PARALEGAL ESSENTIALS

CHAPTER 1 - WORKING IN A LAW FIRM

1. Overview

1.1 Working in a law firm can be a very challenging but rewarding occupation. This course aims to equip you with information, knowledge and practical tips that will help you understand and perform the tasks you may undertake as a paralegal.

1.2 All the modules and guides at *paralegal.com.au* have been written by practising Barristers who know what it is like to work in the law and know what is expected of a paralegal.

1.3 This course:

(a) provides practical guidance and assistance with several tasks you may commonly be asked to perform as a paralegal, including:

- Legal research
- Preparing briefs for Barristers
- Filing documents in Court
- Preparing affidavits
- Preparing subpoenas

(b) highlights several important considerations when working in a law firm, including:

- Confidentiality
- Legal ethics
- Importance of organisation
- Communication with clients and file notes.

CHAPTER 2 - ROLE OF A PARALEGAL

2. What is a Paralegal

2.1 Paralegals are not solicitors or barristers, in that they do not hold a practising certificate allowing them to perform the function of a legal practitioner.

2.2 Paralegals perform work of a substantially legal nature that is delegated to them and for which a solicitor is responsible. Paralegals may be employed by law firms, corporations, government agencies and not-for-profit organisations or any other entity, which provides legal services or performs legal work.

2.3 Paralegals may be law students who one day hope to become solicitors. There are also career paralegals, people who become paralegals as their career.

2.4 Paralegals often perform tasks such as:

(a) legal research;

(b) compiling briefs, tender bundles or Court books;

(c) providing assistance in gathering annexures or exhibits to affidavits or witness statements;

(d) drafting Court documents and other legal documents (particularly documents which are largely forms, such as subpoenas);

(e) file management;

(f) document review, say, where discovery is being conducted; and

(g) administrative tasks that have a legal element e.g. ordering transcript, preparing standard correspondence. This can include client contact.

Details of some the above tasks are provided in the next section.

2.5 A paralegal's time may be billed to a client if the work done relates to a matter. Therefore, paralegals are also often required to keep timesheets.

2.6 Paralegals provide a professional service and accordingly there are expectations about the way those services are provided, consistent with ethical and other obligations owed by solicitors. For example, it is expected that paralegals will record their time on timesheets honestly and accurately. It is expected that paralegals will be candid in their dealings with others in the firm and externally and that they will complete tasks competently and promptly. However, unlike a solicitor, paralegals are not subject to the same disciplinary regime as solicitors.

2.7 Paralegals report to others in the firm. Ultimately, if a paralegal makes an error or is negligent, then it is the solicitor responsible for supervising them who will be liable professionally (i.e. in respect of any disciplinary proceedings) and in respect of any

sum of damages that might be payable due to the negligent conduct. It is therefore important for paralegals to perform their tasks with a high level of care and that they be adequately supervised.

CHAPTER 3 - TASKS OF A PARALEGAL

3. Legal Research

3.1 A part of a paralegals job will be to conduct legal research for the solicitors in the firm.

3.2 While you may have done legal research in the past, for example at university, conducting legal research in the context of a law firm is likely to be different because:

(a) it is often performed under time pressure, where an answer is required promptly;

(b) there are often practical elements which do not arise when conducting legal research at university (for example, what relief do I need to seek in a Notice of Motion in a particular set of circumstances?);

(c) where you are conducting legal research to be used in submissions for Court, it is important to find authorities of quality for the propositions you are propounding from which the solicitor, barrister and judge can draw the correct principles, rather than authorities from obscure jurisdictions or unreported judgment (unless the unreported judgment contains important principles); and

(d) when preparing authorities for Court, you should be aware of the Court rules for the citation of cases.

3.3 This course will focus on some general aspects of legal research, provide tips for conducting legal research efficiently, identify free online resources which are commonly used and address the requirements for the citation of cases in the Supreme Court of NSW and the Federal Court of Australia.

3.4 In addition to free online resources for legal research, there are also companies that provide research tools that are available through paid subscriptions. Many law firms subscribe to such services and you should refer to the guide that comes with the subscription if the firm at which you work us a subscriber. Such services also provide training opportunities and technical support that can assist.

3.5 Sources of legal information are generally divided into two categories:

(a) Primary sources is the term used to describe the laws as proclaimed by Parliament and the courts, that is, legislation and case law (where one finds judge-made law).

(b) Secondary sources is the term used to describe sources which summarise, analyse, critique and explain by way of commentary primary sources of law. This includes subscriptions providing commentary on particular areas of law, textbooks, journals, indexes and digests, handbooks, legal encyclopaedias and legal dictionaries. These sources are usually of an academic nature.

3.6 While secondary sources may be useful, it is advisable in legal practice to refer to primary sources of law, rather than secondary sources of law. There are a number of

select legal texts which are exceptions to this rule because they often quoted by judges in judgments, for example, Cheshire & Fifoot on the Law of Contracts. However, often, the most useful legal research in day-to-day legal practice is that which draws from primary sources.

3.7 So, then, what are secondary sources useful for? Secondary sources are commonly used:

(a) to look up points of practice and procedure if you need to determine how something is done, for example, the bases upon which a subpoena may be set aside; and

(b) as a starting point for your legal research to identify relevant cases and principles to provide guidance for your research into primary sources.

3.8 While the modes of legal research have changed over the years, particularly with the introduction of online resources, the aim of legal research has stayed much the same, that is, to locate the law, determine the law, analyse the principles and apply those legal principles to the facts. From that, the basic steps in legal problem solving have also remained much the same:

(a) the relevant facts should be identified;

(b) the legal issues should be identified from the facts;

(c) identify the principles relevant to the legal issues and interpret them;

(d) apply those principles to the facts; and

(e) arrive at your conclusion or conclusions.

3.9 Identification of the relevant facts can be difficult and is a skill which improves with more legal experience. A client, when telling you their story in an initial conference, will often provide you with facts that they consider to be very important but which have little or no bearing on the central legal issues. It is then up to you to sift through all that the client has told you to determine what facts are relevant to the legal issues.

3.10 However, in your early career as a solicitor or paralegal, you will often be given the relevant facts by your supervisor when they first assign you with a legal research question.

3.11 There are times, however, when you may be given the client documents, you may attend the initial conference and you may be asked to provide a preliminary analysis of the issues. In this case, it will be necessary for you to determine the relevant facts.

3.12 As useful method for determining the relevant facts is to ask: How? What? When? Where? Why? For example:

RELEVANT QUESTIONS TO DRAW OUT THE RELEVANT FACTS

- What happened?
- When did this happen?
- How did this happen?
- Who made this happen? Or, who is responsible for making this happen (or not happen)?
- Who was affected by this event and how?
- Why did this event happen?
- What caused this event to happen?

3.13 While these questions may seem like a basic analytical tool, these questions will assist you to not only identify the relevant facts, but also to identify what facts you do not know which might be relevant to any legal analysis.

3.14 Once you have the facts, you should put them into some kind of order such as:

(a) listing the facts in point-form;

(b) ordering the facts into a chronology;

(c) separate facts should be listed or placed into the chronology discretely; and

(d) you should note where facts are missing.

3.15 Identification of the relevant legal issues is also a skill which improves with experience because it involves the application of legal knowledge. As with identification of the facts, early on in your career as a paralegal or solicitor, you will often be given an already-identified legal issue and will be asked to conduct legal research into an aspect of that issue.

3.16 However, there may be times when you are given simply a set of facts from which you must draw legal issues.

3.17 If you are in this position, it can be useful to first identify a set of questions framed around the potential rights, obligations and liabilities of the parties. This is because legal disputes are often about disagreements on the respective rights, obligations and liabilities of the involved parties. From there you can work out other potential legal issues which relate to damages and remedies.

3.18 From here you can work out the relevant broad legal topics from which you can identify the relevant legal principles.

3.19 The skills involved in identifying the relevant legal principles include:

(a) creating relevant search terms;

(b) identifying relevant secondary sources of law which may assist you to identify the legal principles;

(c) using secondary sources to identify the primary sources of law that contain the relevant principles;

(d) evaluating sources of primary law for relevance and authority and then identifying the leading authorities relevant to the issue; and

(e) analysing and synthesising the relevant primary sources.

3.20 Some general tips on effective legal research:

(a) it is important to work quickly - legal research often takes place under some time pressure - but your work needs to remain thorough;

(b) if you strike a road block, it might be useful to change your search terms completely or by making them less specific;

(c) make sure you read the primary sources and refer to primary sources as much as possible in any memo as it is these which are ultimately referred to in legal argument. Do not rely on digests, commentary or head notes;

(d) it is often good to start with the general and work down to the specific; and

(e) if you are not sure whether you are heading in the right direction, it might assist to have a short discussion with a legal practitioner who is more familiar with the area of law about whether you are on the right track. This is something to be particularly conscious of when the research is being time-costed to a file, because recording time spent on irrelevant research is something which one should take steps to avoid.

3.21 When you have identified the relevant legal principles and reach the stage of providing an analysis, you should:

(a) set out the authorities (i.e. cases or legislation) and the principles or policies that are drawn from them which embody the legal rules that apply;

(b) where you refer to cases, identify the best legal authority for each proposition;

(c) set out the interpretation of any legal rule which applies;

(d) determine any areas of ambiguity in the legal rules, where relevant to your matter. This includes conflicting reasoning in precedents or uncertainty in the interpretation of a particular legislative provision;

(e) set out how the legal principles apply to the facts, together with the outcome; and

(f) where you have been asked, address any remedies.

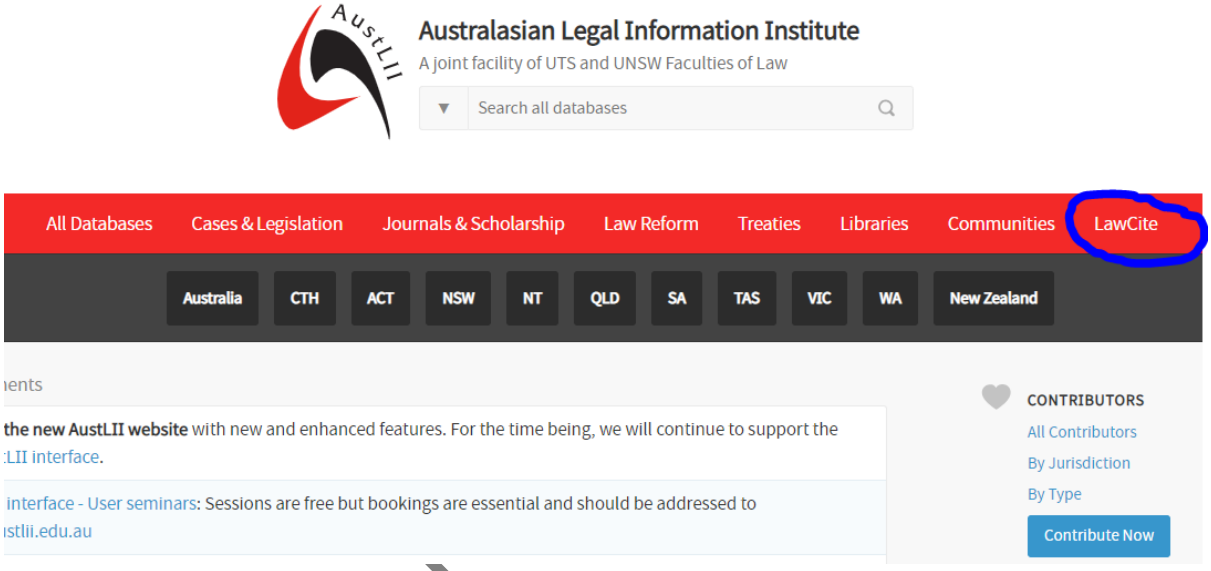
3.22 By using this rough guide as to the structure of any memo you write arising out of your research, you can ensure that your memo flows logically from proper identification of the relevant law and legal principles, to application of that law and those principles to the facts and then, where asked, to remedies.

A. Places to Find Case Law

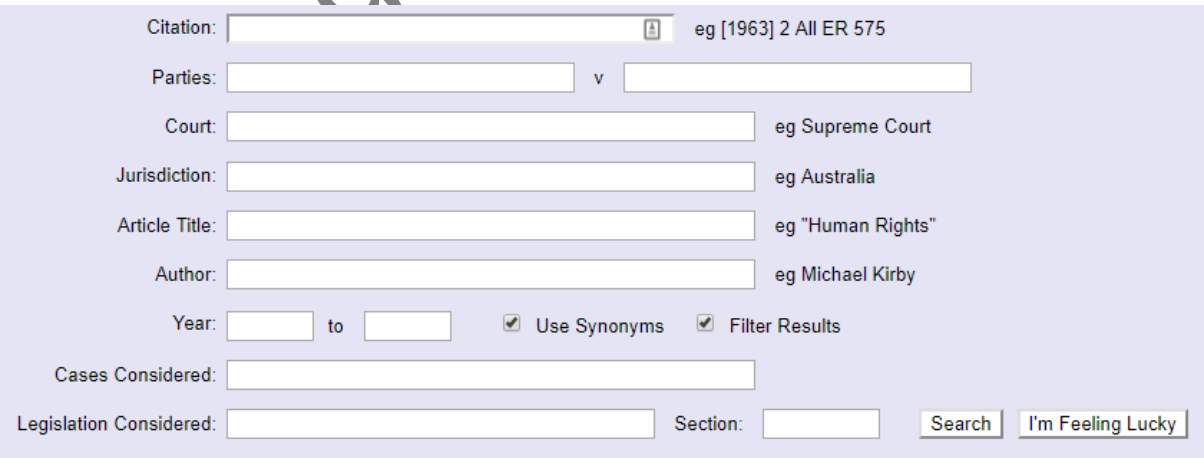
3.23 There are a number of useful free online legal sources where you can locate cases. If you have done legal research before, then you will likely be familiar with them.

3.24 **Case citators** are databases which allow you to locate the case citation in order to then locate the full text judgment. This is useful when you are given only part of a case name and perhaps some other details such as the court. Case citators are also useful when you have only one citation but do not have access to that report. A case citator will allow you to find alternative citations.

3.25 AustLII (www.austlii.edu.au) provides a case citators called LawCite. The diagram below shows where you can find it on the AustLII homepage:



3.26 When you click that link and enter the LawCite page you will find a number of search fields:



3.27 This is useful because you can use whatever information you do have about a case to find the complete citation. This service will also list alternative citations for a case and a link to the full text judgment.

3.28 If you then click on a case name, LawCite will show you the cases which refer to that case. For example:

Aon Risk Services Australia Ltd v Australian National University 1209

[2009] HCA 27; (2009) 258 ALR 14; (2009) 83 ALJR 951; (2009) 239 CLR 175

High Court of Australia
Australia - Commonwealth
5th August, 2009

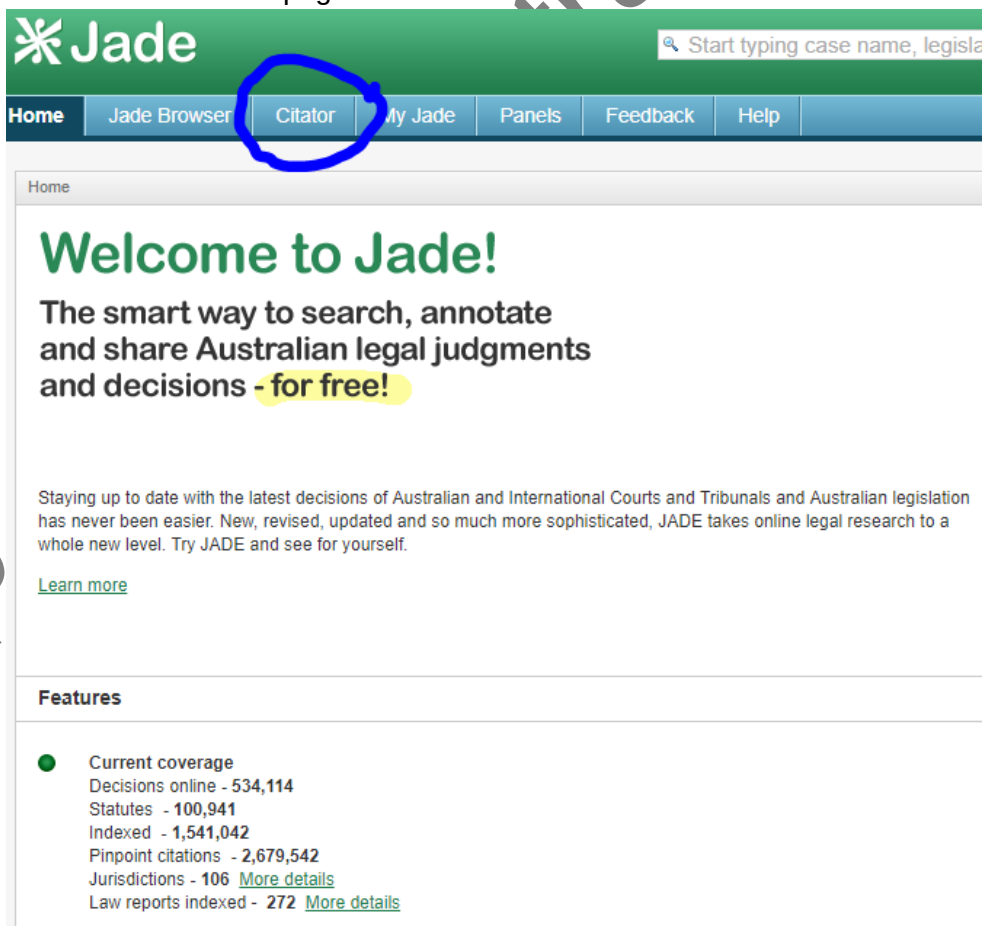
Cases Referring to this Case

Case Name	Citation(s)	Court	Jurisdiction	Date †	Full Text
Australian Securities and Investment Commission v MacKS (No 2)	[2019] SASC 17	Supreme Court of South Australia	Australia - South Australia	22 Feb 2019	AustLII
Girgis Nominees (WA) Pty Ltd v Poliwka [No 5]	[2019] WASC 51	Supreme Court of Western Australia	Australia - Western Australia	22 Feb 2019	AustLII
Pave Wealth Services Pty Ltd v Danielle Jones as executrix of the estate of Michael Frederick Jones	[2019] WADC 21	District Court of Western Australia	Australia - Western Australia	20 Feb 2019	AustLII
Robert John Nettle and Julie-Anne Margaret Tap as Trustees and Executors of the Estate of Gregory James Nettle (Deceased) v Paino	[2019] QDC 10	District Court of Queensland	Australia - Queensland	14 Feb 2019	AustLII
Cacas v Megameg (No 2)	[2019] SADC 14	District Court of South Australia	Australia - South Australia	14 Feb 2019	AustLII
Marke v Victoria Police (Review and Regulation)	[2019] VCAT 207	Victorian Civil and Administrative Tribunal	Australia - Victoria	14 Feb 2019	AustLII
Lamers v Lamers (No 3)	[2019] VSC 63	Supreme Court of Victoria	Australia - Victoria	14 Feb 2019	AustLII

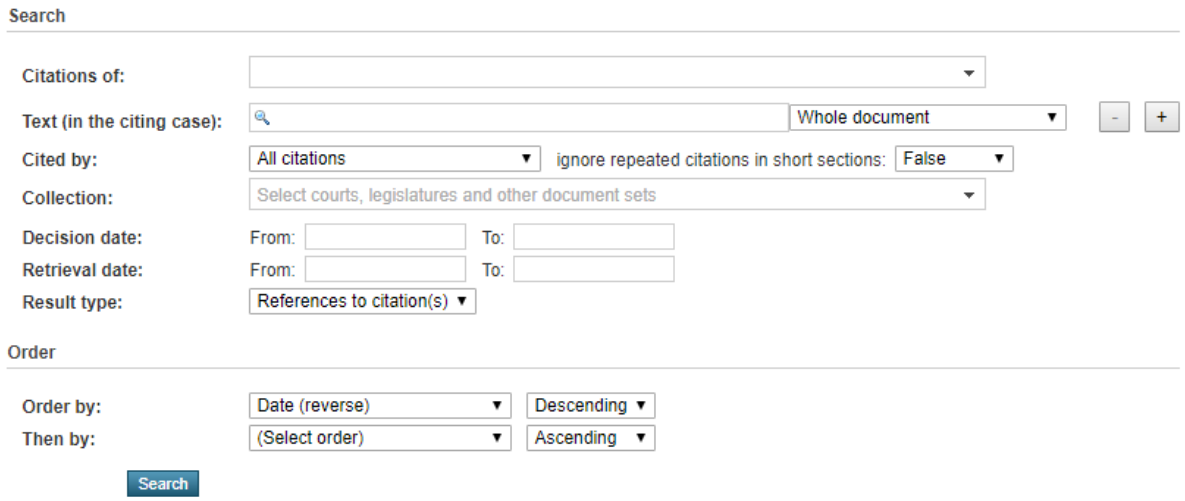
3.29 LawCite will also contain a list and, where available, links to law reform commission reports referring to the case, journal articles referring to the case, legislation cited in the case and any cases or articles cited in the case.

3.30 Unlike paid case citators, like CaseBase, LawCite does not indicate whether the judicial treatment of the case is negative, positive or neutral.

3.31 Another useful free online case citator is Jade (https://jade.io/). The link to the case citator is on the homepage.



3.32 Like LawCite, there are a number of fields where you can enter information to find a case:



3.33 The full text judgment of the case may then be accessed from the case name.

3.34 The most powerful tool available in Jade is its ability to provide pinpoint citations. This allows Jade to not only list cases citing or cited by a particular case but pinpoints judicial consideration at paragraph level.

3.35 Below is a diagram of what this looks like. This is paragraph 14 taken from *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175; 83 ALJR 951; 258 ALR 14, a significant case in relation to practice and procedure.

3.36 As you can see, paragraph 14 in *AON* has been cited 25 times. The cases citing this paragraph of *AON* are then listed down the side of the page, with the relevant paragraph from each case reproduced.

3.37 This *allows* you to see the judicial treatment of a particular paragraph in a case quickly and provides immediate access to the relevant paragraph in the referring case. This allows you to determine the judicial treatment of a case from primary sources rather than through commentary.

[30] See *Supreme Court of Judicature Act* 1875 (UK), s 16.

14. There is a distinction between the discretion of a court to allow a party to amend its pleading on that party's motion and the requirement to make all such amendments as may be necessary to determine the real questions in controversy. That requirement engages with the authority conferred on the court to make amendments of its own motion[31]. The point was made in 1887 by the Full Court of the Supreme Court of Victoria in *Dwyer v O'Mullen*[32] in relation to O XXVIII r 1 of the 1875 Rules. Higinbotham CJ said of the last clause of the rule that it[33]:

> "makes an amendment mandatory. The judge is under the obligation of making an amendment, but only for a certain purpose and in certain cases – for the purpose of determining the real question in controversy between the parties – that being expressed in many cases to be the question which the parties had agitated between themselves, and had come to trial upon."

The position is different where a party seeks to set up, by amendment, a new case at trial[34].

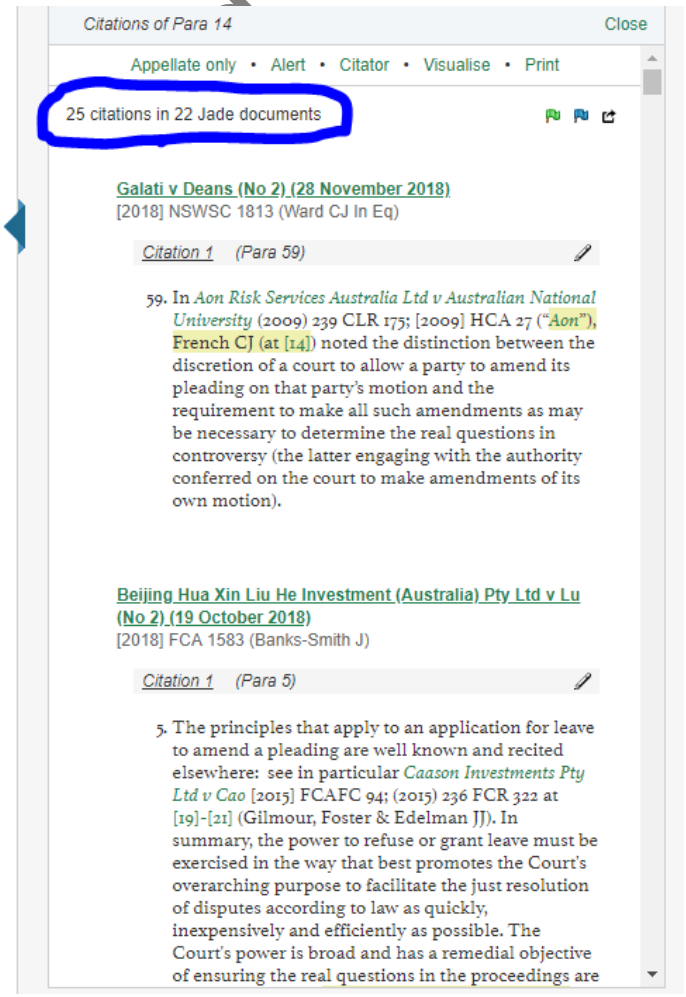
[31] An example of this kind of case is *Nottage v Jackson* [1883] 11 QBD 627 at 638.

[32] (1887) 13 VLR 933.

[33] (1887) 13 VLR 933 at 939, and 940 per Williams J and Kerferd J.

[34] *Hipgrave v Case* (1885) 28 Ch D 356 at 361 per Earl Selborne LC.

15. The *Judicature Act* Rules introduced "fact pleading". That change was effected by O XIX r 4 of the 1875 Rules which required that:



3.38 Both Jade and LawCite allow a researcher to find cases defining legal words and phrases, another useful tool in legal research.

B. Finding the Right Case and the Importance of Using the Correct Citation & Law Report

3.39 Law reports contain cases from courts and tribunals which are the reported, or, in other words, published cases. Not all decisions are reported. Cases are usually selected by editors who review the cases and select those on the basis of their value as precedent. The higher the court, the more likely their cases will be reported. In the cases of the High Court of Australia, all of its cases are reported cases.

3.40 Cases may be published by different law reports, each of which will give the case a citation which relates to its location in that report service. Some law reports are topic specific and may contain cases from different courts.

3.41 Some law reports are deemed to be the authorised reports of a particular court. For example, the New South Wales Law Reports is the authorised report service for the Supreme Court of New South Wales. This means that the reported judgment have been reviewed by the Judges, or the Judge's Associate, prior to publication and so are considered to be an accurate record of the judgment.

3.42 Cases will also be assigned a Medium Neutral Citation which is a citation assigned to the case by the Court or Tribunal and is independent of any commercial legal publisher.

3.43 In conducting legal research, it is important that you are able to distinguish the citation and report service which should be used when the case is referred to in submissions to the court. For example, take the case of *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27; 239 CLR 175; 83 ALJR 951; 258 ALR 14. This case has been reported in the Commonwealth Law Reports (CLR), in the Australian Law Journal Reports (ALJR) and the Australian Law Reports (ALR). However, the Commonwealth Law Reports are the authorised law reports of the High Court of Australia and therefore it is the preferred legal citation for the case.

3.44 This is significant because should you ever be required to, say, compile authorities into a bundle to be given to the judge before a hearing, when you print out the case for the authorities bundle, it should come from the Commonwealth Law Reports.

3.45 If, say, you are assisting a barrister with drafting submissions by providing the barrister with a memo on a legal point to be included in the submissions, then if you refer to a High Court case, you should refer to pages and paragraph from the Commonwealth Law Reports. At a practical level this is most useful because if you provided the barrister with page or paragraph references from the case as it appears in the Australian Law Journal Reports, this will be different to the references in the Commonwealth Law Reports. Because the Commonwealth Law Reports is the preferred law service, the barrister will need to convert any references from the Australian Law Journal Reports to references in the Commonwealth Law Reports in his or her submissions.

3.46 This is not because the barrister is overly pedantic, it is because courts will usually have practice notes that tell practitioners about its policies on citation which practitioners must adhere to when referring to cases in court.

3.47 The Supreme Court of New South Wales Practice Note SC Gen 20, "Citation of Authority", which applies in the Supreme Court, Court of Appeal and the Court of Criminal Appeal, provides:

> *"3. Where a judgment is reported in one of the following (authorised) reports, that citation should be used:*
>
> - *Commonwealth Law Reports (High Court of Australia)*
> - *Australian Capital Territory Law Reports (Supreme Court of the Australia Capital Territory)*
> - *Federal Court Reports (Federal Court of Australia)*
> - *New South Wales Law Reports (Supreme Court of New South Wales)*
> - *Northern Territory Law Reports (Supreme Court of Northern Territory)*
> - *Queensland Reports (Supreme Court of Queensland)*
> - *South Australian State Reports (Supreme Court of South Australia)*
> - *Tasmanian Reports (Supreme Court of Tasmania)*
> - *Victorian Reports (Supreme Court of Victoria)*
> - *Western Australian Reports (Supreme Court of Western Australia)*
>
> *4. Other series of reports should be used when a judgment is not reported in these authorised reports.*
>
> *5.* ***An unreported judgment should not usually be cited unless it contains a statement of legal principle or a material application of principle which is not found in authority. In such cases, the Medium Neutral Citation of a judgment (if any) should be provided.****"*
>
> [Emphasis added.]

3.48 The above paragraph has been highlighted because it should be noted that, not only does this Practice Note specify what law reports should be used, but it also specifies that unreported judgments should only be used in certain circumstances. This is significant for any legal research you might conduct. If the matter relates to something which will be used in Court, then unreported judgments should only be used in certain circumstances.

3.49 While this does not apply to other legal research it does indicate that some primary sources are better than others and you should be aware of the quality and precedent-value of any case law you seek to use. This becomes easier with experience and judgment. It would be of little use to quote a case of the Court of Appeal of New South Wales when the High Court has handed down a judgment which says the opposite. However, the position can be more nuanced than that. For example, the Court of Appeal of New South Wales may be critical of a judgment of the Supreme Court of

New South Wales, but may not see fit to go so far as to over-rule it for whatever reason. It would be prudent to note such criticism in any legal research, even though the lower court case was not ultimately overruled.

3.50 The Federal Court has its own rules regarding citation, contained in Practice Note GPN-AUTH, "List of Authorities and Citations Practice Note", which also contains rules for the provision of lists of authorities to the Court and the Court position on hypertext links in documents to cases.

C. Where to Find Legislation

3.51 When locating legislation, while you might use paid subscriptions or AustLII (where legislation is freely available), when reproducing legislation for a final memo or to go with submissions, it is preferable to obtain that legislation from government sources. For example:

(a) In NSW, the official legislation website for the government of New South Wales: https://www.legislation.nsw.gov.au/

(b) In respect of Commonwealth legislation, the Federal Register of Legislation: https://www.legislation.gov.au/

D. Usefulness of AustLII – Something to Keep in Mind

3.52 AustLII is very widely used in the legal community. Associates to judges in various courts, when sections of legislation are required during a hearing, have been known to quickly access the provision in AustLII and print out the provision from there.

3.53 However, while AustLII is a good source for locating relevant cases and legislation, documents printed from AustLII should not be used in court.

4. Preparing Briefs for Barristers

4.1 As a paralegal or graduate solicitor, you will need to be able to prepare briefs to barristers.

4.2 A brief is a collection of documents that a solicitor provides to a barrister when they are retained. The brief contains all the documents the barrister needs to answer the particular question or to perform the particular task required by the solicitor.

4.3 A brief should be comprehensive but, because a solicitor is paying the barrister to read everything, it is more cost-efficient if it does not contain extraneous documents. Of course, it is also more time-efficient if a brief contains only the documents that are required.

4.4 This means that when you commence preparing a brief, the first step is to ask, "What is the barrister being asked to do?"

4.5 The answer to this question will inform you about the necessary contents of the brief.

4.6 For example, if the barrister is being asked to advise in a matter where a person is claiming damages for injuries suffered in an accident but is only being asked to advise on liability, then the brief need not contain the documents which are only relevant to the extent of injury suffered (i.e. which are relevant to the issue of the amount of damages).

4.7 From there, where a matter is litigated, briefs should contain (where relevant to the question they have been briefed to answer):

(a) pleadings;

(b) other documents relevant to practice and procedure such as Notices of Motion, subpoenas and previous orders. If a Notice of Motion has been disposed of, it may not be necessary to include. You should use your judgment in such cases;

(c) interrogatories and requests/replies to particulars;

(d) evidence served between the parties such as affidavits or statements, expert reports and any other documents the parties have served and on which they intend to rely at hearing;

(e) investigation reports or statements obtained for the client but which have not been served;

(f) documents produced under subpoena to produce or discovery;

(g) party/party correspondence; and

(h) solicitor/client correspondence.

4.8 Where a matter is not litigated, then the contents of the brief will be fully informed by what documents are relevant to the task you have asked the barrister to perform. For example, if the barrister is to prepare an advice on rights and obligations under a contract, then the brief should contain at least the contract in full and any correspondence or other documents relevant to the contract dispute that has arisen between the parties.

4.9 Briefs are usually structured in a methodical way with different categories under different tabs or numbered tabs and an index.

4.10 While practices can vary from matter to matter, you should also consider whether a full copy of the brief should be kept either in hard copy or electronically. For example, if you have briefed a junior barrister but a senior barrister will also likely be briefed in the future, it may be useful to retain a copy of the brief so that an identical brief can be prepared for the senior barrister very easily. Some solicitors find it useful to retain a copy of the brief so that they can confer with the barrister and refer to tab numbers which correlate to the brief. Other solicitors will retain only an index to the brief but not a separate copy of the documents.

4.11 Briefs are also usually accompanied by Observations. This is a document which is essentially a memo to the barrister which tells the barrister about the facts and

circumstances relevant to a matter and which also sets out the task that the barrister has been briefed to do. Useful sub-headings in the Observations include:

(a) parties: the name of the relevant parties and who acts for them;

(b) facts and circumstances: the background to the dispute or legal problem;

(c) status of proceedings;

(d) positions of parties;

(e) liability;

(f) damages;

(g) settlement negotiations (if, say, advice on an offer is sought); and

(h) important dates: limitation periods, Court ordered dates, hearings, mediations, directions.

4.12 Instructions for Counsel are also usually set out in the observations to the brief. It is usual to set out the timeframe for performance of the work.

5. Filing Documents in Court

5.1 In order to "lodge" documents with the Court, one states that they are "filed". This can be done over a registry counter or electronically (although some courts in Australia may still not allow this). In relation to electronic filing, each court has its own system. The courts of New South Wales have a common system where documents may be filed in the Local, District or Supreme Courts. The Federal Court, Federal Circuit Court and Family Court also share the same online platform for electronic filing. Documents may also be processed physically over the counter at the court registry during business hours.

5.2 Filing is important because the date of filing can have a wider significance in the proceedings. For example, the date of filing of an originating process (such as a summons or a statement of claim) is the date that a plaintiff is deemed to have "commenced proceedings". This would be important in considering whether the plaintiff has sought to commence proceedings after the expiration of a limitation period.

5.3 Litigants are also often ordered to file things by certain dates in order to progress the proceedings. If the documents are not filed in time then the order has been breached and, technically, this is capable of amounting to a contempt of court because you have not obeyed a court order. That is an extreme example, however if litigants do not file documents in the time prescribed by the court then there can be adverse consequences (for example, interim adverse costs orders, the claim or defence may be struck out).

5.4 While filing may seem simple, documents can be rejected from the court registry for very basic errors. You should be aware of this as sometimes such errors can be easily missed. The rules and requirements for the for filing documents in New South Wales are found in Parts 3 and 4 of the *Uniform Civil Procedure Rules 2005* (**UCPR**) which

addresses both electronic filing and filing documents by other means, for example, at the court registry.

5.5 If you are asked to file something, unless you are in an extreme rush, it is advisable to check the document before you attempt to file it to minimise the chance that it will be rejected. The filing of documents is a simple thing, however there can be adverse consequences if a document is rejected. It is therefore prudent to take steps to ensure that the document is correct in form so that it is not rejected for a simple error.

5.6 Rule 3.4 of the UCPR provides, in relation to electronic filing:

"3.4 Electronic filing of documents

(1) This rule applies to any document that is permitted to be filed using Online Registry.

(2) In any proceedings, a document permitted to be filed using Online Registry may be filed in the court on behalf of a party to the proceeding by a registered user of Online Registry who:

(a) is authorised under rule 4.4 to sign documents on the party's behalf, or

(b) has been given permission to file the document on behalf of a person who is authorised under rule 4.4 to sign documents on the party's behalf.

(3) A document that is filed by means of Online Registry is taken to have been filed when Online Registry gives notice of acceptance of the document.

(4) Notice of acceptance of a document, and of the date and time of the acceptance, is to be given, by means of Online Registry, to the registered user by whom the document was filed.

(5) Despite a document being submitted to be filed by means of Online Registry, and notice of acceptance given by Online Registry, the document may subsequently be rejected by the court if the document fails to comply with any substantial requirements of the approved form or the rules in relation to such a document."

5.7 In filing documents online, you should be especially mindful of Rules 3.4(3) and 3.4(5) of the UCPR where time deadlines are tight. The document is not considered to have been filed until a Notice of Acceptance has been issued by the Court. While this generally happens quickly, there can be a delay. You should also be aware that if a document is rejected from the online court there may be some delay between lodging it for filing and then receipt of a rejection notice. This might be important if there is an essential deadline.

5.8 Rules regarding the uploading of documents for filing are provided for in Rule 3.5 of the UCPR, which provides:

"3.5 Uploading documents

*(1) In this rule, **document** means a document submitted for filing in accordance with rule 3.4 and includes any attachment that forms part of or accompanies that document.*

(2) This rule applies to any document that may be, or is required to be, uploaded and submitted for filing by Online Registry.

(3) A true and complete copy of the document must be uploaded in a format that is permitted by Online Registry.

(4) Each document uploaded must be accurately described.

(5) If the document is an affidavit, the description of the document must include the name of the deponent and the date that the affidavit was sworn or affirmed.

(6) If a document that is required to be signed under rule 4.4 is uploaded, the document must be a scanned copy that includes a clear, legible copy of the signature of the person who signed the document.

(7) If an affidavit or statement of evidence is uploaded, it must include:

(a) a clear, legible copy of the signature of the deponent of the affidavit or person making the statement, and

(b) if the document has been witnessed, a clear legible copy of the signature of the witness, and

(c) if the document is an affidavit executed in New South Wales, a duly completed certificate under the Oaths Act 1900.

(8) A person who has filed a document by uploading it is taken to have agreed that, if the court so requires, he or she will file the original document in accordance with the court's directions.

(9) The original signed copy of a document filed under this rule must be kept until the later of the following:

(a) 2 years from after the date that proceedings in which the document was filed are determined by judgment, order or discontinuance, or

(b) if the proceedings in which the document was filed is appealed, 2 years after the date that appeal is determined by judgment, order or discontinuance, or

(c) 2 years after the date the document was filed."

CHECKLIST FOR FILING DOCUMENTS ELECTRONICALLY

□ The electronic copy of the document is complete (no missing pages).

□ The document is accurately described on the Online Registry.

□ If the document is an affidavit, does the description include the name of the deponent and date sworn/affirmed?

□ The scanned copy should include a clear legible signature of the person who signed it and (in the case of affidavits) witnessed it.

□ Affidavits should include a certificate under the *Oaths Act 1900*.

□ Original document must be kept on file as this may be called for in the future.

□ Have method of payment ready.

□ Document may be marked as filed when the acceptance notice is received from the Court, and not before. Follow this up if not received.

5.9 Rule 4.10 of the UCPR addresses filing by other means and provides:

"4.10 Filing generally
(cf SCR Part 1, rule 9A)

(1) A person may lodge a document for filing in relation to any proceedings:

(a) by delivering it to an officer of the court in the registry, or

(b) by sending it by post to the registry's business address.

(2) Any person may lodge a document with an officer of the court for the purpose of its being filed in relation to proceedings, or proposed proceedings, in the court.

(3) Unless acceptance of the document is subsequently refused by the court or by an officer of the court, a document is taken to have been filed when it is lodged for filing.

(4) The court may refuse to accept a document for filing whether or not an officer of the court has accepted the document for filing.

(5) An officer of the court may refuse to accept a document for filing in the following circumstances:

(a) in the case of originating process:

(i) if the location specified in the document as the venue at which the proceedings are to be heard is a location at which the court does not sit, or

(ii) if the person on whose behalf the originating process is sought to be filed is the subject of an order of the Supreme Court declaring the person to be a vexatious litigant,

(b) in the case of a document for which a filing fee is payable, if the fee has not been paid or arrangements satisfactory to the officer of the court have not been made for its payment."

CHECKLIST FOR FILING DOCUMENTS BY OTHER MEANS (NEW SOUTH WALES COURTS)

□ If filing in person at the registry, check before leaving the office that the document is not missing any pages.

□ Check you have the correct documents and have a quick look that the form is correct (the responsible solicitor is ultimately responsible for this so just check for anything that is obviously incorrect).

□ Bring payment, whether by cheque or some other means.

□ If the document requires leave of the Court to be filed, check the time for leave has not lapsed. Have details ready of when leave was granted and by whom.

□ Have sufficient copies for service (one for the court and one for each party.)

□ Affidavits should include a certificate under the *Oaths Act 1900*.

5.10 If you file a document physically over the counter, then the court officer at the counter will, in almost all cases, inform you whether the document has been accepted or rejected (some exceptions are documents like applications for default judgment which are scrutinised by the court before default judgment is granted which can take days).

5.11 In the Federal Court, the relevant rules regarding filing are found in Division 2.3 of the *Federal Court Rules* (**FCR**).

5.12 A document may be filed with the Court in a number of ways as set out in Rule 2.21 of the FCR:

2.21 How documents may be lodged with the Court

(1) A document may be lodged with the Court by:

(a) being presented to a Registry when the Registry is open for business; or
(b) being posted to a Registry with a written request for the action required in relation to the document; or
(c) being faxed to a Registry in accordance with rule 2.22; or
(d) being sent by electronic communication to a registry, in accordance with rule 2.23.

(2) A document in an existing proceeding that is to be lodged with the Court in accordance with paragraph (1)(b), (c) or (d) must be sent to the proper Registry.

(3) If a document in an existing proceeding is lodged with a Registry other than the proper Registry, the document must be accompanied by a letter:

(a) identifying the proper place for the proceeding; and
(b) requesting that the document be sent to the proper Registry.

(4) Subject to rules 2.22 and 2.23, a document that is required to be sealed, stamped or signed by the Court must be accompanied by the required number of copies for sealing, stamping or signing.

5.13 Documents may be faxed, in accordance with the requirements of Rule 2.22 of the FCR:

CHECKLIST FOR FILING DOCUMENTS BY FACSIMILE (FEDERAL COURT OF AUSTRALIA)

- □ The document must not be more than 20 pages.
- □ The fax must include a cover sheet stating the sender's name, postal address, telephone number, fax number and email address, the number of pages and the action required in respect of the document.
- □ The sender must keep the original document and the transmission report showing successful transmission to be produced if requested by the Court.
- □ If the document is accepted by the registry, the registrar will return a copy of the document by fax to the originating fax number.

5.14 Requirements for sending a document for filing by electronic communication is set out in Rule 2.23 of the FCR:

"2.23 Sending a document by electronic communication

(1) A document that is sent by electronic communication to a Registry for filing must:

(a) be sent by using the Court's website at http://www.fedcourt.gov.au; and

(b) be in an electronic format approved by the Registrar for the Registry; and

(c) if a document is required to be in accordance with an approved form - so far as is practicable, be in an approved form that complies with rule 2.12 or 2.13; and

(d) be capable of being printed in the form in which it was created without any loss of content.

Note: The electronic format approved by the Registrar for a Registry is available on the Court's website at http://www.fedcourt.gov.au.

(2) An affidavit must be sent as an image.

(3) (If the document is in an existing proceeding, it must be sent to the proper Registry by using the Court's website at http://www.fedcourt.gov.au.

(4) The person who sends the document must:

(a) keep a paper or electronic copy of the document prepared in accordance with this rule; and

(b) if ordered to do so by the Court, produce the hard copy of the document."

5.15 A document is considered to have been filed if it satisfies the criteria set out under Rule 2.25 of the FCR

CHECKLIST: DOES THE COURT CONSIDER MY DOCUMENT AS FILED (FEDERAL COURT OF AUSTRALIA)

- □ Document must be lodged in accordance with Rule 2.21(1) of the FCR.
- □ The Registry has accepted it and "stamped" it.
- □ While it is possible to file documents at registries that are not considered the "proper Registry" in a matter, it is best to file the document at the proper Registry. If this is not possible, see Rule 2.25 of the FCR for when a document is considered as filed in a registry other than the proper Registry.
- □ If a document is faxed or sent by electronic communication to a Registry, the document is taken to have been filed on the date received by the Registry (assuming it is stamped by the Registry) if it is received by 4:30pmon the business day of that registry or, in any other case, the next day. Note that there might be a delay with receiving the document by the Registry due to the Registry's firewall.
- □ Also note that the term "file" is taken in these rules to mean "file and serve".

6. Preparing Subpoenas

6.1 Subpoenas are Court forms which are prepared often in litigation to:

(a) compel a party to produce documents to the Court which may then be accessed by the parties; or

(b) compel a person to attend Court to give evidence at a hearing; or

(c) to compel a person to attend Court to give evidence **and** to produce documents.

6.2 The precise form of a subpoena will vary from court to court.

6.3 This section will cover the rules of preparing subpoenas which are common to Federal Court and courts in New South Wales.

6.4 Subpoenas need to be addressed to a person or proper legal entity. If it is a subpoena to give to evidence then, of course, this should be addressed to a person. If a subpoena is to an entity other than a person (such as a company or a partnership) then you must take steps to ensure that the subpoena is addressed to a proper legal entity. The consequence of failing to address a subpoena to a proper legal entity is that the subpoena becomes unenforceable (naturally, because there is no proper legal entity named in the subpoena who can be sanctioned for a failure to produce documents).

6.5 It can sometimes take some effort and investigation to determine the proper legal entity.

6.6 If, say, you need to issue a subpoena to "Priceline Pharmacy North Parramatta", you cannot simply place that name on the front of the subpoena. It is not a proper legal entity against whom the subpoena can be enforced. In fact, the entity which operates Priceline Pharmacy North Parramatta is "L Tran & T H Vu & M Wong, a partnership trading as Priceline Pharmacy North Parramatta (ABN 3867 426 6325)". This is the name which should be named on any subpoena to produce.

6.7 While this may seem trivial and, it is noted that if the party does not object to producing documents, this becomes a non-issue. However, should the party, for whatever reason, not wish to produce documents, if the subpoena has not been made out to a proper legal entity, then there is no one against whom the subpoena can be enforced. This can place you in a difficult position if the documents sought under the subpoena are vital to your client's case and the error is not uncovered until the hearing, that is, when there is no time to issue a subpoena to the proper legal entity.

6.8 Tips for finding the proper legal entity (this applies with any subpoena in any court):

TIPS FOR FINDING THE PROPER LEGAL ENTITY TO WHOM A SUBPOENA SHOULD BE ISSUED

- □ If you have a document from that entity, such as a letterhead or tax invoice, in other records on the file, it may have the corporate or partnership or other such entity on the document. It may also have an ABN which can be checked online.

- □ If it is a business, you can call the business and ask them. Generally, the account person is often a person capable of answering this query. You can either explain to them that you need to issue a cheque to the business (for conduct money) and your book keeper needs the ABN for the requisition or you can explain that you need to issue a subpoena and require the proper legal entity to whom the subpoena may be issued. As an accounts person often needs to establish the proper legal entity for their record-keeping, many seem to understand this query.

- □ If you get an ABN over the phone, perform an online ABN check.

- □ If the entity is a health service or hospital, they often have people who manage patient records and subpoenas that the general reception can put your call through to. They will know to whom the subpoena should be issued and also the person to whose attention it

should be brought, a handy detail when you are sending a subpoena to a large organisation.

- □ Government services will often have their own rules regarding addressing subpoenas to their office. For agencies such as the police, a good place to start is their website.

- □ If the entity is a business name, then the subpoena should be addressed to the person who is engaged in operating that business, that is, the owner of the business name. Also, the operator of a business name may be a corporation, in which case, the corporation is the proper legal entity.

6.9 General rules for the address for service:

a) For a natural person, their place of residence;

b) For a company, the address for service is the registered office (s109X of the *Corporations Act 2001*);

c) For an unregistered business name, service may take place at the address where the business operates on a person engaged in that business and seemingly over the age of 16 years (Rule 10.9 of the UCPR); and

d) Government agencies will often have a preferred address for service for subpoenas. It helps to use this address because it ensures that your subpoena reaches the right person.

6.10 Each subpoena must specify a proposed access order. The proposed access order is important, particularly where time deadlines are short: for example, where documents are being produced close to a hearing date and the documents need to be reviewed before the start of the hearing.

6.11 The proposed access order is the order which will be made by the Court for access to documents produced under the subpoena, in the absence of any objection by a party (or by the producer of the documents). Common access orders are:

(a) "General access" – this order is appropriate where there are no issues regarding potential privilege or confidentiality over the documents.

(b) "Plaintiff/defendant first access for 7 days" (and general access thereafter) – this order gives one party first access to the documents, usually for a limited time, in order to extract any documents that might be subject to privilege. First access orders are also usually granted over documents such as medical files, allowing the person whose file it is, first access to the documents.

6.12 The Registry address must also be completed. This tells the producer the physical address to which documents may be forwarded.

6.13 Subpoenas also specify a date by which the subpoena must be served or the "last day for service". This is calculated from the anticipated return date of the subpoena. Under Rule 33.3(8)(a), the last day for service of a subpoena in courts in New South Wales

is 5 clear days before the earliest date on which the addressee is required to comply with the subpoena or an earlier date as fixed by the Court.

6.14 Beware of subpoenas issued to medical experts. The last date for service is 21 days before the earliest date on which the subpoenaed person is required to answer the subpoena: Rule 31.32(3) of the UCPR. In the District Courts and Local Courts, for the service of subpoenas to give evidence on a medical expert, the medical expert must be notified in writing at least 28 days before any hearing date that their attendance is required at the hearing for service of the subpoena to be valid: Rule 31.30(3)(b) of the UCPR.

6.15 Generally, where there is no rush in the subpoena process (the documents are not required urgently), plenty of time should be given for issuing, service and production. A party may have many documents and may need time to conduct searches of archives to locate all the relevant documents. The subpoenaed party may be located at a remote address where service might take a few days.

6.16 Note that service of a subpoena must be served personally on the addressee: Rule 33.5 of the UCPR. The exception is where it is served on a corporation and service may be completed in accordance with s109X of the *Corporations Act 2001* (that is, by post to the registered office).

6.17 Also, a subpoena must be served on each other active party to the proceedings as soon as is practicable after it has been served on the addressee: Rule 33.5(2) of the UCPR.

6.18 A party who is compelled to produce documents, is not so compelled unless conduct money is paid to them for their reasonable costs of complying with the subpoena: Rule 33.6(1) of the UCPR. In practice this often means forwarding the subpoena with a nominal cheque for $30, with any additional conduct money to be paid later. Some parties will, however, refuse to produce until their invoice for compliance is satisfied. Also, some government agencies and hospitals will have a different prescribed amount for initial conduct money. You should make enquiries about this at the same time enquiries are made regarding other matters such as proper legal entity and service address.

6.19 The rules for subpoenas in the Federal Court (both subpoenas to give evidence and subpoenas to produce) are found in Division 24.2 of the FCR. The most relevant rules for preparation and service of a subpoena are at Rules 24.11 to 24.16 of the FCR. Notably, the time for service of 5 days is the same as the NSW courts (Rule 24.13(8)(a) of the FCR. Subpoenas must also be served personally on the addressee: Rule 24.16(1) of the FCR. Subpoenas must also be served on each other active party to the proceedings as soon as practicable after service on the addressee: Rule 24.16(2) of the FCR.

6.20 The schedule to the subpoena (where the subpoena is a subpoena to produce) describes the documents which the producer is being asked to forward to the Court. The drafting of a schedule is usually something which the solicitor who has asked you to prepare the subpoena will be able to complete, however the solicitor may have

preferred schedules to be used in specific matters. You should make enquiries regarding a solicitor's preference for preparation of the schedule.

6.21 There is a lot of case law regarding the wording of schedules in subpoenas. This is because a subpoena may be set aside if the schedule is, for example, too broad, or so broad so as to be a fishing expedition. A schedule may also be onerous in that the documents described are vast and would be expensive to produce. Care should be taken to describe the documents sought under a subpoena with as much specificity as possible, but with enough breadth so as to ensure the documents sought are captured in the description. This takes practice and your ability to do this will improve with experience. As stated above, a good place to start is to look at subpoenas others have prepared.

7. Preparing Affidavits

7.1 As a paralegal or junior solicitor it is unlikely you will be asked to draft the contents of an affidavit right at the start of your career.

7.2 However, you may be asked to assist with the pro forma elements of preparing an affidavit. You should therefore be aware of the UCPR rules (which apply in New South Wales courts) and the Federal Court rules which apply in the Federal Court and Federal Circuit Court as they differ slightly.

7.3 In courts in New South Wales, the rules for preparation of affidavits can be found in Part 35 of the UCPR:

CHECKLIST FOR REQUIREMENTS AS TO FORM FOR THE PREPARATION OF AFFIDAVITS IN NSW COURTS

- □ The heading to an affidavit must include the name of the deponent and the date on which the affidavit is made: Rule 35.3A of the UCPR.
- □ If there is any interlineation, erasure or other alteration in the body of an affidavit, the affidavit may not be used except by leave of the Court, unless the person making the affidavit initials the alteration and, where the change is an erasure, rewrites in the margin of the affidavit any words or figures written on the erasure and signs or initials them: Rule 35.5 of the UCPR.
- □ Documents attached to an affidavit may be an annexure or an exhibit: Rule 35.6(1) of the UCPR.
- □ Annexures to an affidavit must be endorsed and identified **on the annexure** (and **not** on a separate page to the annexure) and signed by the person witnessing the affidavit: Rule 35.6(2) of the UCPR.
- □ Pages of the affidavit, including the annexures, must be consecutively numbered in a single series of numbers: Rule 35.6(3) of the UCPR.

- □ An exhibit to an affidavit is kept as a separate bundle and identified by a certificate attached to the front entitled in the same manner as the affidavit and signed by the witness: Rule 35.6(4) of the UCPR.

- □ Exhibits to an affidavit are not filed: Rule 35.6 of the UCPR. However, the exhibit must be capable of being produced when it is asked for by the court or inspection by another party.

7.4 As to the rules for compiling affidavits in the Federal Court and Federal Circuit Court, the following rules, in Part 29 of the FCR, apply:

CHECKLIST FOR REQUIREMENTS AS TO FORM FOR THE PREPARATION OF AFFIDAVITS IN THE FEDERAL COURT

- □ Affidavits must comply with Form 59 and must be in the first person: Rule 29.02(1) of the FCR.

- □ A document that accompanies an affidavit must be annexed to the affidavit unless it is an original or, due to its dimension, it cannot be annexed: Rule 29.02(4) of the FCR.

- □ Pages of the affidavit, including the annexures, must be consecutively numbered in a single series of numbers: Rule 29.02(6) of the FCR.

- □ Each annexure and each exhibit must be identified on its first page by a certificate entitled in the same manner as the affidavit and by the deponent's initials followed by a number (starting with "1" for the first annexure or exhibit): Rule 29.02(8) of the FCR. Note this is different to the NSW Courts.

- □ Annexures and exhibits must be numbered sequentially: Rule 29.02(9) of the FCR.

- □ No subsequent annexure or exhibit in any later affidavit sworn by the same deponent may duplicate the number of a previous annexure or exhibit. In practice, this means that if Sally Smith swears one affidavit with annexures SS1 – SS29, if Sally Smith swears a second affidavit in the same proceedings, the first annexure to the second affidavit will be number SS30: Rule 29.02(10) of the FCR. Note that this is different to the NSW Courts.

- □ Each exhibit to an affidavit must be signed on the first page of the exhibit by the witness: Rule 29.02(11) of the FCR.

- □ Copies of the annexures or exhibits to an affidavit must be served with the affidavit: Rule 29.05 of the FCR.

- □ A party intending to rely on an affidavit must serve that affidavit on each other interested party at least 3 days before the occasion for using it arises: Rule 29.08 of the FCR.

CHAPTER 4 - IMPORTANT CONSIDERATIONS WHEN WORKING IN LAW FIRMS

8. Confidentiality

8.1 Solicitors have a duty to keep client information confidential. Solicitors' rule 9 provides:

> ***"9. Confidentiality***
>
> *9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:*
>
> *9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or*
>
> *9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,*
>
> *EXCEPT as permitted in Rule 9.2.*
>
> *9.2 A solicitor may disclose information which is confidential to a client if:*
>
> *9.2.1 the client expressly or impliedly authorises disclosure,*
>
> *9.2.2 the solicitor is permitted or is compelled by law to disclose,*
>
> *9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,*
>
> *9.2.4 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or*
>
> *9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity."*

8.2 In addition to the duty under Solicitors' rule 9, the duty of confidentiality arises as a term of the contract between the solicitor and the client, and also as a result of the fiduciary relationship that exists between the solicitor and the client.

8.3 In short, it is clear from the different ways a duty of confidentiality arises between solicitor and client that the duty of confidentiality is of utmost importance to the solicitor/client relationship. It is the essence of the solicitor/client relationship that a client must be able to disclose information in a full and frank manner to his or her

solicitor and trust that information is kept confidential because this is necessary to effective representation of the client.

8.4 A breach of the duty of confidence has serious consequences. The solicitor is exposed to a claim by the client for damages arising from the breach. *Taylor v Blacklow* (1836) 3 Bing NC 235; 132 ER 401 is a case which involved a breach of confidence by a solicitor because the solicitor revealed a defect in title to a proposed lender. A breach of confidence can also give rise to disciplinary proceedings against the solicitor. In *Legal Services Commissioner v Tampoe* (2009) LPT 14, the solicitor acting for Schapelle Corby breached confidence when he gave an interview on the Channel 9 "Sunday" program when he revealed a contents of a confidential conversation he had with Mr Corby's sister regarding past criminal convictions in the family. It was also found that Mr Tampoe spoke about his client and her family in a scandalous and offensive manner. As a result, it was found that Mr Tampoe was not fit to practise as a legal practitioner and his name was removed from the roll of legal practitioners.

8.5 In practice, adherence with the duty of confidence means that all communications between a client and solicitor which arise in conversation, email or letters must be kept confidential. This includes communications between clients and staff who are employed by the client's solicitor.

8.6 The duty of confidence does not end when the client retainer ends, nor does it come to an end if you should cease working at a firm. The duty persists even after the death of the client and is one which is then owed to the client's successors (e.g. the executor of the client's estate).

8.7 The duty may be owed in circumstances where the client is a potential client and no retainer is actually formed.

8.8 When working in a law firm there are things to watch out for which often come up on a day-to-day basis that you should be aware of in relation to the duty of confidentiality:

(a) confidential information should not be discussed in public areas such as lifts or cafes, even when the conversation is with someone else from the firm who is working on the file. You can never be sure who might be listening;

(b) a client's matters should not be discussed with persons who are related to the client (say, a friend or family member) unless that person has been expressly authorised by the client. When in doubt, check;

(c) where the client is a company, be clear on who the correct contact person is for the client;

(d) do not divulge confidential information, even to people who you might trust or who you believe bear no connection to the client or the matter (for example, to friends at the pub after work or at a dinner party);

(e) do not take home documents which are work-related, unless authorised by your supervisor; and

(f) do not send matter-related information to yourself at a non-work email address, even for legitimate work-related purposes. Your personal email would likely be subject to different security measures.

8.9 There are a number of circumstances which are exceptions to the duty of confidentiality. These include:

(a) where disclosure is compelled by a Court (e.g. a subpoena) or otherwise by law (e.g. a warrant); or

(b) where the solicitor is defending themselves against an allegation of impropriety or incompetence; or

(c) where the client gives express permission for information to be disclosed.

8.10 In situations where a solicitor is compelled to disclose documents or information, then the duty requires that steps be taken to assert any legal privilege which attaches to the information or documents.

8.11 These are matters where a senior solicitor or partner are likely to be involved. If you have questions regarding exceptions to confidentiality which may apply, then raise them with your supervisor.

9. Legal Ethics

9.1 Law Society of New South Wales statement of ethics:

The true profession of law is based on an ideal of honourable service.

Riley, NSW Solicitors Manual

We acknowledge the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

Our conduct and behaviour should reflect the character we aspire to have as a profession.

This means that as individuals engaged in the profession and as a profession:

- We primarily serve the interests of justice.
- We act competently and diligently in the service of our clients.
- We advance our clients' interests above our own.
- We act confidentially and in the protection of all client information.
- We act together for the mutual benefit of our profession.
- We avoid any conflict of interest and duties.

- We observe strictly our duty to the court of which we are officers to ensure the proper and efficient administration of justice.
- We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.
- We charge fairly for our work.

Proclaimed by the Law Society's Council, 28 May 2009.

9.2 The above Statement of Ethics is that made by the Law Society of New South Wales, first published in 1994 and revised a number of times since then. The Statement identifies the main ways that the legal industry can achieve successful delivery of legal services to the people of New South Wales. While a solicitor would not be disciplined for failing to adhere to the Statement of Ethics, it represents a useful summary of what a solicitor should be and the standard to which they should practise.

9.3 The legal profession, and those that practise in it, have obligations to the community in relation to upholding the rule of law and to the proper administration of justice. While it is important to learn and master the technical parts of legal practise and the administrative tasks required to function in a law firm, it is just as important to bring the proper professional values and attitude to how those legal services are delivered to the community.

9.4 Delivering legal services is distinct from other industries where a service is provided to a client or customer (as in, say, a tradesperson or a dentist) because the manner in which those services is delivered has a vital part to play in maintaining the integrity of the rule of law in the jurisdiction. How people in the legal industry operate has the potential to affect a sphere larger than the client and matter directly at hand. What lawyers do and how they conduct themselves can affect the confidence the public has in the legal industry and, in turn, on the administration of justice.

9.5 There have been many judicial statements regarding the proper and ethical delivery of legal services. One which is often quoted is that of Moffit P in *B, Re* [1981] 2 NSWLR 372 at 381-382 which expresses the ethical duty in legal practise in the following terms:

The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty is to conduct himself in relation to those privileges and otherwise in a manner which will uphold the law and further its pure administration.

9.6 Another statement regarding the significance of the ethical conduct of legal practice is that made by Spigelman CJ in *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279:

> *"19 Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.*

20 There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people."

9.7 While the Statement of Ethics is not an enforceable document, the legal profession is regulated by legislation and regulations. In New South Wales, this includes the following:

(a) *Legal Profession Uniform Law (NSW)*;

(b) *Legal Profession Uniform Law Application Act 2014* (NSW);

(c) *Legal Profession Uniform General Rules 2015* (NSW);

(d) *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW and Vic);

(e) *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW);

(f) *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (NSW);

(g) *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (NSW);

(h) *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (NSW); and

(i) *Legal Profession Uniform Admission Rules 2015* (NSW).

9.8 Some of matters which represent ethical conduct have been discussed in previous sections of this manual (see the sections on solicitors and barristers as well as the section on the duty of confidentiality).

9.9 Given the broadness of the area of legal ethics, for the purpose of this introductory discussion, it would be most useful to illustrate ethical legal practice by what is not sound ethical legal practice, by way of case studies. Two areas are discussed: that of honesty and the requirement that legal services be delivered promptly.

CASE STUDY 1: HONESTY IN LEGAL PRACTICE
***Re B* [1981] 2 NSWLR 372**

A journalist and political activist sought to be admitted as a barrister. Between 1970 and 1981, B participated in a string of activist causes on issues including the export of uranium, the dismissal of the Whitlam government in 1975, police corruption and censorship laws. During this period, B had been arrested many times with offences related to her protest activities such as indecent language, offensive political signage, failure to leave premises when required and failing to obey police.

When B applied for admission as a barrister, she was candid about this activity. Further, there were no convictions for dishonesty or violence.

Despite that, her application for admission was denied.

In its decision, the NSW Court of Appeal referred to an incident in 1979 (2 years before her application for admission) when she provided bail for a criminal defendant on charges that she was helping him to defend. B told the court at the time that she had borrowed the money for bail from a mutual friend and had not provided the money herself. However, it turns out that the bail money had been provided by the friend who she was assisting.

The NSW Court of Appeal found that B's deceit was fatal to her application for admission because:

"That a person can be trusted to tell the truth and, regardless of the ends, not participate in a breach of the law is fundamental to being a barrister… The bail matter and her evidence in respect of it establish she is not fit to be a barrister."

The Court also specifically expressed the opinion that being a political activist does not bar a person from admission as a legal practitioner. However, B's dishonesty to a court in respect of the bail matter gave rise to a conclusion that B was not fit to practise because her claim that her previous attitudes had changed were only partly true; she remained prepared to break the law if she deemed the cause worthy enough.

CASE STUDY 2: HONESTY IN LEGAL PRACTICE
Kaye v Woods

This was a medical negligence case. Meadows was a partner in a law firm acting for the first defendant and Alexander was an employed solicitor under her supervision.

Meadows sought to serve a supplementary expert report by Dr Hudson a day or two before the final hearing in April 2016, stating in the letter of service that service of the report had been previously overlooked due to an administrative error. Dr Hudson's supplementary report was dated August 2014.

The plaintiff issued a Notice to Produce and a subpoena seeking production of documents relevant to consideration of service of Dr Hudson's report. The first defendant claimed privilege over those documents. It subsequently sought to withdraw its reliance on Dr Hudson's report, then stating that the privilege claim over documents produced in answer to the Notice to Produce and subpoena was no longer relevant. However in the course of this, Meadows had sworn an affidavit regarding the reasons for delay for service of Dr Hudson's report.

The plaintiff pressed the argument, expressing the view that it was then a question of whether the conduct of Meadows, and those working for her, was conduct capable of disciplinary proceedings. Essentially, the plaintiff's position was that Meadows was not honest in her representation that Dr Hudson's supplementary report had not been served due to being "overlooked" in the course of an "administrative error".

In its judgment, the Court found that Alexander had represented to the solicitor for the second defendant in October 2014 that, after Dr Hudson's third report, the first defendant had not obtained any further expert reports. This was untrue as Mr Alexander knew that Dr Hudson's fourth report had been received in August 2014. The Court found these comments to be false or misleading and that Alexander knew those comments to be false or misleading when they were made by him.

The Court also found that Meadows' had sworn an affidavit which, while it could not be proven to be false, was designed so that the reader would draw the following inferences:

(a) Meadows had little personal knowledge of the matter (and hence obtained her knowledge from the terms of the file rather than from personal knowledge);

(b) The reason why it was not served was because it was not identified as an outstanding matter when Alexander left the firm in July 2015;

(c) Consistently with the representation in the earlier letter, the failure to serve the report arose from an oversight rather than from a forensic decision;

(d) Until 14 April 2016, Meadows did not have any other relevant involvement with the non-service of the report.

However, the contemporaneous documents (including Meadows' timesheets) indicated:

(a) Meadows had ongoing and detailed involvement in the case both as a result of supervision of junior solicitor and otherwise. That included detailed reviews of the file at important points, communications with the insurer and determining strategy;

(b) there was a deliberate decision not to serve the report in accordance with the timetable required by the rules or in accordance with the Court's directions, and that following Alexander's departure there was further consideration by Meadows in December 2015 of whether to serve the report. That is inconsistent with Alexander's failure being the cause of non-service.

(c) It is clear that Meadows had substantial involvement in the matter prior to the first involvement referred to in the affidavit on 14 April 2016.

The Court found that Ms Meadows' affidavit was either reckless as to the potential for the affidavit to be misleading or intended it to mislead the Court or the parties.

9.10 Honesty is an integral part of proper and ethical legal practice.

9.11 Solicitors are required to be honest to the court in accordance with the Solicitors' rules at 19.1 and 19.2:

"19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.

19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading."

9.12 The above case studies also illustrate that, not only is it important to be honest with the Court, but it is also important that one is honest to their opponents.

9.13 This is reflected in the Solicitors' rules at 22.1 and 22.2:

> *"22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).*
>
> *22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false."*

CASE STUDY 3: GROSS DELAY
***George Traikovich* [1997] NSWLST 7**

A solicitor practising at a Sydney suburb was instructed in 1985 by the widow of a man who died from injuries suffered on his journey home from work. The solicitor was instructed to apply for probate of the deceased's will, and to bring claims, on behalf of the widow and the two dependent children under the Workers Compensation Act and the Compensation to Relatives Act. While the solicitor took some action in the fulfillment of his instructions, he had not filed an application for probate nor did he significantly advance the actions commenced on behalf of the widow and children, when his instructions were terminated and he handed over his file to other solicitors instructed by the widow in 1995.

The solicitor claimed that he had inexperience in dealing with such claims.

The solicitor's conduct was found to be professional misconduct.

9.14 Performing tasks and carrying out a client's instructions in a timely manner is an important part of ethical legal practice.

9.15 This is required under Solicitors' rules 4.1.3 which provides a solicitor must "deliver legal services competently, diligently and as promptly as reasonably possible".

9.16 In cases of gross delay, a solicitor's conduct may result in a finding of professional misconduct, as illustrated in the above case study.

CHAPTER 5 - THE IMPORTANCE OF ORGANISATION

10. Responsibility

10.1 Legal practice, by its very nature, involves handling many different matters at any one time, each of which will have specific deadlines, including important deadlines such as limitation periods and where the Court orders a particular task to be done by a particular date.

10.2 In legal practice, responsibility ultimately lies with the responsible solicitor. If mistakes are made in relation to tasks which may seem administrative, for example, issuing bills, the responsible solicitor will be held accountable for any such errors, including errors made by support staff and/or by automated computer systems of the firm where those systems are found to be inadequate.

CASE STUDY 4: FAILURE TO SUPERVISE
***Scroope v Legal Services Commissioner* [2013] NSWCA 178**

Scroope was a legal practitioner employed as a senior associate by a plaintiff personal injury firm called Keddies.

Scroope was ultimately found guilty of unsatisfactory professional conduct (reduced on appeal from a finding of professional misconduct made at the lower tribunal) due to overcharging a client in a claim for personal injury.

Keddies had a system whereby many time keepers entered time on a matter. The time recording was found to be inaccurate in that many items were duplicated and inaccurate time was recorded for many tasks, resulting in "gross" overcharging to the client. These errors in the time keeping made their way into the bills when the bills were generated by support staff of the firm. Scroope as responsible for the day-to-day carriage of the matter and for supervising on the matter (but was also himself under the ultimate supervision of a partner, Mr Keddie). Nobody picked up on the inaccuracies in the bill, even though this could have been done with a simple inspection. Scroope took responsibility for the errors made by support staff and which were also made as a result of the inadequate computerised system of Keddies. This admission was deemed appropriate in the circumstances by the Court.

CASE STUDY 5: FAILURE TO SUPERVISE
***Law Society of Tasmania v Scott* [2007] TASSC 30**

The respondent solicitor employed a Ms Kumala to assist with conveyancing work. Ms Kumala dealt with a particular matter in such a way that it was apparent that Ms Kumala had little understanding of the principles applicable in conveyancing matters and the obligations of purchasers. The respondent solicitor had a duty to client to ensure that any employees were aware of such matter, were competent to handle transactions they were dealing with and, in any event, were supervised. The respondent solicitor was held to have failed to do any of these things.

10.3 This means that it is vital to keep your work organised so that mistakes are picked up easily and can be corrected.

10.4 An important part of this is that you should keep an accurate diary which records important dates including (where relevant in your matters):

(a) matters which the Court has ordered to be done by a particular date;

(b) dates for mediations, settlement negotiations and all Court appearances (for instance, directions, Notices of Motion and hearings);

(c) client-related dates (for example where the client requires an advice by a certain date);

(d) dates for the expiration of limitation periods;

(e) meetings (internal, with clients, with third parties such as experts and opponents, with barristers);

(f) expiration dates for offers of compromise and any offers of settlement; and

(g) practice-relevant dates: these are dates which remind you to follow up on matters where you are waiting for someone else to do something (e.g. an advice from Counsel, a report from an expert, a reply to a letter).

10.5 Communication is also key: talk to those you work with to work out a system that suits you all. This may involve others having access to your diary and you having access to their diary. In addition to keeping yourself organised, a thorough, accurate and well-kept diary will assist those you work with to carry on if you should be absent due to an unexpected emergency.

10.6 The recording of dates is not the only essential part of organisation**: planning is of equal importance**. Often, your work will need to be checked or used by others to complete their work. For example, if an advice is due to the client on 15 February, it will probably not assist your supervisor if you should provide the draft advice to them on that day. They will likely have other appointments scheduled and will be unable to check the advice in time. Another example is where your client is ordered to serve affidavits of evidence on 10 August. It would not be acceptable to make first contact with your client's star witness on 9 August to talk to them about their evidence. It is likely they will not have time to complete an affidavit overnight.

10.7 After you record the important dates in your diary, count backwards from that date to decide when you need to start working on a task to ensure the deadline is met. This might involve talking to other people: checking with your supervisor when they need to have a draft by or checking with witnesses about whether they are going on holidays and, if so, when you can meet with them to draft their affidavit. You might wish to diarise reminders leading up to an important deadline. For example, if the deadline is the expiration of a limitation period, you may wish to contact the client 4 months before that period expires to seek instructions as to whether they wish to commence proceedings or not.

10.8 Come up with your own system that works for you but ***apply it consistently and reliably!***

10.9 The overall benefit of good organisation and planning is that you will find working in a team more enjoyable where there is predictably and reliability in meeting important deadlines. You will also find that you will sleep better at night and will not wake in fright at the thought of missing key deadlines!

CHAPTER 6 - COMMUNICATION WITH CLIENTS AND FILE NOTES

11. Overview

11.1 In this role, you will be required from time to time to communicate with clients of the firm. In any such communications, you:

(a) should be professional and courteous;

(b) should not give any legal advice, unless so arranged with your supervisor;

(c) should be honest, this includes accurately communicating your level of knowledge (i.e. if you do not know something, do not make up the answer!); and

(d) where relevant, relay your conversation to your supervisor.

11.2 Most importantly, however, is that **YOU SHOULD ALWAYS MAKE A FILE NOTE OF THE CONVERSATION** with a client or other party relevant to a matter.

12. File Notes

12.1 File notes are an essential part of legal practice because they:

(a) remind you of what has happened in a matter and assist you in your work on the matter;

(b) are crucial for keeping a complete record of a matter (this is relevant, say, when a matter is being assessed by a cost assessor who will then compare telephone records on the time sheet with the documents in the file. Issues may arise if there are telephone calls on the time sheet and no file notes of those calls);

(c) may be important evidence in later litigation including in disciplinary proceedings or proceedings for professional negligence; and

(d) are an expected part of competent legal practice.

12.2 A good file note is one:

(a) which is prepared during or immediately after the conversation, that is, it should be contemporaneous;

(b) that is legible, as they are often handwritten;

(c) that contains what was said by each party during the conversation, ideally so that the conversation can be recounted accurately in an affidavit later, if required. Of course, this might vary depending on the nature of the conversation. If it is simply where a message has been left to return a call, then the file note will be very simple. However, where the conversation included an argument with an opposing party then, naturally, the file note will be very detailed; and

(d) which records basic information such as the date and time, the matter and the participants in the conversation. You may also elect to include details such as the length of the conversation and the phone number you called.