

STEP's CODE OF PROFESSIONAL CONDUCT - WHAT WE ARE SEEING AND WHAT WE WOULD LIKE TO SEE

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1. At the heart of our professionalism, as members of STEP, there is a “Code of Professional Conduct”.¹
2. Depending on our calling, we are familiar with the ethical rules governing conduct as:
 - (a) a solicitor and barrister,
 - (b) a “barrister sole” (to borrow the nomenclature from New Zealand),
 - (c) a member of one of the accounting bodies, or
 - (d) as a member of a financial planning bodies.
3. But STEP has its own Code. It is not only useful guidance in difficult situations. It is mandatory.

¹ See at link: [Code of Professional Conduct](#).

While I can speak with the benefit of experience as a member of STEP’s Disciplinary Panel, I emphasise that my views are personal, and do not necessarily represent those of STEP. When discussing matters with others on the Disciplinary Panel, I have been impressed with their depth of knowledge, and feel I am always learning. Nevertheless, I trust these observations are of assistance.

4. STEP is a multi-disciplinary body. It is also an international body. Neither of those facts makes it unique.² But our Code has particular focus on the kinds of work members do, across borders.

1 Why do professions have ethical codes?

5. Lay people cannot always judge the quality of professional services.
6. One way that a profession can signal quality is to bind members of the profession to ethical rules.
7. That signalling is reinforced by showing that the rules are being enforced.
8. This can be shown by exception. Consequences of poor enforcement of professional conduct in the legal profession in one Australian Colony were described as follows:³

Early attempts to enforce professional discipline were spasmodic and reflected badly on the profession's motives. The advocate-general (1849) and the Law Club (1851) intervened in applications for admission on the basis of rumour and sectarianism, while aggrieved clients had to band together to have a lawyer struck off the roll in 1865.

9. The author then described steps by the profession to rectify this situation, and went on:

This trend toward self-discipline proved cathartic and, post-war, lawyers perfected the mix of tradition and accountability that are the hallmarks of a mature profession.

10. Today there is constant scrutiny of professional advisers. There is incessant pressure on professional bodies. It is unthinkable that a body of professionals would answer criticism of conduct of a member by saying that the member's conduct is her own affair.

² The Tax Institute is multi-disciplinary, and has an international credential, "CTA" which is licensed internationally. Chartered accountants in Australia and New Zealand are regulated ultimately by the same Institute. The difference with STEP is in terms of diversity of jurisdictions, and particular focus of the work of members (albeit members of distinct professions).

³ *The Wakefield Companion to South Australian History*, entry for "Legal Profession", page 314 (entry written by Mr Peter Moore)

2 What are we seeing?

2.1 The numbers

11. I asked London to compile some figures.⁴

2.1.1 Code provision subject of complaint

12. First, we have an indication of numbers of complaint (by reference to Code provision),

2014-2020:

Code	Number
1.1 Observing the Law	43
1.3 Rules and Regulations of the Society	2
2 Competence	46
3 Integrity	31
4 Objectivity	9
5 Courtesy	6
6 Confidentiality	2
7 Honesty	15
8 Conflicts of Interest	10
9 Handling of Client Property	11
10 Fees	6
11 Indemnity Insurance	1
12 Advertising	3
13 Relationship with the Society	10
16 Continuity Arrangements	2
Will Code 3.1 Testamentary Capacity	3

13. If I can address some remarks to this, next.

⁴ I again thank Ms Amy Tunstall and Ms Sarah Manuel for facilitating this.

There has long been a [summary of cases actually decided](#). The version I will mention in oral remarks is as at October 2020.

14. First, I am not sure whether the table discriminates by the major charge arising from a complaint, (or by the major charge found proved). There will often be several complaints preferred, at once.⁵
15. “Observing the law” covers a multitude of errors and crimes.
16. In one matter, the initial cause of the problem was a failure to comply with a local rule, which meant that an amount was miscalculated. Withdrawing the miscalculated amount from an account was automatically a breach of local law.
17. It was obvious in that case that there was a breach of the obligation to observe the law (once the local branch member⁶ had walked us through how the local law worked). But my major concern in that case was “Integrity” – especially, with the steps taken by the professional afterward. The first mistake was understandable, hardly ideal, and the cause of much trouble to him and to his innocent client. But I was confident the professional had learnt from that error.
18. I was more concerned with bringing home to the professional the need for corrective action, charged instead under “Integrity”. We made and shaped orders accordingly.
19. My first case hearing a complaint immediately showed up the problems of doing the hearing on the papers. A charge of dishonesty, however one expresses the test, cries out for the ability to see the member’s answer personally. This was one of the major changes made by the new [Disciplinary Rules 2020](#), which allow for oral hearing.

⁵ One suggestion I have made is to not charge, say a matter of discourtesy (eg failure to respond to a fellow practitioner’s correspondence), where the real risk is (say) want of integrity. The latter is often disguised by temporising and fudging in correspondence. If that suggestion is followed through, it will make future figures plainer, enable the respondent member to focus, and make the task of the DP simpler.

⁶ Under r.8.2 of the new *Disciplinary Rules*, the chair of the branch to which the member belongs still nominates a member of the hearing panel. This is useful, though I have noticed that it is a demanding role for the branch chair (or nominee) to fulfil. As chair of what is now a “hearing panel”, I have been greatly assisted by the local institutional knowledge, and by some reality testing, that this member of the panel has brought in a couple of difficult matters.

20. I suspect video-linked hearings may have looked like an innovation before the pandemic.⁷ Now, we are all doing them, or transacting large business that way. The judiciary has come to realise that demeanour is less a guide to fact-finding than the intrinsic coherence of the oral evidence and its support in contemporaneous records.

2.1.2 Country associated with complaint

21. Can I preface the next table by saying that it remains a mystery why some jurisdictions are listed as having so many complaints, and others as none or very few.
22. I include this chiefly so you can see the reach of STEP's disciplinary function, worldwide. These figures are for 2014-2020.

Member Country	Number
United Kingdom	100
Benelux	1
USA	2
Canada	7
Cyprus	1
France	2
Gibraltar	1
Guernsey	15
Hong Kong	1
Isle of Man	2
Italy	1
Jersey	6
Malta	1
Australia ⁸	4
Panama	1
Singapore	1
Switzerland	4
New Zealand	1

⁷ *Disciplinary Rules 2020*, r.8.6

⁸ Combining all Australian chapters in one row.

23. The following remarks are simply speculative, as the real causes of the imbalance in the numbers cannot be readily told.
24. First the UK has a deregulated model of service provision. Persons not otherwise having an affiliation have embraced STEP. Secondly, STEP originated in the UK, and evidently has more impact with consumers there than, say, Australia.
25. Neither of those factors are satisfactory explanations.
26. Under Code 13.3, a member must promptly inform STEP if notified of disciplinary action brought by another professional body.
27. It is hard to credit the small numbers of complaints from countries much larger than each of the UK and Australia. The numbers are correct, but the self-reporting obligation may not be realised.
28. Hence, on renewal last year, you will have noticed a prompt about any matters requiring report to STEP.
29. There may also be a role for branch committee members to nudge self-reports.

2.1.3 The role of self-report

30. In my experience, STEP has monitored a complaint being considered by another professional body or regulator.⁹
31. Where advisable, STEP can suspend membership during the other body's investigation, and specifically may do so if a "regulatory body" has done so.¹⁰
32. But one of the features I look for is insight. Ability to confront a problem, by self-report, is a first step. Avoidance and obfuscation do not play as well.

⁹ Under the former Disciplinary Rules, some forensic use could be made of a finding by the other body. The advantage was more imagined than real. Cf Forbes *Justice in Tribunals* (4ed) pp.214-216.

¹⁰ [Disciplinary Rules 2020](#), r.4.1(b)

33. Depending on the nature and findings by the other professional body, STEP may retain a concern. Recent changes to STEP's processes formalise an innovation I introduced, in seeking to piggy-back corrective action initiated by another body. Some cases are suitable for accepting an undertaking, and agreeing reporting, centred on compliance with the other body's orders.¹¹

3 Outline of Code of Professional Conduct

34. There is no time simply to read through the Code.
35. I would like to put its provisions in context. That context is a wider variety of STEP documents.
36. In the process, I would like to explain some integral concepts, under the Code. One way to do that is by referring to the Guidance on marketing and advertising.

3.1 The other documents

37. In my work as a member of the Disciplinary Panel, I have only dealt with complaints preferred against a member for breach of the [Code of Professional Conduct](#).
38. But it sits with other statements and guidance which must also be understood.
39. The STEP [Code for Will Preparation in England and Wales](#) evidently does not apply directly to Australian Will Preparation. It is nevertheless a useful document to consider in terms of comparative practice. I am aware that solicitors are also reading guidance notes from their insurers, as the product of front-end probate work is litigated more. (Only the other day I heard of expert evidence being marshalled, for litigation abroad, about the standards applied in one State where there are capacity issues in taking Will instructions.)
40. Another matter of concern for STEP is dealt with in the guidance on [Professional Conduct in Relation to Taxation \(PCRT\)](#):

¹¹ *Ibid.*, rr.7.3 & 10.2

- (a) This grew out of work undertaken with the UK tax authorities.
 - (b) But large parts of it have universal application, including in Australian practice.
 - (c) It is not an aspirational statement. You must comply with the parts applicable outside the UK.
 - (d) Anyone advising about tax or doing tax compliance work must be familiar.
 - (e) The UK is catching up on where we were 2-3 decades or more ago. We would have zero tolerance for some of the blatant tax planning seen in the UK till recently.
 - (f) But it reflects a sea change internationally, that is still blowing through Australia. There was recent debate in Australia about tweaking the Uniform Conduct Rules, to require mandatory reporting of some events involving promoter penalty laws.¹²
 - (g) To emphasise: you are obliged to abide by those parts of this which do not specifically only apply to the UK.
41. There is also [Guidance](#) on three topics –
- (a) professional indemnity insurance,
 - (b) insolvency, and
 - (c) marketing and advertising.
42. I leave to one side other policy and guidance notes, all of which have particular application and purposes. Those in leadership positions in STEP will be familiar with some.
43. As I intend chiefly to address the Code, I will direct some brief comments only to the last of those specific items, in paragraph 41(c).

¹² ATO wanted their mere allegation of a breach to be reportable. The Legal Services Council did not progress that suggestion.

3.2 Guidance on marketing and advertising

44. I take the last of those, as an illustration. The STEP guidance on marketing and advertising of professional services principally stands on three sections of the Code. I will first discuss the specific rule, in clause 12 of the Code. (I refer to clauses of the Code as, eg **Code 12**.)
45. I will then move on to Code 3 (Integrity) and Code 7 (Honesty). This is an interesting way of discussing the width of those two provisions.

3.2.1 Code underpinning the Guidance – Code 12

46. Code 12 requires that an advertisement (and other form of promotion of professional services) by a member be accurate and should not mislead.
47. It should not be likely to cause other offence.
48. Nor should it reflect adversely on the member, on STEP, on other members or on fellow professionals.
49. Code 12 goes on specifically to warn against disparaging references to others, or disparaging comparisons with their services.
50. One might have thought Code 12 was enough.
51. Evidently, Code 12 was not enough. This Guidance lists a good number of specific things STEP wished to see stamped out.
52. I remember seeing the Guidance in draft. Inexperienced as I was with STEP's conduct function, I thought the guidance was unnecessary, and in parts undesirable.
53. But I was told about the issues we were seeing.
 - (a) We were seeing advertising tending to denigrate the Inland Revenue. The advertising went beyond all bounds (and certainly going beyond mere matters of taste).
 - (b) Some companies, with say one STEP member, were trading using the STEP logo, as a way of suggesting wider STEP membership within the company.

- (c) The STEP logo is valuable intellectual property. Its use is regulated by the licence to full members. As a case study of one - I do not use the STEP logo. As a sole trader, I do not have the inhouse competence in IT and document design to assure compliance with the [logo rules](#).¹³ It is STEP's IP. The rules maintain the value of the logo. If you cannot assure compliance with the licence, buy in the expertise, or do not use the IP.

3.2.2 Side note - promulgation of guidance – how it works

54. This kind of Guidance does not simply fall from the sky.
55. It is drafted, circulated for comment, comments are considered and debated, and the Guidance then publicised.
56. I am not sure of the precise procedure. As a member of the Disciplinary Panel, I saw a well-developed draft of the advertising and marketing Guidance for comment. I saw other DP members' comments coming back. I prepared my comments, after doing my own research. I felt a particular responsibility, since all other comments I saw came from a European perspective.
57. I raised whether the broader reference to not comparing a member's services with those of others might be anti-competitive. The Guidance says that any advertisement "must focus on the brand, product or service you will provide and not on the shortcomings of others".¹⁴ My immediate concern, given my commercial background at a large firm, is section 45 of the *Competition and Consumer Act 2010*.
58. This is a difficult area, as STEP is regulating conduct in a wide variety of markets. Comments have to be sensitive to that, but in Australia we have a robust, competitive market.

¹³ I was lost at "90 px". If you are, too, reconsider whether you need help to comply with the licence.

¹⁴ Paragraph 8(vi).

59. I cannot say I have ever seen a professional attempting to advertise based on running down the services of another person. I have seen a professional making direct comparisons with the services offered by another professional, and this would be against clause 8 vi) of the final Guidance (if done in marketing or advertising).¹⁵
60. Read with the *Competition and Consumer Act 2010* (Cth), which obviously governs us in Australia, and applying it subject to that law, I cannot see that this has substantial effects on how we do business. The Guidance assists with the STEP brand, in that it prevents an adverse reflection on a member, or on STEP more generally.¹⁶
61. Despite the necessity to consider the competition analysis in Australia,¹⁷ I thought that, whatever the competition analysis might be in Australia, it was a hypothetical point in the highly contested professional services market here. Professionals being enjoined to act with integrity in marketing is hardly the ACCC's largest problem.
62. In the UK, I gather there really was a deal of concern about advertisements and promotion which tended to run down a competitor. I think it is important to understand the international context of rulemaking by STEP.
63. Another aspect of the Guidance on advertising that I found interesting was the specific prohibition on promotional materials "encouraging clients to evade tax" and "portraying tax authorities as the enemy/evil/money-grabbing, etc".
64. Again, I cannot say that I have ever seen such advertising materials circulate in Australia, during my practice. To the extent such remarks may have been made in the past, or might still be made privately, I can certainly understand the distaste that STEP would have.

¹⁵ Note that the Guideline extends to one-on-one meetings to sell a product: clause 2.

¹⁶ If there are grounds for an adverse reflection, there is a complaints function within STEP.

¹⁷ I provided my views on section 45, but do not claim to be a specialist.

3.2.3 Integrity and honesty

65. And the purpose for mentioning this is that the other two limbs from the Code relied on are Code 3 - Integrity - and Code 7 - Honesty.
66. Unfortunately, I have had to deal (outside the advertising arena) with matters where Code 3 and Code 7 have been in issue. My experience in other matters has shown me that the conduct of a member may reflect not only on the member, but on the integrity of STEP more broadly.
67. Thus, in the advertising arena, a distasteful image implying that a revenue authority is an ogre may involve a reflection on STEP more generally. Hence the Guidance on marketing and advertising.
68. Clause 7 to do with Honesty goes further than the simplest concepts of honest conduct, requiring that the member not engage in conduct that is misleading.
69. The thing we have to understand, too, is that concepts of dishonesty and of integrity are governed, for STEP, by the law of England and Wales.¹⁸

3.3 Other Guidance notes

70. I should deal briefly with the other two main Guidance Notes.
71. The Guidance note on Insolvency focuses on the reporting requirements, and potential consequences of any form of insolvency and insolvency protection. People do go bankrupt for a variety of reasons, and the Guidance deals with those factors relevant to how a particular insolvency event should be treated. Obviously, the insolvency event must be reported immediately.
72. The other major Guidance note concerns Professional Indemnity Insurance. I say at the outset on this that some tasks which are heavily regulated in other countries such as

¹⁸ See *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391 (dishonesty). And *SRA v Wingate* [2018] 1 WLR 3969 (integrity).

Australia, are basically unregulated in the UK. Thus, the Guidance note might be thought to be directed largely at a different marketplace. Nevertheless, it is interesting to note the requirement that details of any cover should be “disclosed to a client upon request”. I recall having a discussion during one Disciplinary Panel hearing concerning this. Ultimately, we decided that under Australian law (and the matter involved something overseas in any case) the *Insurance Contracts Act* probably made it more clear that simply advising a client that you are insured did not void the policy. However, again we see the difficulties in regulating an industry worldwide.

4 Scenarios – the theme today

4.1 Why scenarios?

73. It’s more fun, and people tend to remember them.
74. An ethics seminar without a practical scenario to discuss is incomplete.

4.2 Focus

75. In 2015, STEP made a thought-provoking change.
76. It adopted the strap-line: “Advising families across generations”.
77. At the STEP South Australian Trusts Conference in 2017, Mr Tom Cox QC, of the South Australian Bar, gave a number of useful examples, to make it clear that care must be taken in identifying your client.
78. These included warnings of conflicts and the possession of other clients’ confidential information.
79. This led to a discussion at that Conference of the challenges facing practitioners “advising families across generations”.

80. With that introduction, I will address some scenarios that have come across my own desk, as well as *A. v B. v Hill Wallack*: in the context of the *Australian Solicitors Conduct Rules (ASCR)*, and the *STEP Code of Professional Conduct (Code)*.

4.3 ASCR and comparatives¹⁹

81. I will now set out some rules, which we will find handy to keep in mind for the scenarios.

4.3.1 [Rule 9](#) ASCR - confidential information

82. Rule 9.1 prohibits disclosure of information which is confidential to a client, and acquired by the solicitor during the client's engagement, except as authorised by the client in terms of rule 9.2.1.²⁰
83. The Code 6 relies on any exceptions in a "professional obligation", for exceptions to the confidentiality rule. But it imposes strict obligations to take "all necessary steps to safeguard" confidentiality. This looks to the security of information handling and storage.

4.3.2 Conflicts

84. Rules 10 and 11 ASCR both concern conflicts of duty and duty.
85. [Rule 10](#) concerns a conflict arising now, from representation of a former client.
86. [Rule 11](#) deals with only conflicts between current clients.
87. Code 8 deals with a number of issues and bears study. One matter involves actual conflict by the Member entering a business deal with the client: Code 8.4. This kind of thing would be a warning sign for any professional practice in Australia today.²¹ The need to actually state this reflects the fact that STEP is regulating a variety of professions, across the world.

¹⁹ ASCR Rules 7, and 9-11 are an annexure.

²⁰ I have left to one side various exceptions to the rule about non-disclosure.

²¹ It was certainly a feature of business life decades ago.

4.3.3 ASCR Rule 10 – former vs current clients

88. Under ASCR rule 10, you are to avoid a conflict between the duties owed to a current and a former client.

89. The exceptions in ASCR rule 10.2 are nuanced. (Note my added underlining in the quotes below.)

90. The ASCR rule asks if:

... that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed

91. The concepts are similar to the American Bar Association *Model Rules of Professional Conduct (ABA Model Rules)*. Rules 1.9(b) & (c) of the ABA Model Rules speak of:²²

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

92. ASCR rule 10.2 differs from the stricter rule applicable to barristers sole. There is no process of weighing: see *Barristers' Conduct Rules (SA)*, rule 108. As the South Australian rules are not available on the website to non-members, I will instead refer to the parallel Queensland [Barristers' Conduct Rules 2011](#), rule 108.²³

²² The exception created by ASCR Rule 10.2 requires the solicitor not to act for the current client in a matter, where the solicitor (or the law practice concerned) is in possession “of confidential information of a former client”, but only where that information “might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed” (underlining added). ABA Model Rule 1.9(b) also sets up a process of weighing the interests of parties.

²³ The relevant Rules are 108, 109 and 112.

CONFIDENTIALITY & CONFLICTS

108. A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep such information confidential unless or until:

(a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; or

(b) the person has consented to the barrister disclosing or using the information generally or on specific terms; or

(c) the barrister discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the barrister's legal or ethical obligations.

[The South Australian rule does not have para (c).]

93. It provides that the barrister must not “use in any way” confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep such information confidential. It is an absolute prohibition. It is better adapted to a profession which is otherwise subject to the cab-rank rule.

4.3.4 Particular exceptions

94. Permission to use or disclose the information might be obtained, for example as contemplated by ASCR Rule 10.2.1. Code 8.2 also provides an informed consent exception.
95. ASCR Rule 10.2.2 also contemplates that “an effective information barrier” might be established within a firm to deal with such confidential information held by the firm.

4.4 ASCR Rule 11 – Current clients

96. ASCR Rule 11.1 require a solicitor and a law practice to “avoid conflicts between the duties owed to two or more current clients”.
97. The remainder of these Rules deal with the steps that must be taken should a solicitor or law practice seek to act for two or more clients in the same or related matters, where the

clients' interests are adverse and there is a conflict or potential conflict. It is unnecessary to set out the balance of those rules.

98. Code 8.2 & 8.3 deal with informed consent, but interestingly require periodic review of the arrangement "in light of changing circumstances".

4.5 ASCR Rule 7.1 – **Communication of advice**

99. I mention this rule (which is self-explanatory). It is potentially relevant to the discussion of the third scenario:

A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.

100. The Code has no similar provision.

5 Scenarios about knowledge – what do you know?

5.1 **Baldassarre v Butler**²⁴

101. The facts can be simplified for our purposes:

- (a) Two sisters were the personal representatives of their late father. The estate included undeveloped land.
- (b) They received unsolicited offers ranging from \$60,000 - \$117,000 per lot on proposed subdivision. One sister also looked at buying the land, but nothing proceeded.
- (c) Some years passed. The sisters saw the family lawyer, **Butler**. They asked Butler to help find them a buyer.
- (d) Butler spoke with a brother of one of his partners, a real estate broker and developer, **PdF**.

²⁴ [132 NJ 278 \(1993\); 625 A 2d 458](#)

- (e) PdF expressed interest in buying the land himself, but insisted on a right to assign the contract. PdF asked Butler also to represent him in the sale and purchase.
- (f) Butler sent to PdF, and to the sisters, in turn, a letter disclosing the potential for conflict, and advising each to obtain separate legal representation. Neither client did so.
- (g) The letter about conflict did not contain a provision stating that Butler may have to relay to the other client matters conveyed by the first client in confidence. Contrast this with the letter in *A v B v Hill Wallack* (below).
- (h) The price agreed reflected the sisters' instructions as to how much they desired to receive per lot, being about \$110,000.
- (i) The effect of the assignment clause was explained to the sisters. Later they claimed not to understand it.
- (j) Butler then assisted the purchaser, PdF, to assign the benefit of the contract on the basis that PdF would get \$200,000 per lot from the end-purchaser.
- (k) Subdivisional approval did not come through within the agreed timeframe under the contract between the sisters and PdF. Butler did not tell the sisters of the on-sale, but assisted them in documenting an agreement to extend time on the subdivisional condition.
- (l) Still subdivisional approval was delayed, and again Butler obtained the sisters' consent to extension of time.

102. The conveyance, and indeed the whole relationship, went off the rails in ways we need not explore.

5.1.1 Question

103. Was Butler obliged to tell the sisters of PdF's profitable on-sale?

5.1.2 Comment by the Supreme Court of NJ

104. The Supreme Court of New Jersey did not have to decide this, since the sisters settled against Butler, and were pursuing action only against PdF. Nevertheless, the Supreme Court said at [13]

*This case graphically demonstrates the conflicts that arise when an attorney, even with both clients' consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous *296 consequences of Butler's dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller. Therefore, we hold that an attorney may not represent both the buyer and the seller in a complex commercial real estate transaction even if both give their informed consent.*

5.2 **Not that trust again**

105. This scenario is drawn from my practice. I have replaced the names with names of early Governors.
106. There is a discretionary trust, **The John Hindmarsh Trust**.
107. Most experienced practitioners have run into it at some point.
- (a) The trustees are difficult.
 - (b) The settlement is immense.
 - (c) The classes of objects are numerous and varied.
 - (d) From time to time, various members of the distant family of the settlor realise that bounty is but a letter away.
108. You practice in your current profession (whether it be lawyer, accountant or adviser).
109. In 20x2 you were approached by Ms **Georgina Gawler**, who asks you to opine on the terms of clause 15 of the trust deed. Georgina is disappointed with the trustees, as they are ignoring her family's needs, and have made no appointment of income to them.
110. You had quite forgotten that matter.

111. One afternoon in 20x7, you are asked on behalf of Mr **George Grey** if there is any way of obtaining a copy of the trust deed of **The John Hindmarsh Trust**. George does not know whether his family are beneficiaries²⁵ of the trust, but suspects that they are.
112. You cannot see how the interests of the Gawler and Grey families might conflict.
113. Do you accept instructions to act on behalf of Mr Grey?

6 Scenario B – joint representation at mediation

6.1 The survivors

114. Old Mrs Roma is devout and wealthy. She has made her money on the stock exchange, and most of the wealth is still in shares.
115. She has decided that her affairs, as she ages, should be managed jointly by the ABC Trustee Company of Australia (**ABC**) and her children, Mitchell and Marjorie. All three are appointed her enduring attorneys.
116. Her Will is drawn leaving 2 testamentary trusts in favour of the families, respectively, of Mitchell and Marjorie, with a gift over in each case in favour of Mrs Roma's church.
117. In short, while the respective child, respective spouse, or respective grandchildren are alive, there is a discretion to appoint those persons income (only).
118. Almost immediately Mrs Roma falls out with the ABC. ABC want paperwork completed all the time, and it simply does not suit Mrs Roma. Worse, ABC are concerned that Mrs Roma is no longer understanding ABC's advice, and consider she cannot handle her own affairs. An impasse is reached.
119. After some years, Mrs Roma recruits Mitchell and Marjorie to assist her in denuding her (Mrs Roma's) estate, by transferring all shareholdings (the real basis of her wealth) into joint holdings as between Mrs Roma, Mitchell and Marjorie.

²⁵ More likely, objects of discretion.

120. On her death, ABC (as executor) quickly discovers that its co-attorneys for Mrs Roma, Mitchell and Marjorie, have played a part in denuding Mrs Roma's estate.
121. ABC commenced proceedings against Mitchell and Marjorie seeking orders to restore to the estate all the shares that Mrs Roma previously held, which had passed to Mitchell and Marjorie by survivorship.
122. At the close of pleadings, the solicitor representing Mitchell and Marjorie engages junior counsel to appear on a mediation against ABC.
123. About a week before the date for mediation, junior counsel is sent a brief referring to junior counsel representing Mitchell, Marjorie, together with their respective spouses and children.
124. Junior counsel senses danger and looks up South Australian *Barristers' Conduct Rule* 113. Again, since that is not available to everyone, I refer to the parallel Qld rule 113:
- A barrister who is briefed to appear for two or more parties in any case must determine as soon as possible whether the interests of the clients may, as a real possibility, conflict and, if so, the barrister must then return the brief for:*
- (a) *all the clients in the case of confidentiality to which Rule 108 would apply;*
or
- (b) *one or more of the clients so as to remove that possibility of conflict.*
125. Junior counsel points this out to the solicitor. Junior counsel asks how the solicitor is managing compliance with ASCR rule 11 and Code 8.
126. The solicitor says that the respective spouses of Mitchell and Marjorie will do what Mitchell and Marjorie tell them to do, and the children of those two families will do what their parents tell them to do.
127. Junior counsel insists on being led, and you are briefed four days before the mediation.
128. You raise the same issues with the solicitor, and are told the same thing.
129. What do you do?

6.2 Family planning

130. The following scenario was designed by Mr Chris Ward, and was run as part of the QLS' program "Family Law Residential" in 1993. (It appears as part of Mr Richard Tur's essay in a collection noted below.²⁶)

Mrs Smith rings. She tells you that she and her husband have separated and have resolved all matters between themselves. Mrs Smith tells you that she has been told that you are good, sensible solicitor and they both wish to come and see you and have you prepare all the documents necessary to wrap the matter up. Mrs Smith tells you she doesn't want the matter to be blown out of all proportion and she and her husband want a good, sensible wrap-up of the matter. How do you deal with the situation?

OPTION 1

I am sorry Mrs Smith, I can only see you and not your husband and thus you should come in by yourself and we can then communicate with your husband.

OPTION 2

Yes, please come in with your husband. However, I must point I can only act for you and I will need to make that clear on the day.

131. Are there other options? Is it possible to act for both? Further is it possible to assist them, if appropriate, to resolve matters?²⁷
132. Mr Richard Tur notes that a straw pole of practitioners at that conference in 1993 was split between the two options offered, and notes that there may have been other ways of proceeding.

²⁶ The scenario appears in Mr Richard Tur's essay, "Family Lawyering", in *Legal Ethics and Legal Practice*, edited by Parker and Sampford, (Clarendon Press, Oxford, 1995) pages 154-155.

²⁷ These further options are suggested at page 155. Bearing in mind that this scenario was run in 1993, and that community expectations may have changed, nevertheless the presenter of that scenario in 1993 is said to have favoured the second option above, though acknowledging "the need for great care" and discussing "the safety nets necessary to protect the solicitor in such circumstances and some of the problems that might arise in adopting his preferred of action".

7 Scenario C – the black swan

7.1 A. v. B. v. Hill Wallack²⁸

7.1.1 How conflict arose

133. One of my favourite scenarios (which I have discussed elsewhere) is the remarkable New Jersey case, *A. v B. v Hill Wallack*, 726 A.2d 924 (NJ, 1999).
134. No one can blame the law firm for what happened. You could not make up this kind of thing.
135. Hill Wallack then had about 60 attorneys.²⁹
136. A husband and wife engaged the firm, for estate-planning purposes.
137. To deal with the joint representation, both signed letters headed “Waiver of Conflict of Interest”.
138. Those letters conveyed two key matters.
- (a) First the letters explained that if one spouse provided information, it could become available to the other.
 - (b) Secondly, the letters explained that if one spouse gave property under a Will to the other, it would permit the receiving spouse to dispose of that property as the spouse desired.³⁰
139. The husband and wife waived conflicts arising from joint representation.
140. Wills were prepared for signature. Under the Wills, each left the residuary estate to the other. There was a contingent gift in favour of each other’s issue. Under New Jersey law, this included ex-nuptial children.

²⁸ [726 A.2d 924 \(NJ, 1999\)](#)

²⁹ Their website shows that they now have 6 offices and about 75 attorneys,

³⁰ Reading this judgment, I gain the impression that such a letter of waiver had become standard practice in New Jersey. It deserves consideration here, and I have noticed similar wording in some engagements since reading this.

141. Before those Wills were signed, the firm was retained by a woman (*mother*) in a paternity claim against the husband.
142. That retainer only arose through human error. Someone misspelt the surname when registering the estate-planning file. Thus, no conflict was detected by computer search when the mother later sought to retain the firm.
143. The husband was contacted by Hill Wallack's family law attorney, acting on behalf of the mother. The husband raised no issue about Hill Wallack acting, when so contacted. The family law attorney proceeded in ignorance of the estate-planning retainer, which was in progress.
144. The husband finally admitted paternity but retained other attorneys in the paternity claim to contest *quantum*.
145. The Wills were signed at a point where paternity was not in contest, and Hill Wallack remained unaware of the conflict (despite proceedings being on foot).
146. Hill Wallack learned of the conflict when the husband's attorney in the paternity suit told Hill Wallack's family law attorney (representing the mother) about the estate-planning department's legal work for the husband.
147. The husband had never mentioned the ex-nuptial child to the estate-planning attorney.
148. Hill Wallack withdrew from representing the mother.
149. The firm wrote to the husband asserting that it had an ethical obligation to disclose the existence of the ex-nuptial child to the wife, because of the wife's estate plan. Hill Wallack said it would make that disclosure to the wife unless the husband did so by a date given.
150. The husband sought to restrain Hill Wallack from making the disclosure.

7.1.2 Analysis

151. The Wills had been executed after Hill Wallack had issued proceedings against the husband.
152. Thus, the wife had executed her Will at a time when another operative in this 60-attorney firm knew that the husband had an ex-nuptial child, but the firm had not made a connexion between the conflicting retainers.
153. While that Will stood, there was a possibility that the wife's property could pass to the ex-nuptial child, about whom the wife presumably knew nothing.
154. Delivering the judgment of the Supreme Court of New Jersey, Pollock J surveyed differing opinions and solutions that had been propounded in the United States of America, in like cases.
155. As we will see in a moment, New Jersey law had a particular exception to the confidentiality rule, which provided a comfortable solution. (The solution has since been adopted in the ABA Model Rules.³¹)
156. Let us analyse the facts here:
- (a) The husband did not communicate the information to the estate-planning attorney about the ex-nuptial child.
 - (b) By the time the Wills were to be signed, the husband had acknowledged paternity, but was disputing the *quantum* of support.
 - (c) The husband had signed the same letter as the wife, permitting communication to the wife of information received by the estate-planning attorney in confidence from the husband.³² While it indicated an acceptance of the need to communicate

³¹ Rule 1.6(b)(3). See commentary on this 2003 amendment in *Annotated Model Rules of Professional Conduct* (6ed), pp 102-103. The commentary cites the case under discussion.

³² Note this did not expressly cover information coming to the estate-planning attorney or the firm from other sources, as here.

confidential information to the wife for the purposes of estate-planning, it was not itself a basis for communicating this information to the wife.

- (d) Were the law firm restrained from communicating the fact of the existence of the ex-nuptial child to the wife, there was a contingency upon which property in which she was interested might descend to an ex-nuptial child of the husband.

7.1.3 Possible solutions offered by the rules

157. Before turning to the rules in operation in New Jersey, and the STEP and Australian comparatives, I note the existence of another body of guidance, which may assist in reaching an answer (if not contrary to governing rules. See the *STEP Code for Will Preparation in England and Wales* (2016 revision).³³

7.1.4 Avoiding serious crime, preventing imminent serious physical harm

158. ASCR Rule 9.2 would permit the solicitor to disclose information “for the sole purpose of avoiding the probable commission of a serious criminal offence” or “for the purpose of preventing imminent serious physical harm to the client or to another person”.
159. The Supreme Court of New Jersey was faced with similar concepts, and found the likely harm here not to fall into those kinds of categories.³⁴

7.1.5 Fraud

160. Unusually for the United States of America at that time, the New Jersey rules however extended to permit disclosure “to the extent the lawyer reasonably believes necessary to

³³ STEP members are bound by the *Code of Professional Conduct*. Gnomically, rule 6.1 of the Code requires a confidence to be kept unless relevantly, “there is a professional obligation to disclose”. (Obviously it also caters for legal obligations to disclose.) The *Code* has to deal with laws and customs of many countries.

³⁴ *A v B v Hill Wallack*, p 927 [2]

rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used".³⁵

161. There is no equivalent in Rules for South Australian barristers & solicitors nor barristers sole.

7.1.6 Properly informing the client

162. The Supreme Court of New Jersey also relied upon a rule, which has some parallel in ASCR Rule 7.
163. In New Jersey, Rule 1.4(b) obliged the lawyer to communicate to a client all information needed to make an informed decision regarding an engagement.
164. As a reminder, ASCR Rule 7 requires the solicitor to "provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement" (underlining added, noting that the engagement here might have already ended on signing the Wills, depending on whether other work was required). Curiously in WA PCSR Rule 8 is to similar intent:

A practitioner must communicate candidly and in a timely manner with a client in relation to any matter in which the practitioner represents the client.

165. There is no equivalent Code provision. What happens where there is such a gap?

7.2 Resolution

7.2.1 New Jersey

166. By reference to a combination of factors, but chiefly by reference to the New Jersey fraud exception to confidentiality, the Supreme Court of New Jersey found that the law firm was permitted to communicate to the wife the bare fact of the existence of the ex-nuptial child.

³⁵ That kind of exception has since been added to the ABA Model Rules.

167. During the course of Pollock J's thought-provoking judgment, numerous scenarios, which had been discussed by ethics bodies in the United States of America, were given.
168. I commend this judgment to your reading.³⁶

7.2.2 How would this be resolved in SA?

169. On the surface, this is a routine joint engagement for estate-planning, by husband and wife. The interests of the spouses appear aligned. There is no sign of conflict nor potential conflict.
170. Nevertheless, the joint engagement can become perilous.
171. Through no attributable fault (apart from a spelling error in the firm's register), the law firm became involved in urgent and complex litigation, through three tiers of New Jersey courts.
172. How much more complex would the matter have been if any of the following had occurred, considered under the ASCR and the (STEP) Code?
- (a) If there had been no agreement waiving conflicts and permitting disclosure of confidential information.
 - (b) If the husband had told the estate-planning attorney about the ex-nuptial child, at the first conference, prefacing the conversation with the words: "I want to tell you something in confidence". The estate-planning attorney simply does not see the disclosure coming.
 - (c) If that communication, in paragraph (b), to the estate-planning attorney had instead occurred either just before, or (alternatively) months after, the Wills were signed.
 - (d) If the husband had come back to the estate-planning attorney some months after the Wills had been signed, seeking now to make very substantial provision, from assets

³⁶ <http://law.justia.com/cases/new-jersey/supreme-court/1999/a-86-98-opn.html>

that might otherwise have favoured the wife under his Will, by a trust in favour of a hitherto unknown ex-nuptial child and in settlement of litigation instituted against him by another firm before the Wills had been signed.

173. And there is a further complication.

174. Mr Cox SC, in his presentation to STEP in Adelaide in 2017, pointed out that it is not sufficient simply to say that a law firm should withdraw. The question arises as to whether the withdrawal should be silent, or noisy. Even a silent withdrawal conveys something and is thus problematic. But what can you convey if the withdrawal is explained to the parties? What must you convey?

175. No one has ever suggested that private client work is simple. Far from being simple, it involves nuance at a human and ethical level.

David W. Marks QC

Chambers

24 February 2021

Att. ASCR Rules 7, and 9-11

Separately – STEP Code of Conduct, & other STEP documents