

CONDUCT RULES

As Approved by Members in General Meeting on 29 October 2004 and amended by the members at a Special General Meeting on 15 February 2006

PREAMBLE

These Rules are made in the belief that:

1. The administration of justice in Western Australia is best served by reserving the practice of law to officers of the Supreme Court who owe their paramount duty to the administration of justice.
2. As legal practitioners, barristers must maintain high standards of professional conduct.
3. The role of barristers as specialist advocates in the administration of justice requires them to act honestly, fairly, skilfully, diligently and bravely.
4. Barristers owe duties to the courts, to other bodies and persons before whom they appear, to their clients, and to their barrister and solicitor colleagues.
5. Barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.
6. The provision of advocates for those who need legal representation is better secured if there is a Bar whose members:
 - (a) must accept briefs to appear regardless of their personal prejudices;
 - (b) must not refuse briefs to appear except on proper professional grounds; and
 - (c) compete as specialist advocates with each other and with other legal practitioners as widely and as often as practicable.
7. Barristers should be subject to the overriding requirement, in the public interest, that in the conduct of their practice they be honourable, diligent, skilful (to the best of their ability) impartial, independent, competitive with each other and other legal practitioners and generally available to all solicitors who wish to utilise their services.

INTRODUCTION & INTERPRETATION

8. These Rules are made pursuant to Cl. 53 of the Constitution of The Western Australian Bar Association Incorporated and govern the professional conduct of members of that Association who practice as barristers.
9. 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, the Act (and in particular provisions relating to unsatisfactory professional conduct and professional misconduct) and in the general law (including the law relating to contempt of court).
10. These Rules should be read and applied so as most effectively to attain the objects and uphold the values expressed in their Preamble.
11. General provisions of these Rules should not be read or applied in a limited way by reasons of any particular or illustrative provisions.
12. 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.
13. These Rules are not to be read by reference to any former rules made by the Association, whether or not the substance of any such rule is reflected in any of these Rules.
14. Unless the context requires otherwise, the following expressions are defined as follows when used in these Rules:

“Act” means the Legal Practitioners Act (W.A.)

“allege” includes conduct constituted by settling or opening on pleadings, affidavits or witness statements, and reading or tendering affidavits or witness statements filed or prepared for the client (whether or not they were drawn or settled by the barrister).

“assessment of costs” includes the taxation of costs in proceedings.

“Association”	means The Western Australian Bar Association Incorporated.
“barrister”	means a member of the Association carrying on practice as an independent barrister.
“brief offered under a conditional costs agreement”:	means a brief accepted on the basis that the barrister would not be paid any fee unless the client succeeds to an agreed extent in the case.
“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 barrister in question, and includes a professional acting as such, and in Rules 32, 34 and 46 includes those officers, servants or agents of a client which is not a natural person who are responsible for or involved in giving instructions on behalf of the client.
“compromise”	includes any form of settlement of the case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.
“court”	means any body described as such and all other judicial tribunals, and, except in Rule 4 and 79A, all statutory tribunals, and, except in Rules 4 and 79B, all statutory or Parliamentary investigations and inquiries, Royal Commissions, the Anti-Corruption Commission, 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.
“fee”	includes any payment for the reimbursement of expenses.
“forensic judgements”	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.
“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, and includes a solicitor appearing with the barrister as a joint advocate.
“insurance company”	in Rule 54 includes any entity, whether statutory or otherwise, which performs the function of indemnifying in any way civil defendants.
“legal advice”	includes assistance at or presiding over meetings.
“legislation”	includes all kinds of delegated legislation
“member”	of a court, in Rule 79A, does not include the holder of an acting commission or appointment.
“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 judgement, 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.
“prosecutor”	means a barrister who appears for the complainant or Crown in criminal proceedings.
“pupil”	means a barrister who has been admitted to and remains subject to the pupillage scheme administered in accordance with the Pupillage Rules of the Association.
“representative”	means the barrister or, if no barrister, the solicitor who is retained by the party in question.
“Senior Counsel”	means one of Her Majesty’s Counsel appointed in and for the State of Western Australia or Senior Counsel appointed as such in accordance with the protocol for the appointment of Queen’s Counsel or Senior Counsel duly adopted in each jurisdiction.

ADVOCACY RULES

Duty to client

15. 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.
16. 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.

Disinterestedness

17. A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgements called for during the case independently, after appropriate consideration of the client's and the instructing solicitor's desires where practicable.
- 17A. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
- 17B. A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.
18. 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 judgements 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.
19. 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 personal opinion on the merits of that evidence or issue.

Frankness in court

20. A barrister must not knowingly make a misleading statement to a court on any matter.

21. 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.
22. A barrister must take all necessary steps to correct, as soon as practicable, any express concession made to the court in civil proceedings by the opponent in relation to any material fact, case-law or legislation:
 - (a) which the barrister knows, or believes on reasonable grounds, was contrary to what should be regarded as the true facts or the correct state of the law; and
 - (b) in the case of a concession as to fact, which the barrister believes was made by the opponent by reason of a mistake.
23. 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 and argument against granting the relief or limiting its terms adversely to the client.
24. A barrister who has knowledge of matters which are within Rule 23(c):
 - (a) must seek instructions for the waiver of legal professional privilege if the matters are protected by that privilege, so as to permit the barrister to disclose those matters under Rule 23; 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) must inform the court that the barrister cannot assure the court that all matters which should be disclosed have been disclosed to the court.
25. A barrister must, at the appropriate time in the hearing of the case and if the court has not yet been informed of that matter, inform the court of:
 - (a) any binding authority;

- (b) any authority decided by the Full Court of the Federal Court of Australia, a Court of Appeal of a Supreme Court or a Full Court of a Supreme Court;
- (c) any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, which has not been disapproved; or
- (d) any applicable legislation;

which the barrister has reasonable grounds to believe to be directly in point, against the client's case.

- 26. A barrister need not inform the court of matters within Rule 25 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 judgement 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.
- 27. A barrister who becomes aware of a matter within Rule 25 after judgement 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.
- 28. A barrister need not inform the court of any matter otherwise within Rule 25 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
- 29. 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 matter to the court, and those statements are not themselves misleading.
- 30. 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.

31. 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.

Delinquent or guilty clients

32. A barrister whose client informs the barrister, during a hearing or after judgment or decision is reserved and while it remains pending, that the client has lied to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:
- (a) must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie or falsification;
 - (b) must promptly inform the court of the lie or falsification upon the client authorising the barrister to do so; but
 - (c) must not otherwise inform the court of the lie or falsification.
33. A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:
- (a) may return the brief, if there is enough time for another legal practitioner to take over the case properly before the hearing, and the client does not insist on the barrister continuing to appear for the client;
 - (b) in cases where the barrister keeps the brief for the client:
 - (i) must not falsely suggest that some other person committed the offence charged;
 - (ii) must not set up an affirmative case inconsistent with the confession; but
 - (iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;

- (iv) may argue that for some reason of law the client is not guilty of the offence charged; or
- (v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged.

34. 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.

Responsible use of court process and privilege

35. A barrister must, when exercising the forensic judgments called for throughout the 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 already 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.

36. A barrister must not allege any matter of fact in:

- (a) any court document settled by the barrister;

- (b) any submission during any hearing;
- (c) the course of an opening address; or
- (d) the course of a closing address or submission on the evidence;

unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

37. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
- (a) available material by which the allegation could be supported provides a proper basis for it; and
 - (b) 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 and the case if it is not made out.
38. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility.
39. A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 36 and 37 apply, as a reasonable ground for holding the belief required by those rules except in the case of a closing address or submission on the evidence).
40. A barrister who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the barrister believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.

Efficient administration of justice

41. A barrister must seek to ensure that:
- (a) the barrister does work which the barrister is briefed to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and
 - (b) warning is given to the instructing solicitor or the client as soon as the barrister has reasonable grounds to believe that the barrister may not complete any such work on time.
42. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:
- (a) confine the case to identified issues which are genuinely in dispute;
 - (b) have the case ready to be heard as soon as practicable;
 - (c) present the identified issues in dispute clearly and succinctly;
 - (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interest which are at stake in the case; and
 - (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.
- 42A. A barrister must take steps to inform the opponent as soon as possible after the barrister has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try to inform the court of the application promptly.

Integrity of evidence

43. A barrister must not suggest or condone another person suggesting in any way to any prospective witness (including a party of the client) the content of any particular evidence which the witness should give at any stage in the proceedings.
44. A barrister will not have breached Rule 43 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.
45. A barrister must not confer with, or condone another legal practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:
- (a) as to which there are reasonable grounds for the barrister to believe it may be contentious at a hearing;
 - (b) which could be affected by, or could affect, evidence to be given by any of those witnesses; unless the barrister believes on reasonable grounds that special circumstances require such a conference.
46. A barrister will not have breached Rule 45 by conferring with, or condoning another legal practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.
47. 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;
 - (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.

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

Duty to opponent

- 50. A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- 51. A barrister must take all necessary steps to correct any false statement 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 will not have made a false statement to the opponent simply by failing to correct an error on any matter stated to the barrister by the opponent.
- 53. A barrister must not deal directly with the opponent's client 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 enquire whether the person is represented and, if so, by whom.
- 54. A barrister must not confer with or deal directly with the party opposed to the client unless:

- (a) the party, not being indemnified by an insurance company which is actively engaged in contesting the proceedings, is unrepresented and has signified willingness to that course; or
- (b) the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is otherwise unrepresented and the 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.

55. 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.

56. A barrister must promptly tell the opponent what passes between the barrister and a court in a communication referred to in Rule 55.

57. 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 55(b), other than the matters specifically notified by the barrister to the opponent when seeking the opponent's consent.

Integrity of hearings

58. A barrister must not make any statement to or communicate in any way with, the printed or electronic media or any representative thereof in relation to or touching in any way upon any matter in respect of which the barrister has provided, is providing or expects in future to provide professional services unless:
- (a) the statement or communication is expressly stated by the barrister to be “off the record” or “background” (that is – provided on the basis that it is not to be republished or publicly attributed to the barrister) and is restricted to a fair and balanced explanation or recapitulation of proceedings that took place in a public hearing or the correction of errors in a published report of such a hearing and does not include the expression of the barrister’s personal views or opinions; or
 - (b) the barrister has received the prior consent of the President of the Association (or of the Vice President in the event of the unavailability of the President) which consent will only be granted if the President (or in the event of unavailability the Vice President) is satisfied that the grant of consent:
 - (i) is in the interests of the barrister’s client and in the interests of justice; or
 - (ii) is necessary to enable the barrister to respond appropriately to public criticism of the barrister’s conduct”.
- 58A. Notwithstanding Rule 58 a barrister must not publish or take any step towards the publication of any material concerning any proceeding that:
- (a) is misleading; or
 - (b) would amount to a breach of confidence.
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. 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.

Prosecutor's duties

61. 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.
62. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.
63. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.
64. 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.
65. A prosecutor must disclose to the opponent as soon as practicable all material (including the names or means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused, unless:
 - (a) such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person; and
 - (b) the prosecutor believes on reasonable grounds that such a threat could not be avoided by confining such disclosure, or full disclosure, to the opponent being a legal practitioner, on appropriate conditions which may include an undertaking by the opponent not to disclose certain material to the opponent's client or any other person.
66. A prosecutor who has decided not to disclose material to the opponent under Rule 65 must consider whether:
 - (a) the defence of the accused could suffer by reason of such non-disclosure;
 - (d) 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.

66A. A prosecutor must call as part of the prosecution's case all witnesses:

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

unless:

- (e) the opponent consents to the prosecutor not calling a particular witness;
- (f) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused; or
- (g) the prosecutor believes on reasonable grounds that the administration of justice in the case would be harmed by calling a particular witness or particular witnesses to establish a particular point already adequately established by another witness or other witnesses;

provided that:

- (h) the prosecutor is not obliged to call evidence from a particular witness, who would otherwise fall within (a) — (d), if the prosecutor believes on reasonable grounds that the testimony of that witness is plainly untruthful or is plainly unreliable by reason of the witness being in the camp of the accused; and
- (i) the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (f), (g) and (h), together with the grounds on which the prosecutor has reached that decision.

67. A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully 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.

68. A prosecutor must not confer with or interview any of the accused except in the presence of the accused's representative.
69. 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.
70. A prosecutor who has informed the court of matters within Rule 69, 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.
71. A prosecutor must not seek to persuade the court to impose a vindictive sentence, but:
- (a) must correct any error made by the opponent in address on sentence;
 - (b) must inform the court of any relevant authority or legislation bearing on the appropriate sentence;
 - (c) must assist the court to avoid appealable error on the issue of sentence;
 - (d) may submit that a custodial or non-custodial sentence is appropriate; and
 - (e) may inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority.
72. A barrister who appears as counsel assisting an inquisitorial body such as the Anti-Corruption Commission, 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 Rules 61, 63 and 64 as if the body were the court referred to in those Rules and any person whose conduct is in question before the body were the accused referred to in Rule 63.

OPINIONS

73. A barrister must give the barrister's truthful opinion on any matter submitted to the barrister for advice or opinion.

74. A barrister must take reasonable steps to avoid the possibility of the barrister becoming a witness in the case as a result of any correspondence conducted by the barrister or of any dealing by the barrister with persons other than the client.
75. A barrister must not, in the barrister's professional work, hold, invest or disburse any funds for any other person.

Third-line forcing

76. 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.

CAB-RANK RULES & BRIEFS

Cab-rank principle

77. A barrister must accept a brief from a solicitor to appear before a court 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 the brief under Rules 84, 87 or 88.
78. A barrister must not set the level of an acceptable fee, for the purposes of Rules 82(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.

Briefs which must be refused

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

- (a) the barrister has information which is confidential to any other person other than the prospective client, and:
 - (i) the information may, as a real possibility, be helpful to the prospective client's case; and
 - (ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case;
- (b) 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) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case;
- (d) the brief is to appear on an appeal and the barrister was a witness in the case at the first instance;
- (e) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case;
- (f) the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee in the case of a brief under a conditional costs agreement;
- (g) 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) 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) the brief is to appear in a contested 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);

79A. Without limiting the generality of Rule 79, a barrister must refuse to accept or retain a brief or instructions to appear before a court (excluding a statutory or other tribunal) if the brief is to appear

before a court of which the barrister was formerly a member or judicial registrar (other than in an acting capacity), or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur:

- (a) within 2 years after the barrister ceased to be a member of the court in question, if the barrister was a member of the court for less than 2 years;
- (b) within a period after the barrister ceased to be a member of the court in question equivalent to the period for which the barrister was a member of the court, if the barrister was a member of the court for 2 years or more but less than 5 years; or
- (c) within 5 years after the barrister ceased to be a member of the court in question, if the barrister was a member of the court for 5 years or more.

79B. Without limiting the generality of Rule 79, and subject to Rule 79C, a barrister must refuse to accept or retain a brief or instructions to appear before a statutory or other tribunal if:

- (a) the brief is to appear before such a tribunal which does not sit in divisions or lists to which each of its members is assigned exclusively to one division or list of the tribunal and the barrister is a member of the tribunal;
- (b) the brief is to appear before such a tribunal which sits in divisions or lists to which each of its members is assigned exclusively to one division or list of the tribunal and –
 - (i) the barrister is a member of the tribunal assigned to a division or list; and
 - (ii) the brief is to appear in a proceeding in that division or list;
- (c) the brief is to appear before such a tribunal –

- (i) which does not sit in divisions or lists to which each of its members is assigned exclusively to one division or list of the tribunal and the barrister was formerly a member of the tribunal - where the appearance would occur within two years after the barrister ceased to be a member of the tribunal (provided that a barrister who has been, or who is, a member of the State Administrative Tribunal, and who not having sat in that Tribunal resigned, or resigns, as a member of that Tribunal prior to, or forthwith upon, the coming into effect of the amendment to this Rule, shall not thereafter be precluded from appearing before the State Administrative Tribunal).
- (ii) which does sit in divisions or lists to which each of its members is assigned exclusively to one division or list of the tribunal and the barrister was assigned as a member to a division or list - where the brief is to appear in a proceeding in a division or list to which the barrister was assigned and the appearance would occur within two years after the barrister ceased to be assigned to that division or list.”

79C (1) Notwithstanding Rule 79B (a) and (c)(i), a barrister who is a member of a tribunal which does not sit in divisions or lists to which each of its members is assigned exclusively to one division or list of the tribunal may accept a brief to appear in a tribunal of which he or she is a member providing that:

- (a) the brief is not to appear in a division or list of the tribunal to which the barrister is assigned; and
 - (b) the brief does not involve the appearance of the barrister before another member of such tribunal, with whom the barrister has sat, in proceedings before the tribunal, in the previous 2 years.
- (2) A Barrister who accepts a brief pursuant to Rule 79C (1) and appears in the tribunal may not sit as a member of the tribunal with any member of the tribunal before whom the barrister appeared in the tribunal on the brief that was accepted pursuant to this rule until 6 months after the matter has been finally determined by the Tribunal.

80. A barrister need not refuse a brief to appear before a court notwithstanding the application of Rules 79(c) 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

(b) the President of the Association approves of the barrister accepting the brief after the barrister has informed the President of the circumstances.

81. 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, be helpful to the advancement of the prospective client's interests in the matter on which advice is sought; 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.

82. 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

83. A barrister may refuse a brief 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 the costs agreement;

- (c) the brief may, as a real possibility, require the barrister to cross-examine or criticise a friend or relation;
- (d) 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
 - (iii) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused;
- (e) 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; or
- (f) the barrister, being Senior Counsel, considers on reasonable grounds that the case does not require the services of Senior Counsel.

84. A barrister may regard the current listing of a solicitor by the Association 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 83(b).

Return of briefs

85. 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 91.
86. A barrister who holds a brief to defend a charge of a serious criminal offence and also any other brief, both of which would require the barrister to appear on a particular day, must return the other brief as soon as possible, unless the barrister became aware of the appearance being required on that day in the first brief after the barrister was committed to appear on that day in the other brief.
87. A barrister must not return a brief to appear in order to accept another brief to appear unless the instructing solicitor or the client, as the case may be, 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 91.
88. 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.
89. 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.
90. 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.
91. A barrister may return a brief if, after acceptance of the brief:
- (a) the instructing solicitor or client, as the case may be, has refused 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;
- (b) 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 the costs agreement, 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.
- (e) the provisions of rule 92 relating to conditional fee agreements applies.

92. A barrister may return a brief accepted under a conditional costs agreement if:

- (a) the barrister, and the 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 prospects of success or of achieving a result better than the offer.

93. 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 a Professional Conduct Committee of the Association who is Senior Counsel approves of the barrister keeping the brief after the barrister has informed that Senior Counsel of the circumstances.

94. 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.

CONFIDENTIALITY & CONFLICTS

95. A barrister must not disclose (except as compelled by law) or use in any way in the course of practice confidential information obtained by the barrister concerning any person unless or until:

(a) the information has been published;

(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.

96. A barrister must not disclose (except as compelled by law) or use confidential information under Rule 95(c) in any way other than as permitted by the specific terms of the person's consent.

97. A barrister will not have breached Rules 95 and 96 simply by showing briefs to a pupil or to another barrister doing devilling work, so long as the barrister has reminded the pupil or the other barrister of barristers' duties of confidentiality including Rules 95 and 96.

98. A barrister who is shown a brief as a pupil or under a devilling arrangement is bound by the same duties

of confidentiality which bind the barrister whose brief it is, including the duties imposed by Rules 95 and 96.

99. 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, being information which the barrister is prohibited from disclosing or using by Rules 95, 96 or 98, unless the person entitled to the confidentiality consents to the barrister disclosing or using the information as the barrister thinks fit.
100. 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 95 would apply; or
 - (b) in other cases, one or more of the clients:
 - (i) giving preferences to the earliest brief if the barrister was briefed at different times; and
 - (ii) so as to remove that possibility of conflict.
101. 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 95 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.
102. A barrister need not return any briefs to appear under Rules 100 or 101, 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.

103. 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; and
- (b) if the instructing solicitor does not agree to advise the client of the barrister's belief, seek to advise the client in the presence of the instructing solicitor of the barrister's belief.

READING

104. A barrister with whom another barrister is reading as a pupil must seek to assist the pupil with all reasonable skill and diligence and in particular must seek to:

- (a) instruct the pupil in:
 - (i) the art of advocacy;
 - (ii) barristers' work;
 - (iii) the proper conduct of a barrister's practice; and
 - (iv) the ethical standards required of a barrister, including these Rules;
- (b) set aside sufficient time to meet and speak with the pupil from time to time;
- (c) make arrangements for the pupil to attend the barrister in chambers to be shown and to assist in chamber work from time to time;
- (b) make arrangements for the pupil to appear with the barrister in court as an observer;
- (e) ensure that the pupil is attending all necessary or appropriate courses of instruction arranged by the Association; and
- (f) introduce the pupil to the barrister's colleagues.

OBLIGATIONS OF DISCLOSURE

Disclosure Requirements

105. In this Rule, a “disclosable event” in relation to a barrister means any of the following:

- (a) the making of a sequestration order against, or the filing of a debtor’s petition by, the barrister pursuant to the *Bankruptcy Act 1966* (Cth);
- (b) the entry by the barrister into a debt agreement pursuant to Part IX of the *Bankruptcy Act 1966* (Cth), or an agreement, composition or arrangement pursuant to Part X of that Act;
- (c) the disqualification of the barrister from managing or being involved in the management of any body corporate under any law in force in any jurisdiction within Australia, including disqualification from managing corporations under Part 2D.6 of the *Corporations Act 2001*; or
- (d) the conviction of the barrister of an offence under any law in force in Australia or in any overseas country, or a finding that such an offence is proved against the barrister, where the maximum penalty for the offence is a term of imprisonment of 12 months, or more, or where fraud or dishonesty is an element of the offence.

106. Where a disclosable event occurs in relation to a barrister, the barrister must within 28 days after the disclosable event occurs—

- (a) inform the Legal Practice Board and Secretary of the Association in writing of the occurrence of the disclosable event; and
- (b) provide the Legal Practice Board and Secretary of the Association with written details of the circumstances giving rise to the disclosable event sufficient to enable the Legal Practice Board or the Secretary of the Association to determine whether the occurrence of the disclosable event in relation to the barrister, or any of the circumstances giving rise to it, may affect the barrister’s suitability to engage in legal practice as a barrister for the purposes of the relevant legislation in force in each jurisdiction.

- (c) A barrister in relation to whom a disclosable event occurs must, within 14 days after receiving a written request from the Legal Practice Board and Secretary of the Association to do so, provide such further information concerning the disclosable event or any of the circumstances giving rise to it, as the Legal Practice Board or the Secretary of the Association may require.

RULES REGULATING BARRISTERS AS MEDIATORS

107. A barrister acting as 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.

108. A barrister acting as a mediator has the same obligations of confidentiality, with respect to communications made in the course of a mediation, as he or she could have if such communications had been made by a client to him or her as a barrister.

FEES AND COSTS DISCLOSURE

- 109. A barrister who accepts instructions from an instructing solicitor should inform the solicitor of the rates or other basis upon which it is proposed that the barrister's fee is to be rendered, unless the barrister believes on reasonable grounds that the solicitor or solicitor's firm is aware of the basis on which the barrister usually charges.
- 110. A barrister who accepts instructions other than from an instructing solicitor must comply with Rule 16A(1) to (7) of the Conduct Rules of the Law Society of Western Australia."