Bill Swannie*

A CRITICAL APPRAISAL OF THE 'NO CONTACT' RULE

Abstract

The 'no contact' rule is a professional obligation which prohibits a lawyer from directly communicating with the client of an opposing lawyer, apart from certain exceptions. Breach of the rule can result in disciplinary action by a relevant regulator, with sanctions including cancellation of the lawyer's practising certificate. This article argues that the current formulation of the rule in the *Australian Solicitors' Conduct Rules* lacks clarity in several key respects, resulting in uncertainty regarding its scope and operation. Further, the rationales commonly provided for the rule provide little guidance regarding its appropriate scope. This article provides practical proposals to clarify the rule, which would benefit solicitors, clients and the general public.

I Introduction

The *Legal Profession Uniform Law* ('*Uniform Law*')[1] and the *Australian Solicitors' Conduct Rules* ('*ASCRs*')[2] were intended to provide greater clarity and certainty regarding the regulation of Australian solicitors. Although the

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* LLB; BA (Political Science); LLM; PhD; Lecturer, Thomas More Law School, Australian Catholic University. Email: Bill.Swannie@acu.edu.au; ORCID iD: 0000-0002-5540-8105. The author thanks the editors and reviewers for their assistance with this article.

1 The *Uniform Law* can be found in sch 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) ('*Uniform Law Application Act* (Vic)') or *Legal Profession Uniform Law 2014* (NSW), which applies in New South Wales, Victoria and Western Australia: *Legal Profession Uniform Law Application Act 2014* (NSW); *Uniform Law Application Act* (Vic) (n 1); *Legal Profession Uniform Law Application Act 2022* (WA).

2 See Law Council of Australia, *Australian Solicitors Conduct Rules* (at 24 August 2015). These were drafted by the Law Council of Australia under the *Uniform Law*, and have been adopted (with minor differences) in all jurisdictions except the Northern Territory: see Law Society Northern Territory, *Rules of Professional Conduct and Practice* (at May 2005) ('*Rules of Professional Conduct* (NT)'). Unless otherwise indicated, a reference to the *ASCRs* in this article is referring to the current version in *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) ('*ASCRs*'). This version is also applied in Victoria and Western Australia, and similar versions are in force in the Australian Capital Territory, Queensland, South Australia and Tasmania. See: *Legal Profession (Solicitors) Conduct Rules 2015* (ACT)

Uniform Law has only been adopted in Victoria, New South Wales and Western Australia, the *ASCRs* impose professional obligations on solicitors throughout Australia. Given a breach of professional duties can result in disciplinary action being taken by a relevant regulator, and potentially serious sanctions for the solicitor, clarity is necessary regarding their scope and operation. However, the imprecise and confusing drafting of the 'no contact' rule in r 33 of the *ASCRs* creates significant issues concerning the rule's scope. In essence, the rule proscribes a lawyer, except in very limited circumstances, from communicating directly with the client of another lawyer in respect of a transaction or proceeding in which the lawyers in question were engaged.[3]

The rule fails to make several important clarifications, such as whether unintentional contact may be sanctioned, or whether contact during the transfer of a file is prohibited. Part II of this article outlines the serious consequences which may flow from breaching the rule, and Part III outlines some significant uncertainties regarding the scope of r 33.

Various rationales have been given for the rule, including: (1) it prevents inadvertent disclosures to the contacting solicitor; and (2) it prevents another solicitor from undermining the relationship of trust and confidence between a solicitor and their client. These rationales, and their underlying assumptions, are critically examined in Part IV of this article. Part V argues that the exercise of a court's contempt powers may address some of the concerns underlying the no contact rule.

Part VI examines five areas of uncertainty concerning r 33, and outlines how these issues could be clarified. Finally, Part VII examines broader arguments concerning the scope and rationale for the no contact rule. In summary, clarifying the scope of the rule would assist solicitors to comply with it, and would also benefit clients and the general public.

II The *ASCRs* and Solicitor Discipline

The adoption of the *ASCRs* in New South Wales and Victoria in 2015[4] represented a significant development in the regulation of Australian solicitors. As noted by

('*Solicitors Conduct Rules* (ACT)'); Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) ('*Solicitors Conduct Rules* (Qld)'); Law Society of South Australia, *South Australian Legal Practitioners Conduct Rules* (at 21 December 2012) ('*Legal Practitioners Conduct Rules* (SA)'); *Legal Profession (Solicitors' Conduct) Rules 2012* (Tas) ('*Solicitors' Conduct Rules* (Tas)').

3 See Gino Dal Pont, *Lawyer Discipline* (LexisNexis, 2020) 361–2 [14.59]. As will be explained in Part II, the rule exists at common law and now finds expression in *ASCRs* (n 2) r 33 and in every Australian jurisdiction. The rule also applies to barristers, in a modified form. See, eg, Bar Association of Queensland, *Barristers' Conduct Rules* (at 23 February 2018) r 51. This article focuses on the rule's operation in relation to solicitors.

4 See above nn 1–2.

Gino Dal Pont, the *ASCRs* ‘form the foundation for solicitors’ professional rules’ throughout Australia.[5]

Ultimately, the regulation of lawyers is within the jurisdiction of the superior court (usually the Supreme Court) of each state and territory. However, each state and territory has established an independent statutory body responsible for regulating solicitors practising in the jurisdiction, including disciplinary proceedings for breach of professional standards.[6] Disciplinary proceedings against a solicitor are generally conducted before a statutory tribunal.

Four key features of disciplinary proceedings will now be outlined. First, a breach of professional standards, including the no contact rule, is capable of constituting ‘professional misconduct’[7] or ‘unsatisfactory professional conduct’[8] and therefore provides the basis for disciplinary action by a relevant regulator against a solicitor.[9] The no contact rule applies to solicitors in every Australian state and territory,[10] however, this article will focus on the formulation of this rule within r 33 of the *ASCRs*.

Second, the purpose for which Australian solicitors are disciplined is to protect the public, and not to punish errant solicitors. This principle is regularly affirmed in

5 Gino Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 7th ed, 2020) ix. See also Chris Edmonds, ‘Misconduct of Australian Lawyers under Legislation Based on the National Model: Aligning the Common Law Tests with the New Statutory Regime’ (2013) 39(3) *Monash University Law Review* 776.

6 See generally Dal Pont, *Lawyer Discipline* (n 3) ch 3.

7 At common law, ‘professional misconduct’ means conduct ‘which would reasonably be regarded as disgraceful or dishonourable by [a solicitor’s] professional brethren of good repute and competency’: *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 761 (Lord Esher MR). Legislation now expands this definition to include conduct that ‘involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’: see, eg: *Uniform Law* (n 1) s 297; *Legal Practitioners Act 1981* (SA) s 69(a) (‘SA *Legal Practitioners Act*’). The common law concept remains extant: cf *Council of the New South Wales Bar Association v EFA* (2021) 106 NSWLR 383, 397 [63] (Bathurst CJ, Leeming JA and Simpson AJA).

8 ‘Unsatisfactory professional conduct’ includes conduct ‘that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent’ legal practitioner: see, eg: *Uniform Law* (n 1) s 296; SA *Legal Practitioners Act* (n 7) s 68.

9 *ASCRs* (n 2) r 2.3.

10 Ibid r 33, which applies in New South Wales, Victoria and Western Australia. For other jurisdictions, see: *Solicitors Conduct Rules* (ACT) (n 2) r 33; *Rules of Professional Conduct* (NT) (n 2) rr 17.38, 23; *Solicitors Conduct Rules* (Qld) (n 2) r 33; *Legal Practitioners’ Conduct Rules* (SA) (n 2) r 33; *Solicitors’ Conduct Rules* (Tas) (n 2) r 38.

tribunal decisions[11] and by commentators.[12] Similarly, it is commonly argued that the no contact rule seeks to protect clients, rather than, for example, serving the interests of solicitors.[13] However, punishment of a solicitor and protection of the public are not mutually exclusive. Sanctioning a solicitor who breaches professional standards may protect the public, for example by deterring future breaches, either by the same solicitor or by others.[14]

Third, the sanction applied by a tribunal to a particular breach depends on two factors.[15] The first factor is whether the breach is characterised as 'professional misconduct' (essentially, more serious misconduct) or 'unsatisfactory professional conduct' (less serious misconduct).[16] Although there is no difference in the sanctions available for the two types of misconduct, the former is likely to result in more severe sanctions.[17] The second factor is the surrounding circumstances that would determine the appropriate sanction. These circumstances include factors such as the number of breaches,[18] whether the solicitor cooperated with the investigation,[19] and any prior disciplinary history of the solicitor.[20]

Finally, disciplinary proceedings can result in a wide range of sanctions including an order to pay the costs of the application,[21] a fine,[22] a caution or reprimand,[23] imposition of conditions on the lawyer's practising certificate, suspension or cancellation of the solicitor's practising certificate[24] and removal of a practitioner's name

11 See, eg: *Legal Services Commissioner v Poole* [2019] QCAT 381, [86] ('*Poole*'), citing *Legal Services Commissioner v Munt* [2019] QCAT 160, [43]; *Legal Services Commissioner v Bradshaw* [2008] LPT 9, [47], affd *Legal Services Commissioner v Bradshaw* [2009] QCA 126, [15], [49], [52]; *Victorian Legal Services Commissioner v Efron* [2019] VCAT 1798, [29]–[30] ('*Efron*').

12 See, eg, Dal Pont, *Lawyer Discipline* (n 3) 10 [1.12].

13 See below Part IV.

14 *Tuferu v Legal Services Commissioner* [2013] VSC 645, [97], [100] (Zammit AsJ) ('*Tuferu II*').

15 Dal Pont, *Lawyer Discipline* (n 3) 45–6.

16 Ibid 27 [2.1], 45–6 [3.3].

17 Ibid ch 4.

18 See, eg, *Legal Practitioners Conduct Board v Wharff* [2012] SASCFC 116, [13] ('*Wharff*') in which the solicitor's breach was described as 'serious' as it involved 30 separate communications over 10 months.

19 Dal Pont, *Lawyer Discipline* (n 3) 79–83.

20 *Efron* (n 11) [44].

21 See, eg, *Council of the Law Society of New South Wales v Byrnes* [2016] NSWCATOD 64, [40] ('*Byrnes*').

22 *Orlov and Pursley* [1995] NSWLST 3 ('*Orlov and Pursley*').

23 *Poole* (n 11) [92], [94].

24 See, eg, *Legal Services Commissioner v Tuferu* [2013] VCAT 1438, [17] ('*Tuferu I*'). Leave to appeal was refused in *Tuferu II* (n 14).

from the Court roll.[25] In one proceeding, a Victorian tribunal cancelled a solicitor's practising certificate, where he could not reapply for at least 12 months for breach of the no contact rule.[26] Further, sanctions are at the discretion of the tribunal, and are therefore difficult to overturn on appeal.[27]

Notably, solicitors are rarely sanctioned for breach of the no contact rule alone. In most cases, breach of other professional duties are alleged, such as acting where there is a conflict of interest,[28] or making unfounded allegations of misconduct against a solicitor.[29] Further, some tribunals describe a breach of the rule as merely 'technical', and this is reflected in minimal sanctions such as a costs order.[30] In another decision, however, Judge Lacava described it as a 'basic rule' which is 'fundamental to practice as a legal practitioner in this state'.[31] In other words, there appear to be differing views as to the importance of the rule, which is reflected in the varying and sometimes minimal sanctions applied by disciplinary tribunals.

III The Uncertain Scope of Rule 33

This Part highlights the significant uncertainty surrounding the scope and operation of r 33. The uncertainty of r 33 is compounded by the widely differing views expressed by tribunals regarding its importance, which is sometimes reflected in minimal sanctions for its breach. Whilst it is accepted that disciplinary sanctions can and should depend on the surrounding circumstances, the potentially serious consequences for a solicitor who breaches the rule reinforces the need for clarity regarding the scope of the rule.

The no contact rule was originally developed by courts, and judicial statements of the rule are still relevant even though the rule is now expressed in solicitors' conduct rules in each jurisdiction.[32] In *Re Margetson*, Kekewhich J of the Chancery Division stated '[i]t is a professional rule that where parties to a dispute are represented by solicitors, neither of those solicitors should communicate with the principal of the other touching the matters in question'.[33]

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25 *Wharff* (n 18) [69].

26 *Tuferu I* (n 24) [17].

27 See: *Tuferu II* (n 14) [46]; *Guss v Law Institute of Victoria Ltd* [2006] VSCA 88, [28] (Maxwell P, Callaway JA agreeing at [52], Chernov JA agreeing at [53]).

28 *Poole* (n 11) [41].

29 Ibid [57].

30 *Byrnes* (n 21) [38]. See also Dal Pont, *Lawyer Discipline* (n 3) 362–3 [14.60]. Dal Pont comments that 'flouting the "no contact" rule is hardly venal'.

31 *Legal Services Commissioner v Mercader* [2011] VCAT 2062, [55].

32 'In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the [*ASCRs*] apply in addition to the common law': *ASCRs* (n 2) r 2.2.

33 *Re Margetson* [1897] 2 Ch 314, 318 ('*Re Margetson*').

Similarly, in *Jones v Jones*,[34] the Court stated that '[a]ny communication which the solicitor of one party has with a party opposed to him in the cause is extremely unprofessional'.[35]

The rule now finds expression in the *ASCRs*,[36] which provides:

> **33 Communication with another solicitor's client**
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> 33.1 In representing a client, a solicitor shall not communicate about the subject of the representation with a person the lawyer knows to be represented by 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 communication would not be unfair to the opponent's client,
>
> 33.1.3 the communication 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 the communication.

Rule 33 prohibits a solicitor from directly communicating with the client of another solicitor, apart from the listed exceptions. Although the rule only has potential disciplinary consequences for the solicitor, it also effectively prohibits a client from contacting an opposing solicitor directly, unless that client's solicitor consents. For this reason, the rule has been described as conferring a 'veto' power on a solicitor.[37]

Five significant ambiguities surrounding rule 33 will now be highlighted. First, it is unclear whether the rule applies to litigious matters or merely to non-litigious

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34 [1847] 5 Notes of Cases in the Ecclesiastical and Maritime Courts 134 ('*Jones v Jones*').

35 Ibid 140.

36 *ASCRs* (n 2) r 33. This applies in New South Wales, Victoria and Western Australia. Other jurisdictions in Australia also have a no contact rule, expressed in slightly different terms: see above n 10.

37 John Leubsdorf, 'Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests' (1979) 127(3) *University of Pennsylvania Law Review* 683, 683. Part VII of this article examines this argument and its implications.

(or transactional) matters.[38] The rule is contained in a part of the *ASCRs* dealing with 'relations with other persons', rather than the part dealing with 'advocacy and litigation'. This ambiguity in the language and placement of r 33 creates the 'potential for confusion'.[39] On the one hand, the language of r 33 could apply to both litigious and non-litigious matters. On the other hand, sub-r 33.1.2(ii) refers to the 'opponent's client', indicating that the rule applies in a litigious context. Most disciplinary proceedings for breach of r 33 and its predecessors involve litigious matters.[40]

Second, the rule has exceptions that are acknowledged in practice but not specifically referred to in r 33. For example, it is generally accepted that the rule does not apply when a solicitor contacts a client to arrange the transfer of the client file to that solicitor.[41] In these circumstances, contact with the client is necessary to effect the transfer, and it accords with the client's wishes.[42] Additionally, the rule does not prevent a solicitor from communicating with an opposing solicitor's client, for example in a social setting, on matters unrelated to the legal representation.[43] Further, the rule does not prevent a solicitor from providing a second opinion to a client who is represented by another solicitor, provided that the solicitor is not acting in the same matter.[44] It seems, then, that the rule mainly applies when there is a potential conflict of interest between the solicitor and the contacted client.

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38 Law Council of Australia, *Review of the Australian Solicitor's Conduct Rules* (Consultation Discussion Paper, 1 February 2018) 113 ('*Review of Conduct Rules*').

39 Ibid. As will be outlined in Part VI, previous formulations of the rule explicitly distinguished between its application in the litigious as opposed to a non-litigious context. See also *ASCRs* (n 2) r 22, which deals with 'communication with opponents' in the context of litigation.

40 See, eg: *Tuferu I* (n 24); *Orlov and Pursley* (n 22); *Poole* (n 11). But see *Legal Services Commissioner v Paric* [2015] VCAT 703 ('*Paric*') where a solicitor breached the rule in the context of the purchase of property. See also Neil Wertlieb and Nancy Avedissian, 'The No Contact Rule Actually DOES Apply to Transactional Lawyers' [2015] (4) *Business Law News of the California Lawyers Association* 31.

41 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 758.

42 This situation may be covered by the exception in r 33.1.1 — that is, it happens with the solicitor's consent: *Review of Conduct Rules* (n 38) 140. Contact relating to transfer of a client file was a specific exemption in some formulations of the rule: see below Part VI.

43 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 758. Rule 33 was amended in April 2022: see *Legal Profession Uniform Law Australian Solicitors' Conduct Amendment Rules 2022* (NSW). Previously the rule prohibited a solicitor from 'deal[ing] directly' with another solicitor's client. Now, the rule prohibits a solicitor from 'communicat[ing] about the subject of the representation'. The amendment somewhat clarifies this aspect of the rule.

44 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 758. See also Virginia Shirvington, 'Critical Colleagues, Second Opinions and Solicitor Swapping' (2001) 39(6) *Law Society Journal* 45, 45. Some previous formulations of the rule specified that it applied only 'in relation to the case for which the opponent is instructed': see, eg, Law Institute of Victoria, *Professional Conduct and Practice Rules 2005* (30 June 2005) r 18.4 ('*Victoria 2005 Conduct Rules*').

Third, when the client is an organisation or company, it is uncertain whether the rule prohibits an opposing solicitor from communicating with any employee of the organisation, or merely directors and senior executives. If the rule prohibits contact with all employees, this could prevent a solicitor from legitimate evidence gathering.[45]

Fourth, on some occasions, solicitors have been found to have breached the rule by communicating with an opposing solicitor's client through an intermediary, rather than communicating with them directly.[46] However, it is unclear to what extent *indirect* contact will breach the rule. This relates directly to the rule's underlying purpose, which is discussed in Part IV below.

Finally, it was unclear whether (and to what extent) a breach of the rule depends on a solicitor being *aware* that a client is represented. Previously, r 33 appeared to apply regardless of the knowledge or awareness of the solicitor.[47] However, recently the rule was amended to apply only where 'the lawyer knows [the person is] represented'.[48]

In summary, there are significant uncertainties surrounding the scope of the no contact rule.[49] Further, decision-makers have expressed widely varying views regarding the significance of the rule. This uncertainty is problematic when considering the potential for serious consequences of breaching the rule — including the cancellation of the solicitor's practising certificate.[50]

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45 See Queensland Law Society, *Applying the 'No Contact Rule' When the Other Party is an Organisation* (Guidance Statement No 29, 13 October 2011) <https://www.qls.com.au/Guidance-Statements/No-29-Applying-the-no-contact-rule%E2%80%99-when-the-other> ('Guidance Statement No 29').

46 See, eg, *Orlov and Pursley* (n 22), in which a solicitor communicated with an opposing solicitor's client through his wife, who was also a solicitor. Both the solicitor and his wife were found guilty of professional misconduct and received substantial fines. Similarly, in *Byrnes* (n 21), a solicitor communicated with an opposing solicitor's client through his office manager. The Tribunal found that this was unprofessional conduct. However, no sanction other than costs was ordered, as the Tribunal regarded the breach as merely 'technical': at [29].

47 In disciplinary proceedings, tribunals tend to emphasise, at the sanction stage, whether the breach involved conscious wrongdoing. For example, tribunals comment on whether solicitors consciously 'flout[ed] … authority': *Paric* (n 40) [24] or whether they were warned about their conduct and continued it despite the warnings: *Wharff* (n 18) [62].

48 Similarly, earlier formulations of the rule explicitly required knowledge that the client was represented. See *Victoria 2005 Conduct Rules* (n 44) r 18.4.

49 Geoffrey C Hazard Jr and Dana Remus Irwin argue that the rule is 'overbroad and ambiguous in important respects': Geoffrey C Hazard Jr and Dana Remus Irwin, 'Towards a Revised 4.2 No-Contact Rule' (2009) 60(4) *Hastings Law Journal* 797, 798.

50 See above nn 23–6 and accompanying text.

IV Uncertainty Regarding the Rationale for the Rule

This Part argues that the no contact rule has various rationales and that these rationales provide little guidance in resolving uncertainties concerning the scope of the rule. Commonly, it is argued that the rule prevents a solicitor from undermining the relationship of trust between a solicitor and their client. However, an alternative rationale is that the rule prevents collusion between a client and an opposing solicitor, which could disadvantage the client's solicitor.

A *The Common Rationales for the Rule*

As noted previously, the no contact rule was originally developed by courts, and it has a long history.[51] The rule exists in the United States[52] and formerly in the United Kingdom.[53] Although the rule is 'longstanding',[54] its precise purpose or rationale is less clear. It is often stated that the rule seeks to prevent a solicitor from circumventing the protection provided by legal representation.[55] In other words, it protects the client's interests by preventing contact with the opposing solicitor. The risks of allowing direct communication between a client and an opposing solicitor are elaborated as follows. First, the solicitor may obtain admissions from the client which are against the client's interests.[56] Second, the solicitor may access privileged communications between the client and their solicitor.[57] Third, the solicitor may undermine the client's trust in their solicitor, for example, by questioning their competence or judgment.[58] Finally, the solicitor may persuade the client to act against their interests, such as by withdrawing or settling proceedings on unfavourable terms.

The first two concerns outlined above (obtaining admissions and accessing privileged information) relate to evidence which may be obtained from a client and used against them.[59] Rather than prohibiting contact, these concerns could possibly be addressed through other means, such as by a court being given the power to

[51] See, eg, *Jones v Jones* (n 34).

[52] See Leubsdorf (n 37).

[53] The Solicitors Regulation Authority, *SRA Code of Conduct for Solicitors, RELs and RFLs* (Code of Conduct, 2018) prohibits solicitors in England and Wales from 'abus[ing their] position by taking unfair advantage of a client or others': r 1.2. The Code does not otherwise prohibit a solicitor from contacting a represented client.

[54] *Review of Conduct Rules* (n 38) 139.

[55] Dal Pont, *Lawyers' Professional Responsibility* (n 5) 753; *Poole* (n 11) [82].

[56] Dal Pont, *Lawyers' Professional Responsibility* (n 5) 753.

[57] Ibid.

[58] Ibid.

[59] Another rationale for the rule is to prevent a solicitor from potentially being a witness in proceedings whilst also representing a client. This raises practical and ethical issues: see *ASCRs* (n 2) r 27, which prohibits a solicitor from representing a client in proceedings in which the solicitor will be required to give evidence.

order the exclusion of evidence which was obtained unfairly from another solicitor's client.[60] As with disciplinary action, such means may deter potential misconduct by preventing this type of unfairly obtained evidence from being used.[61] Therefore, arguments based on this evidence provide an unconvincing rationale for the rule. Similarly, settlement agreements that were obtained by deception or other unfair means may be set aside.[62]

The substantive rationale or concern underpinning the no contact rule is that 'solicitors [must] have the full confidence of their clients and are enabled to communicate the one with the other upon that footing'.[63] In other words, the rule seeks to prevent a solicitor from 'undermining of the other party's trust and confidence in his or her own legal practitioner',[64] by making direct contact with a client.

The rule is commonly regarded as necessary to prevent a 'dexterous' solicitor from taking advantage of a 'helpless and undefended'[65] client of an opposing solicitor, and to 'ensure that a client, no matter how sophisticated, is entitled to the protection afforded by legal representation'.[66] For example, in *Tuferu I*, a Victorian solicitor breached the rule by arranging a meeting with the opposing solicitor's client and having him sign a document indicating that he did not wish to proceed with an intervention order application.[67] The breach was found to involve serious aggravating circumstances: (1) the opposing solicitor's client was a child who did not understand the document he signed; (2) the intervention order application was against the child's father, where the solicitor acted for the child's father, and the solicitor knew that the child was separately represented; and (3) the solicitor was aware that there was a related matter before the Children's Court of Victoria involving the child.[68]

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60 Hazard Jr and Irwin note that the 'no contact rule was historically a procedural, or evidentiary rule, rather than a rule of professional conduct entailing disciplinary consequences for its breach: Hazard Jr and Irwin (n 49) 799.

61 However, exclusion of unfairly obtained evidence is not possible once a proceeding has concluded. In *Jones v Jones* (n 34) the lawyer for the husband communicated directly with the wife. The judge stated that this 'made [him] look with fear and trembling at the whole evidence', as the lawyer's conduct may have enabled him to gather evidence against the wife: at 140.

62 See, eg, *Re Margetson* (n 33) 319.

63 Ibid 318–9.

64 *Wharff* (n 18) [12]. The concern is that direct contact between a client and an opposing solicitor may 'completely undermine the confidence of [the client] in [their lawyer]': *Orlov and Pursley* (n 22) 47. See also *Nauru Phosphate Royalties Trust v Business Australia Capital Mortgage Pty Limited (in liq)* [2008] NSWSC 833, [33] ('*Nauru Phosphate*').

65 *Jones v Jones* (n 34) 140. See also: George M Cohen 'Beyond the No-Contact Rule: Ex Parte Contact by Lawyers with Nonclients' (2013) 87(5–6) *Tulane Law Review* 1197, 1239; Hazard Jr and Irwin (n 49) 801.

66 *Review of Conduct Rules* (n 37) 140.

67 *Tuferu I* (n 23) [7]–[11].

68 Ibid [14].

The rule's protective purpose explains its strict and almost absolute nature. The rule prohibits *all* communications (outside of the exceptions provided by the rule) by a solicitor with an opposing solicitor's client, regardless of whether they are harmful in the circumstances,[69] because such communication is assumed to be against that client's interests. Further, the protective purpose may explain why the rule cannot be waived by the client, but only by the client's lawyer.[70] The rule's strict operation assumes that clients are vulnerable and incapable of recognising the risks of direct contact with an opposing solicitor, and that 'lawyers will bamboozle parties [who are] unprotected by their own counsel'.[71]

B *Critique of the Common Rationales*

The common rationales for the no contact rule, and their underlying assumptions, have been countered in multiple ways. Not all clients are helpless, unsophisticated or unable to determine whether direct communication with an opposing solicitor is in their interests.[72] The no contact rule may be regarded as paternalistic in that it allows the solicitor, rather than the client, to determine whether direct communication is permitted.[73]

Further, a client may wish to communicate with an opposing solicitor in certain circumstances, for example if they believe that their solicitor is neglecting their matter or misrepresenting their likelihood of success in order to increase legal fees. The client may suspect that their solicitor is delaying settlement or not conveying settlement offers.[74] Alternatively, a client may wish to investigate settlement options with the opposing side, in order to conclude proceedings quickly and cheaply. For a client, these objectives are legitimate and even paramount, and they may override ideals concerning loyalty to a particular lawyer. Many clients are involved in a legal dispute not of their choosing and may simply wish to resolve their matter quickly and inexpensively.

Disciplinary tribunals emphasise the importance of maintaining a client's trust and confidence in their solicitor, and are particularly censorious when a solicitor criticises a client's solicitor *to the client*. For example, in *Legal Services Commissioner v Paric* ('*Paric*'),[75] a solicitor faced disciplinary action for criticising the opposing solici-

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69 Cohen (n 65) 1200. But see *Tuferu I* (n 24) which demonstrates that tribunals typically examine the circumstances of the breach, to determine whether it is serious or not. Therefore, not all communications will be regarded as breaching the rule (or as warranting a sanction).

70 Cohen (n 65) 1201.

71 Leubsdorf (n 37) 686.

72 Ibid 687.

73 Ibid 710.

74 Ibid 690, cited in Hazard Jr and Irwin (n 49) 803–4.

75 *Paric* (n 40).

tor's character and fitness to practice.[76] This conduct was found to breach the no contact rule and a separate regulation prohibiting the use of 'discourteous, offensive and provocative' language.[77] The Tribunal characterised this conduct as professional misconduct and the solicitor was ordered to pay a fine and the costs of the proceeding. Significantly, the Tribunal in this proceeding regarded the solicitor's conduct as particularly serious when the solicitor copied the opposing solicitor's clients into emails.[78]

Notably, disciplinary tribunals have on occassion declined to enquire into or determine whether criticism or allegations made by one solicitor against another are true or justified. Rather, merely *making* the criticism or allegation is regarded as sufficient to breach the no contact rule. For example, in *Paric*,[79] the Tribunal regarded the truth or falsity of the allegations as a 'personal dispute' between the solicitors, which was inappropriate for the Tribunal to decide.

Rule 32.1 of the *ASCRs* prohibits a solicitor from making

> an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it.[80]

This rule prohibits a solicitor from making *unfounded* allegations of misconduct against another solicitor. However, the no contact rule has been interpreted as prohibiting *all* criticism of other solicitors to their client or third parties (although not to professional bodies), regardless of whether or not the criticism is valid. This is concerning, when considering that principles of free speech indicate that statements which are substantially true should not be subject to liability or restriction.[81] The no contact rule, however, as interpreted and applied by courts and tribunals, raises significant issues concerning communications which are possibly truthful and significant for the contacted client.[82]

C *An Alternative Rationale for the Rule*

An alternative rationale for the no contact rule is that it reduces the risk of collusion between the client and an opposing solicitor which may deprive the client's solicitor

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76 Ibid [19]–[22].

77 Ibid [29]–[30]; *Victoria 2005 Conduct Rules* (n 44) r 21. The rules now require a solicitor to be 'honest and courteous in all dealings in the course of legal practice': *ASCRs* (n 2) r 4.1.2.

78 *Paric* (n 40) [34], [43].

79 Ibid [31].

80 *ASCRs* (n 2) r 32.1.

81 Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 7–12.

82 Leubsdorf (n 37) 688.

of legal fees.[83] For example, in *Re Margetson*,[84] a solicitor contacted former clients with whom he was in dispute, and persuaded them to settle the dispute and terminate the retainer of the client’s new solicitor. The new solicitor then sued the former solicitor for his costs. The Court ordered the former solicitor to pay the new solicitor’s costs up to the time of settlement, and the costs of the proceeding.[85] This decision, which provides a classic statement of the no contact rule,[86] did not involve disciplinary action against a solicitor. Rather, the proceeding was brought by a solicitor for the recovery of his legal costs from another solicitor.

Re Margetson demonstrates that *one* purpose served by the no contact rule is to protect solicitors from being deprived of legal fees.[87] The rule can therefore operate to protect a solicitor’s interests, rather than only protecting the client’s interests.[88] In this proceeding, the Court stated that the no contact rule is ‘highly consonant with good sense and convenience, because otherwise solicitors cannot really do their duty’.[89] In this statement, the Court aligns the interest of solicitors with common sense. However, the interests of clients may not always align with those of their solicitors. Rather, the interests of a solicitor and their client may diverge on the issue of communication with an opposing solicitor.

Scholars such as Christine Parker emphasise that the rules of legal practice, including the no contact rule, were developed by lawyers and are enforced by lawyers who work for legal regulators such as the Legal Services Commission, and by tribunal members who include lawyers.[90] Historically, the Australian legal profession was largely self-regulated.[91] Although these rules are often said to be in the public

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[83] Cohen (n 65) 1201–2.

[84] *Re Margetson* (n 33).

[85] Ibid 321.

[86] Dal Pont, *Lawyers’ Professional Responsibility* (n 5) 753.

[87] As outlined above, the rule has many purposes.

[88] Leubsdorf (n 37) 688–93. It is notable that the Court in *Re Margetson* (n 33) did not consider whether the settlement agreed to by the clients was beneficial to them, or reasonable.

[89] *Re Margetson* (n 33) 318.

[90] Christine Parker, ‘Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness’ (2002) 25(3) *University of New South Wales Law Journal* 676, 682, 686. Legal profession disciplinary tribunals generally include lay persons. However, a lawyer (who is often a judge) is usually chair and therefore exercises considerable influence over the tribunal’s deliberations and decision.

[91] Dal Pont, *Lawyer Discipline* (n 3) chs 1, 6. This is no longer the case. For example, in Victoria, the Legal Services Commissioner is a statutory office independent of the profession. See: *Uniform Law Application Act* (Vic) (n 1) ss 48–9; ‘About the Board and Commissioner’, *Victorian Legal Services Board and Commissioner* (Web Page, 27 January 2023) <https://www.lsbc.vic.gov.au/about-us/board-and-commissioner/about-board-and-commissioner>.

interest or for the benefit of the public,[92] they also operate to benefit members of the legal profession.

The principle that the no contact rule can be waived by the solicitor but not by the client supports the argument that the rule seeks to protect a solicitor's interests, rather than the client's interests.[93] If the rule truly sought to protect the client's interests, it could be waived by the client, similarly to other protections such as the prohibitions placed on a solicitor acting where there is a conflict of interest.[94]

V Contempt of Court May Provide an Alternative to Disciplinary Action

This Part argues that the law of contempt of court may provide a suitable alternative to disciplinary action against a solicitor for breach of the no contact rule. Part V(A) outlines that Australian courts are currently using contempt powers to overcome the limitations of the no contact rule. Part V(B) outlines circumstances in which contempt powers may not be available or appropriate.

A *Contempt of Court*

At common law, courts have powers under the law of contempt to regulate their proceedings and to prevent interference with a proceeding.[95] Interference with a proceeding may take many different forms, such as disobedience of a court order, or using improper pressure on another party to withdraw from or settle proceedings.[96] Contempt powers enable courts to make orders to protect and ensure the integrity of judicial proceedings.

Superior courts have the inherent power to make orders relating to conduct which may interfere with the course of justice in a proceeding.[97] This is distinct from the rules of legal practice and the disciplinary powers of tribunals outlined previously in this article. Contempt proceedings seek to maintain the authority of the court,[98] whereas disciplinary action generally seeks to protect the public. However, the exercise of contempt powers may address the same concerns as disciplinary sanctions for breach of the no contact rule. Moreover, they may do so more directly and effectively than disciplinary sanctions, by providing a more timely and practical response to the potential harms of direct contact between a solicitor and an opposing solicitor's client.

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92 See, eg, Dal Pont, *Lawyer Discipline* (n 3) 4–5 [1.3].

93 Leubsdorf (n 37) 688–93.

94 Hazard Jr and Irwin (n 49) 825. See *ASCRs* (n 2) rr 10–12.

95 Sharon Rodrick et al, *Australian Media Law* (Lawbook, 6th ed, 2021) ch 6, 416.

96 Ibid 417–18.

97 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7.

98 Ibid.

As mentioned previously, a significant concern underpinning the rule is the possible impact that direct contact with a client may have on current proceedings between parties. In *Day v Woolworths Ltd* ('*Day v Woolworths*'),[99] a self-represented party was restrained from contacting or communicating with an insurance company involved in the proceedings, other than through the company's lawyers. The Court acknowledged that the self-represented party 'attempt[ed] to obtain an advantage in the litigation by undermining the relationship among [the insurer] and [its] solicitors'.[100] The self-represented party was not a lawyer, and therefore was not bound by the rules of professional practice. However, they were completing legal training and were experienced in litigation.[101] The Court's order, made under its contempt power, operated to apply the no contact rule to a non-lawyer.

The Court's decision in *Day v Woolworths* demonstrates a practical approach to the concerns underpinning the no contact rule. The self-represented party was not subject to the disciplinary powers of any regulator. However, the Court exercised its contempt powers to make suitable orders. Further, the Court's orders addressed the possible impact of the conduct *at the time* and into the future. This type of response may be more practically effective than taking disciplinary action, which may not commence for months or years after the relevant conduct. Although the legal profession is regulated in order to protect the public, the nature of disciplinary proceedings may make achieving this goal difficult in many cases. First, disciplinary action usually takes place months or even years after the relevant conduct. Second, disciplinary action is generally directed towards the impugned solicitor, and tribunals can generally only make orders relating to the respondent. A client may make a complaint regarding a solicitor's conduct to a regulator, but tribunals have limited powers regarding compensation or other remedies for the client.[102]

In *Nauru Phosphate*,[103] the New South Wales Supreme Court exercised its contempt powers in circumstances where the no contact rule might otherwise have been breached. This decision is controversial in that it involved *indirect* communication between solicitors for one party to proceedings, and the opposing party.[104]

[99] [2018] 3 Qd R 593 ('*Day v Woolworths*').

[100] Ibid 597–8 [9]. The self-represented party alleged professional misconduct by the insurer's solicitors: at 598 [11]. Just as in the decisions referred to in Part II(B) of this article, the Court did not determine whether the allegations were true.

[101] Ibid 597–8 [7]–[9], 599 [18].

[102] Parker (n 90) 691. The Victorian Legal Services Board and Queensland Legal Services Commission have the power to order payment of compensation to a client for direct financial loss. See, eg, 'Compensation for Financial Loss', *Victorian Legal Services Board and Commissioner* (Web Page, 20 July 2021) <https://lsbc.vic.gov.au/consumers/how-we-can-help/compensation/compensation-financial-loss>.

[103] *Nauru Phosphate* (n 64).

[104] Decisions such as *Orlov and Pursley* (n 22) and *Byrnes* (n 21) demonstrate that a solicitor may breach the no contact rule by instructing someone else to make the prohibited contact. *Nauru Phosphate* (n 64) extended this principle to circumstances where there is no direct communication with the other party at all, but where the solicitor *intends* the communication to reach and influence the opposing client: at [31].

However, the Court regarded the solicitor's conduct as 'scandalous',[105] 'underhanded and wrong'.[106] The communication criticised the conduct of the client's solicitors, which was likely to cause the client to mistrust the solicitor's advice and motives,[107] and to induce suspicion and lack of confidence in the client's solicitor.[108] The Court regarded the communication as likely to interfere with the proceeding by persuading the client to settle without having obtained 'proper [legal] advice'.[109] This undermined the client's free choice of whether to continue with the proceedings or to settle.[110] The Court did not determine whether this conduct constituted professional misconduct, as this was not the issue. However, it restrained the solicitor from communicating 'directly or indirectly' with the other party except through their solicitors.[111]

In *Allison v Tuna Tasmania Pty Ltd*,[112] the Supreme Court of Tasmania considered the decision in *Nauru Phosphate* in the context of an application to restrain a barrister from continuing to act in the proceeding. The barrister had breached the no contact rule by attending a meeting with the opposing solicitor's client, without the client's solicitor being present, at which settlement of the proceeding was discussed.[113] Initially, the Court restrained the barrister from continuing to act in the proceeding.[114] However, on appeal, the Supreme Court of Tasmania modified the order by merely restraining the barrister from acting as the sole or senior counsel in the proceeding.[115] The Supreme Court of Tasmania, on appeal, emphasised that the barrister immediately provided details of the meeting to the client's solicitor and did not deny the meeting or try to conceal it, and also acknowledged that it was wrong.[116] The Court regarded the original order as going beyond what was reasonably necessary to protect the integrity of the judicial process and the due administration of justice in the proceeding.[117] Rather, due weight needed to be given to the litigant having their barrister of choice, and the cost and inconvenience of changing counsel midway through a complex proceeding.[118]

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105 *Nauru Phosphate* (n 64) [30].

106 Ibid [35].

107 Ibid [27].

108 Ibid [33], [35].

109 Ibid [35]. It is unclear why the Court assumed that the client could not obtain advice from their solicitors before responding to the communication.

110 Ibid [33].

111 Ibid [39]. The solicitors were also ordered to pay the costs of the proceedings on an indemnity basis: at [42].

112 [2011] TASSC 52.

113 Ibid [7].

114 Ibid [39].

115 *Allison v Tuna Tasmania Pty Ltd* (2012) 21 Tas R 293, 305–6 [37].

116 Ibid 305 [36].

117 Ibid.

118 Ibid 300 [21], 303–4 [30], 304–5 [32], 305 [34].

These decisions demonstrate that Australian courts currently use their contempt powers to restrain conduct which may interfere with the administration of justice. Exercising these powers may overcome some of the limitations of the no contact rule, such as the rule applying only to solicitors and not to self-represented parties, and possibly not applying to indirect communications with a client. Further, the curial use of contempt powers may be more practical and effective than disciplinary action against a solicitor for breach of the no contact rule. This is because exercise of contempt powers can address conduct directly and immediately. This is unlike disciplinary action, which is inevitably delayed and cannot address the harms of unprofessional contact with a client directly.[119]

B *Contempt May Not Be Available or Appropriate in All Circumstances*

Although courts can, in certain circumstances, exercise their contempt powers when there has been direct contact between a solicitor and an opposing solicitor's client, this will not be available in all cases. In particular, it will only be available when there is a proceeding already on foot. It will not be available in purely transactional matters which do not involve court proceedings. This represents a major limit on the power of courts to redress any harm of direct contact. Similarly, the exercise of contempt powers may not be effective if a proceeding has concluded. Although a court may sanction a solicitor who has breached the no contact rule, it may be difficult for a court to determine the extent, if any, to which particular conduct has interfered with the administration of justice in a proceeding. Interference with the administration of justice is essential for the exercise of contempt powers, but it is less relevant in disciplinary proceedings.

There may be broader objections to the use of contempt powers in the context of breaches of professional standards. First, courts' powers to punish for contempt are derived from the common law, and therefore, they are not defined or limited like legislative powers.[120] Therefore, contempt powers may be administered by courts in a less predictable way than disciplinary sanctions, which are partially defined by legislation.[121] However, a court's exercise of contempt powers is subject to review on appeal.

Second, only superior courts have the inherent power to punish for contempt. Lower courts and tribunals have no contempt powers, unless granted by legislation.[122] Therefore, only superior courts can exercise this power without specific legislative authority.

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[119] It is assumed that contact with a client comes to the attention of the client's own solicitor in a timely manner, which may not always be the case.

[120] Rodrick et al (n 95) 416–7.

[121] See, eg, *Uniform Law Application Act* (Vic) (n 1) s 150A.

[122] Legislation usually grants lower courts and tribunals limited powers regarding contempt. See Rodrick et al (n 95) 421–4.

Third, court proceedings are commonly more expensive than tribunal proceedings. It may be more expensive for the parties and not an efficient use of the court's time for breaches of professional standards to be determined in a court rather than in a tribunal. It is acknowledged, however, that most disciplinary matters commence before a tribunal and are brought by a regulatory body.[123] Conversely, an action for contempt will be pursued in court precisely because it is not a disciplinary proceeding. Therefore, the costs issues are different in disciplinary proceedings as compared to contempt proceedings.

Further, exercising contempt powers may not have the same deterrent effect as disciplinary action. The purpose of disciplinary action against a solicitor is to determine whether rules of professional practice have been breached, and if so, the appropriate sanction which must be applied. Disciplinary proceedings focus almost exclusively on the practitioner and their conduct. Further, courts and tribunals consider all the surrounding circumstances in determining an appropriate sanction.[124] Disciplinary proceedings may have a greater educational effect than contempt proceedings, in terms of the practitioner involved, the legal profession, and the broader community. Decisions of disciplinary tribunals can be particularly educative if they are reported in the mainstream media or in professional legal journals.[125]

On the other hand, contempt powers are inevitably exercised in the context of another proceeding, and are peripheral to that proceeding. These powers may be less known or understood in the broader community. They are controversial, in that a judge who alleges contempt may also hear and determine the charge and penalty.[126] The focus of contempt proceedings is the impact of certain conduct on the administration of justice in a proceeding.[127] Disciplinary action, on the other hand, focuses on whether the solicitor's conduct meets certain professional standards.[128]

Additionally, disciplinary proceedings have the public interest advantage of naming the offending solicitor, and commonly their name is then listed on a publicly accessible website maintained by the regulator, serving as a warning to unsuspecting future clients.[129] On the other hand, this warning function is not a feature of court reports for contempt proceedings because, at present, adverse court findings are sometimes not automatically linked to the names of lawyers on the

123 Dal Pont, *Lawyers' Professional Responsibility* (n 5) 815–16.

124 In *Tuferu II* (n 14) the Victorian Supreme Court emphasised that once there has been a finding of professional misconduct, the sanction is discretionary: at [46].

125 For example, the Law Institute of Victoria publishes a column on legal ethics in its monthly journal, the *Law Institute Journal*.

126 Rodrick et al (n 95) 430–432.

127 Ibid 416–7, 421.

128 See, eg, *ASCRs* (n 2) r 2.3.

129 See, eg, 'Disciplinary Register', *Legal Profession Conduct Commissioner* (Web Page) <https://lpcc.sa.gov.au/disciplinary-register?page=1>.

regulator's site. Contempt proceedings generally adopt a consequentialist approach, where the primary consideration is the effect of certain conduct on a proceeding.

Disciplinary action, however, focuses on relatively fixed standards of conduct. This is reflected, for example, in the strict approach taken to the no contact rule in some decisions. In *Tuferu I*, the Tribunal rejected the solicitor's argument that he was acting as a 'mediator' between the two parties.[130] Although the solicitor felt obliged to resolve disputes in his local community, his primary duty as a lawyer was to uphold the proper administration of justice.[131] Similarly, in *Orlov and Pursley*,[132] the solicitor argued that he contacted the opposing solicitor's client and arranged settlement of the proceeding in order to assist his friend, the opposing solicitor's client. However, the Tribunal rejected this explanation, stating that the settlement was on terms favourable to the solicitor's client.[133]

Yet, disciplinary proceedings are not entirely lacking a consequentialist aspect, as courts and tribunals consider all of the surrounding circumstances when determining a sanction. Where the breach is considered trivial, the sanction may be minimal, such as a reprimand. However, where the breach is serious or repeated, the sanction may be a fine or even suspension of a solicitor's practising certificate. Therefore, both contempt of court and disciplinary proceedings consider the seriousness of the breach and its impact on proceedings.

In summary, contempt of court may be available as an alternative to disciplinary action where a solicitor has breached the no contact rule. Courts may use contempt powers to redress the harms of direct contact with a client relatively quickly and in a practical manner. However, contempt powers will not be available in all circumstances. Such powers are only available when there is a proceeding already on foot. Further, contempt powers are relatively undefined, and little-known by the general public. Therefore, contempt powers and disciplinary action both ought to be considered where a solicitor makes direct contact with an opposing solicitor's client.

VI Clarifying the No Contact rule

This Part provides practical recommendations on how r 33 could be clarified to resolve the uncertainties outlined in Part III. In summary, these uncertainties are: (a) whether the rule applies to litigious and non-litigious matters; (b) whether it applies to file transfer, providing a second opinion and communications on other matters; (c) the application of the rule when the client is a company or organisation; (d) the extent to which the rule prohibits communication through an intermediary; and (e) whether a breach of the rule depends on a solicitor being aware that the client is represented. The following sections will address these issues in turn.

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130 *Tuferu I* (n 24) [10].

131 Ibid [13].

132 *Orlov and Pursley* (n 22).

133 Ibid.

A *Litigious and Non-Litigious Matters*

As mentioned previously, r 33 is located in the part of the *ASCRs* dealing with 'relations with other persons', rather than the part dealing with 'advocacy and litigation'. This is potentially confusing, as it suggests that the rule does not apply in a litigious setting. This appears unintentional, as the rule has traditionally been understood as applying in both a litigious and non-litigious setting.

Further, the 'advocacy and litigation' part of the *ASCRs* contains r 22.4 (titled 'communication with opponents'), which provides that '[a] solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course'. This rule appears to be a narrow form of the no contact rule, applying only in the insurance context. It is unclear how this specific rule relates to the broader provision in r 33.

Under the previous rules applying in Victoria ('*Victoria 2005 Conduct Rules*'),[134] there were two separate no contact rules — one applying to litigious matters,[135] and one applying to other matters.[136] Rule 25 was in the part titled 'relations with other practitioners'. It was substantially similar to the current r 33, except in the following respects.

First, r 25 applied 'in any matter other than in relation to a case in court'.[137] Therefore, the rule did not apply to litigious matters, which were governed by r 18 (discussed below). Second, the exception concerning delay by the other lawyer in replying only allowed communication 'for the sole purpose of informing the other party that the practitioner has been unable to obtain a reply from that party's practitioner and requests that party to contact the practitioner'.[138]

On the other hand, the equivalent exception in r 33 appears to allow communication with the client *on any topic*, provided the other lawyer has failed, after a reasonable time, to reply. However, the r 33 exception requires there to be a 'reasonable basis for proceeding with the communication'.[139]

Third, there was no exemption in the former r 25 for enquiring whether the other party is represented, as there is in rule 33. Finally, r 25 expressly provided for the transfer of a client's file from one solicitor to another.[140]

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[134] *Victoria 2005 Conduct Rules* (n 44).

[135] Ibid r 18.4.

[136] Ibid r 25.

[137] Ibid r 25.1.

[138] Ibid r 25.1.1(b).

[139] *ASCRs* (n 2) r 33.1.4. It is unclear what this requirement means, apart from a delay in the other solicitor responding.

[140] *Victoria 2005 Conduct Rules* (n 44) r 25.2.

The *Victoria 2005 Conduct Rules* included a separate no contact rule which applied to litigious matters. It was in the 'advocacy and litigation' part of the rules and titled 'Communications with Opponent'. Rule 18.4 is substantially similar to r 33, however, there was no exception for contact following a delay in responding by the other lawyer (as in r 33.1.4). Also, r 18.4 prohibited communication 'in relation to the case for which the opponent is instructed', whereas r 33 appeared to prohibit communication on any topic, until its amendment in April 2022.[141]

As mentioned above, the no contact rule has traditionally been understood as applying in both litigious and non-litigious matters. Rule 33 should be clarified to reflect this reality. In its 2018 review of the *ASCRs*, the Law Council of Australia ('LCA') noted the 'potential for confusion' in placing r 33 in the part dealing with 'relations with other persons'.[142] The LCA recommended either 'replicating rule 33 … in the Part dealing with Advocacy and Litigation, or … including commentary to … rule 22 that draws solicitors' attention, when in an advocacy setting, to the requirements of rule 33'.[143]

The first option (replicating the rule) is potentially confusing, particularly if — as in the *Victoria 2005 Conduct Rules* — there are differences between the versions of the rule in litigious as opposed to non-litigious matters. Rather, the commentary to both rr 33 and 22 should clarify that the former applies in both litigious and non-litigious matters. This would support the protective and educative purpose of the rules.

B *File Transfer, Second Opinions and Other Communications*

The second area of uncertainty regarding r 33 is whether it applies to file transfer, providing a second opinion, and communications on other matters. These matters will be addressed in turn.

Regarding file transfer, some earlier versions of the rule have expressly excluded the transfer of a client's file from one solicitor to another from the operation of the rule.[144] However, this exemption is not included in r 33. In its 2018 review, the LCA argued that an express exemption is unnecessary, as transfer of a client file is covered by r 33.1.1 (which concerns prior consent of the other practitioner).[145] However, this reasoning may be questioned, as it is not necessarily the case that a solicitor whose retainer is terminated would consent to contact with the former client. Although, it is likely that this situation is outside the scope of the rule, as the solicitor–client relationship no longer exists when a solicitor's retainer is terminated.

Likewise, where a solicitor provides a second opinion to a person represented by another solicitor, this will be in many cases outside the scope of r 33. This is because

141 See below Part VI(C).

142 *Review of Conduct Rules* (n 38) 113.

143 Ibid.

144 See, eg, *Victoria 2005 Conduct Rules* (n 44) r 25.2.

145 *Review of Conduct Rules* (n 38) 140.

communicating with the client of another solicitor is not prohibited per se by the rule. Rather, communication is prohibited only if the solicitors are either opponents in litigation or acting for different parties in a transaction.[146] There are ethical obligations on a solicitor who provides a second opinion to another solicitor's client, such as not disparaging the client's solicitor, but this is separate from r 33.[147]

Related to the above, r 33 does not prohibit a solicitor from communicating with a person represented by another solicitor — including an opposing solicitor's client — on matters unrelated to the proceeding or transaction. Before April 2022, r 33 appeared to prohibit communication on any topic and in any circumstances. However, since the amendments, the rule prohibits only communications 'about the subject of the representation'.[148] As mentioned above, previous formulations of the rule were much clearer on this point. For example, r 18.4 of the *Victoria 2005 Conduct Rules* applied only 'in relation to the case for which the opponent is instructed'. The amendment of r 33 clarifies that communication is prohibited only in relation to the matter or proceeding in which another solicitor is instructed. This enables, for example, a solicitor to have social contact with an opposing solicitor's client, provided that the solicitor does not use the occasion to discuss the matter or to obtain information from that client.

C *When the Client is a Company or Organisation*

Difficult issues arise under r 33 when the client is a company or organisation rather than an individual. This is because a solicitor may have legitimate reasons to communicate with an organisation or its personnel, such as the employees of a company. Legally, a company acts only through its officers and representatives, including, in some circumstances, its employees.

Generally, a company's directors and senior executives are the authorised representatives, and therefore are the client for the purposes of r 33.[149] Such officers have power to instruct in the conduct of proceedings and to bind the company to a settlement, whereas ordinary employees generally do not. Restricting client status to directors and senior executives is consistent with there being no property in a witness, and a litigant's right to a fair trial.[150] For example, the *Professional Conduct and Practice Rules 1995* (NSW) expressly prohibited contact 'where the opposing party … is a corporation, [with] any person authorised to make admissions on behalf of the corporation, or to direct the conduct of the proceedings' except

146 See Shirvington (n 44) 45.

147 Ibid.

148 See: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 33, as at 27 May 2015; *ASCRs* (n 2) r 33.

149 See, eg, Law Institute of Victoria, *Communicating with Another Solicitor's Client* (Guidelines, 12 October 2022) 2. See also Guidance Statement No 29 (n 45).

150 Leubsdorf (n 37) 695.

in certain circumstances.[151] On the other hand, Virginia Shirvington argues that the rule prohibits contact with *any* of the corporation’s officers or employees.[152] However, no reasons are provided for this extremely expansive interpretation of the rule.

This issue is particularly important in legal disputes between a company and an employee or employees. It may prohibit a solicitor acting for an employer from contacting an employee, for example, to obtain evidence from that employee or to ask for them to act as a witness where the employee has their own representation in the legal dispute. Therefore, the rule generally does not prevent an opposing lawyer from contacting an employee of their client, provided that the employee is not separately represented. As outlined above, the rule does not prohibit a solicitor from communicating with a company or its representatives on matters unrelated to the transaction or proceeding.

D *Communicating Through an Intermediary*

As mentioned previously, solicitors have been found to breach r 33 by contacting the opposing solicitor’s client through an intermediary, rather than directly. This has occurred in three notable Australian decisions.[153] All three decisions have unique circumstances, and it is uncertain whether indirect contact will be regarded as breaching the rule in other circumstances.

On the one hand, a finding that the rule can be breached by *indirect* contact seems counterintuitive, as the essence of r 33 is prohibiting direct contact. On the other hand, the scope of the rule logically depends on its purpose or rationale. As outlined in Part IV above, the main rationale identified is preventing a solicitor from undermining the client’s confidence in their lawyer. From this perspective, it matters little whether the contact is direct or indirect, and therefore indirect contact may also be sanctioned. However, this creates great uncertainty regarding the scope of the rule, and the potential for inadvertent breaches. This is particularly so given that a client (as opposed to their solicitor) is generally free to contact an opposing party, and a solicitor may instruct their client regarding this without breaching the no contact rule.[154]

In *Orlov and Pursley*, a solicitor communicated with an opposing solicitor’s client through his wife, who was also a solicitor. Both solicitors were found guilty of

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[151] Law Society of New South Wales, *Professional Conduct and Practice Rules 1995* (at 11 December 1995) r 18.2. Rule 18 was titled ‘Duty Not To Influence Witnesses’ and was in the part of the Rules dealing with ‘Practitioner’s Duties to the Court’. The rule was distinct from the broader no contact rule, which was contained in r 31.

[152] Virginia Shirvington, ‘Civility and Thoughtfulness Needed in Communications’ (2005) 43(7) *Law Society Journal* 44, 44.

[153] See: *Nauru Phosphate* (n 64); *Orlov and Pursley* (n 22); *Byrnes* (n 21).

[154] Dal Pont, *Lawyers Professional Responsibility* (n 5) 754–5 [21.250].

professional misconduct and received substantial fines.[155] The Tribunal regarded this conduct as particularly serious, as it resulted in the contacted client settling legal proceedings on terms that favoured the opposing solicitor's client. Further, the Tribunal found that the contact 'completely undermined the confidence of [the client] in [their lawyer]'.[156]

Similarly, in *Byrnes*,[157] a solicitor contacted an opposing solicitor's client through his office manager. The Tribunal found that this was unprofessional conduct. However, no sanction other than costs was ordered, as the Tribunal regarded the breach as merely 'technical'.[158] The finding that the rule was breached in these circumstances was justified, as the office manager was an employee and legally obliged to carry out the employer's directions. The decision confirms that a solicitor cannot direct another person (such as an employee) to do an act which the solicitor is prohibited from doing, particularly where the solicitor obtains the benefit of the agent's act.

Although *Nauru Phosphate* concerned indirect contact, this decision involved the Court exercising its contempt powers, rather than directly invoking the no contact rule.[159] Therefore, this decision does not concern the scope of r 33. However, the outcome was similar to disciplinary proceedings, in that the Court restrained the solicitor from communicating 'directly or indirectly' with the other party except through their solicitors.[160]

In *Orlov and Pursley*,[161] and *Byrnes*,[162] solicitors breached the no contact rule by instructing someone else to contact the client. In *Nauru Phosphate*, however, the Court was less concerned with whether there was any communication with the other party at all, and rather focused on the solicitor's *intention* to communicate with and influence the opposing solicitor's client.[163] Similarly to *Orlov and Pursley*, the Court regarded such communication as likely to undermine the client's confidence in their solicitor.[164]

In summary, the decisions examined in this section do not mean that every contact between a solicitor and an opposing solicitor's client through a third party will

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155 *Orlov and Pursley* (n 22).

156 Ibid.

157 *Byrnes* (n 21).

158 Ibid [29]. The circumstances involved a delay in the opposing solicitor responding to communications, and therefore may have come within the exception in r 33.1.4, had this rule been applicable.

159 *Nauru Phosphate* (n 64) [32]–[33], [36]–[37].

160 Ibid [39]. The solicitors were also ordered to pay the costs of the proceedings on an indemnity basis: at [42].

161 *Orlov and Pursley* (n 22).

162 *Byrnes* (n 21).

163 *Nauri Phosphate* (n 64) [31], [35].

164 Ibid [35].

necessarily breach the rule. Rather, this will only be the case in limited circumstances. An employment (or agency) relationship between the solicitor and the intermediary is more likely to give rise to a breach. Similarly, there may be a breach where the intermediary is also a solicitor, and is therefore assumed to be aware of their professional obligations. Other circumstances in which communication is made through an intermediary are less clear.

E *Relevance of a Solicitor's Knowledge*

The final area of uncertainty concerns the relevance (if any) of a solicitor's knowledge that the contacted party is legally represented. Previously, r 33 appeared to impose strict liability meaning that accidental or inadvertent contact with a client could breach the rule. However, due to a recent amendment, the rule now requires that the solicitor 'knows' that the person is represented. The type of 'knowledge' that is required is an important issue, given the potentially serious consequences for breaching professional conduct rules.[165]

Previous formulations of the rule explicitly required knowledge that the client was represented. For example, the *Victoria 2005 Conduct Rules* prohibited (and potentially sanctioned) contact only if 'to the practitioner's knowledge', another practitioner was currently acting for the client.[166] As mentioned previously, r 25 applied in non-litigious matters only.[167] As the drafting of the *Victoria 2005 Conduct Rules* indicates, in litigious matters, knowledge that a person is represented may be presumed — assuming that a solicitor has entered an appearance. However, such knowledge cannot be so easily assumed in non-litigious matters.

The recent amendment of r 33, which now requires 'knowledge', provides some additional clarity. However, it remains unclear exactly what type of knowledge (or awareness) is required. For example, is it sufficient that the solicitor had reason to believe that a person was legally represented? Even when the relevant rules do not require knowledge, tribunals sometimes require such proof. Tribunals may regard this as necessary to mitigate the potential severity of an inadvertent breach. For example, in *Tuferu I*, the Tribunal emphasised that the respondent solicitor knew, or had reason to believe, that the client was represented by another solicitor.[168] Sanctions are at the discretion of a tribunal, and therefore, an inadvertent or accidental breach

165 As mentioned previously, breach of a rule of professional practice is separate from the imposition of a sanction. That is, a rule may be breached but no sanction, or minimal sanctions, may be imposed. At the sanction stage, disciplinary tribunals tend to emphasise whether the breach involved conscious wrongdoing, such as whether the solicitor consciously 'flout[ed] authority': *Paric* (n 40) or whether they were warned about their conduct and continued it despite the warnings: *Wharff* (n 18).

166 See *Victoria 2005 Conduct Rules* (n 44) r 25.

167 Ibid r 18 applies in litigious matters.

168 *Tuferu I* (n 24) [9]. This decision involved breach of *Victoria 2005 Conduct Rules* (n 44) r 18.4, which does not explicitly require knowledge that the client is represented.

is unlikely to result in more than a reprimand — particularly if the solicitor has a previously unblemished professional record.

VII Wider Reform of the No Contact Rule

Some scholars argue for wider reform of the no contact rule. This Part examines arguments advanced by American scholars in this regard. First, it examines issues concerning delay and neglect by the opposing solicitor. Second, it examines arguments that the opposing solicitor's client (rather than the solicitor) should be able to consent to direct contact.

Lawyers' ethics scholar John Leubsdorf argues that a solicitor should be permitted to communicate with an opposing solicitor's client in certain circumstances, provided that they simultaneously communicate with that client's solicitor.[169] This would address, for example, the risk of delay or neglect by a solicitor to pass on an offer of settlement to a client. This situation is to some extent addressed by r 33.1.4, which permits direct communication

> where 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 the communication.[170]

Leubsdorf goes beyond this exception, however, by requiring simultaneous communication with the client's solicitor. His proposal seeks to protect a client's interests, by protecting them from delay or neglect by their solicitor, particularly regarding settlement offers.[171] For example, by delaying or not passing on a settlement offer, a solicitor may prevent a client from considering and accepting an offer which may be in their interests. However, his proposal also seeks to protect a solicitor's interests by providing simultaneous notice of the communication. This could prevent collusion between the contacting solicitor and the client, to the detriment of the contacted client's solicitor.

However, Leubsdorf's proposal may not go far enough. Specifically, it does not limit the rule to the interests it seeks to promote, or prevent unjustified restrictions on a client's ability to communicate with an opposing solicitor. Rather, the rule may prevent a client from contacting an opposing solicitor even where the client has decided that this is appropriate and preferable to communicating through their own solicitor.

Geoffrey C Hazard Jr and Dana Remus Irwin argue that the no contact rule should not apply if the client waives the rule, say, by initiating contact with the opposing

169 Leubsdorf (n 37) 703.

170 *ASCRs* (n 2) r 33.1.4.

171 Leubsdorf (n 37) 690–3, 703.

solicitor.[172] They argue that clients can waive other protections, such as the rule prohibiting a solicitor from acting when there is a conflict of interest.[173] Significantly, Hazard Jr and Irwin describe these protections as 'right[s]' which a client has in relation to their solicitor.[174]

Hazard Jr and Irwin argue that this proposal promotes a client's personal autonomy, by respecting their choices, particularly regarding matters concerning their interests.[175] Hazard Jr and Irwin's proposal reshapes the no contact rule into one which explicitly serves a client's interests and their preferences. Rather than being paternalistic, their proposal seeks to fully respect a client's agency, personhood and autonomy.

However, this article does not support Hazard and Irwin's proposal, for the following reasons. First, allowing unrestricted contact between a client and an opposing solicitor is likely to undermine a client's relationship with their own lawyer. Allowing direct contact between a client and an opposing solicitor — even if this was sought by the client — means that the client's solicitor 'cannot really do their duty' of protecting the client's interests.[176] If a client seeks their solicitor's consent to make direct contact with an opposing solicitor, and this is refused, the client has the option of terminating the retainer.

Second, the relationship between a solicitor and client is both professional and fiduciary in nature — based on trust and confidence.[177] Particularly in litigious matters, allowing direct contact with an opposing solicitor is likely to undermine the solicitor's role in formulating and implementing a case concept, without interference by an opponent. Even in non-litigious matters, the role of a professional adviser is likely to be undermined if the client ignores expert advice (such as the potential risks of direct contact with an opposing solicitor). In the context of the solicitor–client relationship, promoting a client's 'autonomy' is significant, but perhaps not as important as Hazard Jr and Irwin argue.

Third, solicitors have overriding duties to the court and the administration of justice.[178] This means that solicitors are not obliged to, and in fact are prohibited from, following a client's instructions where they conflict with these overriding duties. For example, a solicitor must conduct proceedings in court in a prompt and organised manner, even if a client seeks to raise extraneous and irrelevant issues.[179]

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172 Hazard Jr and Irwin (n 49) 828.

173 Ibid 825.

174 Ibid.

175 Ibid 827–8.

176 *Re Margetson* (n 33) 318.

177 Parker (n 90) 686.

178 *ASCRs* (n 2) r 3.

179 Ibid r 21.3.

Hazard Jr and Irwin's approach unduly emphasises client's individual rights, rather than the public interest in the orderly and efficient administration of justice.

Finally, r 33 currently protects clients in respect of delays by their solicitor in responding to communication. There is an exception in the rule allowing direct communication in such circumstances. This may be important, for example, regarding settlement offers or other urgent matters. However, if a client believes that their solicitor is neglecting their interests, they may, and perhaps should, terminate the retainer.

VIII Conclusion

This article has argued that the no contact rule in the *ASCRs* requires clarification in several key respects. This article has highlighted five ways in which the operation of the rule lacks certainty. These are serious flaws, considering the potentially very serious consequences for a solicitor who breaches the rule. Further, the rationale for the rule is unclear. Commonly, it is argued that the rule protects clients from opposing solicitors. However, the rule also operates to protect the interests of solicitors, particularly regarding legal fees.

This article proposed practical reforms to r 33 to clarify its scope and operation. These clarifications are necessary to provide certainty to solicitors regarding their professional duties. They are also necessary to provide clarity to clients and other users of legal services. For example, many clients may be unaware that they may communicate with the opposing solicitor directly, if they obtain their solicitor's consent. A client may wish to do this, for example, to reduce legal expenses.

Although this article has argued for clarification of r 33, it does not support wider reforms, such as, by allowing clients to waive the rule. Although this proposal may promote a client's personal autonomy, it is also likely to undermine the trust and confidence on which the solicitor–client relationship is based and, to that extent, may impinge on the administration of justice.