

CHAPTER 6

COMPETENCE AND QUALITY OF SERVICE

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Appendix

Circular 03-182 'Practising Certificate (Special Conditions) Rules'

6.01 Duty to act competently

- (a) **A solicitor owes his client a duty to be competent to perform any legal services undertaken on the client's behalf.**
- (b) **A solicitor must serve his client in a conscientious, diligent, prompt and efficient manner.**

Commentary

1. Competence in the context of Principle 6.01(a) goes beyond formal qualification to practise law. It has to do with a solicitor's capability to deal with the matter in question. It includes knowledge, skill, and the ability to use them effectively in the interests of a client (see Principle 5.03).
2. As members of the legal profession, solicitors are expected to be knowledgeable, skilled and capable in the practice of law. A client is entitled to assume that a solicitor has the ability and capacity to deal adequately with any legal matters undertaken on the client's behalf. A solicitor who claims to have substantial experience in a specific area of law is expected to have a higher standard of competence in that area of law.
3. A solicitor must not undertake a matter without being either competent to handle it, or able to become competent without undue delay, risk or expense to the client. This is a professional consideration and is to be distinguished from the standard of care that a court would apply for purposes of determining negligence.
4. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied and the ability to put such knowledge to practical effect.
5. A solicitor should recognize that competence for a particular task may sometimes require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields. In such a situation a solicitor should not hesitate to seek his client's instructions to consult experts. If such instructions are not forthcoming the solicitor should consider whether he is still competent to act.
6. If assistance is required, a solicitor has a duty to select a competent person to assist and thereafter continues to be bound, professionally and legally, to exercise his independent judgment in the matter. If a barrister is instructed, take particular note of Principle 12.03. A solicitor should not allow his own skill and judgment to be entirely dominated by counsel. [*Davy-Chiesman v Davy-Chiesman* [1984] 1 ALL ER 321 (CA)].
7. Under section 59(2) of the *Legal Practitioners Ordinance* (Cap. 159), a provision purporting to exclude a solicitor's liability for negligence in an agreement for fees in contentious business will be void. In other

business, a solicitor may seek to limit his liability to his clients in accordance with Practice Direction M.

8. There is nothing to prevent a solicitor at the outset from limiting the scope of the retainer. In these circumstances, it is good practice for the limits of the retainer to be precisely defined and communicated in writing to the client.
9. In no circumstances can a solicitor exclude his liability for professional misconduct. Furthermore, a solicitor may not seek an agreement from his client to refrain from making a complaint about his professional misconduct.

6.02 Client with a claim against his solicitor

If a client makes a claim against his solicitor or notifies his intention of doing so, or if a solicitor discovers an act or omission which could reasonably justify such a claim, the solicitor is under a duty to inform his client that he should seek independent advice (see also Principle 6.03).

Commentary

If a client refuses to seek independent advice, the solicitor should decline to continue to act unless he is satisfied that there is no conflict of interest. This is a matter which should be kept under continuous review (see also Principle 7.01).

6.03 Promptly inform insurers of claim

Where a client or third party makes a claim against a solicitor (or gives notice of an intention to make such a claim) and the claim is one in respect of which indemnity is provided under the *Solicitors (Professional Indemnity) Rules* (Cap. 159 sub. leg. M), the solicitor must as soon as is practicable notify the authorised insurers, through the manager appointed by the Hong Kong Solicitors Indemnity Fund Limited, and co-operate with them or their agents in order to enable such a claim to be dealt with by them in the appropriate manner.

Commentary

1. The *Solicitors (Professional Indemnity) Rules* (Cap. 159 sub. leg. M) impose general conditions on a solicitor and his practice. These conditions include a provision that the practice, any successor practice or any member thereof, should not admit liability for, or settle, any

claim for which indemnity is provided or incur any costs or expenses in connection therewith without the prior consent of Hong Kong Solicitors Indemnity Fund Limited or their appointed manager. If a breach of this or any other provision of the *Solicitors (Professional Indemnity) Rules* (Cap. 159 sub. leg. M) results in prejudice to the fund the solicitor may be required to reimburse the difference between the sum payable out of the fund in respect of the claim and the sum which would have been payable in the absence of that prejudice.

2. In cases where a client is not aware of the circumstances but his solicitor discovers an act or omission which may give rise to a claim, the solicitor must:
 - (a) give written notice to the Hong Kong Solicitors Indemnity Fund Limited or the appointed manager;
 - (b) without making any admission of liability inform the client (or former client) in writing in order to enable him to take independent advice;
 - (c) seek approval of the Hong Kong Solicitors Indemnity Fund Limited or the appointed manager, regarding the terms of any further communication with the client or former client.
3. In cases where the client or a third party seeks independent advice and the solicitor is asked to make papers available to the new solicitor who is instructed, it is good practice for the original solicitor to keep copies of these documents for reference.

6.04 Fully and promptly reply to inquiries

A solicitor is obliged to reply fully and promptly to correspondence from a client or former client or on their behalf, and to inquiries from the Law Society or other competent authority.

Commentary

1. A solicitor who fails to answer letters from his client or former client relating to that client's business may be subject to disciplinary action.
2. Failure by a solicitor to answer a letter from the Law Society or a Solicitors Disciplinary Tribunal concerning his professional conduct or to explain his conduct when required to do so by the Law Society, a Solicitors Disciplinary Tribunal, the Court or any other competent authority exercising its regulatory or enforcement powers, may constitute professional misconduct.
3. Failure to comply with a Notice of Inspection issued by the Council under section 8AA of the *Legal Practitioners Ordinance* (Cap. 159) may constitute professional misconduct.

4. Failure or refusal to provide a satisfactory explanation of any conduct which is, in the opinion of the Law Society, unbecoming of a solicitor is a ground for refusal to issue a practising certificate (see rule 2(a) of the *Practising Certificate (Solicitors) (Grounds for Refusal) Rules* (Cap. 159 sub. leg. N)).
5. In addition, failure or refusal since the last issue of a practising certificate to give a sufficient and satisfactory explanation of any conduct when required to do so may result in the imposition of conditions on practising certificates under the *Practising Certificate (Special Conditions) Rules* (Cap. 159 sub. leg. Y) (see Circular 03-182 and section 3 of the *Practising Certificate (Special Conditions) Rules* (Cap. 159 sub. leg. Y)).

APPENDIX

PRINCIPLE 6.04 COMMENTARY 5

CIRCULAR 03-182

2 June 2003

PRACTISING CERTIFICATE (SPECIAL CONDITIONS) RULES

The *Practising Certificate (Special Conditions) Rules* (Cap. 159 sub. leg. Y) came into effect on 1 February 2003.

Reference is made to Law Society Circular 03-29 dated 27 January 2003 outlining the provision including rule 3(c) whereby a condition may be imposed on a practising certificate if a solicitor has been notified that he has failed or refused to give a sufficient and satisfactory explanation of his conduct.

The Standing Committee on Compliance resolved that sufficient notice for the purpose of rule 3(c) of the *Practising Certificate (Special Conditions) Rules* (Cap. 159 sub. leg. Y) would be constituted by:

- i. a letter of regret or a letter of disapproval from the Chairman of the Standing Committee on Compliance to a respondent-solicitor setting out a resolution of an Investigation Committee relating to a breach by the respondent-solicitor of failing to answer either sufficiently or at all the Law Society's enquiries in breach of Principle 6.04 of *The Hong Kong Solicitors' Guide to Professional Conduct*, Volume 1; and
- ii. a Findings and Order issued by a Solicitors Disciplinary Tribunal against a respondent-solicitor relating to his failure to answer either sufficiently or at all the Law Society's enquiries in breach of Principle 6.04 of *The Hong Kong Solicitors' Guide to Professional Conduct*, Volume 1.

Where applicable, members should please refer to the aforesaid policy when completing the Notice of Intention to Apply for a Practising Certificate form.