Ethical issues arise where:

The practitioner takes advantage **OF** the client

OR

The practitioner takes advantage **FOR** the client
How far can you go for your client?
Australian Solicitor Conduct Rules
A solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
A solicitor must also:

- act in **best interests** of client;
- be **honest** and courteous in all dealings;
- deliver legal services competently, diligently and as promptly as reasonably possible;
- avoid any compromise to **integrity and professional independence**;
- comply with the ASC Rules and the law.
A solicitor must not engage in conduct in the course of practice or otherwise which demonstrates that the solicitor is **not a fit and proper person to practise law**, or which is likely to a material degree:

- be prejudicial to, or **diminish the public confidence in**, the administration of justice; or
- bring the profession to **disrepute**.
Rule 6 – Undertakings

• A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

• A solicitor must not seek from another solicitor, or that solicitor’s employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.
Case study

Dealing with proposed grant of a franchise

• **Trevor Trump** is acting for the franchisor.

• On his website he:
  a) states that he has the finest franchise practice in Australia and possibly the world;
  b) states that he acts for McDonald’s, KFC, Dominos, Subway and other leading brands; and
  c) shows the logos of his “clients”

• **Hilary Linton** is acting for the prospective franchisee.
Hilary makes an assertion that her client will not enter into a franchise agreement unless a right of renewal of 5 years is granted.

In fact, Hilary’s client has not insisted on a right of renewal – would like it, but will not insist on it.

Is Hilary’s conduct unethical?

Would considerations be different if Hilary’s client had specifically instructed her to say this?
Case study – Issue 2

- Trevor and Hilary have exchanged several iterations of the draft franchise agreement. On each occasion each side has dutifully accepted changes and tracked their own further changes for presentation to the other side.

- Clause 51 provides for the purchaser to pay for all transaction costs.

- Close to the last version Trevor’s client agrees to the inclusion of a right of renewal provided that the franchisor has a buy-back option in certain circumstances (other than franchisee default). Trevor drafts the changes and tracks them. No change is made to clause 51.

- Hilary accepts the buy-back option clause and doesn’t mention clause 51 requiring alteration.
Case study – Issue 2

• Close to signing Trevor reflects on the agreement and realises he probably should have sought instructions on clause 51. As it stands, Hilary’s client will not only pay all transaction costs for the franchise agreement and associated documents, but also costs on the transfer if the buy-back option is exercised.

• Trevor decides it is too late and he won’t say anything or suggest any further changes. Trevor briefly mentions the issue to his client. The client tells Trevor it is too late and not to raise it.

• *Has Trevor acted unethically? Has there been a breach of the conduct rules?*
Case study – Issue 3

• In fact, Hilary had identified the issue and had accepted the changes to include the buy-back option, but also added a sub-clause to cover the transaction costs being borne by Trevor’s client on exercise of the buy-back. She didn’t track that change and only reverted to Trevor with a clean copy of the agreement for execution.

• In her covering email, Hilary states that her client accepted the changes to include the buy-back option and attaches the final clean version of the agreement for execution.

• Trevor didn’t pick up the addition of the new sub-clause.

• **Was Hilary’s conduct unethical? Would it matter if her failure to track the sub-clause was inadvertent?**
Case study – Issue 4

• Hilary has also never raised with Trevor the fact that the initial franchise fee in the Schedule had changed.

• In the second or third draft of the franchise agreement Hilary had noted that on replacement of the Schedule (by Trevor) the initial franchise fee had changed from $42,000 to $24,000.

• Hilary didn’t expressly raise the issue with her client, but he had confirmed that the information in the Schedule was correct.
Case study – Issue 4

• Hilary hasn’t raised the issue with Trevor. Instead she advises her client to sign as soon as possible.

• She has the opportunity to raise the issue in preparation of some of the ancillary documents for settlement, but does not.

• *Has Hilary crossed the line? What should she have done in these circumstances?*
Some guiding principles

- Issue spotting – **knowledge of conduct rules**
- Time pressures – **take time to reflect**
- Consultation with **peers**
INTEGRITY IS DOING THE RIGHT THING EVEN WHEN NO ONE IS WATCHING