

Review of the

# Australian Solicitors' Conduct Rules

Submission to the Law Council of Australia  
29 June 2018

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# Summary of Recommendations

## Rule 1 (Application and Interpretation)

1. NACLC does not yet have a position as to whether “community legal service” should be included in the definition of a law practice in the Australian Solicitor Rules. We are still seeking our own legal advice as to the implications of this for current CLC practice, and will advise the Law Council when we have reviewed the advice and consulted with our sector.
2. NACLC recommends that there is a definition of community legal services in the Rules, regardless of whether community legal service is defined as a “law practice” or not, and we prefer the definition NACLC proposed in 2012. We recognise however that some states are comfortable with their own definitions and therefore it may be more practicable to adopt the Law Council’s proposed definition, which defers to the jurisdiction-specific definitions.

## Rule 7 (Communication and Advice)

3. NACLC recommends that the Solicitors’ Conduct Rules include a modified version of rule 16A.1 of the South Australian version of the Solicitor Conduct Rules so to also include community legal services.

Proposed rule:

A practitioner has an obligation to inform clients as to their possible eligibility for legal aid or the existence of other free legal assistance services including community legal services, where that practitioner has reason to believe that such a client may be eligible to access such services.

If the Law Council does not accept the possible rule, NACLC otherwise supports the Ethic Committee’s recommendation to broaden the Commentary to make solicitors aware of their ethical duties to advise clients of the availability of legal services from other legal assistance services, including community legal services. NACLC would like to work with the Law Council on the text of this Commentary.

4. NACLC recommends that the Commentary also promote the responsibility of solicitors to advise clients of their costs up-front, even where the costs are likely to be relatively low (eg less than \$750), so that clients can make an informed decision as to whether to first follow up the availability of legal aid or other legal assistance services before signing a retainer with the fee-charging solicitor.

## Rule 8 (Client Instructions)

5. NACLC recommends that the Law Council adopt the Australian Law Reform Commission’s recommendation to provide a new exception to rule 9 (confidentiality), and we refer the Law Council to

the submissions made by disability community legal centres such as Queensland Advocacy Incorporated on this point.

### Rule 9 (Confidentiality)

6. NALCLC agrees that there is no need to change rule 9 in relation to de-identified information but that the Commentary should provide clear guidance about how solicitors can protect clients confidentiality when describing case studies or other de-identified information.
7. NALCLC is of the view that CLC peer risk management process is within the rules of 9.1.2 and/or 9.2.3, and recommends that the Commentary clearly set this out in order to provide clear guidance for CLC staff.
8. NALCLC recommends including psychological harm as an exception to the rule.

### Rules 10 and 11 (Conflicts concerning former clients)

9. NALCLC recommends that the Law Council adopt a new rule that provides a limited exception to rules 10 and 11 for unbundled, discrete legal assistance services provided to individual clients by community legal centres, and (if they agree, subject to consultation with the relevant agencies) other publically-funded legal assistance providers including, legal aid commissions, Aboriginal or Torres Strait Islander Legal Services and Family Violence Prevention Legal Service. The rule and commentary might be based on new Canadian exceptions set out in our submission below, but should be developed in close consultation with the legal assistance and pro bono sector.

### Rule 28 (Public Comments during Current Proceedings)

10. NALCLC recommends that the Commentary provide examples of the application of rule 28 and, therefore, supports the Ethic Committee's position that examples of the application of the rule is needed. In particular, NALCLC recommends that the Commentary include examples of cases where CLCs are involved in public interest proceedings and the extent to which CLCs can inform the public of the issues raised in a public interest matter.

### Rule 33 (Communications with another Solicitor's Client)

11. NALCLC recommends that the Law Council should adopt a limited exemption permitting direct contact with financial institutions or other businesses in debt matters and in circumstances where there is a legal requirement on financial institutions to be a member of an external dispute resolution (EDR scheme) and to have internal dispute resolution (IDR) processes.

### Potential Additional Rule (Claiming Costs in Letters of Demand)

12. NALCL submits that there is a clear need for a separate rule prohibiting solicitors from claiming or requesting costs in letters of demand. If, as the Ethics Committee has pointed out, that the ethical principle is in any event supported by an interpretation of the underlying principles of a combination of four rules, then there is nothing in principle to preclude including a new rule that explicitly states the principle. Moreover, the extent of the practice of solicitors claiming or requesting costs in letters of demand and the problems that CLCs have had with asking regulatory bodies to address the professional ethics of this practice also supports the case for a separate rule.

#### Potential Additional Rule (Mental Wellbeing)

13. NALCL submits that a solicitor should not be obliged to report a fellow practitioner if they form a view that they might be suffering a mental impairment rather than in circumstances where there is an observed breach of an ethical duty or professional obligation. However, if the Law Council is of the view that there should be a rule governing mental well-being of solicitors, NALCL submits that the first step should be confidential reporting to the professional association to be addressed under pastoral care programs rather than by the regulatory authority.

# Introduction

We thank the Law Council Australia (Law Council) for the opportunity to comment on the review of the Australian Solicitors' Conduct Rules (Rules) and the Commentary.

The National Association of Community Legal Centres (NACLC) is the peak national organisation for Community Legal Centres (CLCs) in Australia. Our members are eight state and territory CLC associations, which together represent nearly 190 CLCs in metropolitan, regional, rural and remote locations across Australia. CLCs are independent, not for profit, community-based organisations that provide free and accessible legal and related services to everyday people across Australia. During the financial year 2016-17, CLCs assisted over 216,000 clients with discrete and ongoing services; provided over 409,000 referrals; and responded to over 143,000 requests for legal information from the public.

The practice of law continues to evolve in Australia. NACLC is of the view that ethical guidance provided to solicitors should be responsive to this evolution. Rules of conduct should assist, not hinder, solicitors in providing legal services in a way that facilitates, rather than hinders, access to justice.

In developing this submission, NACLC has referred to several submissions made to the Law Council since the rules were developed in 2011:

- 30 March 2012 - referred to as NACLC Submission March 2012
- 20 November 2012 (NACLC Submission November 2012)
- 12 April 2013 (NACLC Submission 2013)
- 16 January 2015 (NACLC Submission 2015).

All these submissions have argued – and we continue to argue - that there is a need for the Rules and Commentary to recognise and cater for the legal practices and service delivery models that exist in publicly funded legal services, such as CLCs. A one-size-fits-all approach to regulating legal practice has significant negative consequences in terms of constraining our service delivery to a traditional private law firm model, which is primarily structured around a solicitor/client retainer,

and fails to take into account the work undertaken by publically funded legal assistance services, including our one-off legal advice, legal tasks and duty lawyer work.

In this submission, NACLC has not commented on all Rules. We have chosen to comment only on those rules or potential new rules, and their relevant Commentary, that affect the ability of CLCs to practice in a way that provides substantive access to justice, or otherwise raise a public interest issue.

## Rule 1

# Application and Interpretation

### Ethics Committee position

The Ethics Committee has recommended that the definition of law practice in the glossary be amended to include a reference to community legal service, and that a definition of community legal service be inserted as follows:

**“Community legal service”** means an organisation or body that is a community legal service, community legal centre, or a complying legal centre for the purposes of legal profession legislation of a jurisdiction.

### NACLC recommendations

1. NACLC does not yet have a position as to whether “community legal service” should be included in the definition of a law practice in the Australian Solicitor Rules. We are still seeking our own legal advice as to the implications of this for current CLC practice, and will advise the Law Council when we have reviewed the advice and consulted with our sector.
2. NACLC recommends that there is a definition of community legal services in the Rules, regardless of whether community legal service is defined as a “law practice” or not, and we prefer the definition NACLC proposed in 2012. We recognise however that some states are comfortable with their own definitions and therefore it may be more practicable to adopt the Law Council’s proposed definition, which defers to the jurisdiction-specific definitions.

### Rationale: Including “community legal service” in definition of a law practice

When consulted about the Uniform Law back in 2011, NALCLC argued that law practice should include community legal centre or service. The definition did not end up including community legal centres, and indeed the Acts or Regulations in many states specifically exclude community legal centres from the definition of “incorporated legal practices”. Despite this, as NALCLC noted in our 2013 Submission, “in practice CLCs apply the conduct rules on the basis that they are a law practice.”

In our consultations, an issue was raised that being included in the definition of law practice might have legal implications for CLCs. If the Rules’ definition of law practice specifically now includes community legal centres, then this may mean that community legal centres need to move to a new regime. NALCLC is in the process of getting legal advice about the implications for the way the rest of the Rules would apply to CLCs if they are to be clearly defined as law practices.

### Rationale: Common definition of community legal service

NALCLC is of the view that a definition of community legal service should be in the Rules. Even if “community law service” is not included in the definition of “law practice”, NALCLC’s suggestions for new Commentary and our proposed changes to Rules 7, 10 and 11 would require a definition of community legal service. It is also important that the Rules recognise the existence of community legal centres and other legal assistance providers and how these types of practice differ to traditional law delivery models.

As NALCLC recommended in the NALCLC March 2012 Submission, we support a common definition of “community legal service” in the Rules because this would ensure a common understanding of the identity and purpose of community legal centres across the country. Our proposed definition is the same as that put forward in 2012, with the addition of explicitly recognising the Family Violence Prevention Legal Services:

‘Community legal service’ means an organisation (whether incorporated or not) that:

(a) holds itself out as:

(i) a community legal service; or

(ii) a community legal centre; or

(iii) an Aboriginal and Torres Strait Islander Legal Service; or

- (iv) an Indigenous Family Violence Prevention Legal Service whether or not it is a member of a State or Territory association of community legal centres, and whether or not it is accredited or certified by the National Association of Community Legal Centres; and
- (b) is established and operated on a not-for-profit basis; and
- (c) provides legal or legal-related services that:
  - (i) are directed generally to people who are disadvantaged (including but not limited to being financially disadvantaged) in accessing the legal system or in protecting their legal rights; or
  - (ii) are conducted in the public interest.

The absence of this definition – or indeed any definition – of “community legal services” in the Rules has, as we anticipated, led to differing definitions at state and territory level. Some CLCs are satisfied with the definition eventually developed by the relevant state and territory legal practitioners legislation. NACLC, therefore, recognises that the state and territory based definition proposed by the Ethics Committee is, at this time, the most pragmatic approach. If the Law Council is of a mind to push again for a national definition, NACLC would welcome engagement with the Law Council so that we can consider this topic in greater detail.

## Rule 7

# Communication and Advice

### Ethics Committee position

The Ethics Committee was of the view that there did not need to be a rule requiring solicitors to inform a client of their eligibility for legal aid, but that the existing Commentary be expanded to include community legal service.

### NACLC recommendation

3. NACLC recommends that the Rules include a modified version of rule 16A.1 of the South Australian version of the Australian Solicitor Conduct Rules so to also include community legal services.

### **Proposed rule**

A practitioner has an obligation to inform clients as to their possible eligibility for legal aid or the existence of other free legal assistance services including community legal services, where that practitioner has reason to believe that such a client may be eligible to access such services.

If the Law Council does not accept the possible rule, NACLC otherwise supports the Ethic Committee's recommendation to broaden the Commentary to make solicitors aware of their ethical duties to advise clients of the availability of legal services from other legal assistance services, including community legal services. NACLC would like to work with the Law Council on the text of this Commentary.

4. NACLC recommends that the Commentary also promote the responsibility of solicitors to advise clients of their costs up-front, even where the costs are likely to be relatively low (eg less than \$750), so that clients can make an informed decision as to whether to first follow up the availability of legal aid or other legal assistance services before signing a retainer with the fee-charging solicitor.

### **Rationale**

Publicly funded legal services are absolutely essential to providing access to justice for many people across Australia. However, there is a lack of understanding or access to information in the Australian community about what legal services are available to vulnerable, disadvantaged people or everyday Australians who would experience financial hardship in accessing the traditional legal sector. NACLC considers that the Rules should specifically oblige a solicitor to inform a client of their eligibility for legal aid or community legal services, where the solicitor has reason to believe that such a client may be eligible.

One community legal centre noted that uniform legal profession legislation in NSW and Victoria does not require solicitors to provide a cost disclosure when the costs before disbursements and GST do not exceed \$750. This CLC noted that this amount is still a barrier to justice for financially disadvantaged people, and suggested that the Commentary promotes the responsibility for solicitors.

## Rule 8

# Client Instructions

### Ethics Committee position

While this issue was discussed under rule 8 (the duty to follow client instructions), the Ethics Committee considered whether there should be an exception to client confidentiality (rule 9) that where the solicitor reasonably believes the client is not capable of giving competent instructions, a solicitor can disclose this fact for the purpose of assessing client's ability to give instructions, obtaining assistance for the client giving instructions, informing the court about the client's ability to instruct, or seeking the appointment of a litigation representative. This exemption was a recommendation made by the Australian Law Reform Commission.

### NACLC recommendation

5. NACLC recommends that the Law Council adopt the Australian Law Reform Commission's recommendation to provide a new exception to rule 9 (confidentiality), and we refer the Law Council to the submissions made by disability community legal centres such as Queensland Advocacy Incorporated on this point.

### Rationale

NACLC has viewed and supports the submissions in relation to this rule made by Queensland Advocacy Incorporated (QAI), one of our specialist disability community legal centres that provide advocacy and legal services for people with disabilities. NACLC will not repeat those submissions here, however, it urges the Law Council to consult with and pay attention to the submissions of disability community legal centres, who have a wealth of experience in this area.

## Rule 9

# Confidentiality

NALCLC is responding to three issues discussed in this rule: de-identified information, peer risk management practices, and including the risk of psychological harm in an existing exception to client confidentiality in rule 9.

### Ethics Committee position

The Ethics Committee advised that the de-identified information is clearly within rule 9, there is no need to amend the rules, but the Commenteraty should make this clear and set out ways in which client's confidentiality can be protected.

The Ethics Committee sought feedback as to whether CLC peer risk management processes are permitted within rule 9.1.2.

The Ethics Committee also considered whether the exception to client confidentiality permitting a solicitor to disclose confidential information for the purposes of preventing imminent serious risk of physical harm should be expanded to include pyschological harm and requested sector feedback.

### NALCLC Recommendation

6. NALCLC agrees that there is no need to change rule 9 in relation to de-identified information but that the Commentary should provide clear guidance about how solicitors can protect clients confidentiality when describing case studies or other de-identified information.
7. NALCLC is of the view that CLC peer risk management process is within the rules of 9.1.2 and/or 9.2.3, and recommends that the Commentary clearly set this out in order to provide clear guidance for CLC staff.
8. NALCLC recommends including psychological harm as an exception to the rule.

### Rationale: De-identified information

Although it would seem obvious that non-identifying case studies (for example to illustrate the effect of particular laws or policies on individuals) do not breach a lawyer's confidentiality

requirements, we are of the view that including a short discussion on this in the Commentary would be useful guidance for solicitors, particularly junior solicitors who are new to practice. In our 2013 and 2015 submissions, NACLCL provided comprehensive detail to back up our arguments as to the need for clarity. We will not repeat these arguments here here, suffice to say, we are very pleased that the Ethics Committee has listened, and has recommended that advice about de-identified information be included in the Commentary. We would welcome being consulted on the text of this part of the Commentary.

### Rationale: Risk Management Audits

A key risk management practice of CLCs is the use of annual peer based audits of every CLC's legal practice whereby solicitors from other CLCs review a sample of files from another CLC. All solicitors engaging in the peer cross check sign confidentiality agreements and are required to follow strict confidentiality processes set out in a National Community Legal Centre Risk Management Guide. In a sector like ours, where some CLCs only have 2-3 solicitors, this peer system is in fact a robust quality assurance and risk management mechanism.

As NACLCL has previously submitted to the Law Council, the relationship between this risk management practice and rule 9 has been the cause of some discussion and debate among CLCs. NACLCL is strongly of the view that the CLC peer-led risk management audits fall within rules 9.1.2 or 9.2.3, and suggest that this should be made clear in the Commentary. Once again, this would provide clear guidance to CLC staff – and Law Societies in relevant jurisdictions - who are perhaps new to the sector and not used to CLC practice.

### Rationale harm: Psychological harm

NACLCL submits, as we also did in our 2015 submission, that the exception in rule 9.2.5 should be extended to include imminent serious psychological harm. Our position then, as now, is that such an amendment would reflect contemporary concepts of harm by recognising the seriousness of psychological harm and the connection between physical and psychological harm, as was also discussed in the Law Council consultation paper (p.44). It would also bring the the Rules in line with other legislation, such as the *Privacy Act 1988* (Cth) and *Criminal Code Act 1995* (Cth) and with with other comparative jurisdictions, including Canada (where “serious bodily harm” is

defined to also include psychological harm) and New Zealand (which broadly includes “health and safety”).

## Rules 10 and 11

# Conflicts of Interest

### Ethics Committee position

The consultation paper discusses a number of issues in relation to rule 10 and rule 11. NACLC will only address one of those issues, common to both rules 10 and 11, in relation to the Law Council’s question: Would it be appropriate and necessary to provide an exemption from confidentiality and other duties where legal services are provided on a “discrete” or “unbundled” or “limited representation” basis?

### NACLC Recommendation

9. NACLC recommends that the Law Council adopt a new rule that provides a limited exception to rules 10 and 11 for unbundled, discrete legal assistance services provided to individual clients by community legal centres, and (if they agree, subject to consultation with the relevant agencies) other publically-funded legal assistance providers including, legal aid commissions, Aboriginal or Torres Strait Islander Legal Services and Family Violence Prevention Legal Service.

The rule and commentary might be based on new Canadian exceptions set out in our submission below, but should be developed in close consultation with the legal assistance sector and pro bono sector.

### **Proposed New Rule for consultation with Law Council and other legal assistance providers:**

In the following:

“legal assistance provider” is defined as community legal service, Aboriginal or Torres Strait Islander Legal Service, Family Violence Prevention Legal Service, legal aid commissions and any other publically funded or pro bono legal service providers.

“discrete legal assistance services” means advice, legal tasks or other limited legal assistance to a client by a legal assistance provider with the expectation by the solicitor and the client that the solicitor will not provide continuing legal services in the matter, nor take carriage of the matter in an ongoing, representative capacity.

A solicitor may provide discrete legal assistance services without taking steps to determine whether there is a conflict of interest.

Except with consent of the clients as provided for in rules 10 and 11, a solicitor must not provide, or must cease providing discrete legal assistance services to a client where the solicitor knows or becomes aware that there is a conflict of interest.

A solicitor who provides discrete legal assistance services must take reasonable measures to ensure that no disclosure of the client’s confidential information is made to other solicitors in the solicitor’s law practice.

#### **Possible draft commentary**

Publically funded legal assistance providers provide a vast number of unbundled, discrete legal assistance services which focus on giving advice and information to clients so that they can help themselves. These services include legal advice, legal tasks or minor legal assistance (for example where the lawyer helps the client write a letter or prepare for a court hearing where they will be self-represented) and duty lawyer services. These discrete legal services are usually provided in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures for the legal services provider and the solicitors who provide these services. Performing full conflicts checking in circumstances in which the discrete legal assistance services are being offered can be very challenging given the timelines, volume and logistics of the service setting.

The limited nature of discrete legal assistance services significantly reduces the risk of conflicts of interest with other matters being handled by the solicitor’s legal practice. Accordingly, the solicitor is disqualified from acting for a client receiving discrete legal assistance services only if the lawyer has actual knowledge of a conflict of interest between the client receiving the legal service and an existing client of the legal service provider; or between the solicitor and the client receiving discrete legal assistance services.

Confidential information obtained by a lawyer providing the services described in this rule will not be imputed to the other lawyers or to non-lawyers and other staff of the legal assistance provider. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained discrete legal assistance services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained discrete legal assistance services.

In the provision of discrete legal assistance services, the solicitor's knowledge about possible conflicts of interest is based on the solicitor's reasonable recollection and information provided by the client in the ordinary course with the pro bono or not-for-profit services provider or the community legal service to receive its services.

### Rationale for the proposed rule change

NACLC's recommendation for a new rule departs from the Ethics Committee position that there is no need to relax rules 10 and 11. We are of the view that there are compelling reasons for change – it is time for the Law Council to take a more forward-thinking and facilitative approach to conflicts of interest and to adopt a new rule because:

- it is in the public interest to ensure that people can get access to legal services swiftly, at early stage of proceedings, and with a minimum of unnecessary red tape;
- it will bring the Rules in line with forward-thinking developments in comparative jurisdictions;
- it will recognise the increasing importance and extent of pro-bono, not-for-profit and community legal services in Australia's legal environment;
- it is the best practice model for CLCs based on their resources and the type of services they provide, noting that if CLCs do seek to take on a client in an ongoing representative capacity, full conflict checks will of course be undertaken; and
- the limited nature of discrete legal assistance services – advice, legal tasks - significantly reduces the risk of conflicts of interest with other matters handled by the legal practice of the legal assistance provider.

The Ethics Committee put forward three main reasons as to why the conflict of interest rules did not require changes in relation to discrete short-term legal services performed by public legal assistance providers:

- conflicts can be dealt with through the retainer or through effective information barriers (i.e. the development of appropriate procedures and processes for delivery of legal services);
- the most significant impediment to the wider use of limited scope retainers/unbundled legal services are court rules which require practitioners to remain on the record during a matter; despite only providing limited and discrete services throughout; and
- comparative overseas jurisdictions have not changed their conflict of interest rules.

### **Conflicts can be resolved through the retainer and information barriers**

The suggestion of the Ethics Committee that conflicts can be dealt with by the retainer and information barriers misses the critical issue: that rules 10 and 11 require CLCs to ascertain whether there is a conflict of interest before a solicitor can provide even simple legal advice. The Commentary for rule 10 requires (in absolute terms of “must”) a solicitor or law practice to determine whether it is in possession of any confidential information of a former client that it may have to disclose or make use of in order to fulfil its duties to any existing client. NACLC has consistently submitted to the Law Council that the current rules divert limited public resources of CLCs to undertaking prior conflict checks for summary or discrete legal services - an important part of the CLC service delivery model - and in which there is negligible risk of an actual conflict of interest. Some individual CLCs will provide thousands of discrete telephone advice services per year but are required to undertake prior conflict checks on each occasion.

### **Court rules**

Our comments above also apply to the Ethics Committee’s identification that court rules are the major impediment to unbundled and discrete legal services. Court rules only apply when a solicitor is already on the record for a client, but we are talking about discrete services that will probably never get to the court or in which it is made clear, from the solicitor to the client, that the solicitor is not representing the client.

The discussion by the Ethics Committee and the solutions that it offers - such as, that conflicts can be dealt with in the retainer - does not address this reality of CLC legal practice, or publically funded models of legal practice in general, and the real need for a relaxing of the current rules. Publically funded models are an essential and important component of Australia's legal environment, but the discussion is based on a 'private' and 'traditional' legal model of delivery (client attends, signs a retainer, is then provided with services) that is remote to the practice of most CLCs (client attends, is provided with discrete legal assistance such as a one-off advice or assistance with a legal task such as helping with a template letter, client leaves or client calls for a one-off telephone advice service).

### **Change in overseas jurisdictions**

The Ethics Committee looked at limited scope retainer rules adopted by the Law Society of Upper Canada in its Rules of Professional Conduct (rules 15-19). The Ethics Committee noted that these rules did not depart from the ethical requirements embodied in rules 10 and 11 in the Solicitor's Rules, and used this to support their argument that there was no need to consider change. However, the Upper Canada example used by the Ethics Committee was replaced by the adoption of rules 3.4-16.2 in 2016 - rules which do in fact depart from the ethical requirements in the current Rules. We also note that the Law Society of Upper Canada changed its name to the Law Society of Ontario in November 2017. The Ontario rule changes were themselves a modified version of the model rule 3.4-2A – 3.4-2D in the Federation of Law Societies of Canada *Model Code of Professional Conduct* (Canadian Model Code) which was adopted in October 2014, but not discussed by the Ethics Committee. The rule from the Canadian Model Code, and the relevant Ontario Rule, are set out in Appendix A of this submission.

The model rule of the Federation of Law Societies of Canada has also since been separately considered and adopted by law societies in British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and Yukon. It has not yet been adopted in Alberta, and Québec has a different legal system.

We note also that the American Bar Association has adopted model rules in general for "unbundled" legal services. However, NACLCL believes that the Canadian model best resolves the ethical issues and reality for publically funded legal services in Australia, like CLCs

The rules of the Federation of Law Societies of Canada and the Law Society of Ontario explicitly absolve lawyers from undertaking prior conflict checks for what they call “summary” or “short-term legal services” provided on a not-for-profit or pro bono basis. Instead, conflicts of interest are managed by the lawyer providing the service and if the lawyer has actual knowledge of the conflict, measured by a standard of reasonableness. This maintains the spirit of the conflict of interest rules in circumstances that once a conflict comes within the knowledge of the solicitor, the solicitor will cease to act or will obtain informed consent from the relevant clients. Both sets of commentary note that the limited nature of these short-term summary legal services significantly reduces the risk of conflicts of interest with other matters being handled (or previously managed) in the legal service. The commentaries explicitly recognise the difficulty of systematically screening for conflicts of interests in a timely way and other access to justice considerations for short-term summary legal services. The rules and commentaries, in effect, address the very issues and problems that we have been raising with the Law Council in our submissions since 2012.

### **Amalgamations of CLCs**

NACLCL received feedback from several CLCs that having an exclusion for conflict checking for advice services would also solve a problem arising where two or more CLCs merge, as has been happening in Victoria in particular over the past five years. The new legal entity takes on the clients of the previous organisations, and in theory no new advices can be given without doing a substantive conflict check across all clients of all merged organisations. An exception for high volume discrete legal advices or duty law matters would facilitate quick and easy access to justice.

### **A CLC can always continue comprehensive conflict checking if they want to**

NACLCL received feedback from some smaller CLCs, and those in regional or rural areas, that their Principal Solicitor currently check every advice, and/or that they are of the view that there is a reasonably probability that the staff solicitor running the regular advice clinic will have been the person advising the other side in a particular dispute (eg family law, private debts). In these situations, the CLCs have expressed caution about there being a blanket exemption for all legal advice services.

Other feedback concerned the fact that, advice or legal task services can escalate into ongoing representation work. If a CLC has provided advice to both parties (eg in a family law matter), and

then determines it wants to take on one party as a client, a conflict check at this point will then reveal the advice provided to the other party. Some CLCs felt that this was a particularly high likelihood in family law disputes. This might then mean that the CLC has no choice but to refer both parties off to another legal assistance provider.

NACLC is of the view that CLCs – and any other legal assistance providers – would not be forced to avail themselves of the exception, if they have identified that in the situation of their own practice, there are relatively high risks of having information about a matter because of having provided advice to the other party. It may be that some CLCs avail themselves of the exception in all areas of practice except for (say) family law.

If the Solicitors Rules are changed, then NACLC will of course undertake a methodical review of our Risk Management Guide conflict of interest provisions. It would be very helpful to have detailed Commentary in the Solicitors Rules about any new rule so that there is consistency across CLCs, Legal Aid Commissions, ATSILS, and FVPLS. NACLC would then include in our own Risk Management Guide some further guidelines for CLCs to undertake their own risk assessment, and then determine whether they want to use the exception or continue a full conflict checking, based on the circumstances of their practice. It might be that some CLCs with small practices will determine that the “hassle” of conflict checking is not actually much of a cost, compared to the potential risk that the CLC will find itself with an actual conflict of interest.

It would be important to ensure that there is no expectation from funding bodies that just because a CLC might have access to the exception, they would not be forced to do so. Risk management is ultimately a judgment by every individual legal practice, and it would not be appropriate for there to be pressure from outside parties on individual CLCs to avail their practice of the exception.

## Rule 28

# Public comments during proceedings

### Ethics Committee position

The Ethics Committee considered that rule 28 which prohibits publication of any material concerning current proceedings which may preclude a fair trial or the administration of justice

should not be deleted, as some in the legal sector have suggested. However, it also recommended that the Commentary provide examples of the application of rule 28, as there is currently no Commentary on this rule.

### NACLC recommendation

10. NACLC recommends that the Commentary provide examples of the application of rule 28 and, therefore, supports the Ethic Committee's position that examples of the application of the rule is needed. In particular, NACLC recommends that the Commentary include examples of cases where CLCs are involved in public interest proceedings and the extent to which CLCs can inform the public of the issues raised in a public interest matter.

### Rationale

Many CLCs are involved in public interest proceedings. Some consider that rule 28 creates a chilling effect on discussing these proceedings publically at the time that they are litigated. Raising public interest in some of these matters is an essential goal of CLCs in their advocacy and community legal education programs. CLCs would be assisted by Commentary that delineates the differing operation of rule 28 in relation to criminal trials (where there is a risk of a jury being affected by public discussions) as opposed to civil matters before courts and tribunals where there are public interest issues being raised.

Several CLCs provided examples to NACLC of times when they have wanted to comment on a current court case. One CLC noted that it would be useful for the Commentary to ensure that the solicitor making public comments has gained explicit consent from the client where the comments may identify them.

## Rule 33

# Communications with another Solicitor's client

### Ethics Committee Position

The Ethics Committee has recommended that rule 33 should not provide an exemption to the ethical prohibition on a solicitor directly contacting the client of another solicitor, where the client of the other solicitor is a financial institution.

### NACLC recommendation

11. NACLC recommends that the Law Council should adopt a limited exemption permitting direct contact with financial institutions or other businesses in debt matters and in circumstances where there is a legal requirement on financial institutions to be a member of an external dispute resolution (EDR scheme) and to have internal dispute resolution (IDR) processes.

### Rationale

NACLC disagrees with the Ethics Committee position that there is no rationale for providing an exception to the no-contact rule in relation to financial institutions and other businesses (for example, energy companies and telcos) in debt matters with EDR and IDR obligations. The reasons why the Ethics Committee rejected a change of the no-contact rule are as follows:

- submissions do not raise a new issue of ethical conduct to be addressed;
- it is questionable to claim that solicitors acting for financial institutions or similar businesses might not possess sufficient knowledge about these IDR and EDR processes;
- where a solicitor has been retained then it cannot be presumed that the “plaintiff” wants direct contact with the “defendant”, even sophisticated plaintiffs;
- none the above warrants modification of an important ethical principle intended to ensure that a client, no matter how sophisticated, is entitled to the protection afforded by legal representation; and
- this issue is more appropriately addressed in either consumer legislation or in terms of engagement between the financial institution and their solicitors.

NACLC submits that the reasons of the Ethics Committee failed to take into account:

- that this issue raises wider ethical issues and public interest considerations than just the no-contact principle in rule 33, including:
  - balancing the no contact principle with wider ethical issues, such as the consequences of strict compliance of this rule for vulnerable, disadvantaged and everyday Australians experiencing significant financial hardship;
  - significant CLC resources are diverted to dealing with lawyers when contact with the hardship section in financial institutions can resolve the issue quickly and efficiently and in a way that does not compound or worsen the hardship on CLC clients; and
- many CLCs have significant experience dealing with solicitors representing financial institutions and have first-hand knowledge of the issues that arise due to the operation of rule 33 in this context.

#### **Wider ethical issues and public interest considerations**

NACLC submits that there are considerable public interest reasons for including specific ethical and professional principles governing the conduct of solicitors as they relate to people experiencing vulnerability or disadvantage and that this ethical principal needs to be balanced with the ethical principle in rule 33.

Debt and civil work is a core part of the work of many CLCs. CLCs represent clients who are pursued for debts and deal with solicitors retained by financial institutions and other large businesses for debt matters on a day-to-day basis. Our feedback from CLCs is that the no-contact rule has direct bearing on some of the most vulnerable people within Australian society and can have devastating material outcomes on everyday Australians in debt. The difference between making direct contact with with financial institution and working through the financial institution's lawyer, can make the difference between a CLC client's matter being resolved, losing their house, going bankrupt or having insufficient money for food and bills. CLCs informed us during the consultation process that contacting the financial hardship section resolves the indebted clients problems efficiently and quickly. Indeed, CLCs informed us that the outcome for the client is almost always significantly better when they communicate directly with the client's Financial

Hardship or IDR Department. This is also an ‘access to justice’ issue where strict compliance with the Rules leads to poor client outcomes as well as significantly adds to community lawyers’ time, therefore reducing the number of disadvantaged people CLCs can assist.

Further, NACLCL submits that there are public interest considerations that justify a departure from the strict rule applying in debt matters because these financial institutions have concurrent legal obligations on them that do not apply to ordinary Australians or consumers of legal services. The exception NACLCL recommends is limited only to those financial institutions who are required by law to have an EDR scheme and/or an IDR process.<sup>1</sup> Most of these businesses are also subject to industry codes which are legally enforceable,<sup>2</sup> which include obligations relating to the treatment of customers in financial hardship.<sup>3</sup>

These IDR, EDR and financial hardship processes operate separately and concurrently with the courts, and they often override the civil jurisdiction of the courts. For example, the Australian Financial Complaints Authority (previously the Financial Ombudsman Service) can stay court proceedings while investigating a dispute or a financial hardship matter.<sup>4</sup> A bank or insurer must consider a request (for example for a hardship arrangement) made pursuant to the code of practice regardless of whether legal proceedings are on foot.

Thus, NACLCL considers that these considerations justify a limited change to the no contact rule and that financial institutions that have competing legal rights and obligations are not an ordinary consumer of legal services which rule 33 was designed to protect.

### **CLCs are experts in this area**

While NACLCL understands the Ethic Committee’s disbelief that debt collection lawyers representing financial institutions have little understanding of IDR or EDR obligations on their clients, unfortunately the experience of CLCs suggest that this is in fact the case. Indeed, we have

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<sup>1</sup> See, e.g., See section 47, *National Consumer Credit Protection Act 2009* (Cth); ss 912A(1)(g), 912A(2), 1017G, *Corporations Act 2001* (Cth), Part 6, *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), Part 4, National Energy Retail Law.

<sup>2</sup> See *National Australia Bank Limited v Timothy Craig Rice and Albert Rose* [2015] VSC 10]. While this decision was appealed in relation to damages, NAB did not dispute the finding that the Code of Banking Practice was contractually binding.

<sup>3</sup> See, e.g., clause 28, Code of Banking Practice; clause 8, General Insurance Code of Practice.

<sup>4</sup> Paragraph 13.1(a)(ii) of the Financial Ombudsman Service (FOS) terms of reference outlines when FOS can consider a dispute that is already in court. FOS can do so if legal proceedings relating to debt recovery have been issued before the dispute is lodged at FOS and the applicant has not taken a step beyond lodging a defence or a defence and counterclaim. FOS accepted more than 1,000 disputes in 2016-17 which were lodged after legal proceedings had commenced: FOS Annual Report 2016-17, page 105, available at: <http://www.fos.org.au/custom/files/docs/fos-annual-review-20162017.pdf>.

received similar feedback from CLCs about this issue for this review as we did for our 2012, 2013 and 2015 submissions. CLC experience continues to show that in many cases where the financial institution is legally represented, the lawyer has very little understanding of the client business' obligations under EDR, codes or hardship programs. Lawyers routinely act in the role of debt collector for these businesses and are involved in approximately 20 per cent of the matters. Commonly, a lawyer representing these businesses continues to threaten or take court action and will not respond to any requests to consider financial hardship or refer a matter to IDR, which ignores the obligations of the client business.

We have been informed by CLCs that complaints against lawyers and their clients for breaches of these obligations are made by CLCs on behalf of their clients on a regular basis. For example, one CLC who has made complaints against lawyers acting on behalf of financial institutions in debt collection matters said that two law firms which were on an insurance company's panel indicated their lack of knowledge—one stating incorrectly that the Code did not apply to third parties, the other stating incorrectly that the Code was not mandatory. Of course in theory this could be addressed if lawyers responded appropriately, but there has been little improvement despite growing awareness and coverage of EDR, IDR and code obligations since 2012 when NACLC first raised this issue with the Law Council in its submissions.

### **Example**

One CLC in Victoria, Westjustice, received grant funding to operate a Mortgage Stress Project, where community lawyers worked closely with social workers to identify mortgage stress early and either help the client to retain their home or, if this wasn't possible, help them through the process to ensure they minimised their financial loss. Clients were disadvantaged and vulnerable, many with significant health issues and/or lack of English language skills. Many of the lenders (mostly banks) worked co-operatively with the project, and they appreciated the fact that the CLC's intervention often resulted in a better outcome for the lender as well as the consumer. As an example, agreements were often struck whereby the lender would ensure the consumer retained enough funds to find rental housing, while the consumer agreed to move out in a timely way with social work support.

Despite the aim of early intervention, the project dealt with a significant number of clients where the mortgagee had already engaged lawyers. In almost all cases the involvement of lawyers prevented the CLC from assisting the lender and consumer to resolve the matter quickly. The clients would have suffered had the CLC not contacted the bank directly. One option was to brief the social worker, who was not bound by the Rules, to make direct contact with the mortgagee. However, it is not appropriate for a project with limited funds struggling to meet demand, to add to the role of the social worker whose role it was to assist the family into housing or help address related personal issues.

### **Case Study**

A was a taxi driver supporting 3 children, and paying off his home. When legal proceedings were brought against A by an insurer, his taxi club said they will “look after it”. Once judgment is entered against A, he discovers that the “insurance” he has paid his taxi club isn’t actually insurance, and won’t cover the damages. The insurer’s lawyer issues bankruptcy proceedings. The CLC contacted the insurer’s lawyer who advises that the matter has gone “too far” and that the bankruptcy proceedings would proceed, in which case A would lose his family home and his vehicle. The CLC had previously discussed the unfair situation facing taxi drivers with the insurer, and so the CEO made direct contact with the insurer’s financial hardship department. They finally agreed to waive the debt and withdraw bankruptcy proceedings.

The example and case study exemplify how rule 33 can operate in this context in a way which leads to unjust outcomes and can have significant adverse consequences for indebted Australians. This is both a public interest and access to justice issue and the Solicitor Rules should be amended to facilitate justice and not hinder it and so that public funds can be used to assist more Australians.

## Potential Additional Rule

# Claiming Costs in Letters of Demand

### Ethics Committee position

In the consultation paper, the Ethics Committee stated that the ethical duty to not mislead a person into believing legal costs or other debt recovery costs are payable is embodied in the principles underpinning a number of rules, including:

- to be honest and courteous in all dealings in the course of legal practice;
- to not bring the profession into disrepute;
- to not make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the client; or
- to not make any statement which misleads or intimidates the other person.

For these reasons, the Ethics Committee considered that a separate and specific ethical rule about claiming legal costs in letters of demand is not required. It did, however, recommend that further attention should be drawn to this kind of conduct in the Commentary.

### NACLC recommendation

12. NACLC submits that there is a clear need for a separate rule prohibiting solicitors from claiming or requesting costs in letters of demand. If, as the Ethics Committee has pointed out, that the ethical principle is in any event supported by an interpretation of the underlying principles of a combination of four rules, then there is nothing in principle to preclude including a new rule that explicitly states the principle. Moreover, the extent of the practice of solicitors claiming or requesting costs in letters of demand and the problems that CLCs have had with asking regulatory bodies to address the professional ethics of this practice also supports the case for a separate rule.

### Possible changes to rule 34 (italicised text):

#### **Rule 34 Dealing with other persons**

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 make any statement which grossly exceeds the legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the other person,

34.1.2 threaten the institution of criminal or disciplinary proceedings against the other person if a civil liability to the solicitor's client is not satisfied,

34.1.3 use tactics that go beyond legitimate advocacy and which are primarily designed to embarrass or frustrate another person,

*34.1.4 make a demand or claim for legal costs in connection with collecting a debt that was wholly or predominantly accrued in connection with personal, domestic or household purposes, without a reasonable basis or which is misleading or is likely to mislead.*

34.2 In the conduct or promotion of a solicitor's practice, the solicitor must not seek instructions for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.

While NACLCL believes that a new rule is needed, should the Law Council disagree with our position, we certainly support the Ethics Committee's proposal to include a discussion of this issue in the Commentary. NACLCL would appreciate being consulted about the wording of the Commentary.

## Rationale

NACLCL is of the view that there is a need for a separate and specific rule for three reasons.

First, the extent of the practice exemplifies the need for a separate and specific rule. NACLCL has received feedback from CLCs who have firsthand knowledge, that the practice of solicitors demanding costs in letters of demand continue unabated and in significant numbers. In Victoria, for example, the Australian Solicitors Rules were adopted from 1 July 2015. One CLC provided feedback that it has, however, continued to observe law firms representing debt collectors or

mercantile agents demand payment of legal costs that are unlawful or misleading. Sometimes law firms word such letters of demand so as to 'request' costs that are not legally recoverable at the time of the letter. In the eyes of a debtor who receives such a letter there is little if any difference between this and a demand. These letters are also, obviously, clothed in the colour of legal authority, which makes it a professional ethical issue.

However, regulatory bodies have failed to treat this issue as a professional ethical one. When one CLC raised complaints with the Legal Services Commissioner in Victoria, the response was that the Commission is not the appropriate body to raise these complaints to, and the debtors would need to first prosecute their claims for misleading conduct in a court or tribunal. However, because of the amount of the debt and the costs of prosecuting such claims in a court or tribunal, nothing can be done to resolve this issue. This conduct therefore disproportionately affects pensioners or low-income earners who are unable to afford legal proceedings. In this regard, a general consumer based requirement that solicitors not engage in conduct which misleads or intimidates the other person has failed to address the problem of lawyers claiming impermissible legal costs in their letters of demand. A specific ethical rule is therefore required to ensure that regulators believe they are empowered to investigate this issue properly and eradicate this unethical practice.

### **Case Study**

Consumer Action Law Centre made a group complaint to the Victorian Legal Services Commissioner on behalf of a number of vulnerable and disadvantaged consumers.

Consumer Action argued that a Victorian law firm had breached the Australian Rules by demanding payment for legal costs in letters of demand sent to debtors where that firm had no right at law to demand those fees by operation of section 52 of the Australian Consumer Law and Fair Trading Act 2012 (Vic) (ACLFTA).<sup>5</sup> Consumer Action Law Centre alleged that the lawyer had breached rule 34 of the Australian Rules because it had made repeated statements in their letter of demands which exceeded their legitimate assertion of the rights or entitlements of the solicitor's client, and which misleads or intimidates the recipients of their letters of demand. Consumer Action alleged that this conduct was systemic.

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<sup>5</sup> Section 52 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) prohibits a debt collector to seek costs in connection with collection or attempting to collect a debt where that debt was wholly or predominantly accrued in connection with personal, domestic or household purposes. This would include charging legal fees to collect debts such as gym contracts, residential energy bills, doctor bills.

The regulator stated that it could not take any further action in relation to the group complaint because the underlying law which made the claim misleading, being section 52 of the ACLFTA, was not the type of legal breach which warrants an intervention by the Legal Services Commissioner. The Commissioner went on to say that it would only consider whether further action was warranted if a Tribunal or Court made an adverse finding against the law firm.

## Potential Additional Rule

# Mental Wellbeing

### Ethics Committee Position

The Ethics Committee sought feedback about whether there should be an ethical duty on a solicitor to respond if they form a view that a fellow practitioner might be suffering a mental impairment and, if so, whether this matter should be raised with the relevant professional association or should be reported to a regulatory authority.

### NACLC recommendation

13. NACLC submits that a solicitor should not be obliged to report a fellow practitioner if they form a view that they might be suffering a mental impairment rather than in circumstances where there is an observed breach of an ethical duty or professional obligation. However, if the Law Council is of the view that there should be a rule governing mental well-being of solicitors, NACLC submits that the first step should be confidential reporting to the professional association to be addressed under pastoral care programs rather than by the regulatory authority.

### Rationale

NACLC is of the view that mental impairment alone does not necessarily mean that a solicitor is unable to undertake legal practice. The issue should be whether a practitioner is breaching an ethical duty or professional obligation. NACLC believes that separate guidance and education should be provided to solicitors on how to address another practitioners mental impairment in a

sensitive and confidential way and what services and programs are offered by professional associations.

## Appendix

### Law Society of Ontario Rules: Short-term Pro Bono Legal Services<sup>6</sup>

3.4-16.2 In this rule and rules 3.4-16.3 to 3.4-16.6,

"pro bono client" means a client to whom a lawyer provides short-term pro bono services;

"lawyer's firm" means the law firm at which the pro bono lawyer practices law as a partner, associate, employee or otherwise.

"pro bono provider" means a pro bono or not-for-profit legal services provider that makes pro bono lawyers available to provide advice or representation to clients.

"pro bono lawyer" means (i) a volunteer lawyer who provides short-term pro bono services to clients under the auspices of pro bono provider or (ii) a lawyer providing services under the auspices of a Pro Bono Ontario program.

"short-term pro bono services" means pro bono legal advice or representation to a client under the auspices of a pro bono provider with the expectation by the pro bono lawyer and the client that the pro bono lawyer will not provide continuing legal advice or representation in the matter.

3.4-16.3 A pro bono lawyer may provide short-term pro bono services without taking steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer's firm or of the pro bono provider.

3.4-16.4 A pro bono lawyer shall take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

3.4-16.5 A pro bono lawyer shall not provide or shall cease providing short-term pro bono services to a client where the pro bono lawyer knows or becomes aware of a conflict of interest.

3.4-16.6 A pro bono lawyer who is unable to provide short-term pro bono services to a client because there is a conflict of interest shall cease to provide such services as soon as the lawyer actually becomes aware of the conflict of interest and the lawyer shall not seek the pro bono client's waiver of the conflict.

### Commentary

[1] Short-term legal pro bono services, such as duty counsel programs, are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way,

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<sup>6</sup> [https://www.lsuc.on.ca/relationship-to-clients/#ch3\\_sec4-16-short-term-pro-bono](https://www.lsuc.on.ca/relationship-to-clients/#ch3_sec4-16-short-term-pro-bono)

despite the best efforts and existing practices and procedures of the pro bono provider the pro bono lawyer and the lawyer's firm. Performing a full conflicts screening in circumstances in which short-term pro bono services are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] The limited nature of short-term pro bono services significantly reduces the risk of conflicts of interest. Accordingly, the lawyer is disqualified from acting for a client receiving short-term pro bono legal services only if the lawyer has actual knowledge of a conflict of interest in the same or a related matter. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term pro bono services.

[3] In the provision of short-term pro bono legal services, the lawyer's knowledge about conflicts is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consulting with the pro bono provider regarding the short-term pro bono services.

[4] The disqualification of a lawyer participating in a short-term pro bono services program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a pro bono client, will not be imputed to the lawyers, paralegals and others at the lawyer's firm. As such, these people may continue to act for another client adverse in interest to the pro bono client and may act in future for another client adverse in interest to the pro bono client.

[6] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the pro bono client or to other persons at the lawyer's firm. Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-23) to the situation of a law firm acting against a current client of the firm in providing short-term legal services. Measures that the lawyer providing the short-term pro bono services should take to ensure the confidentiality the client's information include:

- (a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the pro bono client;
- (b) identifying relevant files, if any, of the pro bono client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- (c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[7] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term pro bono legal services.

[8] The provisions of Rules 16.3 and 16.4 are intended to permit the provision of short-term pro bono services by a pro bono lawyer without the client being considered to be a client of the lawyer's firm for conflicts and other purposes. However, it is open to the pro bono lawyer and the client to agree that the resources of the lawyer's firm, including other lawyers, may be accessed for the benefit of the client, in which case the provisions of Rule 16.3 and 16.4 do not apply, the pro bono lawyer would be required to clear conflicts and the client would be considered a client of the lawyer's firm.

## [Federation of Law Societies of Canada, Model Code of Professional Conduct, October 2014](#)

### **Short-term Summary Legal Services**

3.4-2A In rules 3.4 - 2B to 3.4 - 2D "Short - term summary legal services" means advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

3.4-2B A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest.

3.4-2C Except with consent of the clients as provided in rule 3.4-2, a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

3.4-2D A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

### **Commentary**

[1] Short-term summary legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short-term summary services described in these rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided.

[2] The limited nature of short-term summary legal services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the pro bono or not-for-profit legal services provider or between the lawyer and the client receiving short-term summary legal services.

[3] Confidential information obtained by a lawyer providing the services described in Rules 3.4-2A-2D will not be imputed to the lawyers in the lawyer's firm or to non-lawyer partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

[4] In the provision of short-term summary legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the pro bono or not-for-profit legal services provider to receive its services.