek instructions but, if it is not possible to obtain instructions, the prosecutor is under a duty to make such view known to the court.
139. 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; or
  - (b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;
- unless:
- (i) the opponent consents to the prosecutor not calling a particular witness;
  - (ii) 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
  - (iii) 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:
- (A) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within (a) and (b), 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 or from any other identifiable circumstances;
  - (B) 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 (i), (ii) or (iii), together with the grounds on which the prosecutor has reached that decision.

140. While the prosecuting barrister alone bears the responsibility of deciding whether a person will be called as a witness for the prosecution, this discretion should not be exercised in order to obtain unfair advantage for the prosecution.

141. 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) the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person or is clearly contrary to the public interest; 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

provided that any doubt as to whether the balance is in favour of, or against, disclosure should always be resolved in favour of disclosure.

142. A prosecutor who has decided not to disclose material to the opponent under Rule 141 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.

143. 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; and
- (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.

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

145. 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.

146. A prosecutor who has informed the court or the opponent that the prosecutor has evidence supporting an aspect of its case 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.

147. A prosecutor must not seek to persuade the court to impose a vindictive sentence or a sentence of a particular magnitude, but:

- (a) must make an adequate presentation of the facts;
- (b) must correct any error made by the opponent in address on sentence and fairly test any defence evidence;
- (c) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
- (d) must assist the court to avoid appealable error on the issue of sentence;
- (e) may submit that a custodial or non-custodial sentence is appropriate; and
- (f) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.

148. A barrister who appears as counsel assisting an inquisitorial body such as the National Crime Authority, the Australian Securities Commission, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with these Rules 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.

### When Defending

149. A barrister representing a person charged with a criminal offence should endeavour to protect that person from being convicted, except by a competent tribunal and upon admissible evidence sufficient to support a conviction for the offence charged. A barrister must not invent facts to assist in advancing the defence case.
150. Subject to these Rules, a barrister representing a person charged with a criminal offence is under a duty to defend that person irrespective of any belief or opinion which the barrister may have formed as to whether that person is guilty or not guilty.
151. It is the duty of a barrister representing a person charged with a criminal offence to advise that person generally about any plea to the charge. It should be made clear that whether the client pleads “not guilty” or “guilty”, the client has the responsibility for and complete freedom of choice in any plea entered. For the purposes of giving proper advice, the barrister is entitled to refer to all aspects of the case and where appropriate may advise a client in strong terms that the client is unlikely to escape conviction, and that a plea of guilty is generally regarded by the court as a mitigating factor, at least to the extent that the client is thereby viewed by the court as co-operating in the criminal justice process.
152. Where the accused is a person who suffers from some mental or physical disability or who appears to be disadvantaged from lack of education, lack of familiarity with the English language, lack of ability to communicate, or otherwise, a barrister appearing for the accused should take special care to ensure that those factors do not work to the accused’s prejudice.
153. Notwithstanding a barrister’s duty to the court to conduct proceedings as expeditiously as the interests of justice require, a barrister appearing for the accused is under no duty, other than by compulsion of law, to disclose to the court or to the prosecution the nature of the defence case. A barrister appearing for the accused should not make admissions of fact or consent to the absence of prosecution witnesses without first obtaining instructions.
154. A barrister appearing for the accused is under a duty to advise that person of his or her rights, for example, the right to challenge jurors, the right to give evidence, the right to call evidence, to name but three. A barrister may properly advise a client as to the exercise of these rights but it is the client who must make the decision. If a barrister receives instructions from a client that the client is not guilty of the

offence charged but does not wish to give evidence, it is the duty of the barrister to put the client's defence before the court and, if necessary, to make positive suggestions to witnesses.

155. Where a client denies committing the offence charged, but nonetheless insists on pleading guilty to it for other reasons, the barrister may continue to represent that client, but only after advising what the consequences will be, and that submissions in mitigation will have to be on the basis that the client is guilty. Wherever possible in such a case, a barrister should receive written instructions.
156. A barrister should not attribute to another the offence with which the client is charged, unless the facts or circumstances disclosed by the evidence in the case, or which form part of the barrister's instructions, or rational inferences to be drawn from them, raise at least a reasonable suspicion that the offence may have been committed by such other person.
157. A barrister 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.
158. A barrister will not have made a misleading statement to a court simply by failing to disclose facts known to the barrister concerning the client's character or past, when the barrister makes other statements concerning those matters to the court, and those statements are not themselves misleading.
159. Where on sentence a barrister is aware of a client's previous convictions which have not been made known to the court by the prosecution, a barrister is under no duty to correct the omission of the prosecution. However, the barrister remains under a duty not to mislead the court and therefore should not make any submission capable of being regarded as an assertion that the client has no previous convictions.
160. A barrister 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.
161. A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:
  - (a) should continue to act and do all that the barrister honourably can in the client's defence;
  - (b) must not falsely suggest that some other person committed the offence charged;
  - (c) must not set up an affirmative case inconsistent with the confession;
  - (d) must ensure that the prosecution is put to proof of its case;
  - (e) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged; and
  - (f) may argue that for some reason of law the client is not guilty of the offence charged;
  - (g) may argue that for any other reason not prohibited by (b) or (c) the client should not be convicted of the offence charged;
  - (h) must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.
162. Where a barrister has accepted a brief to defend the person charged with a serious criminal offence, the barrister shall not return the brief except in the most compelling circumstances and then only if sufficient

time remains for another barrister to master the case provided that the barrister may in any case return the brief with the consent of the client given with full knowledge of all the circumstances concerning the return of the brief, including the terms of this rule.

163. In a clash between two criminal matters which are due to be heard on the same day:

- (a) a barrister should ordinarily give preference to the brief fraught with the more serious consequences to the client, for example, a brief where the charge is murder as against a brief where the charge is stealing, or a brief where a conviction will almost certainly lead to a term of imprisonment as against a brief in which a conviction will most likely lead to a fine;
- (b) generally speaking a brief on a trial which will lead to a verdict should take priority over a brief on a committal although this may yield to particular circumstances as in (c);
- (c) the brief in which insufficient time appears to be available for another barrister to master it may be given preference to a brief,

in a more serious matter in respect of which that consideration does not arise.

164. If a barrister is instructed in a civil case which clashes in point of time with a case in which the same barrister is briefed to appear for the accused in the trial of a serious criminal offence, the barrister is obliged to return the brief in the civil case unless permission is given by the client under rule 162 or by the Bar Council.

## PART VI - DIRECT ACCESS

165.

(a) Subject to these rules, a barrister may advise or act in a professional capacity (otherwise than in accordance with rules 126 or 127 upon instructions of a brief received –

(i) directly from a client; or

(ii) from a member of an approved body, acting on behalf of a client of the member; or

(iii) from Victoria Legal Aid, acting on behalf of a client, in a criminal matter –

in accordance with this Part.

(b) A matter in which a barrister accepts such instructions or a brief is referred to in this Part as a "direct access matter".

166. [Deleted]

167. The Rules of Conduct apply to direct access matters.

168. A barrister:

(a) must not accept any brief or instructions in a direct access matter if he or she considers it is in the interests of the client that a solicitor be instructed.

(b) must decline to act in a direct access matter in which at any stage he or she considers it in the interests of the client that a solicitor be instructed.

169. A barrister may appear in a criminal matter in the County Court for a legally aided person if he or she is requested to do so by the Victoria Legal Aid without an instructing solicitor and he or she is satisfied that no prejudice will be suffered either by the barrister or by the client due to the absence of such a solicitor.

170. A barrister may appear in a direct access matter in the Magistrates' Court or the Federal Magistrates Court in a criminal proceeding.

171. A barrister must not, except with the written permission of the Ethics Committee, accept any instructions or brief in a direct access matter:

(a) to appear in the High Court of Australia, Federal Court of Australia, Family Court of Australia, Supreme Court of Victoria, County Court of Victoria (except in criminal matters where the barrister is instructed by Victoria Legal Aid), or in any civil proceeding in the Magistrates' Courts of Victoria or the Federal Magistrates Court;

(b) once proceedings are instituted (if acting for a plaintiff) and served (if acting for a defendant) in any of the courts set out in sub-paragraph (a) hereof.

172. A barrister who has accepted any instructions or a brief in a direct access matter must cease to act once proceedings are instituted (if acting for a plaintiff) and served (if acting for a defendant) in any of the courts set out in Rule 171(a) hereof unless:

(a) retained by a solicitor to act; or

(b) given permission by the Ethics Committee so to act.

173. Notwithstanding anything to the contrary in these Rules, a barrister in a direct access matter must not deliver, file or lodge any document as the legal practitioner on the record in any Court or Tribunal.

174. A barrister who accepts instructions or a brief in a direct access matter must:

- (a) keep a case record in written form which sets out:
  - (i) the date of receipt of the instructions or brief, the name of the client, the name of the case and any requirements of the client as to time limits;
  - (ii) the date on which the instructions or brief were accepted;
  - (iii) the terms on which the instructions or brief were accepted;
  - (iv) the dates of any subsequent instructions, of the dispatch of advices and other written work, or conferences and of telephone conversations;
  - (v) when agreed the fee;
  - (vi) when made any promises or undertakings as to the completion of the work;
  - (vii) as soon as they become apparent to the barrister, any time limits;
- (b) retain:
  - (i) copies of instructions and briefs;
  - (ii) copies of all advices given and documents drafted or approved;
  - (iii) a list of all documents enclosed with any instructions or brief;
  - (iv) notes of all conferences and of all advice given on the telephone.

175. A barrister must not accept instructions under these Rules:

- (a) to receive or handle client's money;
- (b) to perform any administrative work not normally performed by a barrister in private practice;
- (c) to perform inter partes work of a kind not normally performed by a barrister in private practice;
- (d) from a member of an approved body on behalf of a client in respect of a matter not generally within the professional expertise of that body.

176. A barrister shall not commence any work on a direct access matter until the barrister and the client have executed the standard terms of engagement approved by the Bar Council, except where it is impossible to do so prior to commencing the work, in which case the terms should be executed as soon as is reasonably practicable.

177. All fees paid for direct access work shall be paid into a trust account established pursuant to the Legal Practice Act to be retained in that trust account until a memorandum of fees is forwarded to the client.

## PART VII - LEGAL ADVICE CENTRES AND CHARITABLE WORK

178. For the purpose of these Rules:

- (a) “Centre” means a place (other than chambers or a solicitor’s office) where legal advice by qualified practitioners is habitually given without fee in the course of the operation of a scheme to provide legal services to persons who would not otherwise have access to them;
- (b) “Charitable Organisation” includes a marriage guidance bureau and any charitable, benevolent or welfare organisation.

179. A barrister may attend at a Centre and participate in a scheme conducted at such a Centre if the Centre is approved by the Bar Council. A barrister wishing to participate should advise the Chief Executive Officer in writing. The Chief Executive Officer will communicate that wish to the Centre.

180. A barrister assisting at a Centre is bound by the ethics and etiquette of the Bar, and these Rules. The barrister should be particularly careful not to act in such a way as to give rise even to a suspicion that services are given in order to obtain introductions to solicitors, or for financial gain.

181. A barrister may act in proceedings as counsel for a lay client after advising that client at a Centre if:

- (a) instructions are received from a solicitor (who may be a solicitor working at the same Centre); and
- (b) no fee is paid.

182. Unless instructed by a solicitor, a barrister must interview lay clients attending at the Centre only at that Centre. To those clients he or she should appear to be no more than one of the legal advisers at the Centre.

183. A barrister may not sign letters on behalf of clients of a Centre in his or her capacity as a barrister but may sign such letters for and on behalf of the Centre.

184. There is no objection to a barrister showing to a client a list of solicitors kept by the Centre. The client must, however, be left to choose a solicitor from amongst those names on the list who deal with the relevant class of work.

185. A barrister who undertakes voluntary work for a charitable organisation may properly give advice, without the intervention of a solicitor, to a person referred for that purpose by the organisation, provided that:

- (a) there shall be no fee or payment in respect of that advice;
- (b) there shall be in the course of giving such advice no recommendation to that person that any particular solicitor should be retained;
- (c) having given advice to that person, the barrister shall not thereafter act professionally in any proceedings relating to the subject matter of that advice.

## PART VIII - FEES

186. Subject to these Rules and the Legal Practice Act, the amount of or the method of calculating a fee shall be that which is agreed with the instructing solicitor or client.
187. A barrister may not undertake to represent any person, authority or organisation for a fixed salary, or accept a single brief marked with a single fee to appear on behalf of a client in unrelated matters.

### Fees to Be Collected by Clerk

188.

- (a) This Rule applies to all barristers who employ or engage a clerk approved under section 177 of the Legal Practice Act 1996.
- (b) A barrister must render all accounts for his or her fees through the clerk.
- (c) Without limiting sub-rule (b) above, a barrister must also maintain a personal record of each fee charged by the barrister and record each such fee at the time at which it is charged or payment is received, whichever is the earlier.
- (d) Subject to sub-rule (e) below, a barrister must not request or receive any payment for fees (by cash, cheque, electronically or otherwise) unless:
  - (i) The clerk has rendered a tax invoice for the fees; and
  - (ii) The payment for the fees is made to the barrister by the clerk.
- (e) A barrister may receive a payment offered for or on account of his or her fees (by cash, cheque, electronically or otherwise) but he or she must forthwith deliver such payment to the clerk to be deposited into the clerk's appropriate account, after which it may be paid to the barrister only after the clerk has rendered a tax invoice for the fees in accordance with sub rule (d) above.
- (f) A barrister must provide a copy of any records and provide any information in relation to the barrister's fees which he or she is requested to provide by any disciplinary body, the Legal Ombudsman, the Ethics Committee or the Bar Council.

### Fees Collected by Barristers Who Do Not Engage a Clerk

188A.

- (a) This Rule applies to barristers who do not employ or engage a clerk.
- (b) A barrister must maintain a record of each fee charged by the barrister.
- (c) Subject to sub rule (d) below, a barrister must not receive or request any payment for or on account of his or her fees (by cash, cheque, electronically or otherwise) unless the barrister has rendered a tax invoice for the fee charged by the barrister.
- (d) A barrister may receive a payment offered for or on account of his or her fees (by cash, cheque, electronically or otherwise) but he or she must as soon as practicable thereafter comply with sub rule (c) above.

- (e) A barrister must, for each payment received by the barrister for or on account of his or her fees, make out and give or send to the client as soon as is practicable thereafter a numbered receipt specifying:
  - (i) the client to whom the legal services were provided;
  - (ii) the date the payment was received;
  - (iii) from whom the payment was received;
  - (iv) whether the payment was by cash, cheque or draft;
  - (v) in the case of a cheque or draft, the name of the drawer;
  - (vi) the amount of the payment; and
  - (vii) brief particulars sufficient to identify the relevant transaction.
- (f) A barrister must provide a copy of any records and provide any information in relation to the barrister's fees which he or she is requested to provide by any disciplinary body, the Legal Ombudsman, the Ethics Committee or the Bar Council.

#### **False Receipts - Conditional Payments**

189.

- (a) A barrister shall not sign a receipt for any fee unless it has been actually paid;
- (b) A barrister shall not accept a cheque or promissory note on condition that it shall not be payable pending the result of a taxation of costs.

#### **Time for Payment**

190. In the absence of other agreement, a barrister is entitled, but not obliged, to require payment of fees within a reasonable time of rendering a memorandum of fees, whether or not any litigation to which the work relates is concluded.
191. In a costs agreement under s. 96 of the Legal Practice Act a barrister may insist on an appropriate fee being paid on delivery of the brief, or before the work to which it relates shall have been done.
192. Where a solicitor has assumed primary liability for the payment of his or her fees and it is not otherwise agreed:
- (a) it is the general rule that the barrister should seek to recover unpaid fees from the instructing solicitor and not directly from the lay client;
  - (b) without the permission of the Ethics Committee it is improper for a barrister to seek to recover unpaid fees directly from the lay client except:
    - (i) where the solicitor is bankrupt or has made an arrangement of composition with his or her creditors or is insolvent;
    - (ii) where the solicitor is deceased and his or her estate is insolvent;
    - (iii) where the solicitor cannot be served with legal process; or

- (iv) where the barrister is unable to recover unpaid fees from the solicitor after having obtained a judgment in respect thereof;
- (c) it is improper for a barrister to seek to recover unpaid fees directly from the lay client where the lay client has previously paid or provided the amount of such fees to the solicitor who retained the barrister unless the lay client is entitled to recover the amount of the fees from the Fidelity Fund pursuant to the Legal Practice Act 1996 and the barrister is not so entitled.

### Factoring

193. A barrister shall not factor or assign his or her fee debts unless:

- (a) the transaction is on terms that no proceeding or step for recovery shall be taken save in the barrister's name or with his or her express and specific approval given to that proceeding or step;
- (b) the transaction does not take out of the hands of the barrister the ability to determine that no proceedings or step for recovery shall be taken having regard to the particular circumstances of the client, the relationship between the barrister and the solicitor or the solicitor and the client or the barrister and the client, the maintenance of the reputation and goodwill of the barrister and of the Bar as a whole and all like matters which should be taken into account when a decision is reached by a barrister to take a proceeding or step for the enforcement of a debt.

## PART IX - CODE OF CONDUCT

### Sexual Harassment

194.

- (a) A barrister shall not, in any professional context, engage in sexual harassment.
- (b) For the purposes of sub-rule 194(a) a barrister sexually harasses another person if:
  - (i) the barrister makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to that person; or
  - (ii) engages in other unwelcome conduct of a sexual nature in relation to that person;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that that person would be offended, humiliated or intimidated.

“Conduct of a Sexual Nature” includes making a statement of a sexual nature to the person allegedly harassed or in the presence of that person, whether the statement is made orally or in writing.

### Vilification

195. A barrister shall not, in any professional context, engage in conduct which is calculated to disparage, vilify or insult another person (“the person allegedly vilified”) on the basis of that person’s sex, sexual preference, race, colour, descent, national or ethnic origin or religion.

### Procedure

196.

- (a) The person allegedly harassed or vilified may lodge a complaint in writing alleging a breach of Rule 194(a) or Rule 195 with any one of the persons appointed from time to time by the Bar Council as a Conciliator for Complaints of Harassment (“Bar Conciliator”);
- (b) A Bar Conciliator who receives such a complaint shall treat the complaint and any response as confidential but may do any one or more of the following:
  - (i) provide the person allegedly harassed or vilified with counselling and advice;
  - (ii) inform the barrister concerned of the complaint;
  - (iii) provide that barrister with an opportunity to respond to the complaint;
  - (iv) provide that barrister with an opportunity to be counselled or advised in respect of the complaint;
  - (v) arrange for the complaint to be conciliated by that Bar Conciliator acting alone or together with any other Bar Conciliator.

The steps referred to in sub-paragraphs (i), (ii), (iii) and (iv) shall only be taken with the consent of the person allegedly harassed or vilified. The step referred to in sub-paragraph (v) shall only be taken with the consent of both parties.

- (c) Nothing in these Rules shall prevent the person allegedly harassed or vilified from lodging a complaint alleging a breach of Rule 194(a) or Rule 195 or of Section 137 of the Legal Practice Act 1996 with the Ethics Committee or the Chairman of the Bar Council.

# PART X - OBLIGATIONS OF DISCLOSURE

## Disclosure Requirements

197. [Deleted 22/9/2009]

## **PART XI - RULES REGULATING BARRISTERS AS MEDIATORS**

198. A mediator must disclose to all parties to the mediation any interest or association, personal, professional or commercial, which he or she has or may have in or with:
- (a) the outcome of the dispute the subject of the mediation; or
  - (b) the parties to the mediation.
199. A mediator has the same obligations of confidentiality, with respect to communications made in the course of a mediation, as he or she would have if such communications had been made by a client to him or her as a barrister.

## **PART XII - CONDITIONAL FEE AGREEMENTS**

200. A barrister may return a brief accepted under a conditional fee agreement if:

- (a) the barrister and instructing solicitor, if any, consider on reasonable grounds that the client has unreasonably rejected a reasonable offer of compromise contrary to the barrister's advice;
- (b) the client has refused to pay the barrister a reasonable fee for all work done or to be done after the client's rejection of the offer;
- (c) the client was informed before the barrister accepted the brief of the effect of this rule; and
- (d) the barrister has the firm view that the client has no reasonable prospect of success or of achieving a better result than the offer.

201. Nothing in this Part entitles the barrister to enter into a Conditional Fee Agreement in criminal proceedings or proceedings under the Family Law Act 1975.

## PART XIII - GUIDELINES

### Guidelines Concerning Facilities (Rules 80 and 81)

The main concern of Rule 80 is to ensure that Barristers maintain adequate chambers and staff to enable them to conduct their practices properly and professionally.

These guidelines are intended to provide a useful guide to assist Barristers to comply with the requirements of Rule 80. Rule 80 is not intended to impose any unnecessary financial or other burden on Barristers in the conduct of their practice. It is not intended that the Rule operate so as to require that Barristers, for example, use the most up to date technology, have an extensive library, or have grandiose premises from which they conduct their practice. It is recognised that the needs of each individual Barrister vary according to his or her practice and individual requirements.

In general, it is important for Barristers to maintain adequate chambers from which they conduct their practice. Chambers enable barristers to confer in a professional manner and in professional circumstances, to have a location from which they may properly carry out their work when out of Court, to maintain a location at which they might be conveniently contacted, and to maintain the various appurtenances and facilities such as library, telephone and the like, which enable them to properly conduct their practices. In exceptional cases, a barrister may not require chambers to enable discharge of his or her duties in a professional manner. However, in general, it is envisaged that most, if not all, Barristers should conduct their practices from suitable chambers in order that they comply properly with Rule 80.

In selecting chambers, Barristers should bear in mind that it is important that the chambers be sufficiently respectable so as not to detract from the good standing and repute of the individual Barrister and of the Victorian Bar as a whole. In this respect, it is sufficient for barristers to comply with Rule 80 by leasing premises from Barristers' Chambers Limited, or by using premises which are approved by The Victorian Bar Incorporated.

The requirements of each Barrister's practice vary in relation to the amount of staff (if any) required by the Barrister to enable that Barrister to properly conduct his or her practice. It is important that Barristers be able to properly service the requirements of their practices.

In this respect, it is sufficient for a barrister to comply with Rule 80 by engaging a clerk licensed by The Victorian Bar Incorporated, or to engage any other person who is sufficiently qualified, experienced and competent to act as a Barristers clerk. The clerking system has traditionally provided the basic infrastructure necessary for a Barrister's practice. It has provided each Barrister with a point at which they may be contacted by telephone, with a place at which briefs might be delivered and messages left, and a person with whom solicitors might readily communicate in order to ascertain the Barrister's availability and negotiate fees. Further, a clerk approved by The Victorian Bar Incorporated is entitled to receive trust money on account of legal costs pursuant to s.177 of the Legal Practice Act 1996.

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## Introductory

1. These Rules –
  - (a) shall be known as The Victorian Bar Continuing Professional Development Rules 2008;
  - (b) are made under s.3.2.9(2) of the Legal Profession Act 2004;
  - (c) shall be in effect from 1 April 2008; and
  - (d) apply to local legal practitioners who practise solely as barristers.

## Definitions

2. For the purposes of these Rules –

“Bar”	means the Victorian Bar Inc.
“Bar Council”	means the governing body of the Victorian Bar Inc, the Victorian Bar Council.
“Bar CPD Committee”	means the CPD Committee of the Victorian Bar.
“barrister”	means a local legal practitioner who engages in legal practice solely as a barrister.
“Board”	means the Legal Services Board established by Part 6.2 of the Legal Profession Act 2004.
“CPD”	means continuing professional development.
“CPD activity”	means a continuing professional development activity within the meaning of Rule 3.
“CPD point”	means a point allocated to a CPD activity pursuant to these Rules.
“CPD year”	means the year commencing 1 April and ending on 31 March.

## CPD activity for barristers

3. For the purposes of these Rules, a CPD activity:
  - (a) has significant intellectual or practical content dealing primarily with matters related to the practice of law as a barrister;
  - (b) is conducted by persons who are qualified by practical or academic experience in the subject overed;
  - (c) extends the barrister’s knowledge and skills in areas relevant to the barrister’s practice; and
  - (d) consists of any of the following:
    - (i) a seminar, workshop, lecture, conference, discussion group, practical training exercise or multimedia, audio, video or web based program or exercise;
    - (ii) publication of a learned book, article of like work, including editing and updating;

- (iii) teaching or instructing in the Bar Readers' Course;
- (iv) teaching or instructing in the Bar, or another, CPD program;
- (v) teaching in an undergraduate or graduate Law course;
- (vi) active membership of a committee, taskforce or section of the Bar or the Law Council of Australia;
- (vii) preparation of a submission on matters relating to the practice of law;
- (viii) participating in advanced study courses such as for a graduate diploma or Masters degree in Law;
- (ix) law reporting for the Commonwealth Law Reports, the Victorian Law Reports or like reports;
- (x) listening or viewing a pod cast, audio, DVD or tape of a CPD activity.

#### CPD points allocation

4. The Bar CPD Committee shall determine what, if any, points may be earned by barristers for each CPD activity, taking into account the value and relevance of the particular CPD activity to practice as a barrister.
5. Unless the Bar CPD Committee otherwise determines in respect of a particular CPD activity –
  - (a) one (1) CPD point is earned for each completed hour of engagement in an activity under Rule 3(d)(i) or (x)
  - (b) three (3) CPD points are earned for each completed hour for which a barrister teaches or instructs in the Bar CPD program or other form of legal education or CPD;
  - (c) three (3) CPD points are earned for each completed hour for which a barrister teaches or instructs in the Bar Readers' Course;
  - (d) one (1) CPD point is earned for two completed hours of attending meetings of a committee, taskforce or section of the Bar or the Law Council of Australia to a maximum of three (3) CPD points;
  - (e) three (3) CPD points for each Commonwealth Law Reports headnote and two (2) CPD points for each Australian Law Reports or Victorian Reports or equivalent headnote – in each case capped at 6 CPD points per annum; ten (10) points for editing the Commonwealth Law Reports or Victorian Reports;
  - (f) three (3) CPD points are earned for each semester as a student in advanced study courses such as towards a graduate diploma or Masters degree in Law;
  - (g) No more than five (5) CPD points are earned by a barrister in a CPD year in respect of –
    - (i) teaching or instructing in the Bar Readers' Course;
    - (ii) teaching or instructing in the Bar CPD Program;
    - (iii) a single CPD activity;
    - (iv) activities at a single conference;
    - (v) membership of a committee, taskforce or section of the Bar or the Law Council of Australia.

6. Notwithstanding anything to the contrary in the foregoing, the Bar CPD Committee may from time to time determine that a number of points different from the number specified in Rule 5 shall be earned by a barrister for engaging in any CPD activity or activities referred to in that Rule.
7. Publication by a barrister of a learned book, article or other work, including editing and updating, and submissions may each earn for a barrister such number of CPD points as is determined by the Bar CPD Committee.

### Annual Requirements

8. A barrister must in each CPD year engage in CPD activities sufficient to earn at least ten (10) CPD points.
9. Subject to Rule 13, a barrister must in each CPD year engage in CPD activities of the descriptions and to the extent in the following table:

- Ethics and Professional Responsibility	- at least 1 CPD point
- Professional Skills	- at least 1 CPD point
- Substantive Law	- at least 1 CPD point
- Practice Management & Business Skills	1 CPD point only
10. A barrister who applies to the Board for a practising certificate after the start of a CPD year must in the remainder of the CPD year engage in CPD activities sufficient to earn the number of CPD points as are referable to the balance of the CPD year on a pro-rata basis.
11. Pro-rating under Rule 10, as applicable to the two major annual intakes of barristers, is, and is deemed to be, that:
  - (a) a barrister who obtains a practising certificate upon signing the Bar Roll in May is to earn at least eight (8) CPD points; and
  - (b) a barrister who obtains a practising certificate upon signing the Bar Roll in November is to earn at least four (4) CPD points; in each case, subject to the category requirements of Rule 9.
12. In any other case, pro-rating, and the application of Rule 9 in the pro-rated situation, is to be decided by the Bar CPD Committee.

### Records

13. A barrister must maintain a written record of his or her engagement in CPD activities for the CPD year in the form provided by the Bar and must retain such record for at least three years after the CPD year in which he or she engaged in those activities.

### Repeal

14. The Compulsory Continuing Legal Education Rules 2007 previously made by the Bar Council are repealed subject to the transitional provisions in these Rules.

### Transitional Provisions

15. A CPD activity carried out before the commencement of these Rules that complied with the Compulsory Continuing Legal Education Rules 2004 (as amended) or the Compulsory Continuing Legal Education Rules 2007 complies with these Rules.

