

CHAPTER 7

THE FIDUCIARY DUTY

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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).