

QLS Ethics and Practice Centre

Leadership in legal professionalism

Fidelity | Service | Courage



Community Legal Centres Queensland State Conference

Ethics Session – Discussion Panel

Panelists

Stafford Shepherd
Director, QLS Ethics and Practice Centre

Rebekah Leong
Queensland Advocacy Inc

Rachel Neil
Women's Legal Service Qld

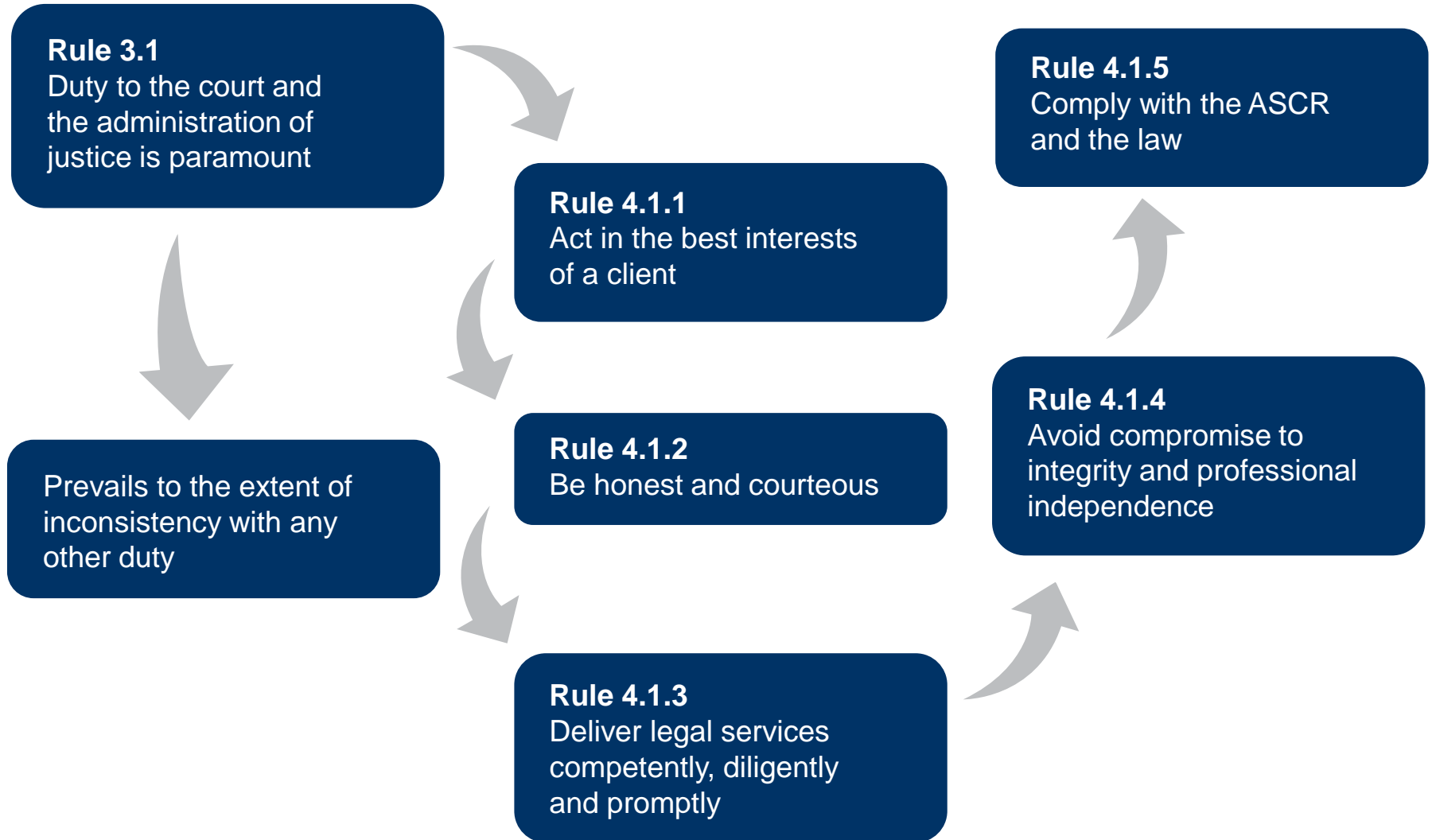
Bill Mitchell
Townsville Community Legal Service

21 March 2019

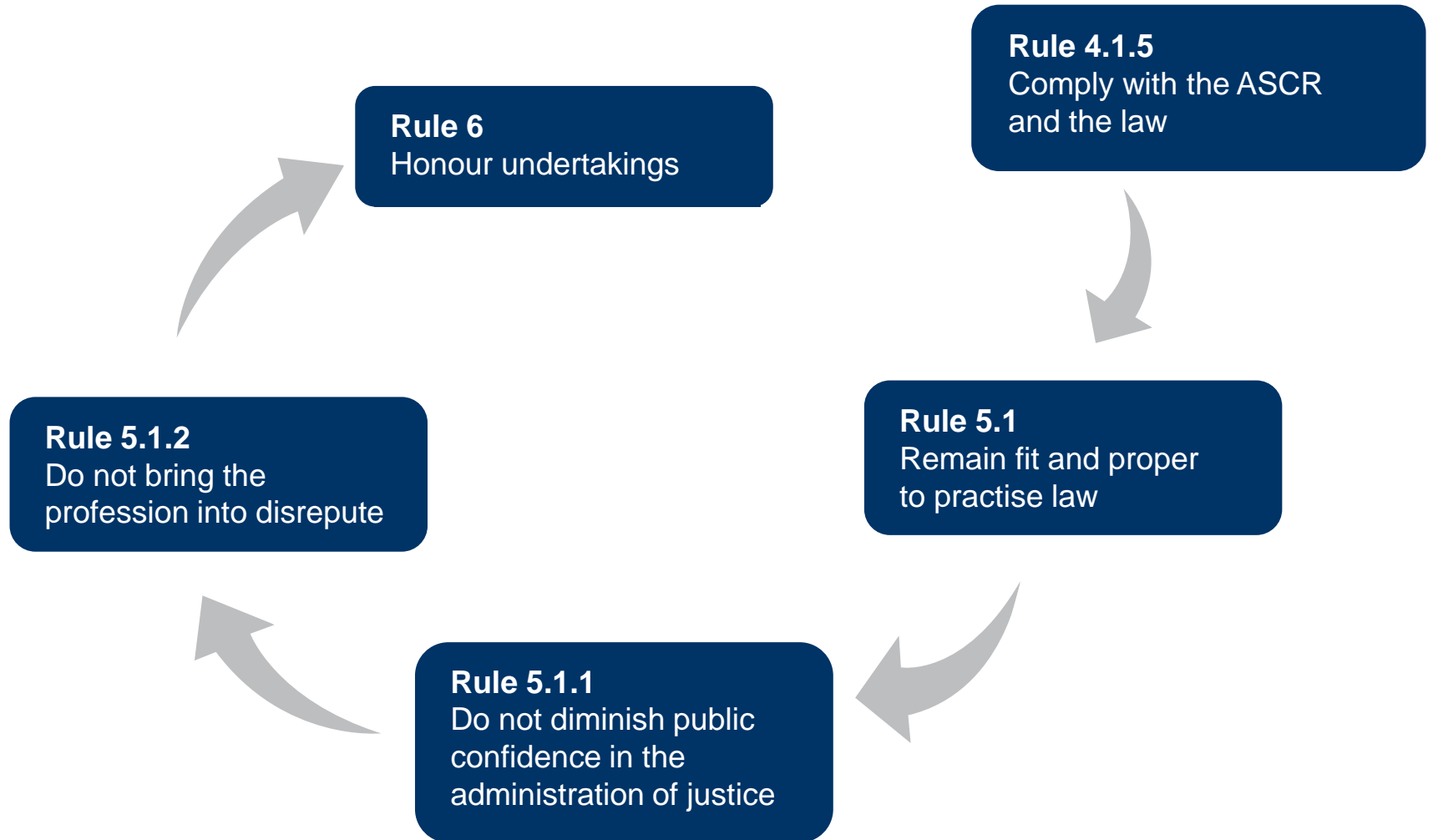


REFLECTION

Fundamental duties of solicitors



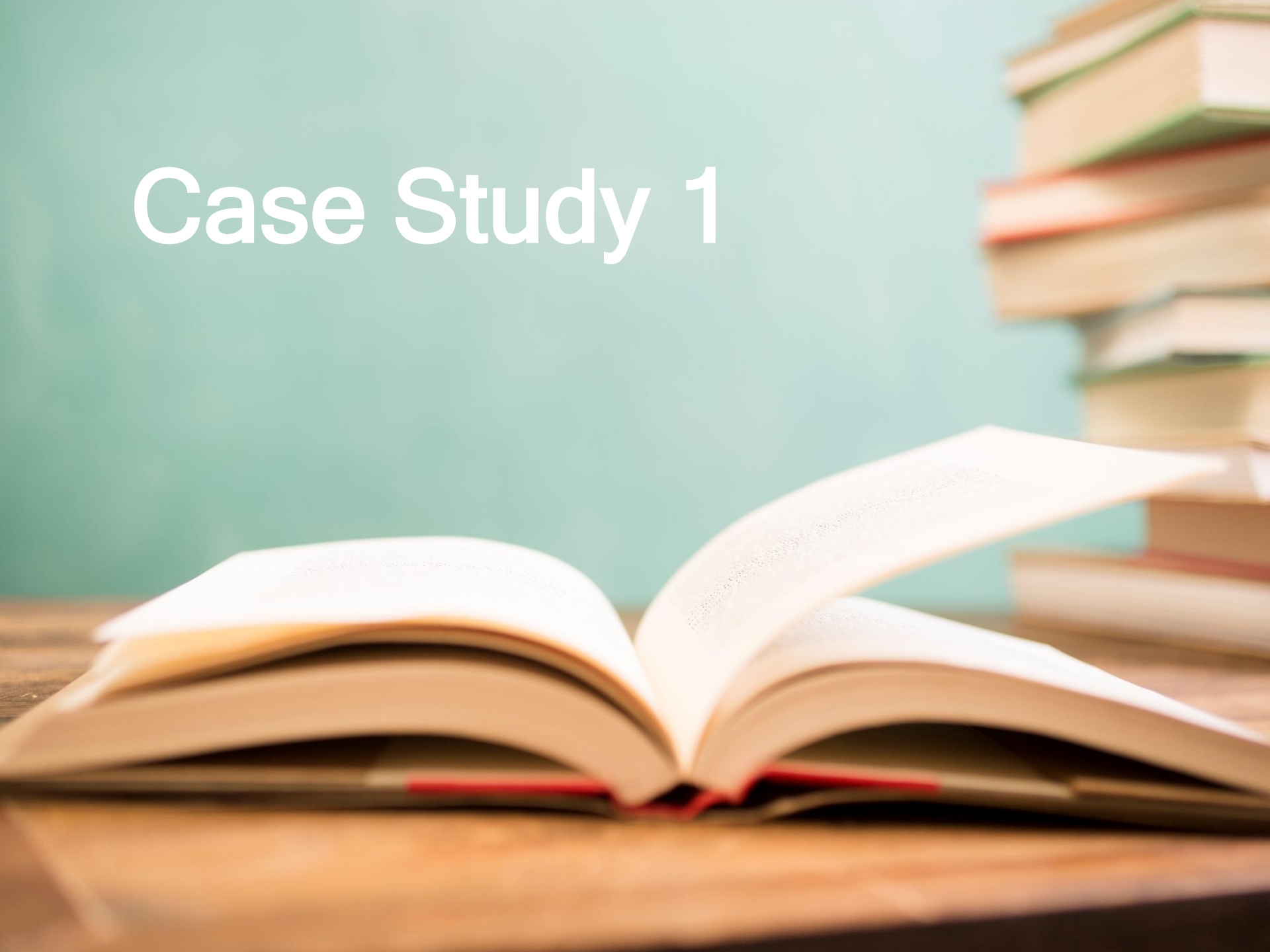
Fundamental duties of solicitors



‘If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skillful evasion.’

Sir Gerard Brennan, ‘Ethics and the Advocate’ (Speech delivered at the Continuing Legal Education Lecture, Bar Association of Queensland, 3 May 1992).

Case Study 1



Case Study 1

Sam and her husband negotiated a settlement of their financial disputes following divorce. Accordingly, Sam instructed John to put that agreement into a form which the court would approve. John accepted Sam's instructions and drafted a consent order.

The court approved the draft consent order and made a formal order in those terms.

Sam came to regret having entered into the consent order and blamed John for their advice or lack of advice, which had resulted in the consent order being made.

Sam subsequently commenced proceedings against John claiming damages for professional negligence.

***Minkin v Landsberg* [2016] 1 WLR 1489, 1496 (citations omitted)**

‘The extent of a solicitor’s duty to his/her client is determined by his/her retainer. The starting point in every case is to ascertain what the client engaged the solicitor to do or to advise upon.’

‘[T]he court must be aware of imposing upon solicitors ... duties which go beyond the scope of what they are requested and undertake to do ... The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession ...’

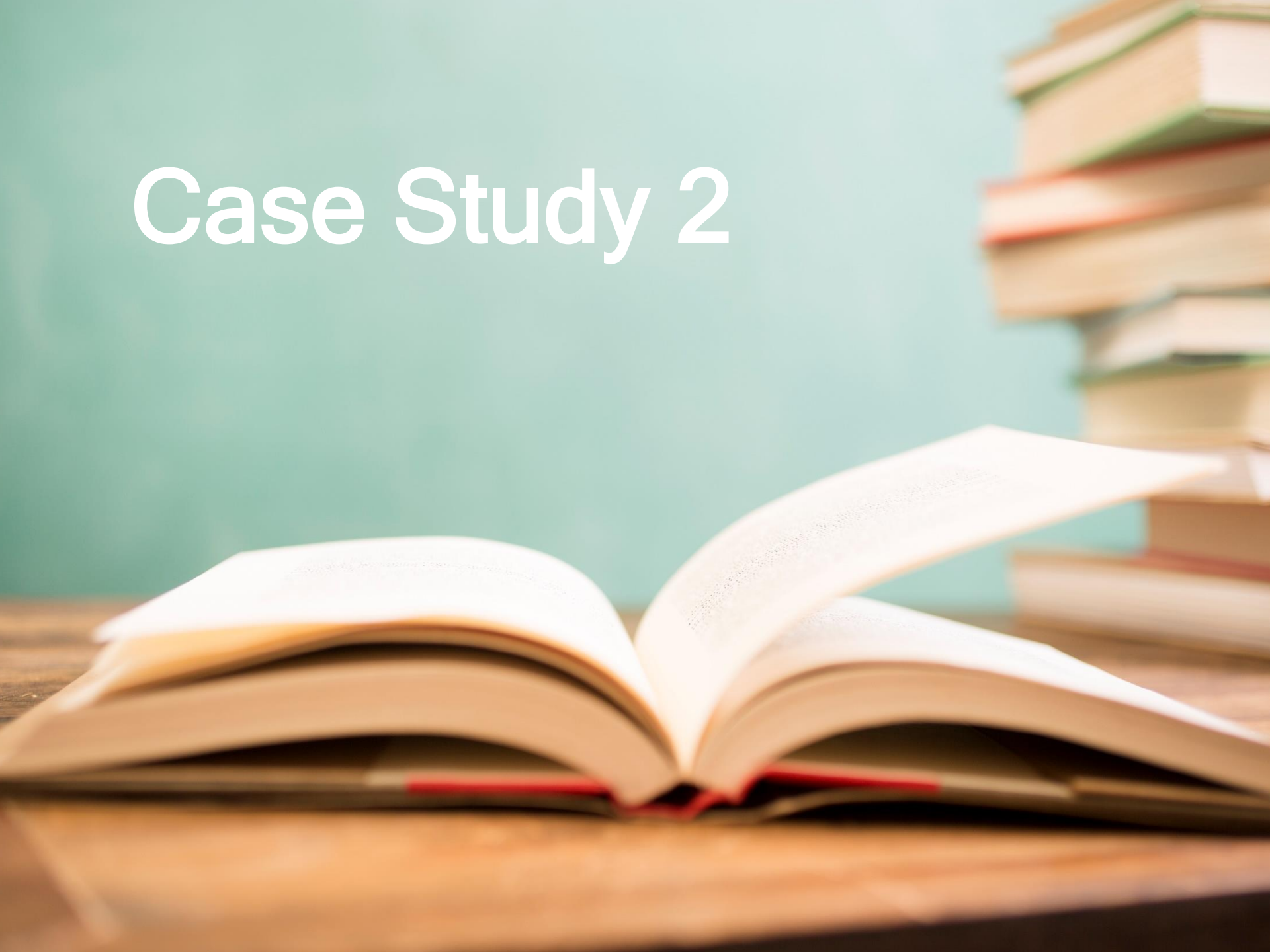
***Minkin v Landsberg* [2016] 1 WLR 1489, 1498**

- A solicitor has a contractual duty to carry out the tasks instructed by the client and those that the solicitor has agreed to undertake.
- It is implicit in the retainer that the solicitor will proffer advice reasonably incidental to the work carried out.
- In determining what is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
- The solicitor and client may agree to limit the duties which would otherwise form part of the solicitor's retainer. This agreement should be confirmed in writing.

Guidance Statement No. 7 – Limited scope representation in dispute resolution (8 June 2017)

- Is the matter suitable for limited scope representation?
- Review suitability continually.
- Clarify roles and responsibilities.
- Manage the scope.
- Confirm when the retainer is at an end.
- When dealing with third parties, inform them of the limited nature of the representation.

Case Study 2



Case Study 2

Tim is 81 years old and was formally a high ranking public servant. Four years ago he had two small strokes which affected his speech.

His partner Henry died last year and since his death Tim has remained at home with the support of his neighbour Brian, whom he often refers to as Henry.

His son Leon lives 200 miles away and rarely visits him.

Tim has property worth around 3 million dollars. The value of his house is about 1 million dollars and although he has no mortgage, he has the usual outgoings to pay, rates, water charges, gas, electricity, telephone and insurance and there are his normal day to day living expenses.

He has 1 million dollars in the banks and building societies and a portfolio of shares in unit trusts worth approximately 1 million dollars.

The income from his superannuation and state pension comes to around about \$85,000 a year.


Case Study 2

Tim has recently written to Brenda his solicitor. Tim has indicated he wishes to make a new will leaving a legacy of \$500,000 to Brian. He proposes that the residuary of his estate will go to his son Leon only if Leon comes to reside with him. Tim also wants to appoint Brian as his attorney. Tim does not have a power of attorney.

Tim has recently visited his GP and has been given a clean bill of health.

Brian has been of great support to Tim since Henry's death. Without Brian's assistance with the shopping, cooking, cleaning, laundry and ironing as well as occasionally helping to wash and dress Tim. Tim would have found it difficult but not impossible to remain in independent living.

Tim has already bought Brian a new Ford Escort, admittedly Tim has the benefit of Brian driving him where he needs to go. Although it cost a reasonable sum, Brenda is aware of this recent gift.



Fundamental ethical duties – solicitors and capacity

- duty to follow lawful, competent and proper instructions
- paramount duty to the administration of justice
- duty to act in the client's best interest (including to respect client autonomy)
- duty not to engage in conduct which constitutes discrimination
- duty of confidence to the client.

Based on the ethical conduct rules from the *Australian Solicitors Conduct Rules 2012* (Qld).

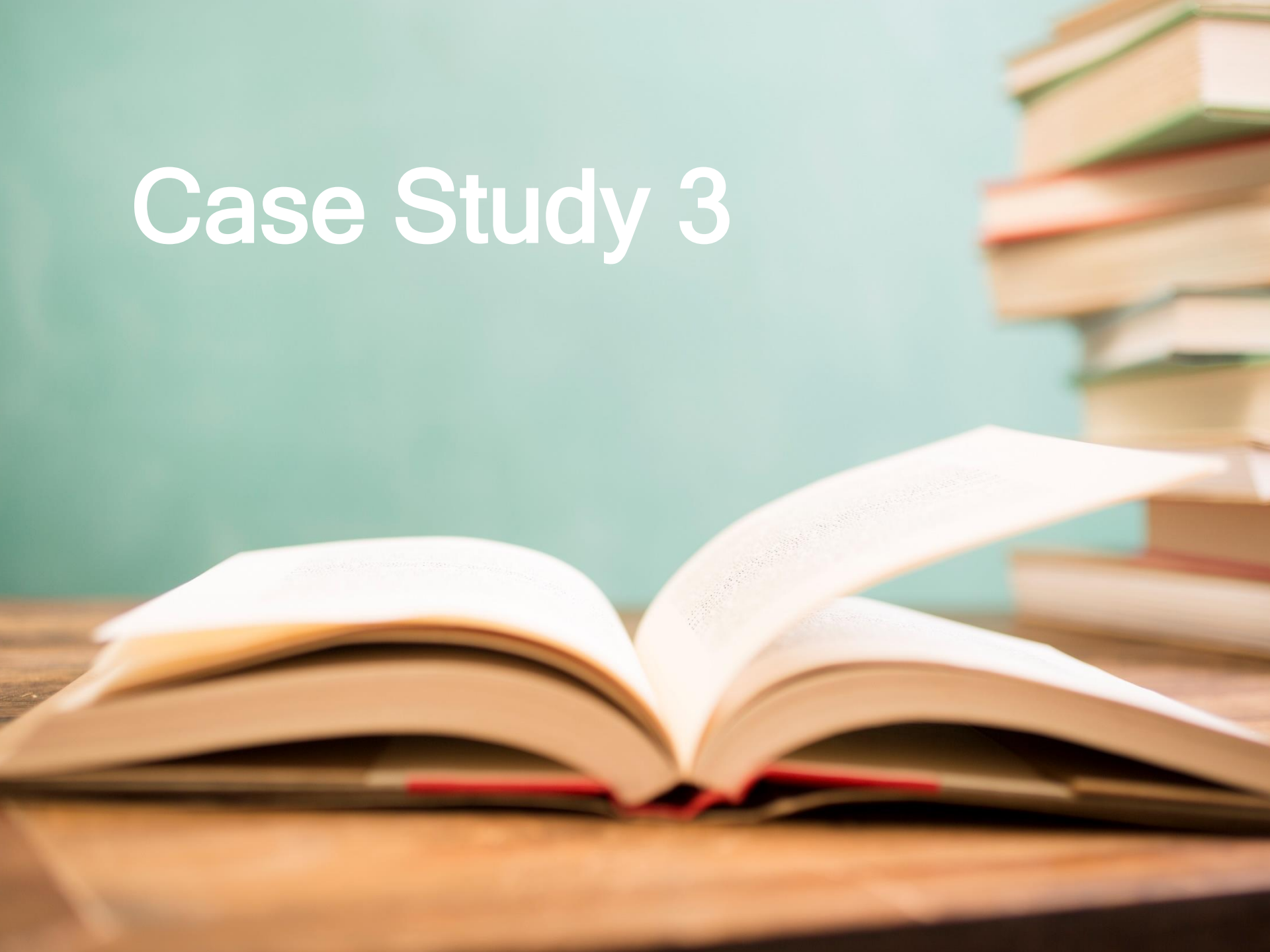
Basic principles regarding capacity

- capacity should not be assessed solely on the basis of:
 - appearance
 - age
 - behaviour
 - communication style
 - disability or impairment
- capacity can be increased with appropriate support
- substituted decision making is last resort
- determining whether a person has capacity is ultimately a matter for the courts.

Identifying the red flags

- ▶ elderly
- ▶ disability or impairment
- ▶ hospital/nursing home
- ▶ difficulty recalling things/bad memory/forgetful
- ▶ performing simple calculations
- ▶ lack of mental flexibility
- ▶ anxiety about decision making or managing tasks
- ▶ limited ability to interact
- ▶ frequent changes in instructions
- ▶ third parties directing communications
- ▶ ‘friend’ who will benefit
- ▶ change in personality

Case Study 3



Case Study 3

Optima Legal ('Optima') is a national law firm with offices in Coober Pedy and Brisbane.

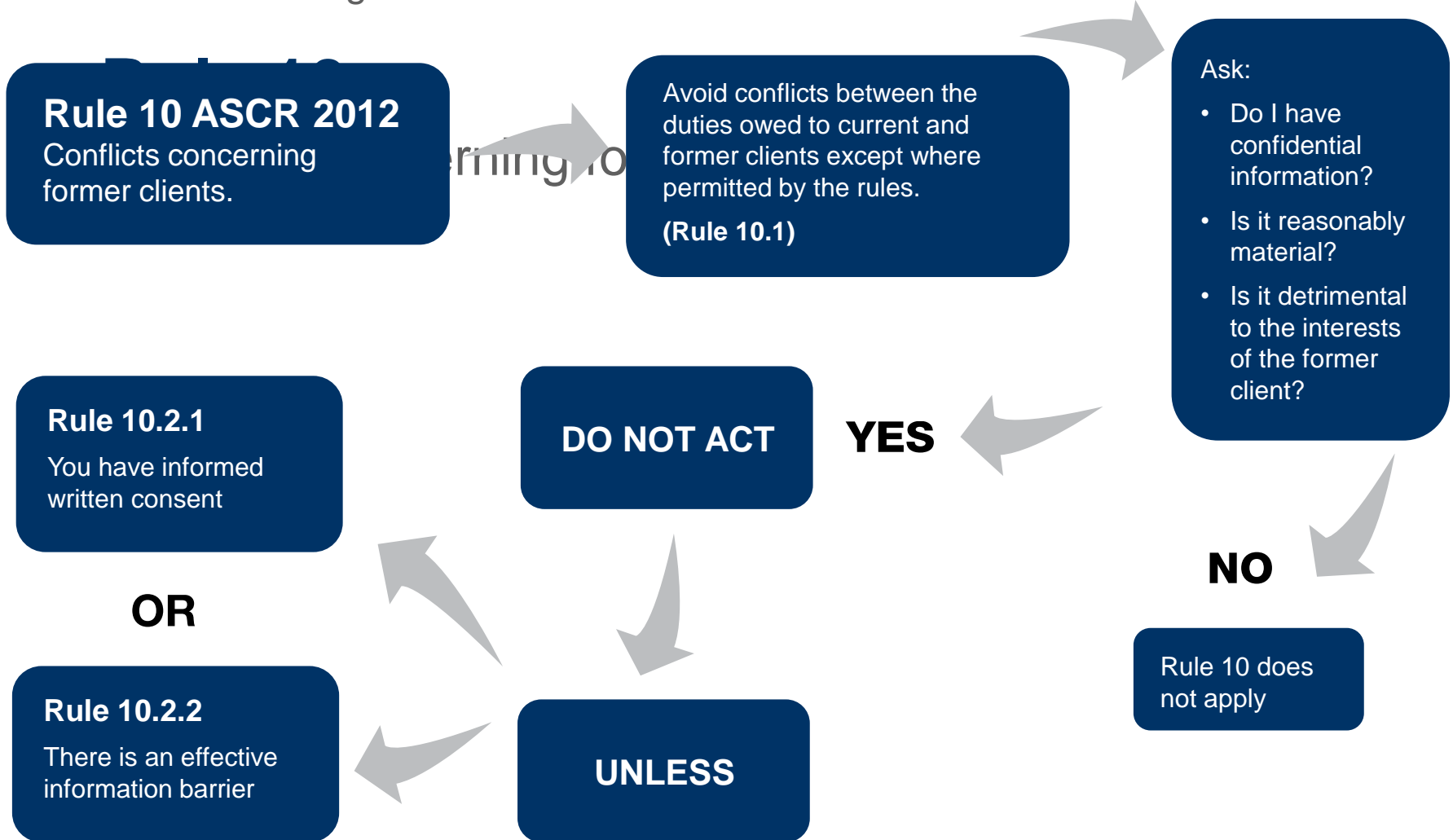
5 years ago the Coober Pedy office represented Super Bottles, South Australia's 2nd largest thermal water bottle manufacturer, in a corporate restructuring.

In the course of Super Bottle's engagement of Optima, Optima carried out far-reaching investigations into Super Bottle's businesses and became privy to a substantial amount of confidential information, including financial and accounting information regarding their manufacturing business.

The Brisbane office of Optima now represents Gary from Newmarket, Brisbane ('Gary'), a local connoisseur of hot Milo. Gary claims that his thermal water bottle has been manufactured negligently by Super Bottles, and that his thermal water bottle is not fit for its purpose.

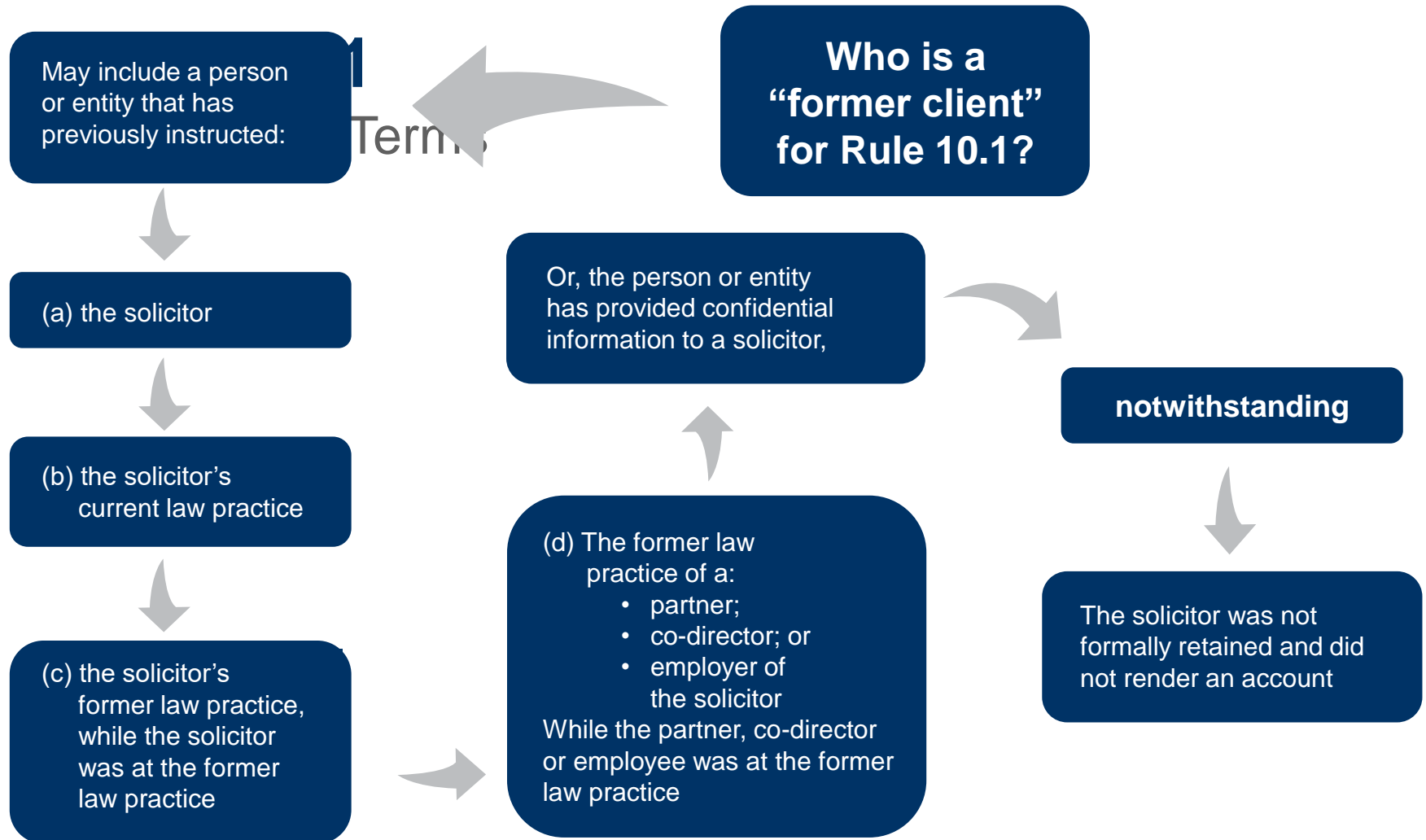
Rule 10

Conflicts concerning former clients

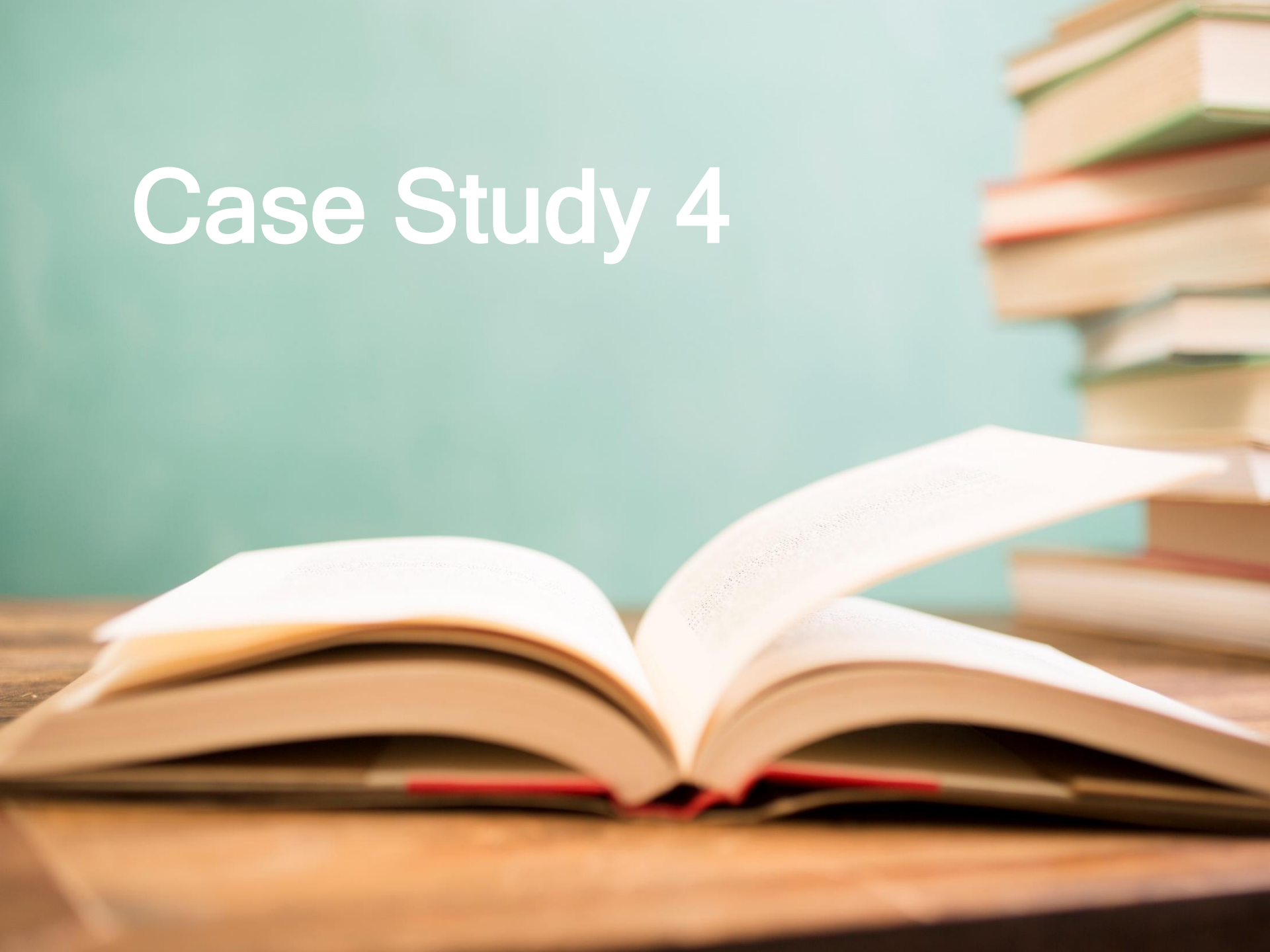


Rule 10.1

Glossary of Terms



Case Study 4



Case Study 4

Pat alleges she was sexually harassed and bullied whilst she was a sales manager at her former workplace. Pat subsequently retains Sam to represent her in a work-place discrimination and harassment claim.

Eve, a former colleague of Pat, agrees to provide a statement to Sam. She admits that she is nervous about the upcoming hearing and says that she knows the cross-examination is likely to be vicious.

Eve asks Sam to run through the questions she is likely to face so that she can be prepared. Sam already told her to “tell the truth, and keep it simple” but she also wants some examples of how she should answer likely questions.

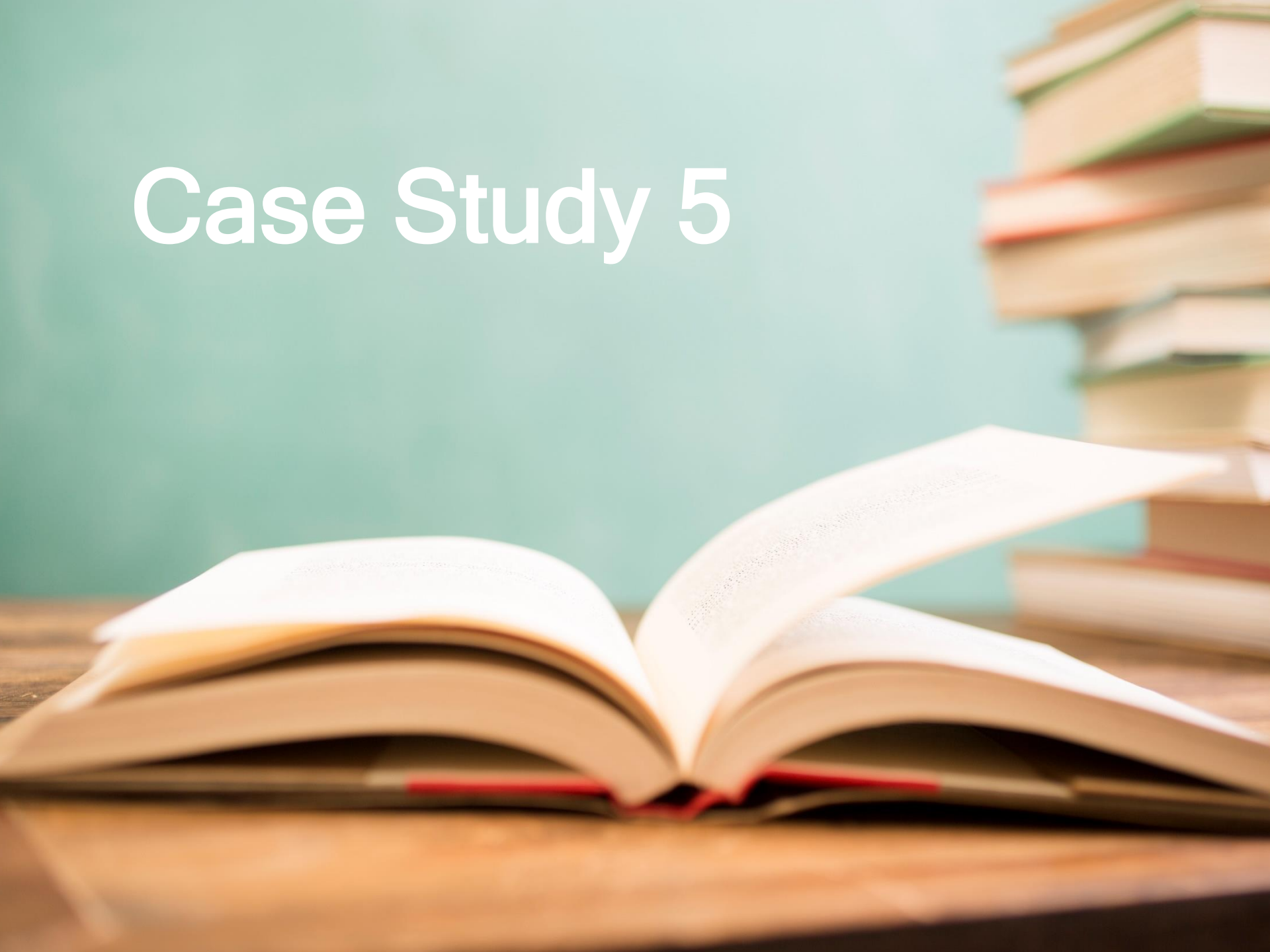
Witness preparation and witness coaching

- The difference between each concept can be difficult to define
- See *Re Equiticorp Finance Ltd* (1992) 27 NSWLR 391:
 - where a solicitor advising the witness as to how they should answer questions went over the line.
- **Rule 24.1.2** – A solicitor must not coach a witness by advising what answers the witness should give.
- But the solicitor does not contravene this rule by:
 - Questioning and testing in conference the version of evidence to be given; or
 - Drawing the witnesses' attention to inconsistencies or difficulties... (see **Rule 24.2.2 & 24.2.3**).
- Do not conference witnesses together nor encourage them to compare notes (See **Rule 25**) – watch out for this with business partners & couples.

“It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly.”

Day v Perisher Blue Pty Ltd (2005) 62 NSWLR 731 at [30].

Case Study 5



Case Study 5

A Coroner's inquest is to be held into the death of wealthy mariner, Cam. Relations between Wendy (his daughter) and Tina (his widow) are acrimonious.

Wendy alleges that Tina only married Cam for his money and hastened his death. Her lawyers prepare a chronology of statements to that effect.

Peter is an in-house solicitor for Wendy's company. He sometimes provides her with personal legal advice. She asks him to manage discreet disclosure of the Chronology to the media. Peter discloses to four journalists, on the condition that they do not publish the contents. He has not read the Chronology.

A fifth journalist contacts Peter on a tip-off from the others, and Peter provides the chronology without mentioning the condition. He assumes that the journalist knows the condition because of the agreement with the other journalists.

The next day an article appears in a major Townsville newspaper under the name of the fifth journalist containing many allegations from the Chronology.

Rule 9 Confidentiality

Rule 9 ASCR 2012 Confidentiality

Rule 9 Confidentiality

Rule 9.1

Must not disclose information confidential to a client and acquired by you during the client's engagement to any person who is not:

UNLESS

OR

A solicitor who is a partner, principal director, or employee of the solicitor's law practice
(Rule 9.1.1)

A barrister or an employee of, or person otherwise engaged by, your law practice or by an associated entity for the purposes of delivering or administering legal services
(Rule 9.1.2)

Rule 9.2

- Client expressly or impliedly authorises disclosure;
- You are permitted or compelled by law to disclose;
- In a confidential setting for obtaining advice in connection with your legal or ethical obligations;
- For the sole purpose of avoiding the probable commission of a serious criminal offence;
- To prevent imminent serious physical harm to client or another person; OR
- Disclosed to your insurer, law practice or associated entity.

The duty of confidentiality

Sources of the duty:

- Implied term in the retainer (can be modified by express agreement)
- Equitable obligation to protect confidential information from unauthorised use or disclosure
- Conduct Rules: Rule 9 *ASCR 2012*

Duty not affected by:

- the termination of the retainer
- death of the client
- conflicting duties – “he may not prefer one duty to the other, he must perform both as best he can. But in any case the impossible position that he has chosen to put himself in does not exonerate him from liability”: *Hilton v Barker Booth & Eastwood* [2005] 1 All ER 6

Camp v Legal Practitioners Complaints Committee [2007] WASC 309 [65]

“...[practitioners must not make] allegations which may have ‘ruinous consequences’ ... and which [can not] be substantiated by credible evidence”

“...when practitioners speak out of court about a client’s case ...they [must] maintain standards of decency and fairness”

“...[particularly] where the practitioner has no duty to his client... to make such allegations.”





Further information

- January to December 2018 the Centre received 4,090 calls
- Common call categories:
 - client documents;
 - client instructions;
 - confidentiality/privilege;
 - conflict;
 - costs; and
 - practice support.
- QLS Senior Counsellors' Service
- Deliberative Model
([http://www.qls.com.au/Knowledge_centre/Ethics/Deliberative Model](http://www.qls.com.au/Knowledge_centre/Ethics/Deliberative_Model))

Contact Details

QLS Ethics and Practice Centre

ethics@qls.com.au

p 07 3842 5843

qls.com.au/ethics

Stafford Shepherd

s.shepherd@qls.com.au

p 07 3842 5967



@staffshepherd