

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.