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## USE AND INTERPRETATION OF THIS GUIDE

This Guide is divided into chapters comprising Principles and Commentaries. Chapter 15 is primarily concerned with the powers of the Law Society of Hong Kong ('Law Society') and applicable procedures in relation to allegations of misconduct. For this reason, it does not contain Principles and Commentaries. The headings for the Principles indicate their subject matter. The language is deliberate. If there is a compelling obligation to advise, act or cease to act, this will be indicated by the words 'must' or 'shall'. The phrase 'a solicitor is under a duty' and 'a solicitor is obliged to' carries the same mandatory obligation. Any breach of such Principles will be a disciplinary matter.

In many instances there is room for discretion, usually coupled with guidance about the steps to be taken by the prudent solicitor. The words 'should', 'may' or the context itself will make it clear that a discretion exists. Breaches of these guidelines *may* incur sanctions.

## GENDER AND NUMBER CLAUSE

In this Guide words and expressions importing the masculine gender include the feminine and neuter genders and words and expressions in the singular include the plural and words and expressions in the plural include the singular.

## PRINCIPLES OF PROFESSIONAL CONDUCT

### **1.01 Rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H)**

**'A solicitor shall not, in the course of practising as a solicitor, do or permit to be done on his behalf anything which compromises or impairs or is likely to compromise or impair—**

- (a) his independence or integrity;**
- (b) the freedom of any person to instruct a solicitor of his choice;**
- (c) his duty to act in the best interests of his client;**
- (d) his own reputation or the reputation of the profession;**
- (e) a proper standard of work; or**
- (f) his duty to the court.'**

### **Commentary**

Rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) sums up the basic principles of conduct governing the professional practice of solicitors. The principles set out in the Rule are the bedrock of a solicitor's practice and should always be kept in mind.

## **1.02 The general principles of professional conduct apply to all solicitors, trainee solicitors and registered foreign lawyers whether employed or not.**

### **Commentary**

1. As to trainee solicitors, see *Legal Practitioners Ordinance* (Cap. 159), *Trainee Solicitors Rules* (Cap. 159 sub. leg. J) and other applicable statutory and professional rules.
2. As to registered foreign lawyers, see *Legal Practitioners Ordinance* (Cap. 159), *Foreign Lawyers Practice Rules* (Cap. 159 sub. leg. R) and other applicable statutory and professional rules.

## **1.03 Conduct subject to discipline**

**A solicitor is an Officer of the Court (see section 3(2) of the *Legal Practitioners Ordinance* (Cap.159)), and should conduct himself appropriately.**

### **Commentary**

As an Officer of the Court, proper standards of behaviour whether in his practice or in his independent business activities are required of a solicitor as a member of an honourable profession.

## **1.04 Sources**

**The requirements of a solicitor's professional conduct are derived from both statutory and non-statutory sources.**

### Commentary

1. The principal statutory provisions which regulate solicitors' professional conduct include:
  - (a) the *Legal Practitioners Ordinance* (Cap. 159) and subsidiary legislation;
  - (b) the *Rules of the High Court* (Cap. 4 sub. leg. A).
2. Non-statutory sources include:
  - (a) the common law, which has developed and elaborated the basic principles of conduct;
  - (b) Law Society guidance on conduct, including:
    - (i) this Guide;
    - (ii) Law Society Circulars;
    - (iii) guidance issued by the Guidance Committee;
    - (iv) Practice Directions issued by the Council.
  - (c) decisions of the Solicitors' Disciplinary Tribunal and the court.
3. Many of the standards and obligations of professional conduct are derived from decisions and dicta by the judges in cases involving contract, tort, fiduciary duties, interlocutory issues, appeals against disciplinary findings and the criminal law. However, ethical standards and obligations stand apart from the legal sources. They have been established by lawyers as standards by which they will be bound. Some ethical standards and obligations are higher than the requirements of the law.

For the law affecting solicitors' practice reference can be made to appropriate texts such as Wilkinson & Sandor, *The Professional Conduct of Lawyers in Hong Kong* (LexisNexis Hong Kong, 2008) and Wilkinson & Sandor's *Student Edition* of the same text, A.M. Dugdale and K.M. Stanton, *Professional Negligence* (London: Butterworths, 1998), Frederic T. Horne, *Cordery's Law Relating to Solicitors*, 8th edition (London: Butterworths, 1988) and The Hon. Mr. Justice Ma, *Professional Conduct and Risk Management in Hong Kong*, (Sweet & Maxwell Hong Kong, 2007).

#### 1.05 Keeping abreast of changes

**A solicitor should keep abreast of changes in the statutory rules and non-statutory guidance governing solicitors' professional conduct as are published from time to time by the Law Society.**

### **Commentary**

1. The Law Society's Circulars announce rule changes, and reproduce or summarise major new requirements of professional conduct. They may be mandatory or advisory.
2. The Law Society's Standards and Development Department gives written or telephone advice on the requirements of professional conduct. If necessary, an opinion can be sought from the Guidance Committee. Advice is usually given on a confidential basis. This edition of the Guide sets out the law and practice in effect as at 1 September 2012. Readers are advised to check whether the Law Society's Circulars included in this Guide are still in force or have been amended from time to time.

## **1.06 The Law Society**

**The Law Society registered as a company limited by guarantee under the *Companies Ordinance* (Cap. 32) is the professional body representing solicitors in Hong Kong as well as exercising statutory functions in the regulation of solicitors, trainee solicitors and registered foreign lawyers.**

### **Commentary**

1. The Law Society was incorporated on 19 March 1907. Its objects include:
  - (a) to support and protect the character, status and interests of solicitors in Hong Kong,
  - (b) to establish and promote good standards of practice and to repress malpractice, and
  - (c) to ensure compliance by solicitors with relevant laws, codes and regulations.

For full objects, see Clause 3 of the Law Society's Memorandum of Association.

2. By article 6 of the Law Society's Articles of Association, every member of the Law Society is bound by the Articles of Association and all Practice Directions, rules and regulations from time to time of the Law Society including but not limited to those relating to continuing professional development, risk management education, remuneration for professional charges and other charges connected with practice as a solicitor in Hong Kong and each member is deemed to have given an undertaking to the Law Society to abide by all such Practice Directions, rules and regulations and the Articles of Association. By article 6A of

the Articles of Association this obligation is extended to associate members.

3. The Council has by Practice Direction I.2. determined that the standards of practice required of solicitors in Hong Kong shall be those set out in this Guide as revised from time to time.
4. Non-practising solicitors who are not members of the Law Society, trainee solicitors, registered foreign lawyers and employees of solicitors shall have regard to the Principles set out in this Guide as they are also subject to the jurisdiction of the Solicitors' Disciplinary Tribunal (see section 9A(1) of the *Legal Practitioners Ordinance* (Cap. 159)).

### 1.07 Information Communication Technology

**A solicitor using information communication technology should endeavour to ensure within the parameters of technology, information and knowledge available at the time of use, that no Principle in the Guide or a provision in the Practice Directions or applicable law is breached by such use.**

#### **Commentary**

Solicitors may use the available information and knowledge available at the time to determine whether to adopt a particular approach to the use of information communication technology. For examples of non mandatory guidelines see Circular 04-604, ISO/IEC 17799:2005 and ISO/IEC 27001:2005 (see also Principle 8.01 Commentary 31).

### 1.08 Practice outside Hong Kong

**A solicitor when practising as a Hong Kong solicitor outside Hong Kong remains bound by the general principles of professional conduct which apply to him as a Hong Kong solicitor.**

#### **Commentary**

1. The Principles and Commentaries in this Guide apply to practice outside Hong Kong with any modification necessitated by local conditions.
2. In addition to the provisions of Commentary 1, the Council has adopted as the basic code for solicitors practising outside Hong Kong the

International Bar Association's International Code of Ethics (set out below) whenever the same is not inconsistent with this Principle.

3. In the absence of an express application of local rules to the solicitor as a foreign lawyer, a solicitor should nevertheless respect the rules of conduct applied to local lawyers. Where the structure and sphere of activity of the local legal profession or professions differ substantially from those of Hong Kong solicitors, it may be inappropriate or impossible for a solicitor to comply in every particular with the rules of conduct applicable to the local profession or professions, or it may be doubtful which rules of conduct should be applied. In such circumstances, the solicitor should observe the standards of conduct applicable to the local lawyers to the extent this can be done without infringing the rules applicable to Hong Kong solicitors and without hindering the proper exercise of his profession.
4. When attesting a conveyancing document overseas for use in Hong Kong, a solicitor must ensure that he complies with the appropriate laws and regulations applicable in Hong Kong (see Circular 00-127).



**1.09 Statutory provisions overriding the Guide**

added on  
16/12/2022 as per  
Circular 22-827

**Where applicable a solicitor shall comply with the statutory provisions to ensure that no principle in the Guide or a provision in the Practice Directions or applicable law is breached.**

**Commentary**

1. The provisions of the *Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022*, Part 10B, *Arbitration Ordinance* (Cap. 609) ('ORFSO') and the Arbitration (Outcome Related Fee Structures for Arbitration) Rules ('ORFSR'), Part 10B, *Arbitration Ordinance* (Cap. 609) (collectively 'ORFS') impose specific statutory obligations on a solicitor which override provisions of the Guide. See Principle 4.07 Commentary 3, Principle 4.16, Principle 4.17 and its Commentary 4, Principle 5.01 Commentary 9, Principle 5.02 Commentary 4, Principle 5.04 Commentary 3, Principle 5.05 Commentary 2, Principle 5.07 Commentary 3, Principle 5.14 Commentary 2, Principle 5.19 Commentary, Principle 5.22 Commentary 13, Principle 7.02 Commentary 8, Principle 12.04 Commentaries 1, 6 to 7 and Principle 12.05 Commentaries 1 and 4.
2. The provisions of the Third Party Funding of Arbitration, Part 10A, *Arbitration Ordinance* (Cap. 609) ('TFA') impose specific statutory obligations on a solicitor which override provisions of the Guide. See Principle 3.01 Commentaries 5 and 10, Principle 4.16, Principle 4.17 and its Commentaries 4 to 5, Principle 5.01 Commentary 9, Principle 5.14 Commentary 2, Principle 5.19 Commentary, Principle 5.22 Commentary 13, Principle 7.02 Commentary 8, Principle 12.04 Commentary 6 and Principle 12.05 Commentary 4.
3. In the case of TFA, a solicitor should ensure the TFA agreement, process and conduct comply with (a) the Code of Practice issued under Section 98P of the *Arbitration Ordinance* (Cap. 609) and (b) relevant provisions of Part 10A of the *Arbitration Ordinance* (Cap. 609).

## **APPENDICES**

### **PRINCIPLE 1.07**

**CIRCULAR 04–604**

**29 November 2004**

## **GUIDELINES**

### **Guidelines on E-mail for Solicitors**

The Law Society's Management and Technology Committee has prepared a revised set of Guidelines on E-mail to assist members to consider 'best practice' in relation to E-mail. Members should note the Guidelines do not create or extend or define the scope of any duties of professional conduct. These Guidelines have been adapted, with permission, from the Guidelines published by the Law Society of England and Wales.

Click [here](#) for a copy of the Guidelines

Circular 03-490 is superseded.

## **PRINCIPLE 1.08 COMMENTARY 2**

### **INTERNATIONAL CODE OF ETHICS OF THE INTERNATIONAL BAR ASSOCIATION**

Adopted by the Council of the Law Society as the basic code for solicitors practising outside the jurisdiction

#### **Preamble**

The International Bar Association is a federation of National Bar Associations and Law Societies with full or sustaining organisational members and individual members. Most of the full or sustaining organisational members have established Codes of Legal Ethics as models for or governing the practice of law by their members. In some jurisdictions these Codes are imposed on all practitioners by their respective Bar Associations or Law Societies or by the courts or administrative agencies having jurisdiction over the admission of individuals to the practice of law.

Except where the context otherwise requires, this Code applies to any lawyer of one jurisdiction in relation to his contacts with a lawyer of another jurisdiction or to his activities in another jurisdiction.

Nothing in this Code absolves a lawyer from his obligation to comply with such requirements of the law or of rules of professional conduct as may apply to him in any relevant jurisdiction. It is a re-statement of much that is in these requirements and a guide as to what the International Bar Association considers to be a desirable course of conduct by all lawyers engaged in the international practice of law.

The International Bar Association may bring incidents of alleged violations to the attention of relevant organisations.

#### **Rules**

1. A lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted. He shall also observe all ethical standards which apply to lawyers of the country where he is working.
2. Lawyers shall at all times maintain the honour and dignity of their profession. They shall in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members.
3. Lawyers shall preserve independence in the discharge of their professional duty. Lawyers practising on their own account or in

partnership where permissible, shall not engage in any other business or occupation if by doing so they may cease to be independent.

4. Lawyers shall treat their professional colleagues with the utmost courtesy and fairness.

Lawyers who undertake to render assistance to a foreign colleague shall always keep in mind that the foreign colleague has to depend on them to a much larger extent than in the case of another lawyer of the same country. Therefore their responsibility is much greater, both when giving advice and when handling a case.

For this reason it is improper for lawyers to accept a case unless they can handle it promptly and with due competence, without undue interference by the pressure of other work. To the fees in these cases rule 19 applies.

5. Except where the law or custom of the country concerned otherwise requires, any oral or written communication between lawyers shall in principle be accorded a confidential character as far as the court is concerned, unless certain promises or acknowledgements are made therein on behalf of a client.
6. Lawyers shall always maintain due respect towards the court. Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or to any other person.

Lawyers shall never knowingly give to the court incorrect information or advice which is to their knowledge contrary to the law.

7. It shall be considered improper for lawyers to communicate about a particular case directly with any person whom they know to be represented in that case by another lawyer without the latter's consent.
8. A lawyer should not advertise or solicit business except to the extent and in the manner permitted by the rules of the jurisdiction to which that lawyer is subject. A lawyer should not advertise or solicit business in any country in which such advertising or soliciting is prohibited.
9. A lawyer should never consent to handle a case unless:
  - (a) the client gives direct instructions, or
  - (b) the case is assigned by a competent body or forwarded by another lawyer, or
  - (c) instructions are given in any other manner permissible under the relevant local rules or regulations.
10. Lawyers shall at all times give clients a candid opinion on any case. They shall render assistance with scrupulous care and diligence. This applies also if they are assigned as counsel for an indigent person.

Lawyers shall at all times be free to refuse to handle a case, unless it is assigned by a competent body.

Lawyers should only withdraw from a case during its course for good cause, and if possible in such a manner that the client's interests are not adversely affected.

The loyal defence of a client's case may never cause advocates to be other than perfectly candid, subject to any right or privilege to the contrary which clients choose them to exercise, or knowingly to go against the law.

11. Lawyers shall, when in the client's interest, endeavour to reach a solution by settlement out of court rather than start legal proceedings.

Lawyers should never stir up litigation.

12. Lawyers should not acquire a financial interest in the subject matter of a case which they are conducting. Neither should they, directly or indirectly, acquire property about which litigation is pending before the court in which they practise.
13. Lawyers should never represent conflicting interests in litigation. In non-litigation matters, lawyers should do so only after having disclosed all conflicts or possible conflicts of interest to all parties concerned and only with their consent. This rule applies to all lawyers in a firm.
14. Lawyers should never disclose, unless lawfully ordered to do so by the court or as required by statute, what has been communicated to them in their capacity as lawyers even after they have ceased to be the client's counsel. This duty extends to their partners, to junior lawyers assisting them and to their employees.
15. In pecuniary matters lawyers shall be most punctual and diligent. They should never mingle funds of others with their own and they should at all times be able to refund money they hold for others. They shall not retain money they receive for their clients for longer than is absolutely necessary.
16. Lawyers may require that a deposit is made to cover their expenses, but the deposit should be in accordance with the estimated amount of their charges and the probable expenses and labour required.
17. Lawyers shall never forget that they should put first not their right to compensation for their services, but the interests of their clients and the exigencies of the administration of justice.

The lawyers' right to ask for a deposit or to demand payment of out-of-pocket expenses and commitments, failing payment of which they may withdraw from the case or refuse to handle it, should never be exercised at a moment at which the client may be unable to find other assistance in time to prevent irreparable damage being done.

Lawyers' fees should, in the absence of non-applicability of official scales, be fixed on a consideration of the amount involved in the controversy and the interest of it to the client, the time and labour involved and all other personal and factual circumstances of the case.

18. A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a court as to its reasonableness.
19. Lawyers who engage a foreign colleague to advise on a case or to co-operate in handling it, are responsible for the payment of the latter's charges except where there is express agreement to the contrary. When lawyers direct a client to a foreign colleague they are not responsible for the payment of the latter's charges, but neither are they entitled to a share of the fee of this foreign colleague.
20. Lawyers should not permit their professional services or their names to be used in any way which would make it possible for persons to practise law who are not legally authorised to do so.  
  
Lawyers shall not delegate to a legally unqualified person not in their employ and control any functions which are by the law or custom of the country in which they practise only to be performed by a qualified lawyer.
21. It is not unethical for lawyers to limit or exclude professional liability subject to the rules of their local bar association and to there being no statutory or constitutional prohibitions.

## PRINCIPLE 1.08 COMMENTARY 4

CIRCULAR 00–127

2 May 2000

### ATTESTATION, CERTIFICATION AND NOTARIZATION OF DOCUMENTS BY HONG KONG SOLICITORS AND NOTARIES OUTSIDE HONG KONG

The Council wishes to draw members' attention to the following matters:-

1. Declarations/Affidavits taken by Hong Kong Solicitor outside Hong Kong

A solicitor is not allowed to take an oath or a declaration under the *Oaths and Declarations Ordinance* (Cap. 11) outside Hong Kong because the power to do so is confined to the jurisdiction of Hong Kong.

2. Attestation and Certification of Documents for use in Hong Kong by Hong Kong Solicitors outside Hong Kong

A Hong Kong solicitor holding a current practising certificate may:

1. attest the execution of documents; and
2. certify copy documents

for use in Hong Kong outside Hong Kong

3. Notarization of Documents by Notary Public outside Hong Kong

A Notary Public may not notarize a document or otherwise exercise his office as notary outside Hong Kong for the following reasons:-

(a) A Notary is appointed as such for and in Hong Kong only.

(b) The Notarial Faculty issued to a Notary bears the following words:

‘You may henceforward at the Colony of Hong Kong and not in any other place wheresoever exercise such office of Notary .....’

and under Section 14(1) of the *Hong Kong Reunification Ordinance* (Instrument A601):-

‘Every Notary public who immediately before 1 July 1997 was registered on the register of notaries public kept by the Registrar of the High Court under Section 41 of the *Legal Practitioners Ordinance* (Cap. 159) shall on and after that date continue to be a notary public with all the powers which immediately before that date were exercisable by a notary public under the law of Hong Kong.’

4. Identification of Signatory to Document executed outside Hong Kong by Attesting Solicitor

An attesting solicitor should identify a signatory to a document executed outside Hong Kong in the same manner as if the document were executed in Hong Kong, i.e. by means of documentary evidence, or in the absence of such evidence, a statutory declaration or declarations to be made by the signatory and/or others who are in a position to identify the signatory.

5. Circular 97-227 is superseded.



# CHAPTER 3

## OBTAINING INSTRUCTIONS

### 3.01 Basic principles

1. Rule 2 of the *Solicitors' Practice Rules*
2. Free choice for client
3. Improper influence
4. Instructions from insurers on behalf of insured
5. Avoid conflict of loyalties
- 6.&7. Mortgages
8. Solicitor must not act contrary to law and ethics
9. Taking on cases from recovery agents
10. Apply equally to a solicitor acting in an arbitration

added on 16/12/2022  
as per Circular 22-827

### 3.02 Compliance with rule 2AA of the *Solicitors' Practice Rules*

### 3.03 Prohibition against obtaining business by improper means Improper means

### Appendices

Circular 12-176 'Recovery Agents'

Circular 00-204 'Solicitors' Practice Promotion Code'

Circular 03-7 'ISO Certification'

Circular 12-857 'Legal Visits'

### 3.01 Basic principles

**It is fundamental to the relationship which exists between a solicitor and his client that a solicitor is able to give impartial and frank advice to his client, free from any external or adverse pressures or interests which would destroy or weaken his professional independence or the fiduciary relationship with his client. The status of the profession is dependent upon a solicitor being in a position to advise his client independently and without any allegiance to or influence from anyone else.**

#### **Commentary**

1. The basic principles governing a solicitor's practice are summed up in rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).
2. A potential client who has been improperly influenced in his choice of solicitor cannot be said to have had a free choice. Improper influence can come from a solicitor or from a third party. This chapter deals with circumstances in which the influence may be improper. For example:
  - (a) a solicitor must not act for a borrower of money who is not an existing client where the solicitor knows or ought to know that a condition of the loan is that the solicitor must act for him;
  - (b) some developers and real estate agents may seek to impose a condition on the sale of real estate that a named solicitor must act for the purchaser. For that solicitor to accept instructions in such circumstances is a breach of rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).
3. Where a solicitor has reason to suspect that there may have been improper influence, he must ensure that the client's freedom of choice has not been restricted. If the solicitor is unable to satisfy himself of this, he must not act.
4. Many insurance policies contain the right for insurers to act in the name of the insured in the defence, prosecution or settlement of any claim falling within the policy cover and to nominate a solicitor to carry out legal services on behalf of the insured in relation to the claim. A solicitor is permitted to act on the instructions of an insurer who offers this form of policy, without being in breach of rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H). It must be recognised that in these circumstances, a solicitor-client relationship is established between the solicitor and the insured (see Principle 9.04 Commentary 1).

If the insurer's solicitor acts for the insured in defending criminal proceedings, the solicitor should normally act in such proceedings on the instructions of the insured alone, notwithstanding that the outcome of the prosecution may affect subsequent civil proceedings.

5. A solicitor must avoid being placed in the position where his interests or the interests of a third party, to whom the solicitor may owe a duty, conflict with the interests of a client (see Chapters 7 & 9.) For example, where a solicitor acts for a funded party in an arbitration, he must not act for the third party funder in the same arbitration (as defined in Part 10A of the *Arbitration Ordinance* (Cap. 609)) (see Principle 1.09).
6. A solicitor must not attempt to persuade a purchaser to take a mortgage from a bank preferred by the solicitor. If the purchaser wishes to go to another bank to obtain a mortgage, and if the solicitor in any way undermines the purchaser's freedom to choose, the solicitor may be guilty of professional misconduct.
7. A solicitor acting for a mortgagee must not persuade the purchaser or mortgagor to transfer or give instructions on the purchase to his firm.
8. A solicitor must not allow his client to override his professional judgment, for example, by insisting on the solicitor acting in a way which is contrary to law or to a rule of professional conduct (see Principle 5.01 Commentary 6).
9. Solicitors are prohibited from taking cases referred to them in breach of Principle 3.01 and which may also be in breach of the specific prohibitions stated in Circular 12-176.
10. Principle 3.01 and relevant Commentaries shall apply equally to a solicitor acting in an arbitration for a funded party or a third party funder (as defined in Part 10A of the *Arbitration Ordinance* (Cap. 609)).

amended on  
16/12/2022 as per  
Circular 22-827

added on  
16/12/2022 as per  
Circular 22-827

### **3.02 Compliance with rule 2AA of the *Solicitors' Practice Rules***

**In promoting his practice, a solicitor must pay careful attention to and comply with rule 2AA of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and the Solicitors' Practice Promotion Code.**

#### ***Commentary***

Rule 2AA of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) states:

- '(1) Subject to subrule (2), a solicitor shall not publicise or otherwise promote his practice or permit his practice to be publicised or otherwise promoted.
- (2) Subrule (1) does not apply to anything done in accordance with the Solicitors' Practice Promotion Code as made from time to time by the Council with the prior approval of the Chief Justice.'

### **3.03 Prohibition against obtaining business by improper means**

**A solicitor must not obtain business by improper means.**

#### ***Commentary***

Improper means can include provision of misleading or deceiving information to attract instructions, offering to assist the performance of illegal contracts, obtaining business by touting (in contravention to the Solicitors' Practice Promotion Code), undue influence, arrangement to share fees or proceeds of litigation with unqualified persons (see Circulars 00-204, 03-7 and 12-857). The list is non-exhaustive.

## APPENDICES

### PRINCIPLE 3.01 COMMENTARY 9

**CIRCULAR 12-176**

**12 March 2012**

#### **RECOVERY AGENTS Updated March 2012**

1. The Law Society wishes to remind members of its concerns about the activities of recovery agents, who are unqualified persons offering themselves to assist accident victims in their claims for compensation.

The Court of Final Appeal Judgment in *Winnie Lo v. HKSAR* FACC No. 2/2011 dated 23 February 2012 affirms the following:

‘...the offences of maintenance and champerty possess the required legal certainty to qualify as duly ‘prescribed law’ for (Basic Law) Article 39 purposes.’ (paragraph 78 of the judgment).

Thus, there is no uncertainty over whether acts of maintenance and champerty are offences.

Click [here](#) for a copy of the CFA judgment

2. The Law Society wishes to remind members of the features of Recovery Agency Contracts which could result in prosecution:

The contracts entered into between the recovery agents and the accident victims (‘recovery agency contracts’) usually provide that:

- a. the recovery agent will finance the claim by paying legal fees and other disbursements;
- b. the accident victim has to pay over a share of his compensation to the recovery agent;
- c. the accident victim has to appoint a lawyer of the recovery agent’s choice;
- d. either the accident victim gives full authority to the recovery agent to accept any settlement or if the accident victim refuses to accept a settlement offer, the recovery agent can withdraw his assistance;
- e. the accident victim has to authorize his lawyer to pay over the recovery agent’s share to the recovery agent directly;
- f. the accident victim cannot terminate the recovery agency contract until the claim is completed.

3. The Law Society also notes that such recovery agents are not professionally qualified or subject to any code of professional conduct; there is no compulsory insurance covering any claims directed at them and they are of unknown financial backing. Moreover, the majority of accident victims probably qualify for Legal Aid, which renders it unnecessary for a third party to finance their claims. Since accident compensation in Hong Kong is assessed on the basis of actual loss, the victims will not be adequately compensated if part of their compensation has to be paid over to recovery agents. The more seriously injured victims may not have sufficient means to maintain their livelihood.

#### Advice from Senior Counsel on Legality of Recovery Agency Contracts

4. The Law Society has sought advice from Senior Counsel on the legality of a number of recovery agency contracts and is advised that:
  - a. The contracts are champertous and are unenforceable.
  - b. Maintenance (of which champerty is a more serious form) remains a criminal offence in Hong Kong and the recovery agents are liable to be prosecuted.

#### Misconduct of Solicitors acting in claims financed by Recovery Agents

5. In light of the features of the recovery agency contracts and on the basis of Senior Counsel's advice, the Law Society is of the view that any solicitor who is aware that an accident victim's claim is financed by a recovery agent under a recovery agency contract should properly advise the accident victim on his legal position, and, where appropriate, advise him to apply for Legal Aid. If a solicitor acts for an accident victim in a legal action financed by a recovery agent, he will have committed professional misconduct in the following respects:
  - a. The solicitor will be in breach of Rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), in particular paragraphs (a), (b), (c) and (d),
  - b. The solicitor will be in breach of Principle 4.01 of *The Hong Kong Solicitors' Guide to Professional Conduct*, vol. 1, second edition (the 'Guide').
6. As a corollary to this Principle, the Law Society is unlikely to accept any suggestion by a solicitor that he does not know his client's claim is to be financed by a recovery agent as he has every practical and ethical reason to discuss financing of the claim with his client. The misconduct is aggravated if the solicitor subsequently seeks to claim costs from the Defendant knowing that in fact his client has no liability to pay him.

7. The triangular relationship between the recovery agent, the accident victim and the solicitor will put the solicitor in an inextricable position of conflict, as there is a strong incentive for the solicitor to maintain his relationship with the recovery agent who may be a constant source of business and compromise his duties to the accident victim when differences arise between the recovery agent and the accident victim. This will render the solicitor in breach of the fiduciary duty of openness and fairness owed to the client and which forms the Governing Principle in Chapter 7 and Principle 7.01 of the Guide.
8. If a solicitor acting for an accident victim financed by a recovery agent subsequently claims costs from the Defendant, knowing that the accident victim does not have any liability to pay him, the solicitor may be faced with serious disciplinary sanction including possible suspension from practice or even having his name struck off the Roll of solicitors.
9. If a solicitor passes on part of the accident victim's compensation to the recovery agent, then, apart from committing professional misconduct, he renders himself liable to a civil claim by the accident victim.
10. Further, depending on the exact arrangement between the solicitor and the recovery agent, the solicitor may be guilty of the offence of aiding and abetting the offence of champerty. He may also render himself in breach of section 49(1) of the *Legal Practitioners Ordinance* (Cap. 159).

#### Liability of Employed Solicitors

11. The Law Society further wishes to point out that the above acts of misconduct can be committed by the principals of a firm as well as their employed solicitors. In conducting legal action for an accident victim, an employed solicitor owes the same duties to the accident victim as does his principal. Any principals who instruct or cause their employed solicitors to commit professional misconduct are likely to be liable for an even heavier penalty.
12. It should also be pointed out that legal executives and clerks are under the same disciplinary regime as solicitors pursuant to section 2(2) of the *Legal Practitioners Ordinance* (Cap. 159).

#### Duty to Report Misconduct

13. The Law Society will have no hesitation in instituting disciplinary proceedings against any solicitor who commits the type of misconduct referred to above. Any solicitor who is aware of any such misconduct is under a duty to report the same to the Council as required under Principle 11.03 of the Guide.
14. Law Society Circular 09-674 has been superseded.

### **PRINCIPLE 3.03**

**CIRCULAR 00-204**

**24 July 2000**

#### **SOLICITORS' PRACTICE PROMOTION CODE**

##### **Resolution under paragraph 10**

1. Notice is hereby given that in accordance with paragraph 10 of the Solicitors' Practice Promotion Code, the Council of the Law Society at its meeting on 11 July 2000 resolved:
  - (1) That practice promotion in the form of a statement of a solicitor's fees as being 'from' or 'upwards of' a stated figure or words of a similar phraseology in the opinion of the Council constitutes a breach of the general principles and intent of the Code.
  - (2) Any such practice promotion effected or continued after a period of one month from the date of this notice will be regarded by the Council as a breach of the Code.
2. The period of one month has been allowed to enable members to conclude any existing arrangements that they may have in respect of practice promotion that may breach the Code as a consequence of this resolution of the Council.

Any enquiries can be directed to the Assistant Director, Regulation and Guidance on 2846 0503.



### **PRINCIPLE 3.03**

**CIRCULAR 03-7**

**13 January 2003**

#### **ISO CERTIFICATION**

1. The Solicitors' Practice Promotion Code provides, inter alia, that practice promotion must be honest and truthful, and not be likely to mislead or deceive, whether by inclusion or omission.
2. Where a firm has been awarded ISO Certification by ISO Certification agencies in Hong Kong which are accredited by the Hong Kong Accreditation Service in relation to an area of its practice, the ISO Certification Logo may be used on the firm's promotional material (except business cards) provided that:
  - (a) the area of the firm's practice to which the certification relates is clearly stated, as follows:
    - (i) on the letterhead and leaflets introducing the firm, provided that if the certification only relates to a particular area of the firm's practice, this is stated immediately beneath the logo in font no smaller than the words 'Certified Company' which appear within the logo;
    - (ii) on the firm's promotional material and advertisements subject to the qualifications set out in paragraph (i) above, and provided that it otherwise complies in all respects with the Solicitors' Practice Promotion Code;
  - (b) the following phrase, which should be legible and referable to the ISO Certification Logo (for instance, by the use of an asterisk), be inserted wherever the Logo is permitted to be used on the firm's practice promotional materials:

'This ISO [area of practice] Quality Certificate is awarded for the quality of the system of management of our [area of practice] department / practice. It is not awarded for, and makes no representation as to, the quality of our legal services.'
3. Breach of these guidelines may incur disciplinary sanctions.
4. Circulars 00-118 and 00-208 are superseded.
5. The Council has resolved to allow members a period of one month from the date of this Circular to comply with the above requirements.

Any enquiries can be directed to the Assistant Director, Regulation and Guidance on 2846-0503.

### PRINCIPLE 3.03

**CIRCULAR 12-857**

**12 November 2012**

#### LEGAL VISITS

This circular is issued to (i) remind members of the updated standing procedures agreed between the Law Society and the law enforcement agencies in relation to legal visits to persons detained in places of detention or to persons under investigation in the ICAC premises or police restricted areas by solicitors, counsel, trainee solicitors, overseas lawyers, interpreters and solicitors' clerks whose names are on the current Authorized Solicitors' Clerk List under the Authorized Solicitors' Clerks Scheme ('authorized solicitors' clerks'); and (ii) provide updated information on the Authorized Solicitors' Clerks Scheme.

- I. 1. The standing procedures for the Correctional Services Department, the Customs and Excise Department, the Immigration Department, the ICAC and the Police are summarized in Appendix 1.

Please click [here](#) for the Appendix 1

2. In addition, members are reminded of the following:-
  - a. Principals of solicitors' firms are reminded to consider whether any family or personal relationship which he or a member of his staff may have with a detained client inhibits his ability or that of his staff to advise the firm's client properly and impartially. Firms should avoid sending their solicitors, trainee solicitors or authorized solicitors' clerks to visit clients who are known to be a relative of any of them.
  - b. Amendments to a formal request made by any person other than the solicitor signing the authorization letter or the principal(s) of the solicitors' firm will not be accepted. All applications will be closely scrutinized. Refusals and amendments to applications of this nature will be referred to the Law Society for investigation and inappropriate applications will be investigated as matters of professional misconduct. Where appropriate, the circumstances will be referred to the Hong Kong Bar Association.
  - c. Trainee solicitors become paralegals or clerks when their trainee solicitor contracts expire. They are not allowed to conduct legal visits until they are issued with the first Practising Certificates, unless their names are on the current Authorized Solicitors' Clerks List. Trainee solicitors are urged to apply to be placed on the Authorized Solicitors' Clerks List

well before the expiration of their trainee solicitor contracts if they wish to be continually able to conduct legal visits.

- d. Overseas lawyers who do not fall within the exception of Section 50B(2) of the *Legal Practitioners Ordinance* (Cap. 159) and are employed by law firms as paralegals are not allowed to conduct legal visits unless their names are on the current Authorized Solicitors' Clerks List.
- e. The Police no longer participate in the Authorized Solicitors' Clerks Scheme. The Police will, however, continue to conduct integrity checks on the background of the applicants applying to be authorized solicitors' clerks.

### 3. Authority to permit legal visits

The Law Society is not in any position to grant any 'special permission' for any person to visit clients in places of detention. The authority to permit entry of any person into places of detention is vested in the Correctional Services Department, the Customs and Excise Department, the Immigration Department, the Police and the ICAC, as the case may be.

## II. Authorized Solicitors' Clerks Scheme

### 1. Forms

All authorized clerks applications must be made in the attached Application form (lvform 3.2) together with the attached Authorization (lvform 3.3). The format of the Authorization (lvform 3.3) complies with the *Personal Data (Privacy) Ordinance* (Cap. 486). Details of criminal conviction data will be released by the Police when the Authorization (lvform 3.3) is signed by the applicant and witnessed by a member of the Law Society. Applications to delete names from the current Authorized Solicitors' Clerks List must be made by submitting the attached Deletion form (lvform 3.4).

Please click the link below to download:

[lvform3.2](#)

[lvform3.3](#)

[lvform3.4](#)

### 2. Authorized Solicitors' Clerks List

The Law Society is responsible for updating the Authorized Solicitors' Clerks List and the Registered Foreign Lawyers List. The updated Authorized Solicitors' Clerks List and the Registered Foreign Lawyers List are sent to the participating law enforcement agencies every two months.

A solicitors' clerk who was on the Authorized Solicitors' Clerks List of a previous employing firm and has changed employment to work for another solicitors' firm will, until his new application to be on the Authorized Solicitors' Clerk List as an authorized clerk of the new firm has been approved, be required to produce to the law enforcement agencies a letter of authorization from his new employing firm signed personally by a named solicitor corroborating his change of employment and indicating that a new application has been made by him.

3. The power of the Law Society

The Council of the Law Society (which has delegated its powers to the Consents Committee) has accepted the responsibility to consider applications for the names of solicitors' clerks to be included in the Authorized Solicitors' Clerks List. All applicants about whom the Police have revealed information, and the firms by which they are employed, will be informed of the information and their representations will be sought.

4. Professional misconduct

The purpose of legal visits by authorized solicitors' clerks is to take instructions from clients and make arrangements for the attendance of solicitors, counsel and trainee solicitors. Any report of abuse of the Authorized Solicitors' Clerks Scheme and/or violation of the law, for example, a breach of section 18 of the *Prisons Ordinance* (Cap. 234) will be treated as a matter of misconduct and subject to investigation by the Law Society.

5. Intervention by the Law Society

Immediately after the exercise of its intervention powers under section 26A of the *Legal Practitioners Ordinance* (Cap. 159), into the practice of a firm, the Law Society will delete from the current Authorized Solicitors' Clerks List the names of all the authorized solicitors' clerks of that firm and notify the law enforcement agencies of the same.

6. Practice Direction D6 and Rule 4B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H)

Members are separately reminded of the Law Society's Practice Direction D6 specifying the number of authorized clerks for each firm and of rule 4B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) prohibiting the employment of a clerk, either part-time or full-time, by more than one firm of solicitors, save with the written approval of the Council.

The following circulars have been superseded: 01-84, 01-147, 02-9, 02-10, 02-144, 07-258, 07-296 and 11-315.

# CHAPTER 4

## FEES

- 4.01 Inform client about costs
  - 1. Explain extent of work
  - 2. Estimate of cost
  - 3. Ensure that 'estimates' are not 'agreed fees'
  - 4. Disbursements
  - 5. Weigh outcome against cost
  - 6. Advertising fees
  - 7. Rule 3 of the *Solicitors' Practice Rules*
  - 8. Client's responsibility for costs in contentious proceedings
  - 9. Legal aid or assistance by the Duty Lawyer Service
  - 10. Advice on legal aid in writing
  - 11. Duty applies throughout proceedings
  - 12. Obtain sufficient funds
  - 13. Client's responsibility for costs in civil proceedings
  - 14. Client's responsibility for costs in criminal proceedings
  - 15. Criminal litigation
    - Confirm in writing to the client - rule 5D of the *Solicitors' Practice Rules*
  - 16. Non criminal litigation
    - Client should sign the letter in confirmation
  - 17. Prohibition against taking cases from recovery agents
- 4.02 Agreed fees must be recorded
  - 1. Agreed fee cannot be unilaterally altered
  - 2. Client's right to challenge agreement on fees
  - 3. Fee agreements usually to be written
  - 4. Agreed fees must not be paid into client account
  - 5. Itemized bills of costs
- 4.03 Provide details of fees
  - Authority for disbursements
- 4.04 Oral estimates
  - Inform client if estimate likely to be exceeded
- 4.05 Limit on costs may be set
  - 1. Obtain instructions if limit exceeded
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- 4.06 Regular information
  - 1. Monitor costs

2. Benefit of keeping client informed
- 4.07 Payment on account
  1. Total charge may exceed first payment
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- 4.12 Taxation of bill
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  1. *Solicitors (General) Costs Rules*
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- 4.14 Solicitor liable to pay agents
  1. Experts, agents and witnesses
  2. Agent's fee restrictions to be made clear
- 4.15 Overseas lawyers' fees
  1. Proper overseas fees
  2. Contingency fees of overseas lawyers
- 4.16 Sharing profit costs
  1. Factoring
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  3. See Circular 16-1125 updated on 16/12/2022 as per Circular 22-827
- 4.17 Contingency fee arrangements
  1. Definition
  2. Debt recovery commissions
  3. Champerty and Maintenance
  4. ORFS agreements added on 16/12/2022 as per Circular 22-827
  5. TFA agreements added on 16/12/2022 as per Circular 22-827

## Appendices

Circular 12-176 'Recovery Agents' see Chapter 3

Circular 16-1125 'Sharing of Fees' updated on 16/12/2022 as per Circular 22-827

#### 4.01 Inform clients about costs

On taking instructions a solicitor should normally give his client the best information he can under the circumstances about the likely costs of the matter. The solicitor should discuss with the client how the costs and disbursements are to be met and must consider whether the client (if an individual) may be eligible and should apply for legal aid (including legal advice and assistance) or the assistance of the Duty Lawyer Service. The solicitor should also consider whether the client's liability for costs may be covered by insurance.

#### *Commentary*

1. A solicitor should ensure that his client is given an explanation by a person with the appropriate competence about the work which is likely to be involved in carrying out his instructions and the time which may be taken.
2. Wherever possible, a solicitor should when requested by a client give an estimate of the likely costs of acting in a particular matter. If, because of the nature of the work, a solicitor cannot give even an approximate estimate of his costs and disbursements, he should inform his client accordingly and in that case should give such a general forecast as he can, with the indication of the method by which his fees will be calculated, taking care that his client is kept informed about the costs as the matter proceeds.
3. When giving estimates, a solicitor should take care to ensure that he is not binding himself to an agreed fee unless such is his intention. Clear and appropriate words should be used to indicate the nature of the estimate. To give an estimate which has been pitched at an unrealistically low level solely to attract the work and subsequently to charge a higher fee is improper because it misleads the client as to the true or likely cost. Regard should also be had to Principle 4.03 and its Commentary.
4. Disbursements are included in the definition of costs in the *Legal Practitioners Ordinance* (Cap. 159) section 2. Disbursements have been defined as 'such payments as the solicitor in the due discharge of his duty is bound to make (whether or not his client furnishes him with the money for the purpose or with money on account) as for example court fees, barrister's fees, expenses of witnesses, agents, stationers or printers'.
5. In all matters a solicitor must consider with his client whether the likely outcome will justify the expense or risk involved. It is in the interests of both the solicitor and the client that the solicitor's advice on these issues should be confirmed to the client in writing at the outset and at appropriate stages thereafter.



6. A solicitor may advertise his fees but any publicity concerning charges or a basis of charging must comply with the Solicitors' Practice Promotion Code.

7. Rule 3 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) provides:

'A solicitor shall not hold himself out or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business in contentious matters at less than the scale fixed by Rules of Court or by any other enactment or in any other matters at less than such scale as may from time to time be fixed by any enactment or by the Society.'

See section 56 of the *Legal Practitioners Ordinance* (Cap. 159).

8. If a client is not legally aided but the matter is contentious he should be informed at the outset of the case and at appropriate stages thereafter:

- (a) that in any event he will be personally responsible for payment of his own solicitor's bill of costs regardless of any order for costs made against his opponent;
- (b) of the probability that if he loses he will have to pay his opponent's costs as well as his own;
- (c) that even if he wins his opponent may not be ordered to pay the full amount of the client's own costs and may not be capable of paying what he has been ordered to pay; and
- (d) that if his opponent is legally aided he may not recover his costs even if successful. See section 16C of the *Legal Aid Ordinance* (Cap. 91).

9. Where a solicitor considers that his client may be eligible for legal aid including the Supplementary Legal Aid Scheme or the assistance of the Duty Lawyer Service, he must inform the client of its availability where to apply for it and must recommend that the client apply for it.

10. If such advice is given but the client chooses not to apply for legal aid or the assistance of the Duty Lawyer Service, either a written note of the advice given should be made and put on the file or, preferably, the advice given should be recorded in a letter to the client.

11. The duty to advise as to legal aid does not only apply at the outset of the retainer but, as the matter proceeds, it is the duty of a solicitor to ensure that any material change in his client's means of which he is aware is at once taken into consideration in the context of eligibility for legal aid. Equally a solicitor acting for an aided person has a duty to report to the Director of Legal Aid any wilful failure by his client to comply with any regulation as to the provision of information which includes a disclosure of a change in his financial circumstances (see also Principle 5.22 Commentary 5).

12. If a client is not entitled to legal aid or chooses not to apply for legal aid or the assistance of the Duty Lawyer Service, a solicitor would be well advised to obtain sufficient funds for his costs and disbursements to cover the entire case. He should reach a clear agreement with the client, recorded in writing, on costs and disbursements, for example the amount to be charged, the basis on which they are calculated, when and the stages at which they will be payable.
13. If a client is legally aided in civil proceedings, he should be informed at the outset of the case and at appropriate stages thereafter:
  - (a) of the effect of the statutory charge on his case;
  - (b) that if he loses the case he may still be ordered by the Court to contribute to his opponent's costs even though his own costs are covered by legal aid;
  - (c) that even if he wins, his opponent may not be ordered to pay the full amount of his costs and may not be capable of paying what he has been ordered to pay; and
  - (d) of his obligation to pay any contribution assessed and of the consequences of any failure to do so.
14. If a client is legally aided in criminal proceedings, he should be informed at the outset of the case that he may be liable to pay a contribution and the effect of not paying it.
15. In criminal litigation, a solicitor shall as soon as practicable and not more than seven days after receiving instructions, confirm by letter to the client, inter alia, the services to be provided by the firm and the fee to be charged or an estimate of such fee (see rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and Principle 4.02 Commentary 3). Principle 4.02 Commentary 3 is applicable equally to persons who give instruction under rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).
16. In matters other than criminal litigation, it would be advisable for a solicitor to draft and prepare a retainer letter identifying the scope of service to be provided and the costs to be charged in order to avoid any potential dispute with the client and the client should sign the letter in confirmation.
17. Solicitors are prohibited from taking cases referred to them by recovery agents as they will be in breach of Principle 3.01 and Circular 12-176.

## 4.02 Agreed fees must be recorded

**When fees have been agreed with a client the solicitor must promptly provide the client with a written record of the agreement, signed by the solicitor stating what the fee is, and what it covers and whether it includes disbursements.**

### ***Commentary***

1. If there is an agreement between a solicitor and his client that the solicitor is to be remunerated at an agreed fee, the solicitor is bound to do the work covered by the agreement for that fee, even though circumstances arise which make the work unremunerative for the solicitor.
2. Sections 56 and 58–62 of the *Legal Practitioners Ordinance* (Cap. 159) make provision for agreements on fees in non-contentious and contentious business respectively. The effect of such provisions is to restrict a client's right to challenge a bill, subject to safeguards.
3. Section 56 of the *Legal Practitioners Ordinance* (Cap. 159) requires an agreement as to remuneration in non-contentious matters to be in writing and signed by the person to be bound by it or his agent. Section 58 requires an agreement as to remuneration in contentious matters to be in writing. Rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) provides that an agreement as to fees in criminal matters must be in writing and signed by the client and the solicitor.
4. Under rule 9(2) of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F), money received for or on account of an agreed fee which is paid by a client to his solicitor must be paid into an office account. This applies whether or not the work for which the fee was paid has been undertaken.
5. If requested, an itemized bill of costs must be rendered to a client if the amount of costs exceeds \$10,000 even though there has been an agreed fee. If there are barrister's fees, these must be separately disclosed even if the total agreed sum includes barrister's fees: Practice Direction B.1.

#### **4.03 Provide details of fees**

If no fee has been agreed or estimate given, a solicitor should tell his client how the fee will be calculated, for example, whether on the basis of an hourly rate plus any mark-up, a percentage of the value of the transaction or a combination of both, or any other proposed basis. The solicitor should tell his client what other reasonably foreseeable payments he may have to make either to his solicitor or to a third party and the stages at which they are likely to be required.

##### ***Commentary***

All disbursements incurred by a solicitor should be expressly or impliedly authorised by his client and, if the amount is substantial, the solicitor should obtain the client's agreement in writing. If the solicitor does not obtain the client's agreement in writing the client may not be required to reimburse the solicitor, if he disputes the bill (see Order 62 rule 29(1) of the *Rules of the High Court* (Cap. 4 sub. leg. A)).

#### **4.04 Oral estimates**

Oral estimates should preferably be confirmed in writing. The final amount should not substantially vary from the estimate unless the client has been informed of the reasons for the variations, preferably in writing.

##### ***Commentary***

A solicitor should inform his client from the moment it appears that his estimate will be or is likely to be exceeded. He should not wait until he submits his bill of costs.

#### **4.05 Limit on costs may be set**

**If a matter is not to be undertaken under legal aid or covered by insurance so that the client is personally liable for his solicitor's costs he should be told in appropriate cases that he may set a limit on the costs which may be incurred without further reference to him.**

##### ***Commentary***

1. A solicitor must not exceed any limit without the authority of his client. Further, a solicitor must, as soon as possible, inform his client where the limit imposed on the expenditure is insufficient and obtain the client's instructions as to whether he wishes the solicitor to continue with the matter.
2. Where a solicitor continues to act after the costs have exceeded the limit which his client has fixed and then presents a bill for a sum which substantially exceeds that limit, he may be guilty of professional misconduct. The excess may also be disallowed on taxation in which case the solicitor may be liable for the costs of the taxation.

#### **4.06 Regular information**

**Whether or not a client has set a limit he should be told on an appropriately regular basis the approximate amount of the costs to date.**

##### ***Commentary***

1. A solicitor should monitor the position regarding costs which have accrued to date. The keeping of adequate time records will assist.
2. Failure to keep a client informed, so far as possible of the costs incurred, could prejudice a solicitor's ability to recover a fair and reasonable fee for the work done.

#### 4.07 Payment on account

**A solicitor may, at the outset of the retainer, require his client to make a payment or payments on account of profit costs and disbursements to be incurred.**

##### **Commentary**

1. Where a solicitor receives such a payment on account of profit costs or disbursements to be incurred, he should make it clear to his client that they may be greater than the sum paid in advance, unless such sums represent the total charges for the whole work.

See also Principle 4.01 Commentary 13 and Principle 12.04 Commentary 4.

2. If a solicitor requires a client to pay a sum on account of costs to be incurred, that sum must be a reasonable amount in all the circumstances.
3. Where a solicitor is acting under an ORFS agreement, no payment on account or deposit on account should be collected for the uplifted portion of relevant fee (i.e. the portion of the fee the payment of which is dependent on the relevant outcome of the arbitration) under the conditional fee agreement, damages-based agreement or hybrid damages-based agreement (as defined in Part 10B of the *Arbitration Ordinance* (Cap. 609)), which depends on the triggering of a condition which will take place on a future occasion (see Principle 1.09).

For the avoidance of doubt, payment on account may be collected for the lower fees agreed in such an ORFS agreement (which does not depend on any such trigger condition).

added on  
16/12/2022 as per  
Circular 22-827

#### 4.08 Interim bills

**If a solicitor wishes to render interim bills he must have the agreement of his client.**

##### ***Commentary***

1. An agreement for interim payments should be evidenced in writing.
2. Without such an agreement, a solicitor cannot sue for his profit costs until the work which is the subject of the retainer is completed and a bill rendered, nor can he justifiably terminate his retainer if the client refuses to make such a payment.

#### 4.09 Deliver bill of costs promptly

**A solicitor should deliver a bill of costs to his client within a reasonable time of concluding the matter to which the bill relates.**

##### ***Commentary***

See the definition of 'client' in section 2(1) of the *Legal Practitioners Ordinance* (Cap. 159) and rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).

#### 4.10 Detailed costs in the bill

**A solicitor's bill of costs must contain sufficient information to identify the matter to which it relates and in the case of interim bills must state the period covered.**

##### **Commentary**

1. A solicitor must ensure that a bill complies with the requirements of section 66 of the *Legal Practitioners Ordinance* (Cap. 159). The section provides inter alia, that where a solicitor wishes to sue on a bill, the bill must be signed by the solicitor if he is a sole practitioner or, if the costs are due to a firm, by one of the partners of that firm, either in his own name or in the name of the firm. Alternatively, the bill may be accompanied by a letter which is so signed and which refers to the bill.
2. A bill should show disbursements separately from profit costs.
3. In contentious matters if a bill is disputed, the client has the right to require the solicitor to deliver, in lieu of a gross sum bill, a bill containing detailed items, provided that the client makes the request within the time limit specified in section 63 of the *Legal Practitioners Ordinance* (Cap. 159). Once such a request has been made, the effect is that the original gross sum bill is of no effect.

See also Principle 4.02 Commentary 5.

#### 4.11 Solicitor cannot sue client for one month

**A solicitor may not sue his client until the expiration of one month from the delivery of the bill, unless the solicitor has been given leave to do so on the grounds set out in section 66 of the *Legal Practitioners Ordinance* (Cap. 159).**

##### **Commentary**

A solicitor wishing to sue on an agreement for his remuneration, whether in contentious or non-contentious matters, should refer to Part VI of the *Legal Practitioners Ordinance* (Cap. 159).



#### 4.12 Taxation of bill

**If a dispute arises on a bill or a query is raised about a bill the client must be told, preferably in writing, of his right to apply to have the bill taxed.**

#### 4.13 Overcharging

**A solicitor must not overcharge.**

##### ***Commentary***

1. See the *Solicitors (General) Costs Rules* (Cap. 159 sub. leg. G) and in particular rule 5 as to what may be fair and reasonable.
2. If an agreement has been made between a solicitor and his client which is found to be wholly unreasonable as to the amount of the fees charged or to be charged, disciplinary action could be taken against the solicitor.
3. Where a solicitor has a bill of costs prepared by a costs draftsman, the bill is nonetheless the responsibility of the solicitor.

#### 4.14 Solicitor liable to pay agents

**Subject to Principle 12.04, unless there is an agreement to the contrary, a solicitor is personally responsible for paying the proper costs of any professional agent or other person whom he instructs on behalf of his client, whether or not he receives payment by his client.**

##### ***Commentary***

1. Principle 4.14 covers the proper costs of experts as well as professional and ordinary witnesses and enquiry agents.
2. Where a solicitor wishes to restrict his liability to an agent to whatever sums are allowed on taxation, he should make this clear to the agent before instructing him.

#### 4.15 Overseas lawyers' fees

**A solicitor who instructs an overseas lawyer whether practising in Hong Kong or elsewhere is liable personally to pay that lawyer's proper fees, unless there has been an express agreement to the contrary.**

##### **Commentary**

1. Difficulties may sometimes arise in ascertaining what are the proper fees of a foreign lawyer. In some circumstances, fees may be regulated by a scale approved by the relevant bar association, law society or other authority. In case of difficulty, reference may be made to the appropriate foreign bar association or law society in an endeavour to ascertain what would be the proper fee in the case in question. It should be noted that there are sometimes time limits within which fees must be challenged.
2. There is no objection to a Hong Kong solicitor when instructing a foreign lawyer in proceedings in a foreign jurisdiction agreeing to pay the foreign lawyer's fees on a contingency basis provided that contingency fees are permitted within that jurisdiction.

#### 4.16 Sharing profit costs

**Subject to the exceptions set out in rule 4 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and Parts 10A and 10B of the *Arbitration Ordinance* (Cap. 609), a solicitor shall not share or agree to share his profit costs with any person other than a practising solicitor.**

amended on  
16/12/2022 as per  
Circular 22-827

##### **Commentary**

1. A solicitor should not factor his book debts: see also Principle 8.01 Commentary 33.
2. The Council has granted a general waiver under rule 6 from rule 4 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) to enable solicitors to accept payment of their fees by the use of a credit card facility.
3. See Circular 16-1125.

updated on  
16/12/2022 as per  
Circular 22-827

#### 4.17 Contingency fee arrangements

**A solicitor may not enter into a contingency fee arrangement for acting in contentious proceedings (save where permitted under the law, e.g. under the *Arbitration Ordinance* (Cap. 609)): see section 64 of the *Legal Practitioners Ordinance* (Cap. 159).**

amended on  
16/12/2022 as per  
Circular 22-827

##### ***Commentary***

1. A contingency fee arrangement is any arrangement whereby a solicitor is to be rewarded only in the event of success in litigation by the payment of any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise). This is so, even if the agreement further stipulates a minimum fee in any case, win or lose.
2. This Principle 4.17 only extends to agreements which involve the institution of proceedings. Consequently, it would not be unlawful for a solicitor to enter into an agreement on a commission basis to recover debts due to a client, provided that the agreement is limited strictly to debts which are recovered without the institution of legal proceedings.
3. As to champerty and maintenance see *Winnie Lo v. HKSAR* FACC 2 of 2011.
4. For TFA and ORFS agreements under Parts 10A and 10B of the *Arbitration Ordinance* (Cap. 609) respectively, see Principle 1.09 and relevant Commentaries thereunder and Principles 7.01, 7.02 and 7.03 and relevant Commentaries thereunder.
5. For TFA agreements under Part 10A of the *Arbitration Ordinance* (Cap. 609), see also Principle 3.01 Commentaries 5 and 10.

added on  
16/12/2022 as per  
Circular 22-827

added on  
16/12/2022 as per  
Circular 22-827

**APPENDICES**

**PRINCIPLE 4.01 COMMENTARY 17**

**CIRCULAR 12-176 ‘RECOVERY AGENTS’ SEE CHAPTER 3**

## PRINCIPLE 4.16 COMMENTARY 3

**CIRCULAR 16-1125**

**28 December 2016**

updated on  
16/12/2022 as per  
Circular 22-827

### SOLICITORS' PRACTICE RULES

#### Rule 4 – Sharing of Fees

1. The Society is aware that some Hong Kong firms wish to share profits with their parent firms (or other firms with which they have an association) in overseas jurisdictions.
2. The effect of rule 4 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) ('the Rules') is that a Hong Kong solicitor may not share profits with any unqualified persons, with certain specified exceptions.
3. Pursuant to rule 6 of the Rules, the Council has the power to waive any of the provisions of the Rules in any particular case either unconditionally or subject to such conditions as the Council may think fit to impose.
4. Accordingly, members who wish to share profits with lawyers practising overseas must apply for a waiver of rule 4. Applications should contain all relevant information and will be dealt with on a case-by-case basis by the Consents Committee. With effect from 1 January 2017, the fee for such application is \$20,000.
5. Circular 09-397 is superseded.
6. Enquiries should be directed to the Assistant Director, Regulation and Guidance on telephone no. 2846-0503.

# CHAPTER 5

## RETAINER

### (1) ACCEPTING INSTRUCTIONS

#### 5.01 Freedom to accept instructions

1. Unethical refusal
2. Solicitor's opinion of client's guilt
3. Client suing former solicitor
4. Mental capacity of client
5. Inform if instructions are declined
6. Breach of law or professional misconduct
7. Solicitor's competence and time availability
8. Need for written retainers
9. ORFS added on 16/12/2022 as per Circular 22-827

### (2) ACTING OR CONTINUING TO ACT

#### 5.02 Breach of law or professional misconduct

1. Duty to uphold the law
2. Advice on commission of a crime
3. Abuse of process
4. Client behaving unreasonably or committing material breach of an ORFS agreement added on 16/12/2022 as per Circular 22-827

#### 5.03 Competence to act

1. Professional responsibility
2. Insufficient time or experience
3. Delegation

#### 5.04 Duress or undue influence

1. Suspicion of duress
2. Vulnerable clients
3. Client behaving unreasonably or committing material breach of an ORFS agreement added on 16/12/2022 as per Circular 22-827

#### 5.05 Unclear instructions

1. Preparation of wills
2. Client behaving unreasonably or committing material breach of an ORFS agreement added on 16/12/2022 as per Circular 22-827

#### 5.06 Third party instructions

1. Duty is to client
2. Instructions in litigation

- 5.07 Conflict of interest
  - 1. Between solicitor and client
  - 2. Between clients
  - 3. Client behaving unreasonably or committing material breach of an ORFS agreement added on 16/12/2022 as per Circular 22-827
- 5.08 Appointment leading to conflict
  - 1. Near relative
  - 2. Member of Tribunal or Panel
- 5.09 Law Society investigations
  - 1. Improper to preclude report
  - 2. Settlements not to preclude
  - 3. Cross reference to Principle 6.01 Commentary 7
- 5.10 Solicitor as a witness  
Decline instructions
- 5.11 Where another solicitor has been retained
  - 1. Informing previous solicitor
  - 2. Second opinions
  - 3. Separate interests
  - 4. Executors are free to select a solicitor

### **(3) DUTIES OWED DURING A RETAINER**

- 5.12 Diligence, care and skill
  - 1. Cease representation
  - 2. Agree and confirm scope of retainer
  - 3. Advice at outset of retainer
  - 4. Explain documents
  - 5. Advise progress
  - 6. Implied and ostensible authority to bind client
  - 7. A written retainer is desirable
- 5.13 Confidentiality (see Chapter 8)
- 5.14 Rules of professional conduct to be observed
  - 1. Limitations on retainer
  - 2. ORFS and TFA arrangements added on 16/12/2022 as per Circular 22-827
- 5.15 No exploitation
- 5.16 Fiduciary duty (see Chapter 7)
- 5.17 Communication with client
  - 1. Advise client of responsible solicitor
  - 2. Changes of responsible solicitor
  - 3. Advise client when barrister is needed
  - 4. Inform client about changes of law
  - 5. Frequency of communications with the client
  - 6. Justified withholding of information

- 5.18 Honest, candid and objective advice
  - 1.&2. Explanations
  - 3. Investigation before advice may be necessary
  - 4. Bold assurances
  - 5. Advice on non-legal matters
- 5.19 Unbiased advice
  - ORFS and TFA arrangements added on 16/12/2022 as per Circular 22-827
- 5.20 Costs
  - Keep client informed
- 5.21 Advice about legal aid or duty lawyer
  - 1.&2. Consequences of failure to advise

#### **(4) TERMINATION OF RETAINER**

- 5.22 Constraints on termination
  - 1. Written retainer
  - 2. Entire contract rule
  - 3. Good reasons
  - 4. Failure to pay disbursements or profit costs
  - 5.&6. Termination during court proceedings
  - 7. Termination by operation of law
  - 8. Sole practitioner ceasing practice
  - 9. Client's choice of solicitor if firm dissolves
  - 10. Disagreements about new arrangements
  - 11. Notice to clients about amalgamation
  - 12. Reasonable notice must be given
  - Information upon termination of retainer
  - 13. ORFS and TFA arrangements added on 16/12/2022 as per Circular 22-827
- 5.23 Lien
  - 1. Passive nature
  - 2. Powers of the Law Society
  - 3. Power of the court
  - 4. Release subject to undertaking
  - 5. Legally aided client
  - 6. Charges

#### **Appendix**

Circular 12-475 'Storage and Destruction of Old Files'



## (1) ACCEPTING INSTRUCTIONS

### 5.01 Freedom to accept instructions

**A solicitor is generally free to decide whether to accept instructions from any prospective client.**

#### **Commentary**

1. A solicitor should not refuse to accept instructions based upon the race, colour, ethnic or national origins, sex or religious or political beliefs of a prospective client.
2. In deciding whether to represent a prospective client who is accused of a crime, a solicitor should not be influenced by his own opinion of the client's guilt.
3. A solicitor who is instructed to bring an action against his prospective client's former solicitor should, provided he is competent and able, accept those instructions. However, he should not accept instructions to sue a colleague with whom or with any of whose partners or solicitors he is on friendly terms; he should instead explain the situation and advise the prospective client to seek advice elsewhere.
4. A solicitor cannot be retained by a prospective client who does not have mental capacity. There is a legal presumption of capacity unless the contrary is shown. Whether a prospective client does have capacity is a matter of law and it should be borne in mind that different levels of capacity are required for different activities. If there is doubt about a prospective client's mental capacity it may be advisable, where possible, to seek an opinion from the prospective client's medical doctor.
5. Where instructions are declined, the party giving the instructions must be promptly informed of the solicitor's decision. The solicitor should exercise his judgment whether to give reasons for his decision.
6. When considering whether to enter into a retainer, solicitors must not accept instructions where to do so will involve a breach of law or professional misconduct, e.g. those relating to anti-money laundering and instructions from recovery agents, property fraud, or security transactions with a potentially unduly influenced party. See Practice Direction P paragraphs 18 to 28 in relation to anti-money laundering and Circular 12-176 in relation to Recovery Agents.
7. In deciding whether to represent a client, a solicitor should consider his competence and time availability (see Chapter 6).
8. Save in the case of retainers in criminal matters, which must be in writing under Rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), in civil matters it is advisable for a solicitor to enter into a written retainer with his clients (see also Principle 4.01 Commentary 16).
9. For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder.

added on  
16/12/2022 as per  
Circular 22-827

## (2) ACTING OR CONTINUING TO ACT

### 5.02 Breach of law or professional misconduct

**A solicitor must not act or continue to act where to do so would involve him in a breach of law or in professional misconduct.**

#### *Commentary*

1. A solicitor who has accepted instructions to act is under a duty to uphold the law and to observe the rules of professional conduct; a client must accept these limitations on the performance of a retainer.
2. If a solicitor becomes aware that he will or has become involved in assisting someone to break the law he must cease to act for that person in that matter.
3. A solicitor must not act or continue to act where to do so would amount to an abuse of process.
4. A solicitor who is a party to an ORFS agreement may terminate the ORFS agreement before the conclusion of the matter to which the agreement relates if the solicitor reasonably believes that (a) the client has committed a material breach of the agreement or (b) the client has behaved, or is behaving, unreasonably (see also Principle 1.09, Principle 5.01 Commentary 9, Principle 5.03 Commentary 1, Principle 5.04 Commentary 3, Principle 5.05 Commentary 2, Principle 5.07 Commentary 3 and Principle 5.22 Commentary 13). A solicitor may consider including relevant terms and conditions in the ORFS agreement to provide for termination of ORFS agreement under other circumstances such as conflict of interest.

added on  
16/12/2022 as per  
Circular 22-827

### 5.03 Competence to act

**A solicitor must not act or continue to act in circumstances where he cannot represent the client with competence or diligence.**

#### *Commentary*

1. This obligation to refuse or to cease to act is a consequence of the professional responsibility to act competently and promptly in carrying out any retainer (see Chapter 6).
2. This would apply where a solicitor has insufficient time to devote to the matter, or insufficient experience or skill to deal with the instructions.
3. This Principle will not prevent a solicitor from acting if he is able to do so competently by, for example, instructing suitable counsel. Nevertheless he must be able to exercise sufficient care and control in the matter (see Principle 6.01).

#### 5.04 Duress or undue influence

**A solicitor must not continue to act where he suspects after reasonable enquiry that his instructions have been given by a client under duress or undue influence.**

##### *Commentary*

1. If a solicitor suspects or has reason to suspect that a client's instructions were given under duress or undue influence, he must either see the client alone in order to satisfy himself that the instructions were freely given, or refuse to act.
2. Particular care may need to be taken where clients are elderly or otherwise vulnerable to pressure from others.
3. A solicitor should consider whether it is appropriate to terminate an ORFS agreement if the client has behaved or is behaving unreasonably (see also Principle 1.09 and Principle 5.02 Commentary 4).

added on  
16/12/2022 as per  
Circular 22-827

#### 5.05 Unclear instructions

**A solicitor is entitled to cease to act if he cannot obtain clear instructions from a client.**

##### *Commentary*

1. In relation to the preparation of wills, especially where the client may be elderly, it is important to obtain enough information about the client's circumstances to be able properly to act for the client. When asked to prepare a will on the basis of written instructions alone, a solicitor should always consider carefully whether these are sufficient or whether the solicitor should see the client to discuss the instructions.
2. A solicitor should consider whether it is appropriate to terminate an ORFS agreement if the client has behaved or is behaving unreasonably (see also Principle 1.09 and Principle 5.02 Commentary 4).

added on  
16/12/2022 as per  
Circular 22-827

#### 5.06 Third party instructions

**Where instructions are received not from a client but from a third party purporting to represent that client, a solicitor should obtain written instructions from the client that he wishes him to act. In any case of doubt he should see the client or take other appropriate steps to confirm instructions.**

##### *Commentary*

1. In such circumstances a solicitor must advise the client without regard to the interests of the source from which he was introduced.

2. This Principle should particularly be borne in mind when instructions are received to commence or defend litigation; a solicitor is required by law to be properly authorised to act on behalf of a litigating client; if he is not he may become personally liable for costs if the action is struck out.

### 5.07 Conflict of interest

**A solicitor must not act, or must decline to act further, where there is, or is a significant risk of, a conflict of interest.**

#### *Commentary*

1. For conflict of interest between a solicitor or his firm and a client, see Chapter 7.
2. For conflict of interest between clients, see Chapter 9.
3. In relation to ORFS agreements, see Principle 1.09 and Principle 5.02 Commentary 4.

added on  
16/12/2022 as per  
Circular 22-827

### 5.08 Appointment leading to conflict

**A solicitor must not act or continue to act where either he, his partner, employer, employee or near relative holds some office or appointment which may lead to a conflict of interest or which may give the impression to the public that the solicitor is able to make use of such appointment for the advantage of the client.**

#### *Commentary*

1. The expression 'near relative' includes a spouse, parent, child, brother, sister, or spouse of any of them.
2. For example, a solicitor must not act or continue to act where he or his partner, employer, employee or near relative is a member of the tribunal before which the matter is to be heard. However, if he or his partner, employer, employee or near relative is merely a member of the panel from which that tribunal is selected, he is not thereby disqualified from acting.

### **5.09 Law Society investigations**

**A solicitor should not accept instructions which at any stage involve an agreement whereby the Law Society is precluded from investigating the conduct of a solicitor or his employee.**

#### ***Commentary***

1. It is improper for a solicitor to seek to preclude his client or former client from reporting a solicitor's conduct to the Law Society (see Principle 6.01 Commentary 9).
2. It is also improper for a solicitor acting for either party to a dispute to accept instructions to offer a settlement on similar terms.
3. As to limitation of liability for negligence, see Principle 6.01 Commentary 7.

### **5.10 Solicitor as a witness**

**A solicitor must not accept instructions to act as an advocate for a client if it is clear that he or a member of his firm will be called as a witness in the case, unless his evidence is purely formal.**

#### ***Commentary***

For further discussion, see Principle 10.13.

### **5.11 Where another solicitor has been retained**

**A solicitor generally must not accept instructions to act in a matter where another solicitor is acting for the client in respect of the same matter unless the first solicitor consents.**

#### ***Commentary***

1. Where the first retainer has been determined, another solicitor may act, and there is no duty on the second solicitor to inform the first solicitor of the fact that he has been so instructed, except in litigation where the first solicitor is on the record.
2. This Principle does not preclude a solicitor from giving a second opinion without the first solicitor's knowledge. However, a solicitor from whom a second opinion is sought must carefully consider whether he is in possession of sufficient facts to give such an opinion. In no

circumstances should the second solicitor improperly seek to influence the client to determine the first solicitor's retainer.

3. Furthermore, a solicitor is not precluded from advising another person on the subject matter of the first solicitor's advice if the other person has a separate or distinct interest.
4. Executors appointed under a will are free to choose a solicitor to act in the administration, notwithstanding that the testator may have expressed a wish in the will that a particular firm be used. There is no duty imposed on the solicitor instructed to act to notify the firm named in the will.

### (3) DUTIES OWED DURING A RETAINER

#### 5.12 Diligence, care and skill

**A solicitor who has accepted instructions on behalf of a client is bound to carry out those instructions with diligence and must exercise reasonable care and skill.**

#### *Commentary*

1. If a solicitor cannot act competently or efficiently he should cease representing the client (see Principle 6.01 Commentary 3 in particular).
2. A solicitor must act within his client's express or implied authority. It is therefore essential at the outset for a solicitor to agree clearly with his client the scope of his retainer and subsequently wherever possible to refer any matter of doubt to his client (see also Principle 6.01 Commentary 8).
3. A client should be told in simple language at the outset of a matter or as soon as possible thereafter the issues raised and how they will be dealt with and, in particular, the immediate steps to be taken. The client should also be informed about costs (see Chapter 4). The solicitor should consider whether it is appropriate to confirm in writing the advice given and the instructions received.
4. A solicitor should explain to his client the effect of any important and relevant document.
5. A solicitor should keep his client informed of the progress of the matter, any significant development in the matter and of the reason for any serious delay which occurs. This may often be assisted by sending his client copies of letters. Requests for information should be answered promptly.

6. A solicitor in carrying out his retainer has implied and ostensible authority to bind his client in certain circumstances; however, as a matter of good practice, it would not be appropriate for a solicitor to rely upon such implied or ostensible authority other than for routine matters or in exceptional circumstances, for example, where it was impossible to obtain express authority (see also Principle 10.17 Commentary 1).
7. It is good practice for a solicitor to obtain confirmation of the scope of the retainer in writing from his client at the outset in order to prevent or resolve quickly any dispute over the scope of responsibilities taken up by the solicitor (see also Principle 5.01 Commentary 8).

### **5.13 Confidentiality (see Chapter 8)**

**A solicitor must observe the duty of confidentiality (see Chapter 8).**

### **5.14 Rules of professional conduct to be observed**

**It is an implied term of a retainer that a solicitor is under a duty, at all times, to observe the rules of professional conduct.**

#### ***Commentary***

1. This means that there will be limitations upon the freedom of a solicitor to do what his client wants him to do. A solicitor must not breach the principles of professional conduct in order to benefit his client.
2. For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder.

added on  
16/12/2022 as per  
Circular 22-827

### **5.15 No exploitation**

**A solicitor must not take advantage of the age, inexperience, ill health, lack of education or business experience of his client.**

### **5.16 Fiduciary duty (see Chapter 7)**

**A solicitor owes a fiduciary duty to his client (see Chapter 7).**

### 5.17 Communication with client

**A solicitor is under a duty to keep his client properly informed and to comply with reasonable requests from the client for information concerning his affairs.**

#### *Commentary*

1. A client should be told the name and the status of the person responsible for the conduct of the matter on a day-to-day basis and the partner responsible for the overall supervision of the matter.
2. If the responsibility for the conduct or the overall supervision of the whole or part of a client's matter is transferred to another person in the firm the client should be informed.
3. A solicitor should advise his client when it is appropriate to instruct a barrister and obtain the client's authority before doing so. Whenever a client is to attend a hearing at which he is to be represented, he should be told the name of the solicitor or barrister who it is intended will represent him (see Principle 12.03 Commentary 1).
4. This duty extends to keeping a client informed about recent changes of the law where those changes affect the subject matter of his retainer.
5. The extent and frequency of the information supplied and the degree of consultation will depend on the circumstances and on the type and urgency of the matter and of the experience or otherwise of the client in that type of matter.
6. There may be exceptional circumstances in which a solicitor would be justified in withholding information from a client. See for example, Principle 8.03 Commentary 4.

### 5.18 Honest, candid and objective advice

**A solicitor must be both honest and candid when advising a client and give objective advice.**

#### *Commentary*

1. A solicitor's duty to a client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts, and adequate consideration of the applicable law and the solicitor's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the solicitor honestly thinks about the merits and probable results.



2. A solicitor should explain as well as advise, so that his client is informed of the true position and is fairly and objectively advised about the real issues or questions involved.
3. A solicitor should clearly indicate the facts, circumstances and assumptions upon which his opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client. However, unless a client instructs otherwise, a solicitor should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications.
4. A solicitor should avoid making bold and confident assurances to a client.
5. In addition to advice on legal questions, a solicitor may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course a client should choose. In many instances the solicitor's experience will be such that his views on non-legal matters will be of real benefit to the client. A solicitor who advises on such matters should, where and to the extent necessary, point out his lack of experience or other qualification in the particular field and should clearly distinguish legal advice from such other advice.

### 5.19 Unbiased advice

**A solicitor's advice must be unbiased and not be influenced by whether his employment or other work may depend upon advising in a particular way (see rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and Chapter 3).**

#### ***Commentary***

For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder.

added on  
16/12/2022 as per  
Circular 22-827

### 5.20 Costs

**A solicitor should keep his client informed on an appropriately regular basis of the costs incurred to date (see Principle 4.06).**

### **5.21 Advice about legal aid or duty lawyer**

**A solicitor is under a duty, both at the commencement of a retainer and during the retainer, where circumstances so indicate, to consider and advise a client on the availability of legal aid or the Duty Lawyer Service.**

#### ***Commentary***

1. Failure to advise a client promptly of the availability of legal aid and the Duty Lawyer Service can amount to professional misconduct.
2. See also Principle 4.01 and its Commentaries.

## **(4) TERMINATION OF RETAINER**

### **5.22 Constraints on termination**

**Unless otherwise provided in a written retainer, a solicitor must not terminate his retainer with his client except for good reason and upon reasonable notice, or with the client's consent.**

#### ***Commentary***

1. A written retainer may be terminated in accordance with the terms of the retainer.
2. Where the entire contract rule applies, the contract may be terminated by a solicitor for good reasons and by reasonable notice.
3. Examples of good reason include where a solicitor cannot continue to act without being in breach of the law or rules of professional conduct, where a solicitor is unable to obtain clear instructions from a client, where there is a serious breakdown in the confidence between them or where a conflict of interest arises.
4. A solicitor has good reason to terminate a retainer if a client does not pay disbursements when required. If a client agreed at the inception of or during the retainer to pay on account of profit costs and anticipated disbursements ('fees') and he fails to pay, then that also may justify termination by the solicitor if the terms of the agreement to pay support the solicitor's action. If there is no such agreement the solicitor cannot justifiably terminate for failure to pay fees during the retainer (see Principle 4.08).
5. When funds run out during a trial, every assistance should be given to the client to make an immediate application for legal aid. Unless there are exceptional circumstances, the solicitor should continue to act at legal aid rates if he is on the Legal Aid Panel and if he is assigned to

act by the Director of Legal Aid (see also Principle 10.05 Commentary 3).

6. As to a solicitor's obligations, when he is the solicitor on record in criminal trial proceedings and he intends to terminate his retainer, see Principle 10.05 Commentaries 2 & 4.
7. A retainer may be determined by operation of law, for example, because of a client's or a solicitor's bankruptcy or mental incapacity or death. Where a client suffers mental incapacity the solicitor should take reasonable steps to ensure that the client's interests are protected. This may involve contact with the relatives. The solicitor may also contact the Official Solicitor. See also the *Mental Health Ordinance* (Cap. 136) and the *Official Solicitor Ordinance* (Cap. 416).
8. If a sole practitioner decides to cease to practise, he must inform his clients of that fact so that they may instruct other solicitors. Failure to inform his clients could amount not only to an act of negligence but also could lead to disciplinary action.
9. Where a new firm takes over from a firm which has ceased to practise or an existing firm is dissolved and the partners divide into two or more entities, the clients have the right to choose which solicitor or firm to instruct. It would not be proper for the new firm to take over the clients' business, including papers or money previously held, without the clients being notified promptly. Notification promptly by circular letter is therefore essential as is an agreement between the solicitors concerned as to the contents of such a letter.
10. Where the partners disagree about the arrangements for notifying clients of the dissolution of the firm, one or more partners may separately circularise all the clients of the firm. This circularisation should be a short factual statement informing the clients of the change as a result of a dissolution and may give the new practising addresses of each partner. There must be a statement that the client is free to instruct a solicitor of his choice.
11. The same Principles apply where a firm amalgamates with another firm.
12. Whatever the reasons for termination by a solicitor, it is prudent that reasonable notice or confirmation in writing, with the reasons, be given to the client.
13. For ORFS and TFA arrangements, see Principle 1.09 and relevant Commentaries thereunder. A solicitor should consider whether it is appropriate to terminate an ORFS agreement if the client has behaved or is behaving unreasonably (see also Principle 5.02 Commentary 4).

added on  
16/12/2022 as per  
Circular 22-827

### 5.23 Lien

**On termination a solicitor should, subject to any lien, promptly deliver to the client or his new solicitor all papers and property to which the client is entitled or hold them to his order and account for all funds of the client then held by the solicitor (see Circular 12-475).**

#### **Commentary**

1. Where a lien arises over a client's papers and documents delivered to a solicitor in his professional capacity for costs due and work done, they can be retained until those costs are paid. The lien is passive in nature and does not entitle a solicitor to sell or dispose of a client's property.
2. Despite the lien referred to above, the Law Society has certain powers to take possession of a solicitor's documents and assets under the *Legal Practitioners Ordinance* (Cap. 159), section 26C and Schedule 2.
3. Further, the court has power to order a solicitor to deliver up a client's papers notwithstanding the existence of the solicitor's lien. See *Rules of the High Court* (Cap. 4 sub. leg. A), Order 106 rule 3 and section 65 of the *Legal Practitioners Ordinance* (Cap. 159).
4. Where a solicitor is properly exercising a lien in respect of his unpaid costs the solicitor's papers should normally be released to the successor solicitor subject to a satisfactory undertaking as to the outstanding costs being given by the successor solicitor in lieu of the lien. There is however no duty on the original solicitor to accept an undertaking.
5. Where a client is legally aided, a solicitor's costs are secured by the Legal Aid Certificate and it follows that it would be inappropriate to call for a professional undertaking by the successor solicitor save for the costs not covered by the Certificate.
6. When a client changes solicitors the first solicitor should not charge for removing files from storage for collection by the former client, but he may charge a reasonable amount for the cost of delivering such files to the client or other solicitor. A reasonable charge may be made for retrieving documents from a client's file at the request of the client as this is fee earner's work for which a charge is normally made.

## APPENDIX

### PRINCIPLE 5.23

CIRCULAR 12-475

25 June 2012

#### LAW SOCIETY GUIDANCE NOTE

#### Storage and Destruction of Old Files Revised June 2012

##### 1. Ownership of Papers

The first task which should take place upon the conclusion of the retainer is a thorough review of the file to determine the ownership of the papers. Members should review the following extracts on 'Ownership, Storage and Destruction of documents' from *Cordery on Solicitors*:-

'Is the client entitled to the whole file once the retainer is terminated?'

Not necessarily. Most files will contain some documents which belong to you, some which belong to the client and possibly others belonging to a third party. Documents in existence before the retainer, held by you as agent for and on behalf of the client or a third party, must be dealt with in accordance with the instructions of the client or third party (subject to your lien). Documents coming into existence during the retainer fall into four broad categories.

- (a) Documents prepared by you for the benefit of the client and which have been paid for by the client, either directly or indirectly, belong to the client.

Examples: instructions and briefs; most attendance notes; drafts; copies made for the client's benefit of letters received by you; copies of letters written by you to third parties if contained in the client's case file and used for the purpose of the client's business. There would appear to be a distinction between copies of letters written to the client (which may be retained by you) and copies of letters written to third parties.

- (b) Documents prepared by you for your own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to you.

Examples: copies of letters written to the client; copies made for your own benefit of letters received by you; copies of letters written by you to third parties if contained only in a filing system of all letters written in your office; tape recordings of conversations; inter-

office memoranda; entries in diaries; time sheets; computerised records; office journals; books of account.

- (c) Documents sent to you by the client during the retainer, the property in which was intended at the date of despatch to pass from the client to you, belong to you.

Examples: letters, authorities and instructions written or given to you by the client.

- (d) Documents prepared by a third party during the course of the retainer and sent to you (other than at your expense) belong to the client.

Examples: receipts and vouchers for disbursements made by you on behalf of the client; medical and witness reports; counsel's advice and opinion; letters received by you from third parties.'

## 2. Retention of Old Files

The following are guidelines on the minimum retention period of old files:-

Conveyancing	*15 years
Tenancy	**7 years from expiration of the tenancy agreement
General files	**7 years
Criminal cases	3 years from the expiration of any appeal period

### \*Title Deeds and other original documents

Members should clarify the scope of the retainer in relation to the retention of title deeds. If the retainer does not extend to the safe custody of these documents, members should write to the client and seek instructions on returning these documents. If the client fails to provide instructions, members should write to the client to advise that a 'storage charge' fee will be charged for the safe custody of these documents. The level of any fee will be a matter for the practitioner to decide and is obviously a contractual matter with the client. Members should note however that it is not good conveyancing practice to hold original documents with the file.

\*See paragraphs 5(B)(a) and 8 below

\*\*See sections 51C and 51D of the *Inland Revenue Ordinance* (Cap. 112)

## 3. Storage of Old Physical Files in Hong Kong

Law Society's Practice Direction D7 (June 2012)

All old physical files must be stored in Hong Kong in order to ensure inter alia the preservation of confidentiality and easy retrieval.

Click [here](#) for a copy of Law Society's Practice Direction D7

#### 4. Storage of Electronic Documents / Files (June 2012)

##### (a) Storage of Electronic documents (June 2011)

Members can elect to store all their old files electronically, provided that:

- (i) clients' rights are preserved in respect of confidentiality and otherwise; and
- (ii) appropriate access to copies in Hong Kong be maintained.

##### (b) Back-up Copies

Members should consider maintaining a duplicate set of disks with client information in a suitably secure and off-site location.

#### 5. Destruction of Original Documents

##### A. Generally

Original documents, such as deeds, guarantees or certificates, which are not your own property, should not be destroyed without the express written permission of the owner. Where the work has been completed and the bill paid, other documents, including your file, may be scanned and then destroyed. In cases of doubt the owner's written permission should always be sought. If it is not possible to obtain such permission you will have to form a view and evaluate the risk.

##### B. Original Documents which should not be destroyed - *Electronic Transactions Ordinance* (Cap. 553)('ETO')

##### (a) Schedule 1 of the ETO

The Schedule identifies 13 types of documents which must be kept as originals:-

- '1. The creation, execution, variation, revocation, revival or rectification of a will, codicil or any other testamentary document.
- 2. The creation, execution, variation or revocation of a trust (other than resulting, implied or constructive trusts).
- 3. The creation, execution, variation or revocation of a power of attorney.
- 4. The making, execution or making and execution of any instrument which is required to be stamped or endorsed under the *Stamp Duty Ordinance* (Cap. 117) other than a contract note to which an agreement under section 5A of that Ordinance relates.
- 5. Government conditions of grant and Government leases.

6. Any deed, conveyance or other document or instrument in writing, judgments, and *lis pendens* referred to in the *Land Registration Ordinance* (Cap. 128) by which any parcels of ground tenements or premises in Hong Kong may be affected.
7. Any assignment, mortgage or legal charge within the meaning of the *Conveyancing and Property Ordinance* (Cap. 219) or any other contract relating to or effecting the disposition of immovable property or an interest in immovable property.
8. A document effecting a floating charge referred to in section 2A of the *Land Registration Ordinance* (Cap. 128).
9. Oaths and affidavits.
10. Statutory declarations.
11. Judgments (in addition to those referred to in section 6) or orders of court.
12. A warrant issued by a court or a magistrate.
13. Negotiable instruments.'

(b) Business Records in Electronic Format

The Inland Revenue Department (IRD) has advised that retention of business records in electronic format should meet the requirements set out in sections 7 and 8 of the ETO.

Click [here](#) to view the IRD's letter dated 10 December 2001 and Law Society circular 01-371.

6. Admissibility of Electronic Documents before the Courts

Members should review the provisions of sections 46, 53 and 54 of the *Evidence Ordinance* (Cap. 8) (EO) which deals with admissibility of documents in court proceedings.

(a) Civil Proceedings

The broad and general definitions of 'copy' and 'document' in the EO will allow for the admission of business records stored electronically.

(b) Criminal Proceedings

Documents produced by computer are admissible under sections 22A and 22B of the EO.

7. Duty of Confidentiality

Members should review Principle 8 on the Duty of Confidentiality in *The Hong Kong Solicitors' Guide to Professional Conduct* and ensure



destruction of the file does not jeopardise the confidentiality of its contents.

#### 8. Destruction of Old Files

The responsibility for the decision to destroy a file remains with individual practitioners.

The Law Society recommends that once the retainer is terminated all documents, which belong to the client, should be returned to the client. The failure to do so may cause future difficulties as original documents, such as deeds, guarantees or certificates which belong to the client should not be destroyed without the express written permission of the owner.

Upon expiration of the appropriate retention period for closed files, members should ensure the files are destroyed in a secure manner by engaging a suitable commercial provider.

#### 9. Commercial Providers of Record Management/Scanning Services

(a) Members who wish to engage commercial providers should ensure the confidentiality of the file is maintained.

(b) Commercial Providers should provide an appropriate affidavit on the scanning services provided in compliance with the requirements of the *Evidence Ordinance* (Cap. 8):

- Identification of the document(s) scanned
- Date of scanning
- Identity of employee responsible for the scanning
- Type of machine used
- Whether the 'hard copies' have been destroyed

Circular 02-385 has been superseded (June 2012)

#### 10. Retrieval Charges

Members should arrange to return all of the clients' documents upon termination of the retainer. However, if the client wishes the firm to retain his personal documents, the firm should enter into a written agreement with the client that the firm will provide such service upon payment of appropriate storage and retrieval charges.

#### 11. Circular 02-384 has been superseded

Members should note the contents of paragraph 3 of this circular are mandatory.

# CHAPTER 7

## THE FIDUCIARY DUTY

### Duty of Loyalty

- 7.01 Loyalty, openness and fairness
- 7.02 Conflict of interest between solicitor and client
  - 1. Interests of other persons
  - 2. Other relationships
  - 3. No personal benefit
  - 4. Solicitor's choice of lender
  - 5. Publication rights
  - 6. Interest in a corporation
  - 7. Equity in lieu of fees
  - 8. ORFS Agreement added on 16/12/2022 as per Circular 22-827
- 7.03 Full disclosure
- 7.04 Secret profits  
Interest on clients' account
- 7.05 Gifts from clients
  - 1. Significant gift
  - 2. Secret trust
  - 3. Threat to integrity

## DUTY OF LOYALTY

### 7.01 Loyalty, openness and fairness

**In addition to the other duties implied by a retainer, a solicitor owes a fiduciary duty to his client. He must act with loyalty, openness and fairness towards his client.**

### 7.02 Conflict of interest between solicitor and client

**A solicitor must act in the best interest of his client and he must not put himself in a position where his own interests conflict or are likely to conflict with his duty to his client, quasi-client or potential client.**

#### *Commentary*

1. This Principle applies not only where a solicitor is personally interested in a transaction, but equally where a partner or an employee of his firm is so interested.
2. A solicitor must also consider whether any family or other personal or emotional relationship, office, appointment or shareholding which he has may inhibit his ability to advise his client properly and impartially.
3. Because of the fiduciary relationship which exists between a solicitor and his client, a solicitor must not take advantage of a client nor may he act where there is or there is a likelihood of a conflict of interest between his client and himself. For example, there will invariably be a potential conflict of interest where a solicitor leases to, sells to, or purchases from or lends to or borrows from his own client. In all such circumstances, unless the client takes independent advice, the solicitor must not proceed with the transaction. It should be understood that by independent advice is meant not only legal advice, but where appropriate, competent advice from a member of another profession, for example, a chartered surveyor.
4. A solicitor must not apply any pressure on a purchaser-client to obtain finance from the solicitor's choice of lender (see Chapter 3).
5. A solicitor should not enter into any arrangement or understanding with a client or prospective client prior to the conclusion of the matter giving rise to his retainer by which the solicitor acquires an interest in the publication rights with respect to that matter.
6. A solicitor who is a director or shareholder of a company for which he also acts must consider whether he is in a position of conflict when he is asked to advise the company upon steps it has taken or should take.

It may be necessary for the solicitor to resign from the board or for another solicitor to advise the company in that particular matter.

7. In principle, there is no objection to a solicitor's firm agreeing to take equity in a client's company in lieu of fees, provided that:
  - (a) the firm's bill is rendered in a quantifiable amount, in monetary terms and is fair and reasonable;
  - (b) the client is advised that he should receive independent advice as to the merits of the proposal; and
  - (c) the solicitor's firm cannot act in the acquisition of equity in the client's company and should be aware that the equity holding may affect future dealings with the company and may compromise the firm's independence or integrity and their duty to act in the best interest of the client.
8. This Principle and Principle 1.01(c) apply equally to a solicitor acting in arbitrations involving TFA or ORFS under Parts 10A and 10B of the *Arbitration Ordinance* (Cap. 609) respectively. See Principle 1.09 and relevant Commentaries thereunder.

added on  
16/12/2022 as per  
Circular 22-827

### 7.03 Full disclosure

**A solicitor must disclose with complete frankness whenever he has or might obtain a personal interest or benefit in a transaction in which he is acting for a client. The disclosure should be in a manner that will be understood by the client, and preferably in writing (see Principle 2.07 Commentary 3).**

### 7.04 Secret profits

**A solicitor must not make a secret profit but must disclose to his client fully the receipt of any such profit. He may only retain it if the client agrees (see Principle 2.07 Commentary 3).**

#### **Commentary**

This Principle also applies to the receipt by a solicitor of, for example, interest on client accounts, commissions received from insurance companies and agents and from stock brokers and from estate agents.

### 7.05 Gifts from clients

**A solicitor must tell a client who offers him a gift that the client is not obliged to give him anything. A solicitor must refuse any gift to him as a solicitor if it is significant in value unless the client is independently advised as to the gift. A solicitor must not do anything which might be construed as inviting a gift from a client.**

**This Principle extends to a gift to a solicitor's partners, employees, relatives or otherwise made indirectly for their benefit and also extends to gifts by former clients and the client's family.**

#### **Commentary**

1. Where a client intends to make a gift inter vivos or by will to his solicitor, or to the solicitor's partner, or a member of staff or to the families of any of them and the gift is of a significant amount, either in itself or having regard to the size of the client's estate or means and the reasonable expectations of prospective beneficiaries, the solicitor must insist that the client be independently advised as to that gift and if the client declines, must refuse the gift.
2. Occasionally, a testator may wish to leave all or a substantial part of his estate to a solicitor to be dealt with in accordance with the testator's wishes as communicated to the solicitor either orally or in a document, or as a secret trust. Provided that the solicitor in such circumstances will not benefit personally and financially, there is no need to ensure that the testator receives independent advice. However, the solicitor should preserve the instructions from which the will was drawn and should also see that the terms of such secret trust are embodied in a written document signed by the testator.
3. A solicitor should be alert to any threat to his independence or integrity. See rule 2 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).

# CHAPTER 12

## RELATIONS WITH THE BAR

### 12.01 Obligations when instructing a barrister

1. Conference with a barrister
2. Legal aid cases

### 12.02 Duty to deliver brief to appear

1. Initial written instructions
2. Marking a brief or backsheet

### 12.03 Solicitor remains responsible

1. Recommend competent barrister
2. No obvious errors
3. Watch for delays affecting the claim

### 12.04 Liability of solicitor for barrister's fees

1. No contractual relationship between barrister and solicitor and lay client
2. Solicitor not in private practice
3. Transfer of practice or death or bankruptcy
4. Reasonable excuse
5. Agreeing barrister's fees in civil matters
6. Barrister's fees under ORFS or TFA added on 16/12/2022 as per Circular 22-827
7. Advising on uplifted portion under ORFS added on 16/12/2022 as per Circular 22-827

### 12.05 Payment of barrister's fees

1. Submission of fee note by barrister
2. Taxations in legal aid cases
3. Joint Tribunal for resolution of fees
4. Barrister's fees under ORFS or TFA added on 16/12/2022 as per Circular 22-827

## Appendices

Circular 00-334 'Counsel — Revised Notes for Guidance in Agreeing Fees with Counsel in Civil Matters'

Circular 97-60 'Joint Tribunal of the Law Society and the Bar Association'

For a statement of the rules of conduct applying to barristers, reference should be made to the *Code of Conduct for The Bar of Hong Kong* published by the Hong Kong Bar Committee (see also Circular 00-334).

### **12.01 Obligations when instructing a barrister**

When instructing a barrister, it is a solicitor's responsibility to ensure so far as practicable that adequate instructions, together with supporting statements and documents are sent to the barrister and that those instructions, in the circumstances, are sent to him in good time.

#### ***Commentary***

1. Where necessary and practicable, a solicitor should arrange conferences with the barrister to enable him to clarify his instructions by direct discussion with the solicitor and the lay client, to discuss the facts, evidence and law with the solicitor; and to give advice more directly than is possible in writing.
2. In legal aid cases, whether civil or criminal, a solicitor should draw the attention of the barrister to the fact that his fees and disbursements will have to be taxed or assessed and that only the taxed or assessed amounts can be paid to the barrister. A solicitor should expressly disclaim personal responsibility for payment of fees beyond those allowed on taxation or assessment.

### **12.02 Duty to deliver brief to appear**

**Whenever a barrister is briefed to appear in court, his instructing solicitor must deliver to him a formal brief or backsheet marked with the fee agreed by the solicitor.**

#### ***Commentary***

1. All initial written instructions (including a brief or backsheet) to a barrister should be personally signed by a named solicitor. In subsequent instructions, if a firm name is used, then the initials of the solicitor who has signed on behalf of the firm should appear on the instructions or covering letter for identification purpose (see Practice Direction F.1).
2. Every backsheet should be marked with the agreed brief fee and any agreed refresher or 'Legal Aid' or 'No Fee' as appropriate.

### 12.03 Solicitor remains responsible

**A solicitor cannot abrogate his responsibility to his client by instructing a barrister (see Principle 6.01 Commentary 6).**

#### *Commentary*

1. A solicitor should take care to recommend to his client a barrister with an appropriate level of competence, suitability and experience (see Principle 5.17 Commentary 3).
2. A solicitor when considering the barrister's advice must ensure that it contains no obvious errors.
3. A solicitor must use his best endeavours to ensure that a barrister carries out his instructions within the time limit specified by the solicitor or within a reasonable time and that the client's cause of action does not become statute barred or liable to be struck out for want of prosecution. Where appropriate a solicitor must ask for the return of his papers in order to instruct another barrister.

### 12.04 Liability of solicitor for barrister's fees

**In the absence of reasonable excuse a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees. Failure to obtain funds on account of a barrister's fees shall not of itself constitute reasonable excuse.**

#### *Commentary*

1. Save where a barrister has signed an ORFS agreement, a barrister does not have a contractual relationship with his instructing solicitor or the client and therefore cannot sue for his fees. Where a barrister has signed an ORFS agreement, he may sue such party or parties who assume liability to pay his fees under the agreement and cannot take action against anyone else.
2. This Principle applies equally to a solicitor not in private practice (see also Principle 2.08).
3. The liability of a sole principal and of partners for the liabilities of their co-partners is a continuing one and is not cancelled or superseded by any transfer of the practice, without the barrister's express consent. Equally, a partner or partners in a firm remain liable for the payment of barrister's fees incurred on behalf of the firm by a deceased, bankrupt or otherwise defaulting former partner of the firm. If a transfer of a practice is contemplated, consideration should be given to outstanding barrister's fees on files taken over.

amended on  
16/12/2022 as per  
Circular 22-827



4. In normal circumstances it is recommended that agreement be sought from the client that he will make payment on account of disbursements to be incurred (see Principle 4.07). What constitutes a reasonable excuse will be determined by the Solicitors Disciplinary Tribunal on a case-by-case basis. An example of what may be considered reasonable excuse is the unexpected bankruptcy of a client in circumstances where the credit worthiness of the client was considered beyond question and the necessity to obtain funds on account of barrister's fees was not obvious.
5. For guidance on agreeing fees for barristers in civil matters, see Circular 00-334.
6. Where fees are agreed with a barrister under the ORFS or TFA, matters set out in Circular 00-334, shall apply, where applicable. See Principle 1.09. added on  
16/12/2022 as per  
Circular 22-827
7. A solicitor may consider advising his client to enter into an ORFS agreement directly with the barrister to cover for the uplifted portion (i.e. the portion of fee the payment of which is dependent on the relevant outcome of the arbitration). See Principle 4.07 Commentary 3. added on  
16/12/2022 as per  
Circular 22-827

## 12.05 Payment of barrister's fees

**A barrister's fee must be paid or challenged promptly, and in any event, within two months from the submission of a fee note.**

### ***Commentary***

1. Save where a barrister has signed an ORFS agreement, a barrister may submit a fee note as soon as any particular piece of work is completed, for example, after the settling of pleadings, the giving of an opinion or the holding of a conference. If a fee note is requested by a solicitor, a barrister shall submit it within two weeks (see paragraph 127 of the *Code of Conduct for the Bar of Hong Kong*). Where a barrister has signed an ORFS agreement, he may issue fee note in accordance with the terms of the ORFS agreement to such party or parties who assume liability to pay his fees under such agreement.
2. In legal aid cases, there should be no delay on the part of a solicitor in submitting his bill and papers for assessment or taxation, which results in a barrister not receiving his fees within a reasonable time after submission of a fee note. In the event that the barrister's fee is assessed or taxed less than the bill amount, the solicitor must inform the barrister immediately so that he may take timely action. amended on  
16/12/2022 as per  
Circular 22-827

3. The Law Society and the Bar Association have established a Joint Tribunal to resolve disputes between solicitors and barristers in relation to fees (see Circular 97–60).
4. A barrister's fees payable under ORFS or TFA should be included in the agreement with a barrister to the extent applicable and further terms may be considered in addition to matters set out in Circular 00-334 in particular whether there is an obligation to pay where the client is unable to pay because of insolvency, bankruptcy, appointment of another barrister or other reason, see Principle 1.09. For alternatives, see Principle 12.04 Commentary 7.

added on  
16/12/2022 as per  
Circular 22-827

## **APPENDICES**

### **PRINCIPLE 12.04 COMMENTARY 5**

**CIRCULAR 00-334**

**23 October 2000**

#### **COUNSEL**

##### **Revised Notes for Guidance in Agreeing Fees with Counsel in Civil Matters**

1. A copy of the Revised Notes for Guidance is attached for members' reference.

Members should review Paragraph D which sets out the Law Society's views on the payment of Counsel's fees in Legally-Aided cases.

2. Law Society Circular 00-116 is superseded.

#### **NOTES FOR GUIDANCE IN AGREEING FEES WITH COUNSEL**

Experience has shown that many of the disputes between solicitors and counsel over fees arise from a failure by either or both to address potential problems at the time that instructions are delivered. With a view to reducing these problems, the Society has prepared the following Notes for Guidance which solicitors should take into account.

##### **A. HEARINGS**

Matters to be considered when instructing counsel:

1. Have specific instructions preferably in writing been obtained from the client to brief counsel?
2. Counsel may be asked to provide an estimate of the fees. This may be done by sending the full set of papers to counsel in accordance with a prior arrangement with him or his clerk to provide such an estimate.
3. Marking of Counsel's diary
  - (a) The marking of counsel's diary does not commit either counsel or solicitor, and no fees are payable.
  - (b) If after the marking of counsel's diary, the counsel is approached by another solicitor offering a brief during the same period in question or part thereof, counsel (who by that time should have agreed the brief as well as refreshers)

would be obliged to approach the 1st solicitor and specify terms as to the manner in which the agreed brief fee and refreshers should become payable. If the 1st solicitor does not agree to the terms, then counsel will be free to accept the brief from the 2nd solicitor. In such event, the 1st solicitor need not pay counsel anything in relation to the reserved dates.

#### 4. Brief Fees

When a brief fee is quoted make sure that the following points are clarified:

##### (a) Conferences

Ascertain:-

- (i) If pre-hearing conferences are included and if so whether there is a limit to the number of conferences.
- (ii) If the agreed fee includes conferences with the lay client and/or expert witnesses.
- (iii) If the brief or refresher fees includes conferences which may take place at the end of the day's hearing or otherwise during the course of the hearing.
- (iv) If conferences are not included in the brief or refresher fees - this should be made clear as should the charging rate to be applied for such conferences. If they are to take place other than in counsel's chambers or the precinct of the court, has agreement been reached on whether counsel is to be paid for the time spent travelling to and from the conference in addition to the time advising in conference and if so at what rate?
- (v) Where leading counsel is engaged are consultations between leading and junior counsel during the course of litigation included in their respective agreed fees?

##### (b) Refreshers

Agree:-

- (i) What constitutes a refresher? Is it payable only for a whole day in court or in full for part of a day?
- (ii) Arrangements regarding lost days (e.g. when, during the course of the hearing, the case is adjourned due to the illness of one of the parties or their advisers). Is a refresher payable in such circumstances?
- (iii) Clarify whether refresher fees are payable and at what rate in the event that the case is concluded in a shorter period than that originally reserved in counsel's diary.

- (iv) The arrangements for taking judgment. Will counsel be paid a refresher at the agreed rate or will special arrangements apply?
  - (v) Clarify whether any additional preparation fees will be charged if the hearing is adjourned part-heard for a substantial period of time.
- (c) Lump sum
- If counsel is to be paid an inclusive fee for conducting the case it is essential not only that solicitor and counsel are agreed as to precisely what work is covered by the lump sum fee but also that both lawyers and lay client are in no doubt what their respective positions will be if the case is not concluded within a specified time.
- (d) Trial
- When fees become payable:-
- (i) Unless otherwise agreed, the brief fee is payable once the brief has been delivered to counsel.
  - (ii) Solicitors and barristers may also consider whether they wish to agree that the brief can be deemed to have been delivered under the '10-day rule' i.e. if the fee has been agreed and counsel has not been released 10 days before the hearing.
  - (iii) An express agreement should be made about when counsel fees become payable even if, for whatever reason, the hearing or trial is cancelled or postponed. The parties should remind themselves of the need for counsel to be properly prepared for the hearing.
  - (iv) Briefs are as a rule delivered and accepted on the understanding that counsel may be justifiably prevented from attending at Court. Counsel is entitled to return a brief if there is a subsequent commitment in the Court of Appeal even if those dates were fixed after acceptance of the existing brief in which counsel appeared in the Court below.

## B. OPINIONS AND SETTLING PLEADINGS

1. Agreement should always be reached on the fees payable. Instructions may be delivered to counsel with a request for particulars of the charge rate and an estimate of his fees. Once that estimate has been given and the lay client has agreed counsel will be expected to abide by it but may revert back to the instructing solicitor in exceptional circumstances if he realises that the estimated figure is likely to be exceeded.

2. There should be agreement at the outset whether the fees quoted for an opinion include conferences with the lay client.
3. Similarly, there should be agreement as to whether fees are payable for telephone conferences and what the charge rate will be.
4. If the counsel is unable to prepare the documents the instructing solicitor should be advised and a request made for the return of the papers.

#### C. FORMULAE FOR COSTS

1. Before agreeing any formula for costs with counsel the solicitor should make sure that the lay client fully understands the terms of the proposed formula. Lay client should be asked to give his consent in writing.
2. Solicitor and counsel should consider and advise the client on all the contingencies that can be reasonably foreseen having regard to the particular set of circumstances, for example when it is that he will become bound by the arrangement; whether there is any likelihood of settlement and, if so, when it may occur and the possibility of illness of the judge, counsel or litigants which may increase the costs to be incurred.
3. Any formula which is to be adopted should be comprehensively set out in a memorandum of understanding.

#### D. TAXING OF FEES IN LEGALLY - AIDED CASES

Fees payable to counsel in Legally - Aided cases

These are governed by the *Legal Aid (Scale of Fees) Regulations* (Cap. 91 sub. leg. C).

Regulation 4 states:

‘The fees payable by the Director to counsel acting for an aided person shall be such as may be allowed on taxation or, in default of taxation, as may be fixed by the Director, not exceeding such amount as in the opinion of the Director would have been allowed if there had been taxation’.

Members’ attention is drawn to the obiter comments of Seagroatt J. in the case *Chan Shiu Wah v Wu Kwok On* (PI Action No.1123 of 1997). The Judge indicated that where counsel’s fees have been taxed off or reduced on the basis that such work was ‘solicitors’ work’, counsel should look for payment of those fees from the taxed profit costs of the instructing solicitor.

The Law Society is of the opinion that in relation to the division of work between solicitors and counsel the onus is on counsel to return the papers to the solicitor forthwith if he is of the view that there is a risk

that any work done by him will be taxed off or reduced. Where counsel fails to do so then he would be bound by the provisions in Regulation 4.

#### E. PAYMENT OF COUNSEL'S FEES

##### 1. Time for payment

Counsel's fees must be paid or challenged promptly, and in any event within 2 months from the submission of counsel's fee note.

##### 2. Failure to pay counsel's fees

Principle 12.04 of *The Hong Kong Solicitors' Guide to Professional Conduct* states:

'In the absence of reasonable excuse a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees. Failure to obtain funds on account of a barrister's fees shall not of itself constitute reasonable excuse.'

**PRINCIPLE 12.05 COMMENTARY 3**

**CIRCULAR 97-60**

**3 March 1997**

**JOINT TRIBUNAL OF THE LAW SOCIETY AND  
THE BAR ASSOCIATION**

1. The Society and the Bar Association have agreed to replace the existing Grey Areas Committee with a Joint Tribunal which shall resolve disputes between solicitors and barristers in relation to fees. References to the Tribunal will be mandatory.
2. The Society will be represented by 10 senior practitioners on the panel and is seeking applications from suitably qualified members with:
  - at least 10 years call
  - criminal or civil litigation experience