



16 January 2015

Public Submissions - Uniform Rules
Law Council of Australia
19 Torrens Street
BRADDON ACT 2612

BY EMAIL: uniform-rules@lawcouncil.asn.au

Dear Sir/Madam

Consultation on Uniform Rules

We write in relation to the Law Council of Australia's (**LCA**) current consultation on the proposed Legal Practice Rules (Solicitors) (**Practice Rules**) and Legal Profession Conduct Rules (Solicitors) (**Conduct Rules**) under the Legal Profession Uniform Law.

1. About the contributors

Consumer Action Law Centre (**Consumer Action**) is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

The Financial Rights Legal Centre (**FRLC**) is a community legal centre specialising in financial services, particularly in the areas of consumer credit, banking, debt recovery and insurance. It fully integrates telephone assistance and financial counselling with legal advice and representation. FRLC also operates the Insurance Law Service, a national specialist consumer insurance advice service.

2. Summary of concerns

We have a number of areas of concern with the proposed Practice Rules and Conduct Rules:

- i. the relationship between lawyers and debt collectors
- ii. claims for costs
- iii. misleading conduct in communications with third parties
- iv. communication with another solicitor's client
- v. lawyers acting for insurers
- vi. conflicts of interest
- vii. public comment during current proceedings
- viii. disclosure of referral fees

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

These are addressed below.

3. The relationship between lawyers and debt collectors

We regularly assist debtors who are being pursued by lawyers or law firms acting on behalf of debt collectors or creditors seeking repayment of a debt. Our concern is that existing professional conduct rules do not adequately protect vulnerable debtors being pursued in such circumstances. The Victorian Legal Services Commissioner Debt Collection Round Table held in 2009 highlighted the serious problems associated with lawyers undertaking debt collection.ⁱ

Modern technology allows for mass generation of legal letters of demand on a scale which is inconceivable to most lawyers. As discussed below, in enforcement action taken by the Australian Competition & Consumer Commission against lawyer Pippa Sampson, the Federal Court heard that Pippa Sampson's firm was sending 20,000 letters and notices each month, or 240,000 letters over a 12 month period. Mass debt collection performed by solicitors on this scale has the potential to cause widespread detriment to consumers and broad reputational damage to the legal profession unless it is conducted with absolute probity.

We welcome rule 2 of the proposed Practice Rules on debt collection and mercantile agents, which was not part of the rule package previously consulted on by the LCA. We submit, however, that the rule could be enhanced if it more closely reflected the Victorian *Professional Conduct and Practice Rules 2005* (the **Victorian Rules**).

In particular, rule 29.2.3 of the Victorian Rules states that "practitioners who receives, from a debt collection or mercantile agent, instructions to act for a client creditor, must ensure that ... the practitioner maintains direct control and supervision of (i) any proceedings and (ii) *any correspondence or communication with the client and with the client's debtor to which correspondence or communication the practitioner is or purports to be a party on behalf of the client*" (emphasis added). Proposed rule 2 limits practitioner obligations to control and supervision over proceedings only, and not correspondence and communication.

Consumer complaints to Consumer Action demonstrate evidence of letters being printed on a law firm's letterhead that appear to have been prepared by a mercantile agent, without any apparent legal supervision. For example, it is not uncommon for our clients to receive correspondence that is printed on a legal practitioner's or law firm's letterhead containing the telephone number or email address of a debt collection agency or the credit provider. In our view, this practice may indicate a breach of rule 29.2.3(ii), a view that is also taken by the Victorian Legal Services Commissioner.ⁱⁱ

The disciplinary proceeding taken by the Victorian Legal Services Commissioner against Victoria Nomikos, being the first disciplinary proceeding to deal with rule 29, is a case in point.ⁱⁱⁱ After the Tribunal ordered the legal practitioner to pay \$25,000 to the Legal Services Board, the Commissioner stated that "handing over a letterhead template and allowing a debt collection agency to write a payment demand on it without vetting every letter fell short of what is expected of a lawyer."^{iv}

In our view, given the capacity of mass debt collection lawyers to cause widespread detriment to consumers and damage to the reputation of the profession through written communications, rule

2.2.3 of the Practice Rules should be extended to practitioner communications and correspondence.

4. Claims for costs

The Conduct Rules should clearly state that a lawyer must not make any statement in a letter of demand that is likely to mislead the recipient to believe that legal costs or other recovery costs are legally payable unless those costs are legally recoverable based on a reasonable contract or trading terms, and the letter refers to those terms.

In our experience, lawyers or law firms that act on behalf of debt collectors or mercantile agents regularly seek payment of additional costs on top of the initial debt. Problems with these communications include:

- A 'request' for costs that are not legally recoverable at the time of the letter, often leads the recipient to believe that the costs are actually owed (i.e. the effect is similar to making a 'demand'). We note that this may, breach the Australian Consumer Law but believe that the Conduct Rules should enable the professional regulator to deal with such conduct;
- A demand or request for costs that may be based on an amount legally recoverable based on trading terms agreed to by the parties, but where the basis for the claim is not stated.

Problems with these communications continue despite attention over the years by the Law Institute and the Legal Services Commissioner.

Even where letters of demand refer to trading terms which allow the creditor to recover costs relating to collecting a debt it is not clear that the lawyer or law firm had considered such terms closely and the extent that they allow recovery of costs. It is not uncommon for letters of demand to include "debt collection commission" equating to a significant proportion of the total small debt (e.g. \$250 commission on a \$450 debt) as well as "legal costs", which can also be significant. These costs can add up to more than double the amount of a small debt.

In our view, terms of contracts that allow for recovery of collection costs must be fair and reasonable. If such terms are imbalanced, or not reasonably necessary to protect the interests of the creditor (for example, by permitting recovery of costs exceeding the real costs associated with collecting the debt), they may be unfair terms and thus void under the Australian Consumer Law or the National Credit Code.^v Although section 172 of the Legal Profession Uniform Law provides that 'A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances', it is not clear how this applies to demands or requests for additional costs or charges from consumer debtors. While the Victorian Legal Services Commissioner's fact sheet on debt collection states that overcharging 'may' constitute professional misconduct, and that lawyers' costs should be fair and reasonable,^{vi} it is our view that these principles could be more clearly articulated in professional rules, thereby bringing about an enhanced standard of conduct.

We ask that the LCA consider extending the rules to consider the question of costs in these circumstances.

5. Misleading conduct in communications with third parties

Rule 28 of the Victorian Rules and rules 22 and 34 of the Conduct Rules regulate communications with other persons, such as consumer debtors.

Relevant professional conduct rules

Rule 28 of the Victorian Rules states:

28. Communications

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

28.1 represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or

28.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner's client;

Rule 22 of the proposed Conduct Rules states:

22. Communication with opponents

22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).

22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false.

Further, rule 34 of the Conduct Rules states:

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

....

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

These rules can be contrasted with section 18 of the ACL, which prohibits, in trade or commerce, misleading and deceptive conduct, as well as conduct likely to mislead and deceive. The definition of “trade or commerce” in section 2 of the ACL “any business or professional activity”—in our view, the ACL thus applies to the activities of lawyers.^{vii}

Section 18 covers a very wide range of conduct. It can include lying, making false or inaccurate claims, leading a person to the wrong conclusion, or inaccurate or exaggerated claims. Case law suggests that the overall impression is what matters, and the court will consider whether the conduct is likely to lead a reasonable person to whom it is directed into error, or has the tendency to deceive such persons. In contrast, the professional rules above create a lower standard of professional conduct. For example, rule 34 of the Conduct Rules appears to allow a lawyer or law firm to engage in conduct which is likely to mislead a debtor but falls short of being grossly excessive. It is our view that industry-specific rules, including professional conduct rules that apply to lawyers, should be designed to enhance standards required by general laws, bringing them from generic standards to higher standards.

The Sampson case

The Federal Court decision of *Australian Competition & Consumer Commission v Sampson*^{viii} demonstrates the breadth of the ACL. The conduct of Sampson (partner in law firm Goddard Elliot) was initially investigated after a complaint was made to ACCC by Central Australian Aboriginal Legal Service. The agreed facts were that Sampson and Goddard Elliot acted as a mercantile agent on behalf of a number of video stores. Goddard Elliot sent numerous letters and notices to debtors of video stores since at least April 2002, including approximately 20,000 letters and notices each month in the 12 months proceeding the ACCC action. The Federal Court declared that Sampson acted in breach of section 52 of the *Trade Practices Act 1974* (the predecessor to section 18 of the ACL), including by sending letters marked 'urgent notice' which represented that:

- the lawyer's video rental client was necessarily entitled to recover lawyer's costs of a certain amount;
- if legal action was taken then this would necessarily result in additional costs associated with legal proceedings, even though the video retail client would have no entitlement to recover legal costs if they were unsuccessful, and even if successful, costs would not necessarily be ordered in a proceeding issued for the recovery of a small debt.

There were other examples of misleading conduct including representing that Goddard Elliot could itself enforce a judgment by a warrant, garnishee order and/or attachment of earnings, when of course it could not do so without obtaining an enforcement order from the Court. The Court found it was also misleading for Ms Sampson to issue a document which was similar in format to a court document, but in fact was not a court document.

Following the Federal Court decision, the Legal Services Commissioner (**LSC**) brought charges against Ms Sampson, alleging Ms Sampson breached rules 28.1 and 28.2 of the Victorian Rules.^{ix} The Victorian Civil and Administrative Tribunal (**VCAT**) found that the notices sent by Ms Sampson breached rule 28.2 in that they were calculated to mislead and intimidate and grossly exceed the legitimate assertion of the rights or entitlement of the video store owners. However, Ms Sampson was not found guilty of breaching rule 28.1, as the LSC did not prove that Ms Sampson 'knew, or reasonably believed the representations in the notices were untrue.'^x

The VCAT proceeding highlights the difficulty of discharging the onus of proof in proving professional misconduct in these cases. This may mean that legal services regulators would not necessarily investigate such conduct, despite it being in breach of general consumer laws.

Recommendation

As noted above, the professional rules should seek to enhance general standards. They should not suggest that lawyers can meet a lower standard than required by the Australian Consumer Law. In this case, the professional rules should at least require an equivalent standard as general consumer laws. We ask that the LCA consider amending the relevant rules to ensure that they include a general prohibition on misleading or deceptive conduct, or conduct likely to mislead or deceive.

6. Communication with another solicitor's client

Rule 33 of the Conduct Rules prevents a solicitor from dealing directly with the client of another solicitor, save for limited circumstances. Rule 33 states:

33. Communication with another solicitor's client

33.1. A solicitor must not deal directly with the client or clients of another practitioner unless:

33.1.1. the other practitioner has previously consented;

33.1.2. the solicitor believes on reasonable grounds that:

- (i) the circumstances are so urgent as to require the solicitor to do so; and*
- (ii) the dealing would not be unfair to the opponent's client;*

33.1.3. the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or

33.1.4. there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

This rule is problematic for community legal centres (**CLCs**) and their clients in civil disputes against legally represented providers of financial, insurance or investment services, local councils, utilities, or debt collection agencies.

In many cases liability is not in issue, and the legal assistance the consumer needs is negotiating about hardship and capacity to pay. The 'no contact rule' is problematic for three reasons:

- As noted above, correspondence on the lawyer's letterhead may contain the telephone number or email address of a debt collection agency or credit provider. It is apparent that the law firm is a clearing house for the debt collector or credit provider, and it would be

fruitless (if possible) to contact the law firm, which is unlikely to have specific instructions.

- The service provider may be legally required to attempt alternative or internal dispute resolution. Our clients are entitled to the benefit of those processes, and CLCs need to be able to communicate directly with the relevant provider in order to access and progress their client's submissions. Contact with the debt collection solicitor often frustrates or precludes this.
- It is crucial that we avoid our clients incurring unnecessary costs, particularly since CLCs assist low income and disadvantaged clients. We have found that any contact with the debt collection solicitor adds significantly to the debt claimed to be owed.

For example: A CLC acts for a person who is having mortgage difficulties. The bank has retained a solicitor to recover the debt/arrears. The bank has breached the Banking Code of Practice (which is legally enforceable by a customer) in the way it has responded to a request for a repayment variation. The customer has the right to raise this dispute with the Financial Services Ombudsman, but is required to contact the internal dispute resolution section at the bank in the first instance. Contacting the debt collection solicitor will simply add to the debt and will be ineffective since that solicitor is not receiving instructions from the financial hardship team or the internal dispute resolution section, but from a different section of the bank. The exceptions in rules 33.1.1 to 33.1.4 do not sufficiently address the situations outlined above. We recommend changes to rule 33 of the Conduct Rules to allow solicitors acting on behalf of individuals or small businesses in disputes with traders, who are legally entitled to have access to the trader's internal dispute resolution process or external dispute resolution service, to communicate directly with the trader even where a solicitor acts for the trader.

7. Lawyers acting for insurers

It is our experience that lawyers acting for an insurer under a right of subrogation pursuant to an insurance policy do not regularly inform debtors (commonly clients of CLCs) that an insurance company is involved. This can mean that debtors may not be advised that they have rights, such as the right to make a complaint to the Financial Ombudsman Service (a less costly dispute resolution forum compared to court). This problem usually occurs when the debtor receives court proceedings that only mention an insured and their lawyer (who is in fact acting for the insurer). The debtor may not be aware of the involvement of the insurance company at all. The recently revised General Insurance Code of Practice deals with this issue: new clause 8.10 obliges subscribing insurers to be identified in any communication with debtors, as well as the nature of any claim.^{xi} We submit that the Conduct Rules could similarly oblige lawyers by requiring them to advise the other party if the solicitor is acting under the right of subrogation and, if so, the identity of the insurer.

8. Conflicts of interest

The development of conflict rules has been influenced by conflict of interest case law over time. However, conflict of interest case law is derived from litigation experience, rather than the experience of providing discrete legal services (such as one-off advice or duty services). Consideration of conflict of interest rules tends to focus on conflicts that arise in traditional

lawyer-client relationships. Where a legal firm or CLC provides only discrete legal services to a client, this creates a different type of relationship with a limited retainer and no expectation of ongoing assistance. Rules 10 and 11 of the proposed Conduct Rules fail to exempt the provision of discrete legal services to a client, even where no actual conflict of interest exists.

In calling for access to more 'unbundled' legal services, the Productivity Commission has recognised that conflict of interest rules can hinder access to justice where only a perceived, rather than real, conflict of interest exists.^{xii} The Commission further considered that reforms to the Australian Solicitor Conduct Rules, along with certain Court rules would provide the clarity and the certainty necessary to allow for greater use of unbundling.^{xiii}

We support Legal Aid NSW's submission to the Productivity Commission that the professional conduct rules should include a supplementary rule that recognises the limited lawyer-client relationship that arises in the provision of discrete legal services.^{xiv} We recommend that Rule 10 be amended to provide that an information barrier is not required where the former client has only received a discrete legal service from the legal practice and the solicitor does not have actual knowledge of confidential information about that former client that could give rise to a conflict. Further, we recommend that Rule 11 be amended to provide that consent is not required where the client only requires discrete legal services and the solicitor does not have actual knowledge of confidential information held by the legal practice about another current client(s) with a contrary interest in the same or related matter.

A supplementary rule to this effect would enable legal firms and public legal assistance services to provide much needed legal assistance to clients that would otherwise be 'conflicted out' from receiving assistance and improve access to justice where only a perceived conflict of interest exists.

9. Public comment during current proceedings

Rule 28 of the proposed Conduct Rules states:

A solicitor must not publish or take steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice.

There is no equivalent rule in the Victorian Rules. We are concerned that the proposed rule 28 would unreasonably restrict legal firms and CLCs from commenting on legal proceedings, particularly in public interest matters. Rule 28 may unreasonably restrict lawyers from making comments on current proceedings, even where it is highly unlikely that these comments would prejudice a fair trial. We request that this rule be deleted. In the alternative, we would welcome the publication of guidance that clarifies the application of this rule, particularly in relation to commentary on public interest cases.

10. Disclosure of referral fees

Rule 33 of the Victorian Rules prohibits lawyers from taking advantage of vulnerable potential clients and requires lawyers to disclose details of referral arrangements. Rule 33 also requires a

lawyer to cease acting for a client in a matter involving a third party from whom the lawyer may receive a fee or other benefit.

There is no equivalent rule in the proposed Conduct Rules. We are concerned that this may leave vulnerable people open to predatory marketing practices, particularly those who have suffered trauma or injury and are likely to be at a significant disadvantage in dealing with a practitioner at the time when engagement is sought.

We are also concerned that the proposed Conduct Rules do not require lawyers to disclose referral arrangements to clients, and that there are no explicit restrictions against acting for a client in dealings with third parties that pay referrals. While we question the effectiveness of disclosure alone as a means to protect consumers, we are nevertheless concerned that the Conduct Rules appear to be completely silent on this issue.

In our view, the Conduct Rules should adopt a rule similar to rule 33 of the Victorian Rules.

Please contact us on 03 9670 5088 or at gerard@consumeraction.org.au if you would like to discuss these matters further.

Yours sincerely,

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer
Consumer Action Law Centre
Ph: (03) 9670 5099
Email: gerard@consumeraction.org.au

FINANCIAL RIGHTS LEGAL CENTRE



Katherine Lane
Principal Solicitor
Financial Rights Legal Centre
Ph: (02) 8204 1350
Email: Kat.Lane@financialrights.org.au

ⁱ Victorian Legal Services Commissioner, Summary of the 2009 Debt Collection Round Table convened by the Legal Services Commissioner of Victoria, available at:

http://lsc.vic.gov.au/documents/LSC_DebtCollectionSummary.pdf

ⁱⁱ Victorian Legal Services Commissioner, Fact Sheet—Issues in Complaints about Debt Collection, available at: [http://www.lsc.vic.gov.au/documents/Debt_collection_fact_sheet\(Oct_12\).pdf](http://www.lsc.vic.gov.au/documents/Debt_collection_fact_sheet(Oct_12).pdf)

ⁱⁱⁱ *Legal Services Commissioner v Nomikos (Legal Practice)* [2014] VCAT 251 (12 March 2014)

^{iv} Legal Services Commissioner, Media Release: Large fine, reprimand for debt collection lawyer's conduct, 13 March 2014, available at: http://www.lsc.vic.gov.au/documents/2014-03-13_MR_Large_fine_reprimand_for_debt_collection_lawyers_conduct.pdf

^v Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

^{vi} Victorian Legal Services Commissioner, Fact Sheet—Issues in Complaints about Debt Collection, available at: [http://www.lsc.vic.gov.au/documents/Debt_collection_fact_sheet\(Oct_12\).pdf](http://www.lsc.vic.gov.au/documents/Debt_collection_fact_sheet(Oct_12).pdf)

^{vii} Queensland Legal Services Commissioner, Regulatory Guide 2—The Application of the Australian Consumer Law to lawyers, available at:

http://www.lsc.qld.gov.au/__data/assets/pdf_file/0009/137808/Regulatory-Guide-2-ACL.pdf

^{viii} [2011] FCA 1165

^{ix} *Legal Services Commissioner v Sampson (Legal Practice)* [2013] VCAT 1177 (10 July 2013)

^x Ibid, paragraph 38.

^{xi} General Insurance Code of Practice 2014, available at: <http://codeofpractice.com.au/document/8-financial-hardship>.

^{xii} Productivity Commission, Access to Justice Report, Vol. 2 p. 646, 5 September 2014 available at: http://www.pc.gov.au/__data/assets/pdf_file/0020/145406/access-justice-volume2.pdf

^{xiii} Productivity Commission, Access to Justice Report, Vol. 2 p. 650, 5 September 2014 available at: http://www.pc.gov.au/__data/assets/pdf_file/0020/145406/access-justice-volume2.pdf

^{xiv} Legal Aid NSW, Submission to Productivity Commission Access to Justice Inquiry, p. 38, October 2014, available at: Productivity Commission, Access to Justice Report, Vol. 2 p. 646, 5 September 2014 available at: http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0011/18479/submission-access-justice.pdf