



THE  
**LAW SOCIETY**  
OF HONG KONG  
香 港 律 師 會

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The Hong Kong Solicitors'

GUIDE  
to  
PROFESSIONAL CONDUCT

1

Volume 1  
Third Edition

THE LAW SOCIETY OF HONG KONG

THE HONG KONG  
SOLICITORS' GUIDE  
TO PROFESSIONAL  
CONDUCT

Volume 1

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THIRD EDITION

2013\*

\* Updated to 1 September 2012



## *Index Reference :*

**Regulations,  
Legal Practitioners Ordinance,  
Practice Directions and Rules**

CIRCULAR 22-827 (SD)

16 December 2022

## **22-827 (SD) THE HONG KONG SOLICITORS' GUIDE TO PROFESSIONAL CONDUCT, VOLUME 1 ("THE GUIDE")**

### **Introduction of new Principle 1.09 and related amendments to the Guide**

1. All provisions of Part 10A (Third Party Funding of Arbitration) of the Arbitration Ordinance (Cap. 609) have come into operation since 1 February 2019 and all provisions of Part 10B (Outcome Related Fee Structure Agreement for Arbitration) of the Arbitration Ordinance (Cap. 609) and the Arbitration (Outcome Related Fee Structures for Arbitration) Rules have come into operation since 16 December 2022.
2. As a result of the aforementioned pieces of legislation, a new Principle, Principle 1.09 is included in the Guide. Principle 1.09 provides as follows :-

#### ***"1.09 Statutory provisions overriding the Guide***

***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)."*
3. Consequential amendments are made to [Chapters 1, 3, 4, 5, 7 and 12 of the Guide](#).
4. The major consequential amendments are :-
  - a. Principle 4.16 of the Guide is amended to make it clear that the prohibition against a solicitor's sharing of profits costs with a person other than a practising solicitor is subject to Parts 10A and 10B of the Arbitration Ordinance (Cap. 609).
  - b. Principle 4.17 of the Guide is amended to make it clear that where permitted under the law e.g. under the Arbitration Ordinance (Cap. 609), a solicitor may enter into a contingency fee arrangement in contentious proceedings.
  - c. New Commentaries 6 and 7 to Principle 12.04 of the Guide and a new Commentary 4 to Principle 12.05 of the Guide are introduced to confirm the applicability of the notes for guidance in agreeing fees with a barrister as set out in Circular 00-334(PA) where fees are agreed with a barrister under ORFS or TFA (as defined in the new Principle 1.09) and to remind Members to include appropriate terms in the agreement with a barrister for a barrister's fees payable under ORFS or TFA (as defined in the new Principle 1.09) and to remind Members to consider advising clients to enter into an ORFS agreement directly with the barrister to cover for the uplifted portion.
5. This Circular serves as an Addendum to the Guide.
6. This Circular is mandatory.
7. All enquiries should be sent by email to  
Assistant Director, Regulation and Guidance  
Email address: [adrg2@hklawsoc.org.hk](mailto:adrg2@hklawsoc.org.hk)



## *Index Reference :*

### **Trainee Solicitors**

**CIRCULAR 23-363 (SD)**

**15 June 2023**

## **23-363 (SD) TRAINEE SOLICITOR TRAINING**

1. The Law Society regularly receives enquiries concerning different aspects of trainee solicitor training such as the terms and conditions in the trainee solicitor contract, provisions in the Trainee Solicitors Rules Cap. 159J, training experience, the conduct of the principals or trainees and problems and/or difficulties in training.
2. Members may find the following information useful if they encounter any questions and problems in training.

### **General Information**

3. General information on (i) the recruitment of trainee solicitors, (ii) the terms and conditions of the 3 standard forms of trainee solicitor contract prescribed by the Law Society, Forms A, B and C (together the “Trainee Solicitor Contracts”), (iii) registration of Trainee Solicitor Contracts and (iv) provisions in the Trainee Solicitors Rules Cap. 159J, is set out in the Package entitled “[Information for Trainee Solicitors](#)”.
4. General information on admission as Hong Kong solicitors is set out in the Package entitled “[Admission as A Solicitor: Trainee Solicitors](#)”.

### **Common areas of concern**

#### **5. Provision and supervision of training**

- (a) The Law Society has developed a [Training Checklist for Trainee Solicitors](#) which provides general guidance on the types of training which a trainee could undergo and the target outcomes of such training.
- (b) The Trainee Solicitor Contracts prescribe the basic skills and areas of practice on which a principal must provide training to the trainee.
- (c) When a trainee applies for admission as a Hong Kong solicitor, the principal and the trainee are required to submit the Application for A Certificate of Eligibility for Admission as a Solicitor (Form 4) under which the principal and trainee must declare on oath the types of skills and areas of practice on which the trainee has been provided with training.



- (d) [Circular 20-472\(SD\)](#) provides guidelines on supervision and training of trainee solicitors during the COVID-19 pandemic.
- (e) If a solicitor has employed or is acting as the principal of a trainee solicitor under a trainee solicitor contract, the solicitor must make suitable alternative arrangement for the trainee solicitor to be properly supervised by another solicitor within the firm who is eligible to act as principal under Section 20(1) of the Legal Practitioners Ordinance Cap. 159 (“LPO”) during a prolonged period of absence of the solicitor from the office. If no other solicitor is eligible under Section 20(1) of the LPO within the firm, the solicitor may consider making alternative arrangement pursuant to rule 9(3) of the Trainee Solicitors Rules Cap. 159J for the trainee solicitor to be employed in the office of another solicitor or qualified person who is eligible under Section 20(1) of the LPO to act as the principal of the trainee. A new Commentary 4 is added to Principle 2.05 of the Hong Kong Solicitors’ Guide to Professional Conduct, Volume 1 (“the Guide”) with immediate effect to reflect such a requirement on a sole principal. Please click [here](#) for the updated Chapter 2 of the Guide incorporating the said new Commentary.
- (f) In view of the above statutory obligations imposed on the solicitor who has employed or is acting as the principal of a trainee solicitor by section 20(1) of the LPO, in case of a period of prolonged absence of the employer or principal of a trainee solicitor and no suitable alternative arrangement of the proper supervision of the trainee solicitor has been made, the trainee solicitor should notify Assistant Director, Regulation and Guidance at [adrg@hklawsoc.org.hk](mailto:adrg@hklawsoc.org.hk). Failure on the part of the trainee solicitor to give the above notice to the Law Society will be taken into account at the time of the trainee solicitor’s application for admission as a solicitor in consideration of whether he/she has been duly employed as a trainee solicitor for the whole of the period of the trainee solicitor contract.

## 6. Difficulties and disputes in training

The Trainee Solicitor Contracts prescribe that any dispute and difficulty concerning the provisions in the Trainee Solicitor Contracts or the training may be referred to the Council for a determination and the decision of the Council is binding on the parties.

## 7. Termination of Trainee Solicitor Contract

- (a) The trainee solicitor contract cannot be terminated except by (i) mutual agreement of the principal and the trainee or (ii) by the Law Society in the exercise of its powers under Section 22 of the LPO.
- (b) Under Section 22 of the LPO, the principal or the trainee may apply to the Council to terminate the trainee solicitor contract on such terms as it shall think fit and the Council shall determine any period of employment as effective period of training.



## 8. Conduct of the principal or the trainee

- (a) The LPO and the Articles of Association of the Law Society empower the Council:
  - (i) To investigate any charge of misconduct against any solicitor or employee of a solicitor and institute any disciplinary proceedings;
  - (ii) To investigate any conduct of a solicitor, trainee solicitor, employee of a solicitor as a result of complaint being made and to submit the matter to the Tribunal Convenor of the Solicitors Disciplinary Tribunal Panel.
- (b) Information and procedures on filing a complaint with the Law Society are set out in the [Notes to Parties to a Complaint](#) on the website of the Law Society and [the Hong Kong Solicitors' Guide to Professional Conduct, Volume 1](#).

## Enquiries

- 9. For further enquiries, members may contact Assistant Director, Regulation and Guidance at [adrg@hklawsoc.org.hk](mailto:adrg@hklawsoc.org.hk).



## *Index Reference :*

**Regulations: Legal Practitioners  
Ordinance, Practice Directions  
and Rules**

CIRCULAR 23-419 (SD)

3 July 2023

## **23-419 (SD) THE HONG KONG SOLICITORS' GUIDE TO PROFESSIONAL CONDUCT, VOLUME 1 ("THE GUIDE")**

### **Amendment to Principle 2.01 of the Guide and the addition of a new Commentary thereto**

1. As announced in [Circular 23-111](#), the new Sections 6(6B) and 6(6C) of the Legal Practitioners Ordinance (Cap. 159) ("LPO") in respect of the mandatory practice management course requirement for the first issue of an unconditional practising certificate comes into operation on 3 July 2023.
2. Consequential to the imposition of the new requirement, the second paragraph in Principle 2.01 of the Guide is amended as follows with effect from 3 July 2023 to include cross-references to the new Sections 6(6B) and 6(6C) of the LPO :-

*"2.01 Practising certificates*

...

*A sole practitioner or partner must hold an unconditional practising certificate (Legal Practitioners Ordinance (Cap. 159), sections 6(6), & 6(6A), 6(6B) and 6(6C))."*

3. In addition, a new Commentary 6 as follows is added to Principle 2.01 of the Guide with effect from 3 July 2023 to make a cross-reference to Circular 23-111 :-

*"Commentary*

...

*6. See Circular 23-111 for more on the mandatory practice management course requirement for the first issue of an unconditional practising certificate under sections 6(6B) and 6(6C) of the Legal Practitioners Ordinance (Cap. 159), which came into operation on 3 July 2023."*

4. Please click [here](#) for the updated Chapter 2 of the Guide incorporating the changes mentioned in paragraphs 2 and 3 above.





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5. This Circular serves as an Addendum to the Guide.
6. This Circular is mandatory.
7. All enquiries should be sent by email to Assistant Director, Regulation and Guidance at [adrg2@hklawsoc.org.hk](mailto:adrg2@hklawsoc.org.hk).



## *Index Reference :*

**Regulations: Legal Practitioners  
Ordinance, Practice Directions  
and Rules**

CIRCULAR 23-485 (SD)

27 July 2023

## **23-485 (SD) THE HONG KONG SOLICITORS' GUIDE TO PROFESSIONAL CONDUCT, VOLUME 1 (“THE GUIDE”)**

### **Various amendments to Chapters 1 and 15 of the Guide**

1. Various amendments to Chapters 1 and 15 of the Guide as set out below are made with immediate effect.

#### **Chapter 15 of the Guide**

2. Chapter 15 of the Guide is primarily concerned with the powers of the Law Society and applicable procedures in relation to allegations of misconduct. In paragraph 3 under the heading “Complaints”, it is provided that letters of regret or letters of disapproval may be issued as sanctions to solicitors.
3. The Council is of the view that decisions of the Standing Committee on Compliance are collective decisions. To avoid any misunderstanding or misperception that may arise from the issue of letters of regret and letters of disapproval as being personal decisions of the signatory of those letters, the said paragraph 3 under the heading “Complaints” in Chapter 15 of the Guide is amended as follows:-

“... ”

#### **3. Sanctions**

*The sanctions that can be imposed are the issue of letters of regret or letters of disapproval to the ~~respondent~~ solicitor concerned (which are signed by the Chairman or the Vice-Chairman of the Standing Committee).*  
... ”

4. Please click [here](#) for the updated Chapter 15 of the Guide incorporating the changes mentioned in paragraph 3 above.



## New Principle 1.00

5. The Basic Law is the constitutional document of the Hong Kong Special Administrative Region of the People's Republic of China ("HKSAR"). It forms the foundation for legal practice in the HKSAR.
6. To highlight the importance of the Basic Law to solicitors, a new Principle, Principle 1.00 is included in the Guide and placed before Principle 1.01. Principle 1.00 provides as follows:-

***"1.00 Upholding the Basic Law***

***A solicitor shall uphold The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.***

***Commentary***

*The Basic Law is the constitutional document of the Hong Kong Special Administrative Region of the People's Republic of China. It forms the foundation for legal practice in Hong Kong. A solicitor shall act in a way that upholds the constitutional principle of the rule of law enshrined in the Basic Law."*

7. Please click [here](#) for the updated Chapter 1 of the Guide incorporating the changes mentioned in paragraph 6 above.
8. This Circular serves as an Addendum to the Guide.
9. This Circular is mandatory.
10. All enquiries should be sent by email to Assistant Director, Regulation and Guidance at [adrg2@hklawsoc.org.hk](mailto:adrg2@hklawsoc.org.hk).

## Chief Justice's Foreword

In a society governed by the rule of law, the administration of law assumes a singular importance in ensuring that the benefits of the law – both contents and spirit – are fully and properly enjoyed. Lawyers have a pivotal role in the administration of justice, a role that is defined by the fearless and independent defence of rights, not just for individual clients but also for the community as a whole. The public looks to lawyers to fulfil this role and it is one that requires a combination of competence, proper conduct and professional ethics. It is these three essential characteristics of legal professional practice that provide one of the most important empirical means of testing the strength of a territory's legal system and her administration. After all, paradoxically but critically, both the strongest and the weakest link in this system are the people who work within it.

This updated Guide to Professional Conduct is a publication that is essential to every solicitor's practice and its contents should of course be closely studied. It provides professional guidance that is not aspirational in nature; rather, the standards set out in this Guide are those that all solicitors are expected to achieve and adopt in practice as *minimum requirements* of professional conduct. This is what the public expects. And, similar to the application of laws, the spirit of the Guide is just as important as its letter. This is recognised by the Guide itself: it makes a significant point that some ethical standards and obligations are higher than even the requirements of the law.

The Guide sets out to be as comprehensive as possible and indeed, a lot of ground has been covered. Much work has been put into updating this important publication. I hope every solicitor will recognise that this has been an effort well worth embarking on and I congratulate all those who have made a contribution. Without doubt it reinforces the confidence that members of the public place in Hong Kong's legal system. Our legal system remains one of the most important edifices that make up modern Hong Kong, some even say perhaps the most important.

Geoffrey Ma  
Chief Justice

## President's Foreword

We take pride in being lawyers because we play an important role in society which distinguishes our profession from others - we help others realise and take advantage of their rights, promote the rule of law, enhance easy access to justice for all and participate actively in the fair administration of justice. In short, we form the backbone of the legal system which affects almost every aspect of our society.

The practice of law is an honourable profession which demands high ethical standards and a commitment above all to justice, integrity and the rule of law. Our precious heritage of the profession's core principles and values places a heavy responsibility on us to maintain and safeguard them in a way that measures up to the forebearers of our legacy and to the expectation of future successors.

A solicitor is constantly confronted by difficult ethical issues in daily practice. His or her ability to resist improper pressure and maintain independence requires strong determination to stand firm in safeguarding our ethical standards from erosion.

The Hong Kong Solicitors' Guide to Professional Conduct Volume 1 sets out the basic principles governing the practice of solicitors. It has been very helpful to members of our profession as a user friendly guide and reminder on what minimum ethical standards are expected of us. It was first published in 1995 and the second edition in 1998. The development of the profession in Hong Kong since then has necessitated a major task to review and revise the publication to reflect up to date practice issues.

On behalf of the Law Society, I extend my deepest gratitude to all those involved in the production of the third edition of the Guide and in particular to members, past and present, of the Guide Working Party – the Chairman Amirali Nasir, Stephanie Cheung, Richard Cullen, Joseph Li, Patrick Moss, Michael Wilkinson, Michael Lintern-Smith, Alex Lai and Michael Sandor for their tireless efforts in completing this important task.

Ambrose Lam  
President

## The Guide Working Party's Foreword

This 3rd Edition to The Hong Kong Solicitors' Guide to Professional Conduct (Volume 1) sets out 14 fundamental pillars of professional conduct, which have been revised by the Guide Working Party and approved by the Council of the Law Society.

The Principles of professional conduct define the legal profession as a body of persons committed to adherence to a code of conduct as the foundation of being an honourable profession.

The Principles of professional conduct ensure the independence and integrity of the legal profession as well as protection of clients' interests and the public.

The Principles of professional conduct mould the provision of legal services, representation before courts and Tribunals, and solicitors' interactions with other solicitors, as well as with other professionals and third parties.

Some of these Principles are advisory whilst others are mandatory. The distinction arises from the need to balance the conflicting interests in the protection of the public, freedom of solicitors to practise and the maintenance of the rule of law and the administration of justice. The public interest is, of course, paramount.

The Current and Past members of the Guide Working Party:

Amirali B. Nasir	(Council Member and Chairman)
Stephanie S. Y. Cheung	(Current Member)
Richard Cullen	(Current Member)
Joseph C. W. Li	(Council Member and Current Member)
Patrick R. Moss	(Current Member)
Michael Wilkinson	(Current Member)
Michael J. Lintern-Smith	(Past President, Council Member and Past Member)
Alex T. H. Lai	(Past Council Member and Past Member)
Michael Sandor	(Past Member)

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# CHAPTER 1

## PRINCIPLES OF PROFESSIONAL CONDUCT

Use and interpretation of this Guide

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  - 2. Articles of Association
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- 1.07 Information Communication Technology  
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2 Chapter 1 - Principles of professional conduct

Circular 04-604 'Guidelines on E-mail for Solicitors'

International Code of Ethics of the International Bar Association

Circular 00-127 'Attestation, Certification and Notarization of Documents  
by Hong Kong Solicitors and Notaries outside Hong Kong'

## 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).

## **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 cooperate 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 2

## A SOLICITOR'S PRACTICE

- 2.01 Practising certificates
  - 1. Burden of proof on solicitor
  - 2. Practice by unqualified persons
  - 3. Salaried partners
  - 4. Insurance
  - 5. Employed solicitors
  
- 2.02 Commencement and cessation of practice
  - 1. Rule 5 of the *Solicitors' Practice Rules*
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- 2.03 Principal's individual responsibility
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- 2.04 Standards of supervision and management
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2.07 Companies serving clients and the firm

1. Formation of service company
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1. Practice Direction N
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Appendices

Circular 12-641 'Cessation of Practice'

Circular 10-171 'Cessation of Practice by foreign firms'

Circular 06-337 'Formation of a Service Company'



## 2.01 Practising certificates

**A solicitor who does not hold a practising certificate is not qualified to act as a solicitor in private practice (*Legal Practitioners Ordinance* (Cap. 159), section 7).**

**A sole practitioner or partner must hold an unconditional practising certificate (*Legal Practitioners Ordinance* (Cap. 159), sections 6(6) & (6A)).**

### **Commentary**

1. The absence of a person's name from the list of solicitors with practising certificates published in the *Government Gazette* raises a presumption that the person concerned is not qualified to act as a solicitor: *Legal Practitioners Ordinance* (Cap. 159), section 6(8).
2. The consequences of a solicitor acting as a solicitor without a practising certificate are set out in the *Legal Practitioners Ordinance* (Cap. 159) (for example, see section 45). In addition, this may have consequences for any relevant partnership.
3. If a salaried partner's name appears on the headed notepaper of a firm without distinction from the equity partners' names, he will be treated by the Law Society as if he were a full partner and as holding or receiving clients' money irrespective of whether he can operate the firm's client accounts. If a salaried partner is held out as a partner, he must accept responsibility for the books of the firm and for any breach of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F). This is so, even if he is not permitted access to the books.
4. Subject to any exemption by the Council, every solicitor who is or is held out to the public as a solicitor in practice in Hong Kong must comply with the *Solicitors' (Professional Indemnity) Rules* (Cap. 159, sub. leg. M). (see rules 6(1) & 7(1)).
5. A solicitor employed in private practice, regardless of whether his name appears on the headed notepaper, must hold a current practising certificate if he is held out as a solicitor or if he:
  - (a) appears before any court of record or certain tribunals (section 45 of the *Legal Practitioners Ordinance* (Cap. 159));
  - (b) supervises or manages an office of his employer (rule 4A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H));
  - (c) administers oaths and takes declarations (section 7A of the *Legal Practitioners Ordinance* (Cap. 159));
  - (d) receives a share of the profits (rule 4 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H)).

## 2.02 Commencement and cessation of practice

**Upon commencement of a practice the principal or principals must comply with rules 5(1) & (1A) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and thereafter comply with rules 5(2) & (3).**

### **Commentary**

1. Rules 5(1) & (1A) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) require a firm to provide the following information to the Law Society in a form approved by the Law Society within 14 days of commencing the firm's practice:
  - (a) the names of all the principals in the firm, and whether they are engaged by the firm full-time or part-time;
  - (b) the names of all the solicitors in the firm, and whether they are engaged by the firm full-time or part-time;
  - (c) the names and such other details of all unqualified persons employed by the firm, whether full-time or part-time, remunerated or otherwise as may be required by the Law Society;
  - (d) the address or addresses (including electronic address) of the firm together with telephone, fax, telex and DX numbers, where appropriate;
  - (e) the firm's name;
  - (f) evidence that the firm has complied with the *Solicitors (Professional Indemnity) Rules* (Cap. 159 sub. leg. M) from the date of commencement of practice;
  - (g) the accounting period to be used by the firm; and
  - (h) the name and details of any service company engaged by the firm and particulars of any employee of the service company, whether or not the employee has been provided as staff of the firm and whether full-time or part-time, remunerated or otherwise and whether or not the employee is a solicitor (see Principle 2.07 Commentary 3).
2. A principal of a firm commencing business shall also provide the date of commencement of business in a form approved by the Law Society within 14 days of commencing the firm's practice.
3. Rule 5(2) requires a firm to advise the Law Society of any changes to the information in a form approved by the Law Society within 14 days of the change.
4. Rule 5(3) requires a firm to deliver a return of employees on or before 31 January each year. The return must list details of all staff who are not solicitors and their salaries and bonuses.

5. For guidance on cessation of practice, see Practice Direction D.7 and Circular 12-641.
6. For guidance on cessation of practice for foreign firms, see Practice Direction Q and Circular 10-171.

### 2.03 Principal's individual responsibility

**A principal is prima facie responsible for the acts or omissions of his firm and this extends to the acts or omissions of his partners and staff.**

#### **Commentary**

1. A principal cannot escape responsibility for work carried out in the course of his practice by leaving it to his staff, however well qualified.
2. Specific applications of this general principle are set out in the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) with which all solicitors must comply.
3. Every principal is personally responsible for complying with the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F) and the *Accountant's Report Rules* (Cap. 159 sub. leg. A). All the principals will be liable to disciplinary action if there is a failure to comply with these Rules.
4. See rule 1A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) as to the definition of 'principal'.

## 2.04 Standards of supervision and management

**Solicitors shall ensure that every office where they or their firms practise is and can reasonably be seen to be supervised and managed in accordance with rules 4A and 4B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).**

### **Commentary**

1. Rule 4A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) provides:

'A solicitor shall ensure that every office where he or his firm practise is and can reasonably be seen to be properly supervised in accordance with the following minimum standards:

- (a) every such office shall be managed by a solicitor holding a current practising certificate who shall normally be in attendance at that office during all the hours when it is open to the public; and
- (b) every such office shall be attended on each day when it is open to the public by a solicitor who holds an unconditional practising certificate and has been admitted for at least two years (or such other period as the Council may permit), being either a principal of, or a solicitor employed by, the firm and who shall spend sufficient time at such office to ensure adequate control of the staff employed there and afford requisite facilities for consultation with clients.'

An 'unconditional practising certificate' is defined in the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) as 'a practising certificate that does not contain a condition preventing its holder from practising on his own account or in partnership'.

2. Rule 4B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) provides:

'(1) A firm shall not employ unqualified persons in a number more than six plus eight times the number of resident principals and solicitors employed full time in that firm.

(2) No firm shall, except with the written approval of the Council, knowingly employ any unqualified person who is in the part-time or full-time employment of another firm.

(3) For the purpose of this Rule:

- (a) persons employed otherwise than by the firm (such as by a service company set up by the principal or principals of the firm) but for the purposes of the firm shall be deemed to be persons employed in that firm;
- (b) in calculating the number of unqualified persons employed in a firm, trainee solicitors and full-time law students working full-time or part-time during holidays and breaks or part-time during the academic year shall not be taken into account; and

- (c) in calculating the number of resident principals and solicitors employed full-time in a firm, a solicitor shall not be taken into account in respect of more than one firm.
  - (4) A firm shall ensure that every name card of an employee who is an unqualified person, being a card which bears the name of the firm, includes a clear description of the capacity in which the employee is being employed.'
3. It is a disciplinary offence not to comply with any Practice Directions on practice supervision published by the Law Society. Examples of some of the important matters covered by the Practice Directions are:
- (a) letters in the name of a firm issued in the course of its professional practice must be signed by an approved signatory of the firm (Practice Direction D.2);
  - (b) a solicitor must exercise control over, and personally supervise or verify any signing or attestation of documents;
  - (c) a solicitor must not share his office or staff with another business or person other than:
    - (i) another solicitor with whom he is in partnership; or
    - (ii) with one or more foreign firms with which there is a registered Association; or
    - (iii) with one or more Hong Kong firms with which there is a formal association; or
    - (iv) with a Mainland law firm with which there is a registered association in the Mainland.

## 2.05 Absence of sole principal

**A sole principal should make suitable arrangements for the running of a practice during a period of absence.**

### **Commentary**

1. When a sole principal is absent from his office for whatever reason (holiday, sickness, etc.), he owes a continuing duty to his clients to ensure that his practice will be carried on with the minimum interruption to his clients' business. Consequently, he must make adequate arrangements for his practice (including his firm's client accounts) to be administered and properly supervised during his absence. The degree of supervision required must depend upon the circumstances but regard must be had to the minimum standards of supervision required by rule 4A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).

2. A sole principal should make adequate arrangements in advance to cope with the difficulties which will arise in the event of his incapacity. For example, an accountant's report must be submitted, a practising certificate must be applied for and indemnity cover must be obtained notwithstanding his incapacity. Consequently, a sole practitioner must have a standing arrangement with another solicitor, who is of sufficient seniority and who holds a current practising certificate, to supervise his practice until such time as he returns. Further, he must notify his bankers in advance of these arrangements so that the other solicitor can operate his client and office accounts.
3. Before any responsibility or duty is assumed by such other solicitor he must contact the manager appointed by the Hong Kong Solicitors Indemnity Fund Limited to ensure that cover remains in force under the *Solicitors (Professional Indemnity) Rules* (Cap. 159 sub. leg. M). Insurers writing top-up cover or excess cover for both a sole practitioner's practice and the practice of such other solicitor should be notified immediately of the arrangements that have been made. Unless the absence of the sole practitioner is likely to be of short duration, clients of the practice should be informed as should the Law Society.

## 2.06 Arrangements on death of sole principal

**A sole practitioner must make a will containing provisions for the management of his practice after his death.**

### **Commentary**

1. Although it is not essential for him to appoint a solicitor as an executor, if he does so, this will greatly facilitate the conduct of his practice after his death.
2. In any event, clear instructions should be left by the sole practitioner to ensure that his executors are able to make arrangements immediately after his death for the continuance of his practice by a solicitor of sufficient seniority, pending the disposal of the practice.
3. A personal representative of a deceased sole practitioner has no power to sign cheques on the client accounts of the deceased sole practitioner. This power is vested in the Council under section 4, Schedule 2 of the *Legal Practitioners Ordinance* (Cap. 159).
4. The Council has power to control a deceased solicitor's practice in certain circumstances: see section 26B of the *Legal Practitioners Ordinance* (Cap. 159).

## 2.07 Companies serving clients and the firm

**A solicitor shall not by himself or with any other person set up or operate a separate business, other than a solicitor's practice, which offers any service which may normally be offered by a solicitor as part of his practice. This Principle shall not apply to a wholly-owned executor and trustee company, nominee company or company to provide company secretarial services. Subject to applicable statutory conditions a solicitor may form a service company.**

### **Commentary**

1. The formation of a service company to carry out necessary administrative functions concerned with the running of the practice, for example, the provision of staff, hiring premises, furniture and equipment and general maintenance, is permitted, provided the directors and shareholders of the company are partners of or solicitors employed in the firm (see Circular 06-337).
2. Solicitors who form such a company will be responsible for ensuring that the company is not used as a means to avoid or evade the requirements of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), for example, to share profits with unqualified persons, and that the company is at all times operated in compliance with the rules of professional conduct as if it were part of the solicitors' practice.
3. Solicitors are permitted to form a service company provided the directors and shareholders of the company are partners of or solicitors employed in the firm. The name of the company can be similar to the name of the firm of solicitors controlling it. Clients who use this service must be informed of the nature of the company and whether a solicitor will or may thereby obtain or has thereby obtained a personal interest or benefit. Disclosure should be in a manner that will be understood by the client, and preferably in writing (see Principle 7.03).
4. See also rules 4B and 5(1A) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and Principle 2.02 Commentary 1(h).

## 2.08 Employed solicitors

**A solicitor who works for a non-solicitor employer must comply with the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), Practice Directions and the rules and principles of professional conduct.**

### *Commentary*

1. See Practice Direction N.
2. This obligation takes priority over any conflicting demands or requirements of the non-solicitor employer.
3. A solicitor employed by a non-solicitor employer should have particular regard to rule 4 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and section 49 of the *Legal Practitioners Ordinance* (Cap. 159).
4. An employed solicitor shall have regard to the applicability of legal professional privilege when advising his non-solicitor employer.



## APPENDICES

### PRINCIPLE 2.02 COMMENTARY 5

**CIRCULAR 12-641**

**27 August 2012**

#### LAW SOCIETY GUIDELINES

#### CESSATION OF PRACTICE Updated August 2012

The Revised Guidelines came into effect on 2 August 2004.

Cessation of Practice means the ceasing of practice as such by a Hong Kong firm.

'Cessation' occurs or may occur on:

- (a) the retirement of a sole practitioner; or
- (b) the closure of a practice by a partnership; or
- (c) the retirement of a partner from a partnership; or
- (d) the amalgamation of 2 existing firms; or
- (e) where an existing firm is dissolved and the partners divide into two or more new firms.

#### 1. Notification to the Society

If your firm intends to cease practice you should notify the Society at least 8 weeks prior to the date of Cessation by completing the Notice of Cessation of Practice form ('the Cessation Notice'). The Society must be notified of the firm of solicitors which will act as your Agent (see paragraph 2 below).

Click [here](#) for a copy of the Cessation Notice and Guidance Notes (updated August 2012)

#### 2. Appointment of a Firm of Solicitors as Agent

(Revised March 2007)

When the firm ceases to practise, a firm of solicitors practising with at least 2 partners must be appointed to be the firm's Agent to deal with all consequential matters pursuant to Law Society Practice Direction D.7 as amended in October 2006. Firms which have been appointed as Agent should carefully review the Guidelines prepared by the Law Society on the duties and responsibilities of such appointment.

Click the link below for:

[Law Society Practice Direction D.7](#)

[Guidelines on Appointment as an Agent](#)

3. Notice to the Hong Kong Solicitors Indemnity Fund Limited ('HKSIF') (Updated January 2012)

Notice of Cessation of practice must be given to HKSIF's Manager, Essar Insurance Services Ltd, whose current address and current contact details are:-

Essar Insurance Services Ltd. (FAO The Legal Officer)  
28/Floor, Tower One  
Times Square  
1 Matheson Street, Causeway Bay, Hong Kong

Telephone no: 2861 6666 Fax: 2861 6560

4. Notice to Clients

- (a) You must give sufficient notice to your clients with a view to avoiding any prejudice to your clients' interests and affording your clients adequate opportunity to take such steps as they consider appropriate in the circumstances. What will be sufficient notice will depend upon the particular circumstances of your firm and of the Cessation and it may well be necessary to give notice well before the official notification to the Society (see paragraph 1 above), but in any event not later than the official notification date to the Society. For example there may be files due for completion at about the date of Cessation or you may have a large number of 'live' files to wind-up. Failure to give sufficient notice to clients could amount to an act of negligence and could also lead to disciplinary action.

Click [here](#) for a sample letter to clients

- (b) If you are planning to cease practice, you should be open and frank with your clients when obtaining instructions where it appears likely that the matter will continue beyond your planned date of Cessation. Extra care should be taken to ensure that you do not leave your client unrepresented.

5. Notice Generally

- (a) You must provide fellow practitioners, barristers and others (including relevant Government Bureaux and Departments) involved in transactions with your firm, adequate notice to enable the files to be handed over in good time, or to conclude matters

with your firm, and to take such other steps as may be appropriate in the circumstances. The recommended period of notice should be at least 8 weeks prior to the date of Cessation.

Click [here](#) for a suggested list of organisations to be notified

- (b) Notification should also be given to the Commissioner of Inland Revenue pursuant to the provisions of the *Business Registration Ordinance* (Cap. 310).

## 6. Publication of Cessation

### (a) Notice in the Law Society's Circulars

The Society will advise the membership of the firm's intention to cease practice in the weekly circulars once the Cessation Notice has been filed.

### (b) Notice of Rescission

If the firm changes its decision on Cessation, a Notice of Rescission together with the payment of the fee, as prescribed by Council, must be filed before the expiration of the date of Cessation. A Notice of the Rescission will be circulated to the membership in the weekly circulars.

Click [here](#) for the Notice of Rescission

## 7. Money in Clients' Accounts

This section should be reviewed in conjunction with the guidance provided in paragraph 8 below.

The funds held in clients' accounts must be returned to the clients or dealt with as they direct. If a client cannot be traced it is suggested that you should advertise. At the date of Cessation all outstanding balances in the clients' accounts must be transferred to the firm appointed to act as the firm's Agent in accordance with the directions from Council (pursuant to the firm's application under Section 8(2) of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F)). The firm must notify the Society in writing within 7 days of the date of Cessation of the total aggregate amount in the firm's clients' accounts transferred to the Agent, such notification to be countersigned by the Agent by way of acknowledgement.

## 8. Delivery of Final Accountant's Report

### (a) Date of Delivery of Final Accountant's Report

The Society will confirm the deadline for delivery of the Final Accountant's Report following receipt of the Cessation Notice.

(b) Legislation

The legislation dealing with the Final Accountant's Report can be found in:

(i) Section 8(2) of the *Legal Practitioners Ordinance* (Cap. 159)

This provides that the last date for delivery of the firm's Final Accountant's Report shall be within 6 months from the date on which the firm ceased business.

Click [here](#) for a copy of Section 8 of the *Legal Practitioners Ordinance* (Cap. 159)

(ii) *Accountant's Report Rules* (Cap. 159 sub. leg. A)

The Report must also comply with the requirements stated in Rule 8(2) which states:

'(2) The firm shall deliver the accountant's report to the Council not more than 6 months (or the period prescribed by rules made under section 73(1)(b) of the Ordinance) after the accounting period specified in the report.'

(c) 'Date of Cessation'

The firm's books should be made up as at the date of Cessation, namely when the firm ceased legal practice. Post Cessation events should be recorded in supplemental or reconciliation statements to the Society.

(d) Rule 12 *Accountant's Report Rules* (Cap. 159 sub. leg. A)

The Law Society's Council has the power to waive any of the provisions of the *Accountant's Report Rules* (Cap. 159 sub. leg. A) under Rule 12 in any particular case. Any application to the Council should be made before delivery of the Final Accountant's Report.

9. Office Accounts

A firm can maintain its Office Account after the date of Cessation in order to deal with post-Cessation settlement of bills and accounts receivable, etc. Any correspondence referring to the firm thereafter should make reference to the firm having ceased practice which is achieved by clear notification on the firm's stationery e.g. letterhead, compliments slips, receipts etc. (In addition see paragraph 17 below) (Revised March 2005)

## 10. Preservation of Books of Account

A firm which has ceased practice must also comply with the following requirements:

(a) *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F)

Rule 10(6)

'Every solicitor shall preserve for at least 6 years from the date of the last entry therein all books, accounts and records kept by him under this rule.'

Rule 10(6A)

'Subject to paragraph (8), the books and accounts, ledgers and records kept by a solicitor under this rule must be kept in Hong Kong.'

(b) *Inland Revenue Ordinance* (Cap. 112)

Consideration should also be given to provisions in the *Inland Revenue Ordinance* (Cap. 112) e.g. see section 22 on 'Assessment of Partnerships' and section 51C on 'Business records to be kept'.

## 11. Storage and Destruction of Old Files

(a) Members should review the Society's Guidance Note on The Storage and Destruction of Old Files in Circular 12-475.

Click [here](#) for a copy of Circular 12-475

(b) Full details on the location of the firm's old files must be given to the Society in the Cessation Notice.

(c) Consideration should also be given to the relevant provisions in the *Limitation Ordinance* (Cap. 347).

## 12. Final Notification of Changes to a Practice form

(a) Notification of Changes to a Practice form

The Society will send you the prescribed Notification of Changes to a Practice form following receipt of the Cessation Notice, which must be completed and filed with the Society within 14 days of the date of Cessation.

Click [here](#) for a copy of the Notification of Changes to a Practice form

(b) Final Employees' Return

A Final Employees' Return must be filed in the prescribed form pursuant to Rule 5(3) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H)

(c) *Inland Revenue Ordinance* (Cap. 112)

Consideration should also be given to the provisions in the *Inland Revenue Ordinance* (Cap. 112).

13. Outstanding Professional Fees and Undertakings

The liability of a sole principal, and of partners for the liabilities of their co-partners, or former partners, for outstanding professional fees and undertakings is a continuing one and is not determined or superseded by Cessation.

Please review *The Hong Kong Solicitors' Guide to Professional Conduct*, in particular, the Commentary to Principle 12.04 and Chapter 14.

Click the link below for:

[Commentary to Principle 12.04](#)

[Chapter 14](#)

14. When a Solicitor retires: Is a Practising Certificate required?

(a) Description as a Solicitor

If you have retired from practice as a solicitor and do not hold a practising certificate you may still describe yourself as a solicitor, but care must be taken that you do not hold yourself out as qualified to practise as a solicitor. e.g. 'Solicitor (Non-practising)' is considered to be an appropriate description.

(b) Acting as a Consultant, or Working without remuneration

If a solicitor wishes to act as a consultant with a firm, or on a part-time or ad hoc basis, or if a retired solicitor wishes to work in the capacity of a solicitor without remuneration, for example for friends, relatives, family owned companies or registered charities, he must hold a practising certificate and must comply with all regulations which apply to solicitors.

15. The Retainer – 'Entire Contract Rule'

- (a) A current retainer with the firm may be 'entire', i.e. one to complete the work for which the retainer was given and therefore one which cannot be terminated by the solicitor before completion unless there is good cause and reasonable notice.

(b) It would be prudent to plan in advance and try and complete the retainers to which the entire contract rule applies before Cessation. If that is not possible, and the retainer will be terminated for good cause, the client should be given adequate notice of the Cessation. Appropriate steps should be taken to ensure the client is not left unrepresented.

16. Papers to be handed over on termination of retainer

All documents and materials belonging to a client e.g. title deeds, original wills, codicils, etc., should, subject to any lien, be returned to or disposed of according to the client's directions. (Please see paragraph 11 above)

17. Destruction of stationery and chops

Upon Cessation all stationery and chops with your firm's name should be destroyed, unless they are required for use in dealing with outstanding matters in relation to the firm's Office Account. If the firm's old stationery is to be used it must clearly indicate the firm has ceased practice, e.g. 'ABC & Co. ceased practice'.

(Revised March 2005)

18. Circular 12-81 is superseded.

## PRINCIPLE 2.02 COMMENTARY 6

CIRCULAR 10-171

22 March 2010

### LAW SOCIETY GUIDELINES

#### CESSATION OF PRACTICE BY FOREIGN FIRMS

The Guidelines will come into effect on 7 June 2010.

Cessation of Practice means the ceasing of practice as such by a foreign firm in Hong Kong.

'Cessation' occurs or may occur on:

- (a) the retirement of a sole practitioner; or
- (b) the closure of a practice; or
- (c) the retirement of a partner from a partnership; or
- (d) the amalgamation of 2 existing firms; or
- (e) where an existing firm is dissolved and the partners divide into two or more new firms.

#### 1. Notification to the Society

If your firm intends to cease practice you should notify the Society at least 8 weeks prior to the date of Cessation by completing the Notice of Cessation of Practice form ('the Cessation Notice'). The Society must be notified of the firm which will act as your Agent (see paragraph 2 below).

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

#### 2. Appointment of Cessation Agent

The Agent can be a Hong Kong firm or a foreign firm in Hong Kong practising the law of the same jurisdiction of your firm. The Agent should be a firm of at least 2 partners resident in Hong Kong. The Agent should also be authorised to accept service of process on behalf of your firm. Firms which have been appointed as Agent should carefully review the Guidelines prepared by the Society on the duties and responsibilities of such appointment.

Click the link below for:

[Law Society Practice Direction Q](#)

[Guidelines on Appointment as an Agent](#)



3. Notice to the Insurer

Notice of Cessation of Practice must be given to your insurer.

4. Notice to Clients

(a) You must give sufficient notice to your clients with a view to avoiding any prejudice to your clients' interests and affording your clients adequate opportunity to take such steps as they consider appropriate in the circumstances. What will be sufficient notice will depend upon the particular circumstances of your firm and of the Cessation and it may well be necessary to give notice well before the official notification to the Society (see paragraph 1 above), but in any event not later than the official notification date to the Society. For example there may be files due for completion at about the date of Cessation or you may have a large number of 'live' files to wind-up. Failure to give sufficient notice to clients could amount to an act of negligence and could also lead to disciplinary action.

Click [here](#) for a sample letter to clients

(b) If you are planning to cease practice, you should be open and frank with your clients when obtaining instructions where it appears likely that the matter will continue beyond your planned date of Cessation. Extra care should be taken to ensure that you do not leave your client unrepresented.

5. Notice Generally

(a) You must provide fellow practitioners, barristers and others (including relevant Government Bureaux and Departments) involved in transactions with your firm, adequate notice to enable the files to be handed over in good time, or to conclude matters with your firm, and to take such other steps as may be appropriate in the circumstances. The recommended period of notice should be at least 8 weeks prior to the date of Cessation.

Click [here](#) for a suggested list of organisations to be notified

(b) Notification should also be given to the Commissioner of Inland Revenue pursuant to the provisions of the *Business Registration Ordinance* (Cap. 310).

6. Publication of Cessation

(a) Notice in the Law Society's Circulars

The Society will advise the membership of the firm's intention to cease practice in the weekly circulars once the Cessation Notice has been filed.

(b) Notice of Rescission

If the firm changes its decision on Cessation, a Notice of Rescission together with the payment of the fee, as prescribed by Council, must be filed before the expiration of the 8-week notification of the date of Cessation. A Notice of the Rescission will be circulated to the membership in the weekly circulars.

Click [here](#) for the Notice of Rescission

7. Money in Client Accounts

*Solicitors' Accounts Rules* (Cap. 159 sub. leg. F) are applicable to foreign firms.

This section should be reviewed in conjunction with the guidance provided in paragraph 8 below.

The funds held in client accounts must be returned to the clients or dealt with as they direct. If a client cannot be traced it is suggested that you should advertise. At the date of Cessation all outstanding balances in the client accounts must be transferred to the firm appointed to act as the firm's Agent in accordance with the directions from Council (pursuant to the firm's application under Section 8(2) of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F)). The firm must notify the Society in writing within 7 days of the date of Cessation of the total aggregate amount in the firm's client accounts transferred to the Agent, such notification to be countersigned by the Agent by way of acknowledgement.

8. Delivery of Final Accountant's Report

*Accountant's Report Rules* (Cap. 159 sub. leg. A) are applicable to foreign firms.

(a) Date of Delivery of Final Accountant's Report

The Society will confirm the deadline for delivery of the Final Accountant's Report following receipt of the Cessation Notice.

(b) Legislation

The legislation dealing with the Final Accountant's Report can be found in:

(i) Section 8(2) of the *Legal Practitioners Ordinance* (Cap. 159)

This provides that the last date for delivery of the firm's Final Accountant's Report shall be within 6 months from the date on which your firm ceased business.

Click [here](#) for a copy of Section 8 of the *Legal Practitioners Ordinance* (Cap. 159)

(ii) *Accountant's Report Rules* (Cap. 159 sub. leg. A)

The Report must also comply with the requirements stated in Rule 8(2) which states:

'(2) The firm shall deliver the accountant's report to the Council not more than 6 months (or the period prescribed by rules made under section 73(1)(b) of the Ordinance) after the accounting period specified in the report.'

The Council has the power to waive any of the provisions of the *Accountant's Report Rules* (Cap. 159 sub. leg. A) under Rule 12 in any particular case. Any application to the Council should be made before delivery of the Final Accountant's Report.

(c) 'Date of Cessation'

The firm's books should be made up as at the date of Cessation, namely when the firm ceased legal practice. Post-Cessation events should be recorded in supplemental or reconciliation statements to the Society.

9. Office Accounts

A firm can maintain its Office Account after the date of Cessation in order to deal with post-Cessation settlement of bills and accounts receivable, etc. Any correspondence referring to the firm thereafter should make reference to the firm having ceased practice which is achieved by clear notification on the firm's stationery e.g. letterhead, compliments slips, receipts etc. (In addition see paragraph 17 below)

10. Preservation of Books of Account

A firm which has ceased practice must also comply with the following requirements:

(a) *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F)

Rule 10(6)

'Every solicitor shall preserve for at least 6 years from the date of the last entry therein all books, accounts and records kept by him under this rule.'

Rule 10(6A)

'Subject to paragraph (8), the books and accounts, ledgers and records kept by a solicitor under this rule must be kept in Hong Kong.'

Rule 10(8)

'Notwithstanding paragraph (6A), the Council may specifically exempt a foreign lawyer from that paragraph upon such conditions as it thinks fit.'

(b) *Inland Revenue Ordinance* (Cap. 112)

Consideration should also be given to provisions in the *Inland Revenue Ordinance* (Cap. 112) e.g. see section 22 on 'Assessment of Partnerships' and section 51C on 'Business records to be kept'.

11. Storage and Destruction of Old Files

(a) Members should review the Society's Guidance Note on The Storage and Destruction of Old Files in Circular 02-384.

Click [here](#) for a copy of Circular 02-384

(b) Full details on the location of the firm's old files must be given to the Society in the Cessation Notice.

(c) Consideration should also be given to the relevant provisions in the *Limitation Ordinance* (Cap. 347).

12. Final Notification of Changes

(a) Final Notification of Changes

The Society will send you the Final Notification of Changes following receipt of the Cessation Notice, which must be completed and filed with the Society within 14 days of the date of Cessation pursuant to rule 9(2)(b) of the *Foreign Lawyers Practice Rules* (Cap. 159 sub. leg. R).

Click [here](#) for a copy of the Final Notification of Changes

(b) Final Declaration as to particulars relating to foreign firms

It must be filed pursuant to Practice Direction Q5 within 14 days of the date of Cessation.

Click [here](#) for a copy of the Final Declaration as to particulars relating to foreign firms.

(c) *Inland Revenue Ordinance* (Cap. 112)

Consideration should also be given to the provisions in the *Inland Revenue Ordinance* (Cap. 112).

13. Outstanding Professional Fees and Undertakings

The liability of a sole principal, and of partners for the liabilities of their co-partners, or former partners, for outstanding professional fees and undertakings is a continuing one and is not determined or superseded by Cessation.

14. Certificate of Registration as a foreign lawyer

Upon cessation of practice, the Certificate of Registration as a foreign lawyer will be deemed to have been suspended until notice has been received of a new employment in another law firm in Hong Kong and of the existence of an appropriate policy of insurance pursuant to rule 6 of the *Foreign Lawyers Registration Rules* (Cap. 159 sub. leg. S).

15. The Retainer – ‘Entire Contract Rule’

- (a) A current retainer with the firm may be ‘entire’, i.e. one has to complete the work for which the retainer was given and therefore it cannot be terminated before completion unless there is good cause and reasonable notice.
- (b) It would be prudent to plan in advance and try and complete the retainers to which the entire contract rule applies before Cessation. If that is not possible, and the retainer will be terminated for good cause, the client should be given adequate notice of the Cessation. Appropriate steps should be taken to ensure the client is not left unrepresented.

16. Papers to be handed over on termination of retainer

All documents and materials belonging to a client e.g. title deeds, original wills, codicils, etc., should, subject to any lien, be returned to or disposed of according to the client’s directions. (Please see paragraph 11 above)

17. Destruction of stationery and chops

Upon Cessation all stationery and chops relevant to the Hong Kong practice with your firm's name should be destroyed, unless they are required for use in dealing with outstanding matters in relation to the firm’s Office Account.

## PRINCIPLE 2.07 COMMENTARY 1

CIRCULAR 06-337

19 June 2006

### THE HONG KONG SOLICITORS' GUIDE TO PROFESSIONAL CONDUCT

#### FORMATION OF A SERVICE COMPANY

##### Commentary 1 to Principle 2.07 (Volume 1, 2nd edition)

1. This Circular is only applicable to the service companies as described in Commentary 1 to Principle 2.07 of *The Hong Kong Solicitors' Guide to Professional Conduct* (Volume 1) ('the Conduct Guide').
2. Commentary 1 to Principle 2.07 of the Conduct Guide states that:  
'The formation of a service company to carry out necessary administrative functions concerned with the running of the practice, for example, the provision of staff, hiring premises, furniture and equipment and general maintenance, is permitted, provided the directors and shareholders of the company are partners of or solicitors employed in the firm.'
3. With effect from 13 February 2004, the *Companies Ordinance* (Cap. 32) was amended so that a private company may have one director (section 153A) and/or one shareholder (sections 4 and 95A).
4. Accordingly, a service company formed to carry out administrative functions by a sole practitioner who practises on his own account may have only one director and/or one shareholder. The sole practitioner will thus be able to fulfill the requirements in Commentary 1 to Principle 2.07 of the Conduct Guide.

5. Notwithstanding the removal by the amendment of the difficulties previously experienced by sole practitioners in complying with this Principle, the Council of the Law Society is of the view that the appointment of a second director is important so that there are at least two persons potentially available who can be held responsible for the service company, if necessary. The Council has therefore resolved that sole practitioners who practise on their own account and who wish to set up a service company may continue to:
  - (a) apply to the Law Society for a waiver of the proviso in Commentary 1 to Principle 2.07 of the Conduct Guide to enable them to appoint a reputable professional person as an additional director, an alternate director (section 153B of the *Companies Ordinance* (Cap. 32)) or to appoint a solicitor as a reserve director (see paragraph 7 below) of the service company; and
  - (b) such applications to be considered by the Consents Committee on a case-by-case basis.
  
6. In cases where a waiver of the proviso in Commentary 1 of Principle 2.07 has been granted prior to the date of this Circular to sole practitioners who practise on their own account, such waiver is still valid and it is a matter for the sole practitioners to decide whether to alter the directorship or shareholding structure of the service companies in the light of the amendment to the *Companies Ordinance* (Cap. 32).
  
7. According to section 153A(6) of the *Companies Ordinance* (Cap. 32), where a private company has only one member and that member is the sole director of the company, the company may in general meeting, notwithstanding anything in its articles, nominate a person (other than a body corporate) who has attained the age of 18 years as a reserve director of the company to act in the place of the sole director in the event of his death. As a sole practitioner who practises on his own account is required under rule 5AA of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) to make a testamentary provision which provides for the management of his practice after his death (pending disposal of that practice) to be carried out by a solicitor holding an unconditional practising certificate\*, a sole practitioner shall appoint the same solicitor as a reserve director for his service company in accordance with section 153A(6) of the *Companies Ordinance* (Cap. 32).

\*An 'unconditional practising certificate' is one that does not contain a condition preventing a solicitor from practising on his own account or in partnership.

8. The Council maintains the position that:
  - (a) service companies must be companies incorporated in Hong Kong in order that they be fully governed by the provisions of the *Companies Ordinance* (Cap. 32);
  - (b) service companies set up by sole practitioners who practise on their own account must have no more than two directors, one of whom must be the sole practitioner;
  - (c) the other director must be a reputable professional person and is not permitted to be a company; and
  - (d) the issued shares of the service company must be wholly owned beneficially by the sole practitioner.
  
9. Members please note that if the second director is not an employee of the sole practitioner's firm for the purposes of the definition of 'indemnified' in rule 2 of the *Solicitors (Professional Indemnity) Rules* (Cap. 159 sub. leg. M), he or she is not covered by the Professional Indemnity Scheme, and separate directors' and officers' liability insurance must be taken out for the second director.
  
10. This Circular is regarded as mandatory.
  
11. Circulars 97-349, 99-79, 00-155 and 05-311 are superseded.
  
12. Any enquiries can be directed to the Assistant Director of Regulation and Guidance.



# 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

### 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.)
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.

### **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* FACCC 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
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  - 11. Duty applies throughout proceedings
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  - 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*
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    - Client should sign the letter in confirmation
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- 4.02 Agreed fees must be recorded
  - 1. Agreed fee cannot be unilaterally altered
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  - 4. Agreed fees must not be paid into client account
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- 4.03 Provide details of fees
  - Authority for disbursements
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  - Inform client if estimate likely to be exceeded
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  - 1. Obtain instructions if limit exceeded
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2. Benefit of keeping client informed
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- 4.12 Taxation of bill
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  2. Contingency fees of overseas lawyers
- 4.16 Sharing profit costs
  1. Factoring
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- 4.17 Contingency fee arrangements
  1. Definition
  2. Debt recovery commissions
  3. Champerty and Maintenance

## Appendices

Circular 12-176 'Recovery Agents' see Chapter 3  
Circular 09-397 'Sharing of Fees'

#### 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.

#### 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), a solicitor shall not share or agree to share his profit costs with any person other than a practising solicitor.**

##### **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 09-397.

#### 4.17 Contingency fee arrangements

**A solicitor may not enter into a contingency fee arrangement for acting in contentious proceedings: see section 64 of the *Legal Practitioners Ordinance* (Cap. 159).**

##### **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.

**APPENDICES**

**PRINCIPLE 4.01 COMMENTARY 17**

**CIRCULAR 12-176 'RECOVERY AGENTS' SEE CHAPTER 3**

## PRINCIPLE 4.16 COMMENTARY 3

CIRCULAR 09-397

25 May 2009

### 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. The fee for such application is \$4,000.
5. Circulars 98-171 and 98-238 are superseded.

Enquiries should be directed to the Assistant Director, Regulation and Guidance on 2846-0503.

# CHAPTER 5

## RETAINER

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#### 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).



## (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.

### 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.

#### **5.05 Unclear instructions**

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

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

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.

#### **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.

### **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***

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.

### **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).**

### 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.

### 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 6

## COMPETENCE AND QUALITY OF SERVICE

- 6.01 Duty to act competently
  - 1. Knowledge and skill required
  - 2. Client is entitled to assume competence
  - 3. Competence required
  - 4. Competence includes practical knowledge
  - 5. Seeking assistance
  - 6. Solicitor remains responsible
  - 7. No exclusion of liability for negligence
  - 8. Limiting retainer
  - 9. Exclusion of liability for professional misconduct against solicitor
  
- 6.02 Client with a claim against his solicitor  
Client refusing independent legal advice
  
- 6.03 Promptly inform insurers of claim
  - 1. Do not admit liability
  - 2. Client unaware of a potential claim
  - 3. Keep copies of documents
  
- 6.04 Fully and promptly reply to inquiries
  - 1. Answer letters from client
  - 2. Answer letters from Law Society
  - 3. Comply with Notice of Inspection
  - 4. Provide explanation of unbecoming conduct
  - 5. Give satisfactory explanation of conduct

### 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.

# 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
- 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.

### 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 8

## CONFIDENTIALITY

### 8.01 Duty of confidentiality

1. Client's right to confidential communication with solicitor
2. Underlying principles of confidentiality
3. Solicitor's staff
4. Duty of confidentiality continues indefinitely
5. Unauthorised disclosure
6. Confidentiality and legal professional privilege
7. Request by police
8. Only the client can waive his privilege
9. Communication regarding crime
10. Disclosure pursuant to Ordinance
11. Privileged information to be disclosed only if court order clearly overrides privilege. Distinction between privilege and confidentiality.
12. Duty of confidentiality survives death of client
13. Confidentiality of a will
14. Response to enquiry through the Law Society
15. Disclosure authorised by client
16. Justified disclosure
17. Defence to claims against a solicitor
18. Associated firms
19. Inherent risks in shared services
20. Employment of unqualified staff
21. Non-disclosure of the retainer
22. No indiscreet communication
23. Client matters that are public knowledge
- 24.&25. Joint retainers
26. Project conveyancing interviews
27. Amalgamation of firms
28. Moving to new employment
29. Non-disclosure of client's address
30. Postcards
31. Electronic communication
32. No breach of confidentiality during destruction of client files
33. Sale of book-debts
34. Inform client of disclosure
35. Storage of physical files in Hong Kong

8.02 Profit on information

1. Fiduciary relationship
- 2.&3. Breach of fiduciary duty

8.03 Duty to pass information to a client

1. Consequence of breach
2. No disclosure between clients
3. Confidential information from another solicitor
4. Exception to duty of disclosure
5. Misdirected communications
6. Duty if the solicitor reads documents
7. Duty may be overridden by statute

8.04 Confidentiality of mediation

Appendices

- Circular 04-320 'Criminal Litigation – Guidelines on Steps to Take to Protect Clients' Confidentiality in interviews
- Circular 08-59 'Anti-Money Laundering'
- Circular 08-361 'Practice Direction P'
- Circular 08-362 'Endorsement by the Privacy Commissioner for Personal Data on paragraph 86 of Practice Direction P (as revised by the Council on 24 June 2008)'
- Circular 08-756 'Clarifications of Practice Direction P'
- Circular 09-360 'Anti-Money Laundering'
- Circular 12-438 'Will Searches'
- Circular 07-767 'Association with Local Firms, Foreign Firms and Overseas Firms'
- Circular 02-25 'Breaches of Confidentiality in Multiple-Client Interviews in Project Conveyancing'
- Circular 12-475 'Storage and Destruction of Old Files' See Chapter 5

## 8.01 Duty of confidentiality

**A solicitor has a legal and professional duty to his client to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship, and must not divulge such information unless disclosure is expressly or impliedly authorized by the client or required by law or unless the client has expressly or impliedly waived the duty.**

### *Commentary*

1. The right of a client to confidential legal advice is enshrined in article 35 of the Basic Law (see Circular 04-320).
2. A solicitor cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time a client must feel completely secure and entitled to proceed on the basis, without any express request or stipulation on the client's part, that matters disclosed to or discussed with a solicitor will be held confidential.
3. This duty extends to the solicitor's staff, whether admitted or unadmitted, and it is the responsibility of the solicitor to ensure compliance.
4. A solicitor owes this duty of confidentiality to every client without exception. The duty survives the professional relationship and continues indefinitely after a solicitor has ceased to act for a client, whether or not differences have arisen between them.
5. Unauthorised disclosure of a client's confidences could lead to disciplinary proceedings against a solicitor and could also render a solicitor liable, in certain circumstances, to a civil action by the client arising out of the misuse of confidential information.
6. A solicitor must reveal matters where a court orders that such matters are to be disclosed. Where a warrant permits a police officer or other authority to seize confidential documents a solicitor should comply with the terms of the warrant. However if a solicitor is of the opinion that the documents are subject to legal professional privilege or that for some other reason the order or warrant ought not to have been made or issued, he should seek his client's instructions and subject thereto make an application to have the order or warrant set aside without unlawfully obstructing its execution.
7. A solicitor may be asked by the police to give information or to show them documents which the solicitor has obtained when acting for a client. Unless the client has waived confidentiality, the solicitor should insist upon receiving a search warrant, court order, witness summons or subpoena so that he may, where appropriate, claim privilege and leave the court to decide the issue.

8. A client has the right to refuse to disclose, even to a court, confidential communication with his lawyer made for the purpose of obtaining legal advice. This right to resist disclosure is a privilege granted to a client and so may be abandoned only by him. A solicitor is bound to assert this privilege on behalf of his client. A solicitor has no right unilaterally to waive a client's privilege; consent of the client or a court order must be obtained.
9. Communication made by a client to his solicitor before the commission of a crime or during the commission of a continuing crime for the purpose of being guided or helped in the commission of it is not confidential and not covered by legal professional privilege since such communication does not come within the scope of the professional retainer.
10. There are circumstances in which disclosure is required under various Ordinances, for example, the *Prevention of Bribery Ordinance* (Cap. 201), the *Inland Revenue Ordinance* (Cap. 112) and sections 8A, 8AA, 8B(2) and Part IIA of the *Legal Practitioners Ordinance* (Cap. 159). In relation to anti-money laundering provisions, see the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap. 405); the *Organized and Serious Crimes Ordinance* (Cap. 455); the *United Nations (Anti-Terrorism Measures) Ordinance* (Cap. 575); The Law Society Practice Direction P and Law Society Circulars 08-59, 08-361, 08-362, 08-756 and 09-360.
11. When disclosure is required by law or by order of a court of competent jurisdiction a solicitor should always be careful not to divulge more information than is required. It should be noted that the anti-money laundering provisions referred to above specifically exclude from the duty of disclosure information subject to legal professional privilege i.e. legal advice and related documents prepared or given in contemplation of or in connection with legal proceedings. However, such provisions do not exclude the duty to disclose information that is merely confidential and no statutory defence is available to a solicitor for failing to provide information required to be disclosed under such provisions other than that protected by legal professional privilege.

Privileged information should not be revealed unless the law or a court order clearly overrides legal professional privilege and not merely the duty of confidentiality.

For a summary of the distinction between confidentiality and legal professional privilege see *PCCW-HKT Telephone Ltd v Aitken* [2009] 2 HKLRD 274, CFA; *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4HKC 579.

As to limited waiver by the client see *Citic Pacific Ltd. v. Secretary for Justice & Another* [2012] HKCU 685.

12. The duty to keep confidential a client's affairs continues after the client dies and the right to permit disclosure or withhold it passes to the personal representatives of the client.
13. The contents of a will prepared by a solicitor should not be disclosed before probate is granted, except to or with the consent of the executors.
14. The Law Society is of the view that after the death of the testator it is not a breach of this duty for a solicitor who holds a will or a copy to disclose that fact and the date of execution of the will in response to an enquiry made through the Law Society. However, the solicitor must then seek instructions from the executors named in the will before disclosing the contents of the will and the identity of the named executors to any person. (See Circular 12-438.)
15. Confidential information may be divulged with the express authority of the client concerned and, in some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Again, a solicitor may (unless his client directs otherwise) disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. This implied authority to disclose places the firm under a duty to impress upon its own lawyers and staff and those of any firm with which it may be associated the importance of non-disclosure (both during their employment and afterwards).
16. A solicitor may in exceptional circumstances breach his duty of confidentiality to the extent of revealing information that he believes necessary to prevent a client or any other person from committing or continuing a criminal act that the solicitor believes on reasonable grounds does involve or is likely to result in the abduction of or serious violence to a person (including child abuse). Even then the solicitor must exercise his professional judgment and decide whether there are any other means of preventing the crime and, if not, whether the public interest in protecting persons at risk from serious harm outweighs his duty to his client.
17.
  - (a) Disclosure of confidential information may also be justified in order to recover costs from a client, or in defence of any allegation of malpractice or misconduct, but only to the extent reasonably necessary for such purpose.
  - (b) A solicitor may reveal information which would otherwise be confidential to the extent that it is reasonably necessary to establish a defence to a criminal charge or civil claim (including an investigation as to entitlement to indemnity under the Professional Indemnity Scheme) against him or his firm or

where the solicitor's conduct is under investigation by the Law Society or the Solicitors Disciplinary Tribunal.

18. Firms which are in an association either under section 39C of the *Legal Practitioners Ordinance* (Cap. 159) or under rule 1A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and share premises, facilities, management and employees must inform their clients that the firms will be treated as one firm for the purposes of any rules of conduct relating to conflict of interest and confidentiality. Firms which are not prepared to treat themselves as one firm must not share premises, facilities, management and employees. See Circular 07-767.
19. Problems with confidentiality can arise where a solicitor or firm shares office services provided by independent contractors (such as computers, equipment or typing services) with another person or business. A solicitor should only make use of these where strict confidentiality of client matters can be maintained: see Practice Direction D.5.
20. The Law Society has forbidden employment by a solicitor of any unqualified person who is in the regular employment of another solicitor unless approval has been given by the Council: see rule 4B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).
21. As a general rule, a solicitor should not disclose that he has been consulted or retained by a person in relation to a particular matter. However, certain communication from a client is not confidential if it is a matter of public record, for example, a solicitor has been instructed by a named client in a contentious matter, but the type of business involved may be subject to the duty of confidentiality.
22. A solicitor should avoid indiscreet conversations or communication, even with his spouse or family, about a client's affairs and should shun any gossip about such things even though a client is not named or otherwise identified. Likewise a solicitor should not repeat any gossip or information about a client's business or affairs that may be overheard by or recounted to the solicitor. Apart from professional considerations, indiscreet conversations or communication could result in prejudice to a client.
23. Although some facts concerning a client's affairs may be public knowledge, nevertheless, a solicitor should not participate in or comment upon speculation about a client's affairs.
24. A solicitor must explain to his clients that any information in respect of the retainer is to be fully disclosed to every client who is a party to that retainer. Where a solicitor has received information from joint clients, consent from all is required before the duty to preserve confidentiality can be waived (see also Principle 9.04 Commentary 1).



25. If a solicitor acts for two or more clients jointly, information communicated to the solicitor in his capacity as solicitor acting for only one of the clients in a separate matter must not be disclosed to the other clients without the consent of that one client.
26. When conducting multiple client interviews in project conveyancing, the safeguards for the protection of client confidentiality must be ensured (see Circular 02-25).
27. Where two or more firms amalgamate, the confidential information which each firm has obtained when acting for its own clients is presumed to pass to the new amalgamated firm. As to potential conflicts between clients in the new firm, see Principle 9.04 Commentary 6.
28. A solicitor who moves to a new firm must not pass on information about a previous client's affairs to a client in the new firm without the consent of the previous client. See also Principles 8.03 and 9.02.
29. A solicitor must not disclose a client's address without the client's consent. Where a solicitor is asked for a client's address, he may, as a matter of courtesy, offer to send on to his client, at his last known address, a letter from the enquirer addressed to the client, care of the solicitor.
30. Where a solicitor sends postcards to acknowledge receipt of communications sent to him, care must be taken to ensure that no confidential information of any kind appears on them. The use of open postcards should be discouraged since it is preferable to use cards which can be folded and sealed, or secured in some other way.
31. This Principle extends to cover electronic communication (see also Principle 1.07).
32. Solicitors should take all appropriate supervisory steps to ensure that no breach of confidentiality occurs during the destruction of clients' files. (See Circulars 12-475 and 08-361).
33. A solicitor should not sell his book debts to a factoring agent because of the sensitive nature of a solicitor's bill and the danger of breaches of confidence which may occur. Such factoring may also lead to a breach of rule 4 of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H): see Principle 4.16.
34. Where disclosure has taken place a solicitor should inform his client promptly that he has done so.
35. In accordance with Practice Direction D.7 (6) physical files must be stored in Hong Kong.

## 8.02 Profit on information

**A solicitor must not make any personal profit by the use of confidential information concerning the business and affairs of his client acquired in the course of the professional relationship.**

### *Commentary*

1. The fiduciary relationship between a solicitor and client forbids a solicitor to use any such confidential information for the benefit of the solicitor or a third person, or to the disadvantage of his client. A solicitor who engages in literary works, such as an autobiography, memoirs and the like, should avoid disclosure of confidential information.
2. Breach of the fiduciary duty may result in liability at law to account to the client as well as disciplinary action.
3. For more on a solicitor's fiduciary duties, see Chapter 7.

## 8.03 Duty to pass information to a client

**A solicitor is under a duty to pass on to his client and use all information which is material to the subject matter of the retainer regardless of the source of that information. There are, however, exceptional circumstances where such duty does not apply. In addition the duty is in some instances overridden by statute.**

### *Commentary*

1. A breach of this rule may well be actionable in law in certain circumstances and may involve a solicitor in disciplinary action.
2. A solicitor should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline instructions where there is a reasonable likelihood that such disclosure would be required.
3. A solicitor should not seek to pass on to the solicitor on the other side confidential information which he does not wish to be disclosed to the other solicitor's client. Equally, the other solicitor should decline to accept or receive confidential information on the basis that it will not be disclosed. For example if a letter disclosing confidential information is written to the solicitor on the other side the writer cannot complain if the letter is shown to the other solicitor's client.
4. There may be certain circumstances where the disclosure of information received by a solicitor could be harmful to his client because it may affect his mental or physical condition. Consequently, it

will be necessary for a solicitor to decide whether in the interests of his client he should disclose such information, for example a medical report disclosing a terminal illness.

5. A solicitor should not seek to obtain access to or information from private correspondence or documents belonging to or intended for the other side. This includes not opening or reading letters addressed to someone other than himself or the firm.
6. Where it is obvious to a solicitor that documents have been mistakenly disclosed to him on discovery or otherwise he must immediately cease to read the documents, inform the other side and return the documents without making copies. The solicitor should inform his client. He should advise the client that the court is likely to grant an injunction to prevent the overt use of any information gleaned from the documents. Both the client and the solicitor may find costs awarded against them in respect of such an injunction. (See *English and American Insurance Company Ltd v Herbert Smith*, [1988] FSR 232; [1987] NLJLR 148 and *Ablitt v Mills & Reeve (a firm)* [1995] TLR 635, *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716 and *Pizzey v Ford Motor Co Ltd* [1993] The Times March 8 (CA).
7. The duty may be overridden by anti-money laundering provisions (see also Principle 8.01 Commentary 10).

#### 8.04 Confidentiality of mediation

**A solicitor acting as a mediator shall not without the express consent of one party disclose to the other party or any other person any confidential information acquired by that solicitor during the course of mediation.**

## APPENDICES

### PRINCIPLE 8.01 COMMENTARY 1

CIRCULAR 04-320

26 July 2004

#### CRIMINAL

#### **Criminal Litigation – Guidelines on Steps to Take to Protect Clients’ Confidentiality in interviews**

1. The Society’s Criminal Law and Procedure Committee recently noted the existence of circumstances in which clients are denied the right to obtain private and confidential advice from their legal representatives in criminal cases.

#### The Client’s Right to Confidential Advice

2. Members are reminded that it is fundamental to the criminal justice system that ‘the client’ has the right to request and receive legal advice, secure in the knowledge that neither the client nor his/her lawyer can be forced to reveal the content of the communication against the wishes of the client. Such common law right of the client is now enshrined in Article 35 of the Basic Law.
3. Members, and those in their employment, have a duty to protect their client’s confidences [see Principle 8.01 of *The Hong Kong Solicitors’ Guide to Professional Conduct*, Vol. 1]. If they fail in such duty, they could be the subject of disciplinary proceedings.

#### Guidelines on Steps to take to protect Clients’ Confidentiality

4. Members must therefore take all steps necessary to protect their clients’ confidentiality consistent with their professional duties. These include but not limited to the following:
  - Before conducting interviews with clients in custody, whether at the offices of law enforcement agencies, in Correctional Services institutions or at courts, members must ensure that there is no one within hearing distance. Members should appreciate that evidence of privileged conversations can be given by persons who overhear them unless the court can be persuaded for good reason to exclude that evidence.
  - Law enforcement officers and CSD officers must be told that interviews will not be conducted in their presence and/or hearing distance. If they persist on being present, for whatever reason, the

solicitor should decline to interview the client; make a record of the reason why the interview is not to proceed; explain the reasons for this to the client and ask the client to sign the record. If the interview were to take place in a police station, a complaint should be made to the Duty Officer who should be asked to record the complaint. Similarly, complaints should be made to the appropriate person where the interview were to take place if the interview is other than in a police station.

- Where the law enforcement officers or the CSD officers claim that their presence is necessary to protect the solicitor from a violent client, the solicitor may need to sign a waiver releasing the authority from any liability in the event of an attack.
  - Where the suggestion is that the client will try to escape, there is still an obligation upon the solicitor to ensure that the interview proceeds in a situation of confidentiality. The solicitor should insist upon a secure room which avoids the need for the presence of officers.
5. The Society would like to emphasise that any interviews of clients must not proceed except in situations of confidentiality. Where an interview cannot proceed because confidentiality may be compromised, apart from the complaints mentioned in 4 above, reference identifying the matters complained of should be made to the Secretary for Justice; and if the client is in custody, to the court in which the case is proceeding. Such complaints may be relevant to costs and/or to arguments about the exclusion of evidence or stopping the case in future proceedings.
  6. Whilst members must be forceful in protecting the rights of the client, they must also act politely and professionally at all times. Anything that is said to the officers concerned when seeking to protect the client's rights may eventually come into evidence at a trial. Intemperate, ill thought out comments and threats may well prove embarrassing and will generally be counter productive.

#### Identification Parade

7. The lack of opportunity for a confidential interview may be a particular problem where the law enforcement agency wants to hold an identification parade. In those circumstances, the client should be told, in the presence of the officers:
  - that he/she need not attend an identification parade unless he/she consents to do so;
  - that if he/she does not consent to attend an identification parade, the law enforcement agency may try other methods of identification such as a confrontation or group identification.

8. If, having received the advice in (7), the client consents to attend an identification parade, the solicitor should record that the client has been advised that he/she need not attend an identification parade, that the advice is understood but nonetheless he/she has decided to attend the identification parade and ask the client to sign that record.

Unless the client has dispensed with the services of the solicitor, the solicitor should remain in attendance at the Parade, be alert to any irregularities that might occur and respond to such irregularities in the way that best protects the client's interests.

9. Where the client does not wish to attend an identification parade without a prior confidential interview, the solicitor should:
  - record the client's wishes and ask him/her to sign that record;
  - request the officer in charge of the parade to postpone the identification parade until there has been an opportunity for a confidential interview with the client;
  - ask for that request to be recorded in the Parade Book;
  - make a record of the request and of the response by the Officer in Charge of the Parade.
10. Where the client does not wish to attend an identification parade without a prior confidential interview and the Officer in Charge of the Parade refuses to agree a postponement of the Parade and states that other methods of identification will be tried, the solicitor should:
  - advise the client not to attend the identification parade;
  - inform the Officer in Charge of the Parade that the client does not agree to attend the Parade because of the denial of opportunity for a confidential interview and ask for that to be recorded in the Parade Book;
  - inform the Officer in Charge of the Parade that objection may be taken at the trial of the client to the admissibility of identification evidence because of the denial of the right to a confidential interview and ask for that to be recorded in the Parade Book;
  - make a record of the requests made to the Officer in Charge of the Parade and the response to those requests and ask the Officer to sign that record;
  - make a complaint to the Secretary for Justice and/or the court before which the case is proceeding.

## PRINCIPLE 8.01 COMMENTARY 10

**CIRCULAR 08-59**

**5 February 2008**

### **ANTI-MONEY LAUNDERING**

1. Practice Direction P incorporating a set of guidelines on anti-money laundering and terrorist financing was issued on 3 December 2007. Please click [here](#) for a copy of Practice Direction P.
2. The Practice Direction consists of, inter alia:-
  - (a) a table of mandatory requirements for law firms on client identification and verification, client due diligence exercises, record keeping;
  - (b) a summary of the current relevant legislation on money laundering and terrorist financing;
  - (c) basic policies and procedures required of law firms;
  - (d) relevant legal issues on legal professional privilege, client confidentiality, litigation, civil liability and confidentiality agreements;
  - (e) examples of suspicious transaction indicators and risk areas; and
  - (f) suspicious transaction reporting.
3. Every file opened for each client must record the steps taken by the firm for client identification and client due diligence and those records must be retained. The Law Society has recommended the preservation of files for a specified period. In order to minimize the administration of closed files, the period for which the records are to be retained is to be the same as that for closed files namely:-
  - (a) conveyancing matters – 15 years
  - (b) tenancy matters – 7 years
  - (c) other matters, except criminal cases – 7 years; and
  - (d) criminal cases – 3 years from expiration of any appeal period.
4. The full content of Practice Direction P takes advisory effect from the date of issue on 3 December 2007. It was initially intended that Table A and paragraphs 18 – 28 of the Practice Direction would take mandatory effect from 1 March 2008. To allow members more time to make the necessary adjustments to ensure compliance with the mandatory provisions, the Council resolved to postpone the effective date from 1 March 2008 to 1 July 2008.

5. With effect from 1 July 2008, any law firm, solicitor or foreign lawyer practising in Hong Kong who fails to comply with the mandatory provisions may face disciplinary proceedings (see Chapter 16 of *The Hong Kong Solicitors' Guide to Professional Conduct*). In addition, firms which do not comply with the provisions in Practice Direction P will be exposed to additional risk of being involved in money laundering and terrorist financing activities, with severe consequences of criminal prosecution and significant loss of reputation.
  
6. Circular 07-726 is superceded.



## PRINCIPLE 8.01 COMMENTARIES 10 & 32

CIRCULAR 08-361

30 June 2008

### PRACTICE DIRECTION P

1. On 24 June 2008, the Council resolved to revise paragraphs 24 and 86 of Practice Direction P in the manner as underlined below:-

'24. All files, including all documents relating to the transactions and records obtained or compiled for client identification and due diligence, should be retained in order to facilitate the retrieval of information relating to client identification and due diligence. The recommendations contained in the existing Circular 02-384 should be observed. The retention period for the following types of transactions is as follows:-

- 24.1 conveyancing matters – 15 years;
- 24.2 tenancy matters – 7 years;
- 24.3 other matters, except criminal cases – 7 years; and
- 24.4 criminal cases – 3 years from expiration of any appeal period.

The above retention periods also apply to copies of the individual client's identification documents including the Hong Kong identity cards and passports collected in relation to the files or transactions.'

'86. Original documents (e.g. identity card or passport of an individual, certificate of incorporation or registration of a company or other legal entity) should be inspected whenever possible for verification purpose. Where originals are not available, copies of such documents from a reliable independent source (e.g. copies certified by appropriately regulated professional) should be obtained. Law firms, solicitors and foreign lawyers are required to take or collect copies of individual client's identification documents. Copies of the individual client's identification documents include Hong Kong identity cards and passports. Copies of all such documents must be kept as a record. It is also advisable to note down when the original document(s) was/were inspected and when the copy(ies) was/were taken.'

2. The Practice Direction P as revised will take effect on 1 July 2008.
3. Replacement pages of the relevant paragraphs of Practice Direction P for insertion in *The Hong Kong Solicitors' Guide to Professional Conduct* Volume 2 are attached to Circular 08-363.

**PRINCIPLE 8.01 COMMENTARY 10**

**CIRCULAR 08-362**

**30 June 2008**

**ENDORSEMENT BY THE  
PRIVACY COMMISSIONER FOR PERSONAL DATA  
ON PARAGRAPH 86 OF PRACTICE DIRECTION P  
(AS REVISED BY THE COUNCIL ON 24 JUNE 2008)**

1. Pursuant to paragraph 3.2.2.2 of the Code of Practice on the Identity Card Number and other Personal Identifiers ('the Code'), the Privacy Commissioner for Personal Data has endorsed the requirement set out in paragraph 86 of Practice Direction P (Guidelines on Anti-Money Laundering and Terrorist Financing) (as revised by the Council on 24 June 2008) to members of the Law Society to the extent that they are required to collect their clients' copies of identity cards as being in accordance with Data Protection Principle 1 of the *Personal Data (Privacy) Ordinance* (Cap. 486).
2. Law firms, solicitors and foreign lawyers are permitted under paragraph 3.2.2.2 of the Code to collect copies of the identity cards of their clients in compliance with the requirement contained in paragraph 86 of Practice Direction P which requirement has been endorsed in writing by the Privacy Commissioner.

## PRINCIPLE 8.01 COMMENTARY 10

CIRCULAR 08-756

1 December 2008

### CLARIFICATIONS OF PRACTICE DIRECTION P

1. Client identification and verification are two distinct concepts. Identification refers to the basic information a solicitor is required to obtain and record about his clients to know who they are whenever he is retained: their names, addresses, telephone numbers, occupation, etc. Verification refers to the information a solicitor needs to obtain to confirm that his clients are who or what they say they are.
  
2. Client verification is only required when a solicitor is acting for a client (new or existing) or giving instructions on behalf of such client in any of the circumstances as set out in paragraph 20 of Practice Direction P, namely:-
  - (i) Financial transactions (e.g. buying and selling of real estate, business, company, securities and other assets and property);
  - (ii) Managing client money\*, securities or other assets;  

\*Simply operating a solicitor's client account would not generally be regarded as 'managing client money'. However, where a solicitor acts as an attorney of a client, it may be considered as 'managing client money'.
  - (iii) Management of bank or securities accounts;
  - (iv) The formation, structure, re-organisation, operation or management of companies and other entities;
  - (v) Insolvency cases and tax advice;
  - (vi) Other transactions involving custody of funds as stakeholder or escrow agent or transfer of funds through their bank accounts.

Transaction-based client due diligence in accordance with paragraphs 102–107 of Practice Direction P must also be undertaken in those circumstances.

3. Recommended procedures and policies on client identification and verification are set out in paragraphs 85-97 of Practice Direction P.

4. The Privacy Commissioner in his letter to the Law Society of 14 August 2008, at Annex A, clarified the scope of endorsement given by him on 26 June 2008 pursuant to Clause 3.2.2.2 of the Code of Practice on the Identity Card Number and other Personal Identifiers.
  
5. Practice Direction P embodies a risk based approach in complying with the requirements of client identification, verification and due diligence. Law firms are given latitude to establish their own internal guidelines which are best suited for individual firms' needs.

**PRINCIPLE 8.01 COMMENTARY 10**

**CIRCULAR 09-360**

**18 May 2009**

**ANTI-MONEY LAUNDERING**

1. Reference is made to Circular 08-328. Paragraph 2 of Circular 08-328 provides that an exemption shall be made from compliance with Practice Direction P in the case of files opened prior to 1 July 2008 provided that compliance is undertaken on or before 30 June 2009.
2. The Council has decided that the compliance with Practice Direction P in the case of files opened prior to 1 July 2008 be suspended until further notice.
3. By way of clarification, it will be necessary to undertake client identification, verification and client due diligence measures for all new files opened on or after 1 July 2008 including new files for existing clients in accordance with the provisions under Practice Direction P.
4. This circular supersedes Circular 08-328.

## PRINCIPLE 8.01 COMMENTARY 14

CIRCULAR 12-438

11 June 2012

### PROBATE Will Searches

1. Members should take note that the Society will only entertain will search applications that involve enquiries properly made by interested parties. The prescribed application form requires an Applicant firm to specify the capacity in which the firm is acting. Where the firm is not acting for the usual categories of interested parties specified in the form, namely 'executor(s), administrator(s), beneficiary(ies), creditor(s) or debtor(s)' of a deceased estate, the firm should clearly specify the interests of their clients in the form.

Please click [here](#) for the application form.

2. Members are reminded of the following:-
  - The form must be signed by the solicitor making the enquiry for the client on behalf of the firm.
  - A copy of the Death Certificate issued by the proper Government authority must be submitted with the form.
  - Any foreign death certificate issued by the proper Government authority must be certified by the solicitor as a true copy of the original.
  - Where document(s) other than a death certificate issued by the proper Government authority is/are produced in support of the application, the application must be accompanied by a written confirmation by the firm that 'to the best of their knowledge, information and belief, the person named as the deceased person in the application form has passed away' before the Society will 'consider' the application. The Society retains the discretion to reject the application if it is not satisfied that the death of the person named as the deceased in the application form has been established.
  - The identity of the enquiring firm will be disclosed in the weekly will search notice and the prior consent of the client should be obtained for such disclosure.
  - It should be for firms acting for different clients with an interest in the same estate to liaise directly with each other regarding their clients' affairs and any response on will search enquiry should be directed to the enquiring firm instead of through the Society's secretariat. Firms holding the original or a copy of the will, codicil or other

testamentary disposition made by the deceased person named in the weekly will search notice are requested to contact the enquiring firm direct within 14 working days (updated on 11 June 2012). Members are reminded to exercise due care when responding to enquiries in order to avoid any breach of the duty of confidentiality which they owe to the testator or the testator's personal representatives.

- Subject to the Society's approval of the application, the will search notice will only be published on the Monday following receipt by the Society of all relevant documents and the requisite application fee of HK\$1,800 by Wednesday.

3. Circular 12-230 is superseded.

## PRINCIPLE 8.01 COMMENTARY 18

CIRCULAR 07-767

17 December 2007

### ASSOCIATION WITH LOCAL FIRMS, FOREIGN FIRMS AND OVERSEAS FIRMS

1. Concerns with confidentiality and conflict of interest can arise where a close working relationship develops between two firms of solicitors through the sharing of premises, personnel and facilities.
2. The *Legal Practitioners Ordinance* (Cap. 159), its subsidiary legislation and the Society's Practice Directions contain provisions specifying the permissible types of working relationships which involve sharing between firms in different forms and the measures that have to be taken by the firms to address the concerns on confidentiality and conflict of interest.

#### Between Hong Kong firms

3. It is common for two or more Hong Kong firms to have one or more common solicitors. This situation is referred to as 'association' in the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) (rule 1A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H)).
4. To ensure that the public is made aware of the existence of an association relationship, the firms involved must make reference to it on their respective letterheads in the manner as stipulated in rule 2B(2)(c) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).
5. Further, to minimise the risk of any possible conflict of interest, subject to certain exceptions, two or more solicitors practising in association must not act for both the vendor and the purchaser in a sale or other disposition of land for value (rule 5C of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H)).
6. Where at least one of the solicitors in common is an equity partner common to each of the firms in association, the firms will be permitted to share premises, personnel and facilities (Practice Direction D 5(3)(iii)). However, the firms should only do so where:
  - (a) they are prepared to treat themselves as one firm for the purpose of any rules of conduct relating to confidentiality and conflict of interest; and
  - (b) they will inform their respective clients accordingly.



Between a Hong Kong firm and a registered foreign firm

7. A close working relationship may also develop between a Hong Kong firm and a registered foreign firm. Sharing of fees, profits, premises, management, employees and facilities between a Hong Kong firm and a registered foreign firm is permissible provided that they demonstrate a commitment to the working relationship by
  - (a) entering into an Association with each other;
  - (b) registering the Association with the Society; and
  - (c) entering into an agreement under which fees, profits, premises, management or employees are shared between the two firms within 2 months after registration of the Association (section 39C of the *Legal Practitioners Ordinance* (Cap. 159)).
8. To ensure that the public is made aware of the existence of an Association relationship, the firms involved must make reference to it on their respective letterheads in the manner as stipulated in rule 2B(2)(c) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and rule 5(2) of the *Foreign Lawyers Practice Rules* (Cap. 159 sub. leg. R).
9. Where the firms in an Association wish to share premises, management or employees, they should only do so where:
  - (a) they are prepared to treat themselves as one firm for the purpose of any rules of conduct relating to confidentiality and conflict of interest; and
  - (b) they will inform their respective clients accordingly.

Between a Hong Kong firm and an overseas firm with no place of business in Hong Kong

10. A Hong Kong firm may also develop a close working relationship with an overseas firm which has no place of business in Hong Kong whereby there is:
  - (a) mutual referral of clients;
  - (b) secondment of staff between the firms; or
  - (c) exchange of know how or information.
11. Provided that such a working relationship is an ongoing contractual relationship between the firms that has been in existence for or is likely to remain in existence for at least two years, the Hong Kong firm may make reference to such kind of association on its letterhead in the manner as stipulated in rule 2B(3)(h) of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H).
12. This Circular is regarded as mandatory.

Circular 03-169 is superseded.

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

**PRINCIPLE 8.01 COMMENTARY 26**

**CIRCULAR 02-25**

**28 January 2002**

**PROPERTY**

**Breaches of Confidentiality in Multiple-Client Interviews  
in Project Conveyancing**

1. The Council is aware of the practice of multiple-client interviews in project conveyancing and takes the view that such practice per se amounts to a breach of the solicitor's duty of confidentiality.
2. Members should carefully review their duty under Principle 8.01 of *The Hong Kong Solicitors' Guide to Professional Conduct* Vol. 1 and should institute appropriate safeguards to prevent breaches of the duty.
3. These safeguards could include:
  - invitations, at the outset of the multiple-client interviews, for those who wish to discuss matters confidentially to be given the opportunity to have the interview conducted separately in another room.
  - provide a general explanation in the multiple-client interview to all present and then offer to provide personal details in private to those wishing to avail themselves of the offer.

Appropriate and sufficient safeguards in any given situation may vary and members should exercise their own professional judgment according to the particular circumstances of each individual case.

**PRINCIPLE 8.01 COMMENTARY 32**

**CIRCULAR 12-475 'STORAGE AND DESTRUCTION OF  
OLD FILES' SEE CHAPTER 5**

## CHAPTER 9

### CONFLICT OF INTEREST BETWEEN CLIENTS

#### 9.01 Avoiding conflict

1. Conflicts of interest between clients
2. What constitutes conflict?
3. Conflicting duties
4. Associated firms

#### 9.02 Actual or significant risk of conflict Intervention by the court

#### 9.03 Conflict of interest between existing or former client with prospective client

1. Conflict with former client
2. Personal embarrassment of solicitor
3. Husband and wife
4. Family
5. Lender and borrower
6. Partnerships
7. Corporations
8. Prosecutions

#### 9.04 Existing joint clients

1. Disclosure to joint clients
2. Joint retainer  
Consent of the clients
- 3.&4. Considerations if contentious issue arises
5. When co-accused are in conflict
6. Amalgamation of firms may cause conflict

#### 9.05 Joint representation in conveyancing transactions

1. Rule 5C is mandatory
2. Conflict of interest
- 3.&4. Consent required for joint representation

#### 9.06 Mediation

1. Mediator may not act as a solicitor subsequently
2. Confidentiality of mediation

#### Appendices

Circular 07-767 'Association with Local Firms, Foreign Firms and Overseas Firms' see Chapter 8

Circular 11-610 'Rule 5C of the Solicitors' Practice Rules'

This Chapter deals with conflicts of interest between clients. Conflicts of interest frequently arise involving confidential information or knowledge. Conflicts of interest between solicitors and clients are dealt with in Chapter 7.

### 9.01 Avoiding conflict

**A solicitor has both an ethical and legal duty to avoid conflict. A solicitor or firm of solicitors must not accept instructions to act for two or more clients where there is a conflict or a significant risk of conflict between the interests of those clients.**

#### **Commentary**

1. A conflict may arise between an existing client and a prospective client, a former client and a prospective or existing client or two or more existing or prospective clients.
2. There are many judicial decisions as to what constitutes a 'conflict' at common law and essentially it is a situation where factors exist which adversely affect a solicitor's duty of loyalty to his client and his duty of confidentiality to such an extent that the solicitor cannot act in the best interests of the client.
3. A conflict of interest may arise from conflicting duties to disclose confidential knowledge or information held in relation to one client to another client.
4. Firms that are in an association under either section 39C of the *Legal Practitioners Ordinance* (Cap. 159) or under rule 1A of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and sharing premises, facilities, management and employees will be treated as one firm for the purposes of any rules of conduct relating to conflict of interest and confidentiality (see Principle 8.01 Commentary 18 and Circular 07-767).

### 9.02 Actual or significant risk of conflict

**A solicitor shall not act or shall cease to act where there is an actual conflict of interest or a significant risk of conflict arising during the course of the retainer.**

#### **Commentary**

When a solicitor or his firm is in possession of information confidential to a former client which might be relevant to a subsequent client and which he

may be bound to disclose in breach of his duty of confidentiality to another existing client, the court will intervene to prevent the solicitor from acting for the subsequent client if it is satisfied that the risk of disclosure of the confidential knowledge or information is real and not merely fanciful. See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, HL.

### 9.03 Conflict of interest between existing or former client with prospective client

**If a solicitor or his firm has acquired relevant confidential information or knowledge concerning an existing or former client during the course of acting for him, he must not accept instructions where it is likely that he would be duty bound to disclose or use such relevant confidential information or knowledge in breach of his duty of confidentiality to such client.**

#### **Commentary**

1. Any confidential information and knowledge acquired by a solicitor whilst acting for an existing or former client cannot be disclosed without that client's consent: see Principle 8.01. However, a solicitor may be under a duty to another client to inform him of all matters which are material to his retainer: see Principle 8.03. Consequently, a solicitor in possession of confidential information and knowledge concerning one client which is, or might be relevant to another client cannot act in the best interests of either client because of the potential breach of the conflicting duty owed to each.
2. If a solicitor does not have relevant confidential information and knowledge but would, nevertheless feel embarrassed in acting against an existing or former client, he should not act.

Embarrassment may for example arise because of personal feelings of the solicitor or from friendship with such client. It may nevertheless be appropriate for another solicitor in the same firm to act.

3. As a result of this Principle, a solicitor who has acted jointly for both husband and wife in matters of common interest, must not act for one of them in matrimonial or other proceedings where he is in possession of relevant confidential information and knowledge concerning the other, which he received in the course of the joint retainer.
4. Where a solicitor has acted jointly for members of a family and is then asked to act against one or more, then this Principle will apply. If, however, a solicitor is obliged by this Principle to refuse to act for a particular member of a family who is under a legal disability (for example, not of full legal age), then the solicitor should make every

reasonable effort to ensure that he is represented by another solicitor; it is not sufficient for the solicitor merely to cease to act.

5. Another example of the operation of this Principle is where a solicitor has acted for both lender and borrower in the making of a loan. He should not subsequently act for the lender against the borrower to enforce repayment if he has obtained relevant confidential information and knowledge, for example, of the borrower's financial position, when acting for him in connection with the original loan.
6. If a solicitor has acted either for a partnership or has acted in the formation of that partnership, he may only accept instructions to act against an individual partner or former partner provided he has not obtained relevant confidential information and knowledge about that individual whilst acting for the partnership, or in its formation.
7. A solicitor who has acted for a company and also has separately acted for directors or shareholders in their personal capacity may not act for any of them if he has relevant confidential information and knowledge concerning the party against whom he is now instructed to act.
8. A solicitor who prosecutes in criminal trials must not act against a former client who retained him in respect of the same or a related matter: see also Principle 10.14 Commentary 4.

#### **9.04 Existing joint clients**

**A solicitor or firm of solicitors must not continue to act for two or more joint clients when a conflict of interest arises between those joint clients.**

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

1. Before a solicitor accepts instructions from more than one client in the same matter, the solicitor must advise the clients that the solicitor has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the solicitor cannot continue to act for both or all of them and may have to withdraw completely. When accepting instructions to act for more than one client in the same matter the solicitor would be well advised to obtain the informed written consent from the clients that they are fully aware of the basis of the retainer particularly in the context of this Principle (see also Principle 8.01 Commentary 24).
2. If one of the clients is a person with whom the solicitor has a continuing relationship and for whom the solicitor acts regularly, this fact should be revealed to the other at the outset with a recommendation that both

should obtain independent representation. If, following such disclosure, all parties are content that the solicitor should act for them, the solicitor should obtain their consent, preferably in writing, or record their consent in a separate letter to each. A solicitor should, however, guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.

3. If, after the clients involved have given their consent and a contentious issue arises between them or some of them, the solicitor, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of this Principle if he attempted to advise them on the contentious issue. In such circumstances the solicitor should ordinarily refer the clients to another solicitor. However, if the issue is one that involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and there is no obvious imbalance of bargaining power, they may be permitted to settle the issue by direct negotiation in which the solicitor does not participate. Alternatively, the solicitor may refer one client to another solicitor and continue to advise the other if it was agreed at the outset that this course would be followed in the event of a conflict arising.
4. If a solicitor has already accepted instructions from two clients in a matter or related matters and a conflict subsequently arises between the interests of those clients, the solicitor must cease to act for both clients, unless he can without embarrassment and with propriety, continue to represent one client with the other's consent. A solicitor may only continue to represent one client where he is not in possession of relevant confidential information and knowledge concerning the other obtained whilst acting for the other. Even in such a case he should seek the consent of the other client (usually through his new solicitor) and should proceed in the absence of such consent only if there is no good cause for its refusal. Where the expression 'relevant confidential information and knowledge' is used in this Chapter, it is not limited to what the client may have told him but also includes what the solicitor may have learned about the client's confidential affairs during the course of acting for him within the scope of the retainer.
5. Where a solicitor acts for two or more co-defendants in criminal proceedings, and one or more of them changes his plea, the solicitor must consider carefully whether he may continue to represent any of them. For example, in reaching his decision, the solicitor must bear in mind that if his duty of disclosure to the client or clients he proposes to represent conflicts with his duty of confidentiality to the other client or clients, he must cease to act for all of them. Before agreeing to continue to represent one client he must, therefore, examine carefully

whether there is any information in his possession relating to the other clients which may be relevant to the retained client.

6. Following the amalgamation of two or more firms, the clients of the individual firms will, as a result of an express or implied change of retainer, become clients of the new firm; care must be taken to ensure that the interests of the clients of the new firm do not conflict. If they do, the firm must cease to act for both clients unless they are able, within the terms of Commentary 1, to continue to act for one.

### 9.05 Joint representation in conveyancing transactions

**Subject to Rule 5C of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H), a solicitor or two or more solicitors practising in partnership or association shall not act for both the vendor and the purchaser on a sale or other disposition of land for value.**

#### **Commentary**

1. Compliance with subrule (1) of rule 5C is mandatory and unless a particular transaction either falls outside rule 5C or is covered by one of subrules (2), (3), (4), (5) or (6), failure to observe it is professional misconduct.
2. Notwithstanding subrules (2), (3), (4), (5) and (6) a solicitor must not act or continue to act for two or more parties to the transaction where a conflict of interest between them appears. A solicitor must be alert and cease to act at the first sign of conflict. A solicitor should also be alert to the obligations under Commentaries 1 and 2 of Principle 9.04.
3. In those circumstances where a solicitor may properly act for both parties he must ensure that both clients consent to the arrangement, and that he complies with Practice Direction A.12.
4. See also Circular 11-610 and Practice Directions A.9, A.9A, A.9B, A.10, A.11 and A.12.



## 9.06 Mediation

**A solicitor may act as a mediator between two or more parties in a dispute but if a solicitor does so he must make it clear to each party, preferably in writing, that he is acting solely in the resolution of their differences.**

### *Commentary*

1. Once it has become apparent that the dispute cannot be resolved he must cease his involvement and shall not thereafter act for any party as a solicitor in respect of that dispute.
2. A solicitor acting as a mediator shall not without the express consent of one party disclose to the other party or any other person any confidential information acquired by him during the course of the mediation (see also Principle 8.04).

**APPENDICES**

**PRINCIPLE 9.01 COMMENTARY 4**

**CIRCULAR 07-767 'ASSOCIATION WITH LOCAL FIRMS, FOREIGN  
FIRMS AND OVERSEAS FIRMS' SEE CHAPTER 8**

## PRINCIPLE 9.05 COMMENTARY 4

CIRCULAR 11-610

22 August 2011

### PROPERTY

#### **Consolidated Circular – Rule 5C of the Solicitors’ Practice Rules Updated on 22 August 2011**

This Circular consolidates the Practice Directions and guidelines on the separate representation requirement under Rule 5C of the *Solicitors’ Practice Rules* (Cap. 159 sub. leg. H).

#### 1. Scope of Rule 5C(1)

1.1 Rule 5C(1) prohibits a solicitor or 2 or more solicitors practising in partnership or association from acting for both the vendor and the purchaser on a sale or other disposition of land for value. Rule 5C(8) further provides that Rule 5C applies to 2 or more solicitors or firms conducting their businesses as members of the same group practice. For the purpose of this Circular, any reference to ‘solicitor’ shall, where relevant, include references to 2 or more solicitors practising in partnership or association or 2 or more solicitors and firms conducting their businesses as members of the same group practice.

1.2 The Practice Directions have made clear that separate representation is mandatory in the following circumstances given the unusual nature of the transactions:

- Practice Direction A2 - sale and purchase of an interest in a property under construction which is for less than the whole of the residue of the term of years under which the property is held under the relevant Government Grant;
- Practice Direction A7 - subject to the conditions stated in Practice Direction A7, sale and purchase of partitioned ‘residential’ flats and;
- Practice Direction A10 - where A sells to B, B sub-sells to C and there is an agreement in which A is the vendor, B the confirmor and C the purchaser, the solicitor acting for A may not also act for either B or C.

1.3 A solicitor may act for more than one party in certain circumstances, including:

- conveyancing transaction involving a trustee and a beneficiary;

- in sale and purchase and sub-sale and sub-purchase of units in project developments under the Consent or Non-consent scheme subject to certain conditions being satisfied (Rule 5C(2), (3), (4) & (5)); and
  - where the exemption provisions under Rule 5C(6) applies.
2. Rule 5C(3), (4) and (5) – Approved form of Statutory Declaration; Agreements for Sale and Purchase and Agreement for Sub-sale and purchase agreement [updated on 22 August 2011]

2.1 The updated forms of Statutory Declaration approved under Rule 5C(3) and the various Agreement forms approved under Rule 5C(3), (4) and (5) can be obtained by clicking the link below. Subsequent amendments to these forms shall be notified in Circulars and shall apply with effect from the date as stated in the relevant circulars.

- [Rule 5C\(3\) Statutory Declaration](#)
- [Rule 5C\(3\) Agreement \(Uncompleted Development\)](#)
- [Rule 5C\(4\) Agreement \(Completed Development\)](#)
- [Rule 5C\(5\) Sub-sale and Sub-purchase Agreement \(Uncompleted Development\)](#)
- [Rule 5C\(5\) Sub-sale and Sub-purchase Agreement \(Completed Development\)](#)

2.2 Members who wish to deviate from the form of Statutory Declaration or the mandatory clauses contained in any approved Agreement forms must apply for a waiver from the Council under Rule 5C(6). The application must be accompanied by a copy of the appropriate approved form marked with the proposed changes in red and the application fees prescribed from time to time by the Society.

3. Rule 5C(5) – Sub-sale and purchase

3.1 Rule 5C(5) applies to a sub-sub-sale as well as a sub-sale. The agreement for sub-sale and sub-purchase between the sub-purchaser and the sub-sub-purchaser should be modified to take account of the sub-sub-sale.

3.2 The form of Sub-sale and purchase Agreement approved under Rule 5C(5) applies only where the whole of the premises comprised in the Principal Agreement are sub-sold to the purchaser. It does not apply where, for example, the Principal

Agreement comprises 10 units and only one unit is sub-sold. In such case, either the Agreement would need to be modified or the parties to the Agreement should be separately represented. Where such modifications entail alterations of any of the mandatory clauses, they are required to be approved by the Chief Justice and the Council.

3.3 It would be desirable from the purchaser's point of view to insert a power of substitution in the irrevocable power of attorney referred to in clause 3(1)(d) of the approved form of Sub-sale and purchase Agreement.

#### 4. Rule 5C(6) – Associated Parties

4.1 Transactions involving parties who are 'associated parties' are exempted under Rule 5C(6)(a) from the separate representation requirement under Rule 5C(1). The term 'associated parties' is defined in Rule 1A(c) as 2 or more parties being 'related by blood, adoption or marriage'.

4.2 The Council has provided a list of 'related' parties as follows:-

Husband; Wife; Father; Mother; Father-in-law; Mother-in-law; Son; Daughter; Son-in-law; Daughter-in-law; Brother; Sister; Brother-in-law; Sister-in-law; Grandfather; Grandmother; Grandson; Granddaughter; Uncle; Aunt; Nephew and Niece

[N.B. where appropriate, step, half and adopted relatives are included]

4.3 A solicitor acting jointly for 'related' parties should make reasonable enquiries as to their relationship. If he does not know them personally, he should, for instance, ask for documentary evidence to verify their relationship, and in the absence of such evidence, he should require them to make a statutory declaration. In all other cases, members should seek Council's guidance.

#### 5. Joint Representation under Rule 5C(2), (3), (4) or (5) – 'Warning to Purchasers' [Practice Direction A12]

Before a solicitor could act for both the vendor and the purchaser under rule 5C(2), (3), (4) or (5), he must make sure that the appropriate bilingual 'Warning to Purchasers' under Practice Direction A12 has been duly signed by the purchaser and delivered to him at the time of giving or confirming instructions.

6. Stakeholders Funds – *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F) [Practice Direction A3]

Solicitors who act as stakeholders in respect of funds received from purchasers under Rule 5C(2), (3), (4) and (5) has to deposit the funds in a bank or licensed (but not a registered) Deposit Taking Company in accordance with the requirements under Practice Direction A3.

7. Separate Representation [Practice Direction A4]

7.1 Where the vendor offers for sale property in an uncompleted development in circumstances where Rule 5C applies and the vendor and the purchaser are separately represented, the solicitor acting for the purchaser must comply with the requirements under Practice Direction A4.

8. Attestation of Signatures [Practice Direction A9, A9A, A9B and A11]

8.1 Practice Direction A9 requires that a solicitor acting for one party, or any member of his firm, should not attest the signature of another party, who is not represented by that solicitor.

8.2 The general rule in 8.1 is subject to the exceptions contained in the following Practice Directions:

- Practice Direction A9A - Home Ownership Scheme and Private Sector Participation Scheme Conveyancing Transactions
- Practice Direction A9B - Financial Secretary Incorporated Lease Extension Cases
- Practice Direction A11 - Sub-purchaser Appointed as Attorney for a Confirmor

9. Circular 08-364 is superseded.

# CHAPTER 10

## THE LITIGATION SOLICITOR

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## 10.01 Litigation solicitor

**In addition to the obligations and responsibilities set out elsewhere in the Guide and the Law Society's Code of Advocacy for Solicitor Advocates, a litigation solicitor must meet even higher standards of conduct.**

### **Commentary**

1. In this Chapter, a litigation solicitor refers to a solicitor who has been granted higher rights of audience under the *Legal Practitioners Ordinance* (Cap. 159) (solicitor advocate), a solicitor acting in the role of an advocate or a solicitor acting as an instructing solicitor.
2. The Principles relating to a solicitor acting in the role of an advocate or a solicitor advocate extend to appearances and proceedings not only before the court, but also before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.
3. For the purposes of this Chapter, the references to a solicitor, unless the context otherwise requires, means a litigation solicitor.

## 10.02 The duty of a solicitor

**A solicitor must treat the court with courtesy and respect and must represent his client resolutely, honourably and within the limits of the law.**

### **Commentary**

1. A solicitor has a duty to his client 'fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case' and to endeavour 'to obtain for his client the benefit of any and every remedy and defence which is authorised by law' (per Lord Reid in *Rondel v Worsley* [1969] AC 191 at 227). This duty must always be discharged by fair and honourable means, without illegality and in a manner consistent with his client's instructions and his duty to treat the court with candour, fairness, courtesy and respect.
2. Except in the course of an application to the court, a solicitor must not discuss the merits of the case with a judge, magistrate or other adjudicator before whom a case is pending or may be heard, unless invited to do so in the presence of the solicitor or barrister for the other side or party.

3. If a written communication is made to a judge, magistrate or other adjudicator at any time, a solicitor shall at the same time deliver a copy of it to his professional adversary or to the opposing party if he is not legally represented. Where there is to be oral communication, prior notice to the other party or his solicitor or barrister should be given.
4. Where, after a hearing, judgment is reserved and a relevant point of law is subsequently discovered, a solicitor who intends to bring it to the judge's attention must inform the advocate on the other side.

### 10.03 Duty to court

**A solicitor must never knowingly attempt to deceive or participate in the deception of a court.**

#### **Commentary**

1. Breaches of this Principle include:
  - (a) knowingly misstating the contents of a document, the testimony of a witness, the substance of an argument or the provisions of an Ordinance or like authority;
  - (b) knowingly asserting something as a fact for which there is no reasonable basis in evidence, or the admissibility of which must first be established;
  - (c) dissuading or seeking to dissuade a material witness from giving evidence, or persuading such a witness to be absent;
  - (d) knowingly permitting a witness to be present in a false or misleading way, or to impersonate another.
2. In general, there is no duty upon a solicitor to enquire in every case where he is instructed as to whether his client is telling the truth and it will be for the court, and not the solicitor, to assess the truth or otherwise of the client's statement.
3. When it has come to the knowledge of a solicitor that a client intends to mislead the court by making false statements or producing false evidence, the solicitor has a duty to advise the client not to do so and explain the legal consequences of misleading the court, which may amount to a grave criminal offence such as perjury or perverting the course of justice. If the client refuses to accept the advice, the solicitor must cease to act (see also Principle 10.05).
4. If, either before or during the course of proceedings, a client makes statements to his solicitor which are inconsistent, this is not of itself a ground for the solicitor to refuse to act further on behalf of the client.

5. Where a client, in the course of litigation, admits to his solicitor that he has committed perjury or misled the court in any material matter in those proceedings, it is the duty of his solicitor to decline to act further in the proceedings, unless the client agrees fully to disclose his conduct to the court.
6. A solicitor knowing facts which, or of a witness who, would assist his adversary is not under any duty to inform his adversary or the court of this to the prejudice of his own client, unless the proceedings are ex-parte (see Principle 10.04), or he is acting for the prosecution (see Principle 10.14). He must not, however, himself knowingly put forward or let his client put forward false information with intent to mislead the court. Similarly, he must not indicate his agreement with information that the prosecution puts forward which he knows to be false.
7. Although a solicitor is entitled both before and during a trial to take every point, technical or otherwise, that is fairly arguable on behalf of his client, the court must be advised of relevant cases and statutory provisions by the advocates on both sides. If one of them omits a case or provision or makes an incorrect reference to a case or provision, it is the duty of the other to draw attention to it even if it assists his opponent's case.

#### 10.04 Ex-parte proceedings

**In adversarial proceedings a solicitor's function is inevitably partisan. Accordingly, a solicitor is not obliged (save as required by law or under any relevant rules) to assist an adversary or advance matters detrimental to his client's case. However in ex parte proceedings, a solicitor must take particular care in presenting his client's case to ensure that the court is not misled.**

#### *Commentary*

1. A party seeking relief ex-parte must make full and frank disclosure to the court of all material matters within his knowledge. Failure to do so may result in the discharge of any order obtained with consequent loss to a client. If a solicitor has not fully advised his client of his obligations or he himself has not adequately reviewed the material to be disclosed, the solicitor may be in contempt and be exposed to legal action and complaint to the Solicitors Disciplinary Tribunal.
2. If an ex-parte order has been granted and there is subsequently a material change in circumstances, that change must be disclosed to the court by the solicitor for the party in whose favour the order was granted.

### 10.05 Duty to withdraw

**If during litigation a client desires or intends to take a course of action which will involve a breach of the duties owed to the court and the opponent, his solicitor must refuse to take or support that course of action. The solicitor must do all he can reasonably to prevent it. If that course cannot be prevented then the solicitor should cease to act or seek leave to do so, subject however to the rules concerning ceasing to act.**

#### **Commentary**

1. A solicitor should never terminate a retainer without good cause and without reasonable notice.
2. If a solicitor is acting in the defence of a client in criminal proceedings and the trial is imminent or has commenced, he should be especially concerned about the effect on the client's defence were he to cease to act at such a late stage and should do so only in the clearest circumstances.
3. A client's failure to pay costs on account is not a good reason for ceasing to act unless there has been a breach of a pre-existing agreement to pay them: see Principle 5.22 Commentary 5. Even if there is a breach of such an agreement and the solicitor is on the legal aid panel he should continue to act at legal aid rates if he is assigned to act by the Director of Legal Aid.
4. In any case, reasonable notice of ceasing to act must be given to the client in writing with an explanation. After commencement of civil proceedings or a criminal trial, a solicitor, as instructing solicitor or as advocate, can only cease to act with leave from the court and the court will consider whether good reason exists and reasonable notice has been given. If reasonable notice has not been given the solicitor may be required by the court to continue to act for such period as would constitute reasonable notice (see Circular 02-209).
5. Where a solicitor acting for an assisted person within the meaning of the *Legal Aid Ordinance* (Cap. 91) receives notification of revocation or discharge of his client's Legal Aid Certificate, he must notify the opposite party of the same and, if he has been instructed to continue to act privately for the same client, he must file a notice to act.

### 10.06 Limited instructions for appearance in court

**A solicitor may accept instructions limited to a particular matter or issue in the proceedings, such as an application to adjourn the proceedings. Where a solicitor accepts limited instructions, he shall inform the court before which he has been instructed to appear of the limited nature of his instructions at the first available opportunity after his acceptance of such instructions, and preferably before the solicitor's appearance.**

#### **Commentary**

1. Before he accepts limited instructions, the solicitor should fully advise the client of the possible legal and cost consequences.
2. The client should be made aware and the solicitor should appreciate that once he is on the court record he cannot withdraw from representation without the leave of the court.
3. If counsel is also making a limited appearance on the instruction of the solicitor, the solicitor should ensure that counsel appreciates that the court's consent will be required for withdrawal and it is desirable that he and counsel plan for the contingency of refusal by the court.

### 10.07 Courtesy

**A solicitor should at all times be courteous to the court, to all witnesses and to those engaged on the other side.**

#### **Commentary**

1. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a solicitor, even though unpunished as contempt, might well merit disciplinary action.
2. A solicitor should serve a witness summons in time for a witness to have adequate notice and arrange his affairs accordingly.
3. A solicitor must not make or instruct a barrister to make an allegation which is intended only to insult, degrade or annoy the other side, a witness or any other person.
4. This Principle also prohibits a solicitor from making or instructing a barrister to make an allegation which is scandalous.
5. In any litigation, a solicitor should, if possible, avoid naming in open court persons who are neither parties nor witnesses if their characters would thereby be impugned. The court should be invited to receive in writing the names, addresses and other details of such third parties.

6. A solicitor should not, in a plea in mitigation, make or instruct a barrister to make an allegation which is likely to vilify or insult any person, without having first satisfied himself that there are reasonable grounds for making the statement.
7. A solicitor must observe the correct etiquette in court at all times and must refrain from inappropriate conduct or discourteous behaviour during the course of a hearing before the court.

### **10.08 Court dress**

**A solicitor appearing in court as an advocate should appear duly robed where this is customary and must always wear suitable clothing (see also Circular 11-195).**

### **10.09 Solicitor as litigant in person**

**Whilst it is not improper for a solicitor to engage in litigation on his own behalf, he must, when engaged in such litigation, sue or appear as a litigant in person.**

#### ***Commentary***

1. If a solicitor appears before a court as a litigant, he should not be robed so that it is clear that he is not acting as a professional advocate.
2. Where a solicitor, an employee or the firm is one of a number of plaintiffs or defendants, the firm is permitted to go on the record as the solicitors, but a solicitor or employee who is a party to the litigation should not appear as a professional advocate on behalf of the parties either in chambers or in open court. If he does appear in any other capacity he must not be robed.
3. A solicitor acting on his own behalf in a litigation matter may instruct counsel direct. It is not necessary for the solicitor to instruct another firm of solicitors to instruct counsel.

### 10.10 Undertakings

**An undertaking given by a solicitor to a tribunal, court or to another solicitor in the course of litigation must be strictly and scrupulously carried out.**

#### *Commentary*

1. Such an undertaking is the personal promise and responsibility of the solicitor as an Officer of the Court. Breach of such an undertaking may amount to contempt of court.
2. If, for example, an undertaking has been given by a solicitor and he fails to comply with the undertaking, he may be committed for contempt, his assets were sequestered and he may be required by the court to pay the costs of the hearing and may well be reported to the Solicitors Disciplinary Tribunal (see Chapter 14 for full discussion of solicitors' undertakings.)

### 10.11 Court orders

**A solicitor must comply with any order of the court requiring the solicitor or the firm to take or refrain from taking some particular course of action.**

#### *Commentary*

1. Failure to comply with such a court order may amount to contempt of court.
2. A solicitor must not aid and abet his client to disobey a court order (see also Principle 8.01 Commentary 6.)

### 10.12 Interviewing a witness or prospective witness

**It is permissible for a solicitor acting for any party to interview and take statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party.**

#### *Commentary*

1. This Principle stems from the fact that there is no property in a witness and applies both before and after the witness has given evidence at the hearing.



2. A solicitor must not tamper with the evidence of a witness or attempt to suborn the witness into changing his evidence.
3. A solicitor should be aware that in seeking to exercise his right to interview a witness who has already been called by the other side or who to his knowledge is likely to be called by them, he may be exposed to the suggestion that he has tampered with the evidence. This may be so particularly where the witness subsequently changes his evidence. It may be wise in these circumstances for the solicitor to offer to interview the witness in the presence of a representative of the other side.
4. When interviewing an expert witness or professional agent instructed by the other side there should be no attempt to induce the witness to disclose privileged information. In these circumstances it would be wise to offer to interview the witness in the presence of the other side's representative.
5. As a general principle, it is not improper for a solicitor to advise a witness from whom a statement is being sought by the opposing party that he need not make such a statement but the solicitor must not try to prevent him from making a statement.
6. A solicitor must obtain leave of the court with notice to the barrister or solicitor for the other party, to discuss the case with a witness, whether his client or not, whilst the witness is in the course of giving evidence. This prohibition covers the whole of the relevant time including adjournments and weekends.

### 10.13 Advocate should not be a witness

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

#### **Commentary**

1. A solicitor must exercise his judgment whether to cease acting where he has already accepted instructions to act as an advocate and then becomes aware that he or a member of his firm will be called as a witness.
2. The circumstances in which a solicitor should continue to act as advocate must be extremely rare where it is likely that he will be called to give evidence other than that which is purely formal.
3. In exercising judgment, the solicitor should consider the nature of the evidence to be given, its importance to the case overall and the difficulties faced by the client if the solicitor were to cease to act as an

advocate. The decision should then be taken in the interests of justice as a whole and not solely in the interests of the client.

#### 10.14 The solicitor as advocate for the prosecution

**Whilst a solicitor prosecuting a criminal case must ensure that every material point is made which supports the prosecution, in presenting the evidence he must do so dispassionately and with scrupulous fairness.**

##### **Commentary**

1. The prosecutor should state all relevant facts and should limit his expressions of opinion to those fairly required to present his case. He should reveal any mitigating circumstances; he should inform the court of its sentencing powers only if invited to do so and whenever it appears to be under a misapprehension about those powers.
2. It should be normal practice for the prosecutor to provide the accused with the witnesses' statements of all the witnesses that he intends to call. If a prosecutor obtains evidence which he does not intend to use but which may assist the defence, he must supply particulars of witnesses to the defence, and must consider whether it would be appropriate to supply copies of the statements made by those witnesses to the defence. If, however, he knows of a credible witness who can speak to material facts which tend to cast doubt on the prosecution's evidence or to show the accused to be innocent, he must either call that witness himself or make his statement available to the defence. Further, if he knows, not of a credible witness, but of a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. A prosecutor must reveal to the defence factual evidence of which he has knowledge and which is inconsistent with that which he, as prosecutor, has presented or proposes to present to the court. In any case a prosecutor must reveal any convictions of a witness that he intends to call.
3. A prosecutor must reveal all relevant cases and legislative provisions known to him whether it be for or against his case. This is so whether or not he has been called upon to argue the point in question (see Principle 10.03 Commentary 7).
4. A solicitor who prosecutes must ensure that he has not previously appeared in the same or related matter for the defence.

### 10.15 The solicitor as advocate for the accused

**A solicitor who appears in court for the defence in a criminal case is under a duty to say on behalf of his client what the client could properly say for himself if he possessed the requisite skill and knowledge.**

#### **Commentary**

1. For the defence advocate's duty regarding facts and law, see Principle 10.03 and Commentaries.
2. Subject to the fundamental rights of an accused client on trial (described in Principle 10.16) it is an implied term of an advocate's retainer that he is free to present his client's case at the trial or hearing in such a way as he considers appropriate. If a client's express instructions do not permit an advocate to present the case in a manner which he considers to be the most appropriate, then unless his instructions are varied, he may withdraw from the case after seeking the approval of the court to that course, but without disclosing matters which are protected by his client's privilege.
3. Whilst a solicitor may present a technical defence which is available to his client, he must never fabricate a defence.
4. Where, prior to the commencement or during the course of proceedings, a client admits to his solicitor that he is guilty of the charge, the solicitor must decline to act in the proceedings if his client insists on giving evidence in the witness box in denial of his guilt or requires the making of a statement asserting his innocence. The advocate who acts for a client who has admitted his guilt but has pleaded not guilty (as he is so entitled), is under a duty to put the prosecution to proof of its case and may submit that there is insufficient evidence to justify a conviction. Although the advocate may advance any defence open to his client, he must not assert his client's innocence or suggest, expressly or by implication, that someone other than his client committed the offence.
5. If a client wishes to plead guilty, but at the same time asserts the truth of facts which, if true, would or could lead to an acquittal, his solicitor should use his best endeavours to persuade his client to plead not guilty. However, if the client insists on pleading guilty, despite being advised that such a plea may or will restrict the ambit of any plea in mitigation or appeal, then his solicitor is not prevented from continuing to act in accordance with the client's instructions which it would be advisable to have in writing. The solicitor will not, in mitigation, be entitled to suggest that the facts are such that the ingredients of the offence have not been established.

### 10.16 Fundamental rights of an accused

**An accused has the right to choose whether to plead guilty or not guilty. An accused has the right to choose whether or not to give evidence. A solicitor must advise his client of these rights.**

#### *Commentary*

1. These are fundamental rights. If a solicitor undermines them, or permits a barrister to undermine them, by threatening to withdraw if the client does not comply with the lawyer's advice or by other means of duress, that will amount to a serious act of misconduct.
2. Advice may be given in a strong and persuasive manner but the client must be left with the clear understanding that he has the right to choose how to plead and whether to give evidence.
3. In the situation where a solicitor is acting for an accused in criminal proceedings on the instructions and at the expense of an insurance company client, the accused is also the client of the solicitor, and has exactly the same freedom to choose whether to plead guilty or not guilty or whether to plead guilty to a lesser charge or whether to give evidence, even though this may be contrary to the interests of the insurer client. A solicitor must not intimidate an accused into maintaining a plea of not guilty against his will by threatening that the insurers will withdraw their support should he change his plea.

### 10.17 Encouraging settlements

**A litigation solicitor needs to keep in mind that a settlement may be in his client's interests and to advise and act accordingly.**

#### *Commentary*

1. Even if he has authority to settle, a solicitor should (unless it is not possible to communicate) inform his client of a settlement offer made by the opposing party and give his opinion of its merits before agreeing to settle (see also Principle 5.12 Commentary 6).
2. At the commencement and throughout the retainer, a solicitor should consider with his client whether the likely outcome will justify the expense or risk involved: see Principle 4.01 Commentaries 5 and 8.
3. A litigation solicitor should consider and if appropriate advise his client on alternative dispute resolution procedures such as mediation, conciliation and the like.

### 10.18 Hopeless proceedings

**A solicitor must inform his client if a proposed or continuing action has no prospect of success as a matter of law.**

### 10.19 Bail

**It is unlawful for any person, including a solicitor, to be a party to a bargain to indemnify a surety for bail.**

**No solicitor or his employee may act as surety for bail for a client of the firm without the prior written consent of the Council, which consent would be forthcoming only in the most exceptional circumstances (see Practice Direction I.1).**

### 10.20 Payment of witnesses

**A solicitor must not make or offer to make payments to a witness contingent upon the nature of the evidence given or upon the outcome of a case.**

#### **Commentary**

1. There is no objection to the payment of reasonable expenses to witnesses and reasonable compensation for loss of time attending court. In the case of an expert witness, there is an implied obligation to pay a reasonable fee.
2. A solicitor is professionally responsible for payment of the reasonable agreed fees and expenses of expert, professional and other witnesses whom he calls to give evidence on behalf of his client, unless a specific disclaimer is first conveyed to the witness. Therefore, a solicitor who does not wish to accept such responsibility should make this clear to the witness in advance. In criminal cases, all witnesses who give evidence in the court, other than expert witnesses, can obtain payment of their fees and expenses, within the limits of the statutory scale, from the court. It is good practice for a solicitor to inform such witnesses of this and to agree in advance whether he will accept responsibility for any sum in excess of the scale. (See Principle 4.14)
3. In legal aid cases, whether civil or criminal, a solicitor should draw the attention of the witnesses to the fact that their fees and disbursements will have to be taxed or assessed and that only such amounts can be paid to the witness. A solicitor should expressly disclaim personal responsibility for payment of fees beyond those allowed on taxation or assessment.

4. A solicitor, on his client's instructions, may insert advertisements for witnesses to come forward as to a particular occurrence. However, care must be taken to draft the advertisement so that, so far as practicable, it does not suggest the detailed testimony sought.

### **10.21 Interviewing the opposing party**

**No interview should be conducted or communication made with an opposite party who is represented by another solicitor save with the prior consent of the other solicitor (see Principle 11.02.)**

### **10.22 Attendance in support of counsel during the hearing**

**Where a barrister has been instructed, his instructing solicitor is under a duty to attend or arrange for the attendance of a responsible representative throughout the proceedings, unless the solicitor has agreed with the barrister that such attendance is not required. A solicitor should not reach such agreement with the barrister unless he has the client's consent and he is satisfied that it is reasonable in the circumstances of the case that counsel be unattended and, in particular, that the interests of the client and the interests of justice will not be prejudiced.**

#### ***Commentary***

1. 'Responsible' in this Principle means that the representative should have a reasonable familiarity with the matter so as to be able properly to assist counsel during the conduct of the hearing and to answer counsel's or the court's queries upon the matter. The solicitor in charge of the matter if he is not himself attending court should ensure so far as practicable that he remains contactable so that his representative may make contact with him should that be necessary.
2. Solicitors should exercise careful judgment in considering whether non-attendance is reasonable in a particular case. A solicitor should normally attend or send a representative where:
  - (a) the client is a person at risk, which includes, for example, juveniles, persons with inadequate knowledge of Chinese or English, persons subject to mental illness or mental handicap, or with sight, speech or hearing impediments; this list is not exhaustive, and whether someone is a person at risk is a matter as to which a solicitor must exercise judgment; or

- (b) the client is of such a difficult character that it is desirable that counsel be attended; or
  - (c) there is a probability that the client will receive a substantial sentence of imprisonment or will receive an immediate sentence of imprisonment for the first time; or
  - (d) witnesses as to fact or opinion (i.e. not character witnesses) are required to be present, whether or not they are actually called; or
  - (e) counsel actually appearing in the particular case is not the counsel instructed, unless the solicitor is satisfied that the change of counsel is unlikely to be prejudicial to the interests of the client; or
  - (f) where there is a likelihood that instructions from a lay client may have to be given during the course of proceedings; or
  - (g) there are any other circumstances in which the solicitor considers attendance on counsel is desirable.
3. In any case where a solicitor proposes that counsel should appear unattended he must:
- (a) so inform counsel and deliver a full and detailed brief sufficiently early before the hearing to enable counsel to consider the papers and to decide whether it would be appropriate for counsel to attend alone (see paragraphs 142 & 142A of the *Code of Conduct for the Bar of Hong Kong*); and
  - (b) confirm to the client that counsel will be unattended and tell the client the name of the counsel instructed; and
  - (c) attend on counsel or send a representative where the counsel originally instructed or subsequently substituted informs the solicitor that he believes that it is appropriate for counsel to be attended.

### 10.23 Statement to the press

**A solicitor must not give a public statement without his client's consent. A solicitor who on his client's instructions gives a statement to the press must ensure that he does not become in contempt of court by publishing any statement which is calculated to interfere with the fair trial of a case which has not been concluded.**

#### 10.24 Post-trial responsibilities: legal aid and criminal appeals

When a legally aided client has been convicted, his legal representatives have a duty to consider and advise the Director of Legal Aid whether there are grounds for appeal, and, if so, to settle the same (regulation 9 of the *Legal Aid in Criminal Cases Rules* (Cap. 221 sub. leg. D)), and to act in the appeal if requested (regulation 17 of *Legal Aid Regulations* (Cap. 91 sub. leg. A)).

#### 10.25 Video evidence of children in criminal matters

When a solicitor acting for the prosecution or defence has in his possession a video recording of a child witness, he must comply with Practice Direction C.4.

#### 10.26 Legal Visits

A solicitor representing a client who is detained in custody must ensure that he complies with the appropriate standing procedures for legal visits by himself and authorized clerks, trainee solicitors, interpreters and counsel (see Circular 12-857).

##### *Commentary*

1. For supervision of authorized clerks, see Practice Direction D.6.

#### 10.27 Unqualified intermediaries

Solicitors should exercise caution when accepting instructions to act for a client through unqualified intermediaries (see Circular 12-176 and Principle 5.06).

##### *Commentary*

1. This Principle does not apply to instructions received by a solicitor from insurers acting under the terms of an insurance policy.
2. For the prohibition of solicitors from acting as agents of unqualified persons, see section 49 of the *Legal Practitioners Ordinance* (Cap. 159).



### 10.28 Witness training (coaching)

**Training or coaching of witnesses in criminal proceedings (whether for prosecution or defence) is not permitted.**

#### ***Commentary***

It would be prudent to proceed on the basis that the general principles set out in *R v Momodou and others* [2005] EWCA Crim 177 also apply to civil proceedings.

## APPENDICES

### PRINCIPLE 10.05 COMMENTARY 4

CIRCULAR 02-209

5 July 2002

#### CRIMINAL

#### **Withdrawal of Solicitors During a Criminal Trial (Revised on 15 July 2002)**

1. The Council wishes to remind members that a solicitor should only withdraw from a case during the course of a criminal trial for good reasons and on reasonable notice. Council considers it appropriate to issue the following guidance in relation to withdrawal due to lack of funds:

- (a) Legal Aid

A solicitor is under a duty to consider and advise a client of his entitlement to legal aid. If such advice is given but the client chooses not to apply for legal aid, 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. Failure to give such advice promptly where the client's means are within the legal aid scheme can amount to unbecoming conduct and may result in disciplinary proceedings. It may also lead to a claim in negligence against a solicitor for breach of duty owed to the client.

- (b) Arrange for adequate Funds

If a client is not entitled to legal aid or chooses not to apply for legal aid, members are encouraged to obtain sufficient funds for their fees and disbursements at the beginning of the case to cover the whole trial if relatively short, or to reach a clear agreement with client, to be recorded in writing, on fees and disbursements e.g. the amount to be charged, the basis on which they are calculated, when and the stages at which they will be payable, etc. Members must, therefore, ensure that if Counsel is engaged, Counsel's fees are agreed on a proper basis before the commencement of trial.

- (c) Termination of retainer

- (i) A solicitor will have good reason to terminate the retainer if he has requested funds for disbursements which the client has failed to provide. Further, a solicitor may terminate the retainer where he has requested funds on account of profit costs which the client has failed to provide if the requirement for a payment on account of profit costs was an express condition of accepting instructions. Without this condition (or the client's

subsequent agreement), a solicitor cannot justifiably terminate his retainer if a client refuses to make a payment on account of profit costs. It is emphasized that in either case, reasonable notice to terminate the retainer must be given and should be in writing giving the reasons.

(ii) Withdrawal before date of trial

Where a solicitor, having appeared in Court on behalf of the defendant, withdraws before the date of trial, which withdrawal would not require leave of the Court, it would be good practice for the solicitor:-

- to notify the Court of his withdrawal; and
- to explain to the defendant his right to apply for legal aid.

(iii) During the course of a trial

During the course of a trial, a solicitor cannot come off the record without leave of the Court. It is a matter for the Court in each case to determine whether good reason exists and reasonable notice has been given when deciding whether or not to grant leave to come off the record. The Court may have regard to all the circumstances when determining these issues. In the Council's opinion, a solicitor who, knowing that his client is likely to be unable to pay the costs and disbursements for the entire pre-estimated length of trial, nevertheless fails to advise him at the outset of his rights to apply for legal aid or to advise him of the possibility that he could be left unrepresented in the course of the trial may well be unable to show good reason. The necessity of recording such advice in writing (preferably by letter addressed to the client) is obvious. If reasonable notice has not been given to terminate the retainer, a solicitor may have to continue acting for the period which in the opinion of the Court would constitute reasonable notice, depending on the facts of each case.

(d) Inadequate funds during the trial

Where funds run out during a trial, every assistance should be given to the client to make an immediate application for legal aid. The Council considers that unless there are exceptional circumstances, solicitors should continue to act at legal aid rates if they are on the Legal Aid Panel and if they are assigned to act by the Director of Legal Aid.

2. The attention of members is also drawn to:

- (a) Rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H); and

(b) Principles 10.05 and 10.06, *The Hong Kong Solicitors' Guide to Professional Conduct*, Vol. 1.

3. Circular 90-30 is superseded.

**PRINCIPLE 10.08**

**CIRCULAR 11-195**

**21 March 2011**

**LAW SOCIETY GUIDANCE NOTE**

**1. Solicitors' Rights of Audience  
2. Trainee Solicitors' Rights of Audience  
Updated March 2011**

This Circular offers guidance to Solicitors and Trainee Solicitors on their rights of audience before the Courts and Tribunals and has been approved by the Civil Courts Users' Committee.

**A. SOLICITORS**

General Rights of Audience

A solicitor does not have a general right of audience in the courts but only such rights which have been acquired by statute, rule or usage of particular courts.

1. Tribunals

a. Solicitors have rights of audience in the

- Lands Tribunal

Rule 26 *Lands Tribunal Rules* (Cap. 17 sub. leg. A)

b. Solicitors do not have any rights of audience in the following Tribunals

- Labour

Section 23(2) *Labour Tribunal Ordinance* (Cap. 25)

- Small Claims Tribunal

Section 19(2) *Small Claims Tribunal Ordinance* (Cap. 338)

2. Arbitration Proceedings

Solicitors have rights of audience in arbitration proceedings.

Section 2F *Arbitration Ordinance*

3. Administrative Appeals

Solicitors have rights of audience before the Administrative Appeals Board

Section 18 *Administrative Appeals Board Ordinance* (Cap. 442)

4. Magistracies

Solicitors have a general right of audience in the Magistrates Courts

Section 2 *Magistrates Ordinance* (Cap. 227)

5. Coroner's Court

Solicitors have rights of audience in the Coroner's Court

Section 31 *Coroners Ordinance* (Cap. 504)

6. District Court \*

Solicitors have rights of audience in the District Court

Section 15 *District Court Ordinance* (Cap. 336)

7. Bankruptcy Proceedings in Open Court – Contested Hearings

Solicitors have rights of audience in contested hearings in open court. See the Decision of Yuen J. in *Lai Yin Shan Ex parte the Hong Kong and Shanghai Banking Corporation Ltd.* HCB 992 of 2000.

Click [here](#) for a copy of the Decision in HCB992 of 2000

8. Bankruptcy and Winding-Up Proceedings and Rule 6(a) of the *Companies Ordinance* (Cap. 32) and *Companies (Winding-Up) Rules* (Cap. 32 sub. leg. H)

Solicitors have the right to appear the applications listed in the Judiciary's Practice Direction 3.1:

- (a) for leave to continue or commence proceedings against a debtor under Section 12 of the [*Bankruptcy Ordinance* (Cap. 6)];
- (b) to dispense with a statement of affairs or to extend the time for submitting such statement under Section 18 of the Ordinance;
- (c) for arrest of a debtor under Section 27(1) of the Ordinance and for an order for release;
- (d) for the re-direction of debtors' mail under Section 28 of the Ordinance;
- (e) for a certificate of automatic discharge from bankruptcy where the application is unopposed under Section 30A of the Ordinance and Rule 92;
- (f) for production of documents by the Commissioner of Inland Revenue under Section 30D(1) of the Ordinance;

- (g) to extend the time for trustee to make a decision relating to a proof of debt under Section 34(7A) of the Ordinance;
- (h) to approve the disposition of bankrupt's property under Section 42(1) of the Ordinance;
- (i) to extend the time limit for notice under Section 43C(1) of the Ordinance;
- (j) to include or exclude items from the bankrupt's estate under Section 43D(2) of the Ordinance;
- (k) for income payments order under Section 43E of the Ordinance and to vary and review such order under Rules 128B, 128D and 129;
- (l) for an order to extend the bankrupt's occupation of family home under Section 43F(1) of the Ordinance;
- (m) for disclaimer and extension of time for disclaimer of onerous property under Section 59(1) of the Ordinance;
- (n) for the appointment of a solicitor under Sections 61(c) and 61A of the Ordinance;
- (o) to reduce the allowance to a bankrupt under Section 63 of the Ordinance;
- (p) to approve the dealings relating to copyright work of a bankrupt's estate under Section 65 of the Ordinance;
- (q) for the release of a trustee under Section 94 of the Ordinance and Rule 169;
- (r) for the appointment of a creditors' committee under Section 100E of the Ordinance;
- (s) for leave to commence and prosecute any action in the names of the trustee and of the bankrupt's partners under Section 107 of the Ordinance;
- (t) for leave to disclose the names of the partners in proceedings in partnership name under Section 109 of the Ordinance;
- (u) for summary administration and rescission of a summary administration order under Section 112A of the Ordinance;
- (v) for service of the petition, order or summons on a debtor who cannot be found or is outside the jurisdiction under Rule 31;
- (w) for leave to file a petition under Rule 49(9);
- (x) for security for costs under Rule 55;
- (y) for substituted service of a petition under Rule 59(2);
- (z) to vary the dates relating to the submission of nominee's abstracts and reports under Rule 122Z(6);

- (aa) to extend time for the nominee's notice of final completion of the voluntary arrangement and report under Rule 122ZC(4);
- (bb) to dispense with the production of bills and notes under Rule 124;
- (cc) for leave to disclaim a lease under Rule 130;
- (dd) to give directions to the Official Receiver where there are no available assets under Rule 158A;
- (ee) for disposal of books and papers under Rule 202;
- (ff) for abridgement or enlargement of time under Rule 204;
- (gg) to dispense with a public examination under Section 19A of the Ordinance for cases in which bankruptcy proceedings were commenced before 1 April 1998;
- (hh) for adjudication under Section 22 of the Ordinance for cases in which bankruptcy proceedings were commenced before 1 April 1998.

Click [here](#) for Judiciary's Practice Direction 3.1

## 9. High Court

### I. Open Court

#### a. Masters \*

Solicitors have rights of audience before a Master in Open Court in the following applications:

- trials pursuant to O.14 r.6(2), RHC
- trials pursuant to O.17 r.11, RHC
- trials pursuant to O.36 r.1, RHC
- assessment of damages pursuant to O.37 r.1, RHC
- examinations under O.48 and O.49B, RHC
- unopposed bankruptcy petitions referred to in section 99(3) of the *Bankruptcy Ordinance* (Cap. 6)
- unopposed winding-up petitions referred to in section 180A of the *Companies Ordinance* (Cap. 32)
- the making of an order for imprisonment of a judgment debtor under O.49B r.1B(1), RHC

Click [here](#) for Judiciary's Practice Direction 14.2

#### b. Magistracy Appeals to the High Court \*

- A solicitor has rights of audience before the High Court on the hearing of Magistracy appeals.



Section 2, section 18 and section 118 (2) *Magistrates Ordinance* (Cap. 227)

c. Judiciary's Practice Direction 21.1 \*

Practice Direction 21.1 states as follows:

- '1. In addition to the cases in which solicitors already have rights of audience in the Court of First Instance, and without prejudice to the discretion of a judge to allow a solicitor to represent his client in open court in an emergency, a solicitor may appear in the Court of First Instance in formal or unopposed proceedings, that is to say those proceedings where –
  - (a) by reason of agreement between the parties there is unlikely to be any argument; and
  - (b) the court will not be called upon to exercise a discretion.
2. A solicitor may also represent his client in the Court of First Instance where judgment is delivered in open court following a hearing in chambers at which that solicitor conducted the case for his client.'

II. Chambers Hearings

A solicitor has rights of audience in Chambers before:

- Masters
- A Judge of the Court of First Instance
- An Appeal Court Judge

10. Court Dress\* (March 2011)

Members are reminded to wear appropriate attire when exercising their rights of audience:

Open Court

- gown
- wing collar and bands or collarette
- dark clothes

Chambers/Court generally (March)

Solicitors and Trainee Solicitors should dress in appropriate attire when attending court.

'Appropriate' means suits of a solemn or dark colour, such as navy blue, dark grey or black with shirts of white or other unobtrusive colour.

Male solicitors and Trainee solicitors should also wear ties when they attend court.

Click [here](#) for Judiciary's Practice Direction 21.1

## B. TRAINEE SOLICITORS (March 2011)

Trainee Solicitors have limited rights of audience:

### 11. District Court (March 2011)

A Trainee Solicitor may appear: before a District Court Judge in Chambers in

- an uncontested application in civil matters
- Trainee solicitors during the last 12 months of the trainee solicitor contract may appear in the following:
  - In taxations listed for not more than 3.5 hours subject to the qualifications outlined in paragraph 4 in PD14.1 and paragraph 8A in PD27.
  - Hearings listed for no longer than 15 minutes:
    - Order 14
    - Order 88
    - Order 83A

Click [here](#) for Judiciary's Practice Direction 27

### 12. High Court Chambers (March 2011)

- (a) A Trainee Solicitor has limited rights of audience in Chambers before a Master and can only appear in the following:
- an uncontested application
  - an application listed for a 3-minute hearing
- (b) During the last 12 months of the Trainee Solicitor contract, a Trainee can appear on:
- In taxations listed for not more than 3.5 hours subject to the qualifications outlined in paragraph 4 in PD14.1 and paragraph 8A in PD27.
  - Hearings listed for no longer than 15 minutes:
    - Order 14
    - Order 88
    - Order 83A

Click [here](#) for Judiciary's Practice Direction 14.1

13. Expiration of a Trainee Solicitor contract – Period before date of Admission: No right of audience

At the expiration of the Trainee Solicitor contract and before the date of admission as a solicitor, the former Trainee Solicitor becomes a paralegal and as such has no rights of audience.

14. Circular 09-165 has been superseded.

**PRINCIPLE 10.26**

**CIRCULAR 12-857 'LEGAL VISITS' SEE CHAPTER 3**

**PRINCIPLE 10.27**

**CIRCULAR 12-176 'RECOVERY AGENTS' SEE CHAPTER 3**

# CHAPTER 11

## RELATIONS WITH OTHER SOLICITORS

### 11.01 Duty to act in good faith

1. Deceitful conduct
2. Solicitor's undertaking
3. Be courteous
4. Offensive letters
5. Recording conversations
6. Personal responsibility for solicitor agent's fees
7. Stopping client account cheques
8. When another solicitor has been retained
9. Copying vendor's title deeds

### 11.02 Contact with client of another solicitor

1. Writing to client of another solicitor
2. May be justified
3. Litigation proceedings-service of documents
4. Own client may contact client of other solicitor
5. Instructing an enquiry agent
6. Clients of solicitors not in private practice
7. 'Client' in corporations or Government authorities
8. Interviewing employee of organisation
9. Second opinion

### 11.03 Duty to report misconduct

1. Financial difficulties of another solicitor
2. Misconduct within the firm
3. Solicitor charged with criminal offence
4. Breach of undertaking

### 11.04 References

- Full and frank assessment
1. Proper person

## Appendix

Circular 99-160 'Solicitors' Undertakings - Duty to Report Misconduct'

### 11.01 Duty to act in good faith

**A solicitor must act towards other solicitors with frankness and good faith consistent with his overriding duty to his client.**

#### **Commentary**

1. Any fraudulent or deceitful conduct by one solicitor towards another will render the offending solicitor liable to disciplinary action, in addition to the possibility of civil or criminal proceedings.
2. This Principle also requires that a solicitor must honour any undertaking given either personally, or by partners or by another member of his firm and whether or not in writing. Solicitors' undertakings are dealt with in Chapter 14.
3. A solicitor must at all times maintain his personal integrity and observe the requirements of good manners and courtesy towards other members of the profession and their staff, no matter how bitter the feelings between clients. He must not behave in a manner which is acrimonious or offensive or otherwise inconsistent with his position as a solicitor.
4. This Principle also applies to correspondence. A solicitor must not write offensive letters to other members of the profession, whatever the degree of bad feeling existing between the respective clients.
5. While a solicitor will normally warn the other party to a telephone conversation if he proposes to record it, he may dispense with this warning in cases where he believes that considerations of courtesy are outweighed by other factors.
6. In the absence of an agreement, a solicitor is personally responsible for paying the proper costs of solicitor agents whom he instructs on behalf of his client.
7. A client account cheque should not be stopped (see Principle 13.03).
8. When another solicitor has been retained, a solicitor generally must not accept instructions in the same matter (see Principle 5.11).
9. Note also Practice Direction A.8. which states:  
'(1) It is unethical for a purchaser's solicitor to make certified copies of title deeds or certified copies thereof supplied by the vendor's solicitor unless such copies are made:
  - (a) with the express consent of the vendor's solicitors; or
  - (b) on the instructions and for the purpose of that purchaser who has already paid the vendor's solicitor for the certified copies supplied.'

## 11.02 Contact with client of another solicitor

**In general, a solicitor who has been instructed in a matter should not interview or otherwise communicate with anyone on that matter who to his knowledge has retained another solicitor to act in that matter except with that other solicitor's consent.**

### **Commentary**

1. A solicitor who has been instructed by a client should not write directly to a client of another solicitor where he has reason to believe that the other solicitor's retainer has not been determined.
2. Despite this Principle, a solicitor may be justified in writing direct to a client of another solicitor if that solicitor has failed to reply to letters, or where the solicitor has refused for no adequate reason to pass on a message to his client. However, this step should only be taken after warning the other solicitor of the intention to write directly to his client. It is also courteous to copy such correspondence to the other solicitor.
3. Where there are proceedings and solicitors are on the record, subsequent correspondence and documents should be served on the solicitors and not on the clients unless the court orders otherwise or personal service is required by the *Rules of the High Court* (Cap. 4 leg. sub. A).
4. This Principle does not prevent a solicitor suggesting to a client that he should communicate directly with the client of the solicitor on the other side.
5. Where a solicitor considers it appropriate and his client agrees, this Principle does not prevent a solicitor from instructing an enquiry agent in an endeavour to ascertain for example the whereabouts or means of the other side or to serve documents. However, where the third party is already represented a solicitor should not instruct an enquiry agent to approach the other party to obtain a statement until he has given reasonable notice of his intention to do so to the other party's solicitor.
6. This Principle extends to a client of a solicitor who is not in private practice.
7. For the purposes of this Principle, only those employees or officers of a corporation or government authority who are responsible for the giving of instructions are to be regarded as the client.



8. Save as stated in Commentary 7, it is not a breach of the Principle to interview employees of an organisation on the other side in a matter. When contemplating interviewing such an employee, the solicitor should have regard to the employee's position *qua* employee and in appropriate circumstances should advise the employer or its solicitor of the intention to interview the employee. This would enable the employee to be advised as to his or her position. The interviewing solicitor should have regard to:
  - (a) the liability of the employee; and
  - (b) the fact that the information sought may be confidential to the employer which, if disclosed, may place the employee in breach of his/her contract or the common law, or statute, such as the *Personal Data (Privacy) Ordinance* (Cap. 486)(see also Principle 10.12).
9. For guidance on giving a second opinion to another solicitor's client (see Principle 5.11 Commentary 2).

### 11.03 Duty to report misconduct

**A solicitor is under a duty to report to the Council, where necessary after having obtained his client's consent, any professional misconduct or dishonesty on the part of another solicitor or a member of his staff, or of any other person purporting to represent or to be in the employment of another solicitor or firm.**

#### **Commentary**

1. Where a solicitor has reason to believe that another solicitor is in financial difficulty or where his integrity is in question, he should report the facts to the Council.
2. The Principle that a solicitor must maintain the highest standards of professional conduct and ensure that those in his employment do likewise, extends to a duty to inform the Council of professional misconduct or dishonesty in his own or any other firm.
3. A solicitor should inform the Law Society where he is charged with an offence involving dishonesty or deception or any other serious criminal offence.
4. A solicitor should report a breach of undertaking by another solicitor promptly (see Circular 99-160).

#### 11.04 References

**Where a solicitor signs a certificate or otherwise gives a reference concerning another solicitor, he must give a full and frank assessment of that other solicitor and must not mislead.**

#### *Commentary*

1. This Principle particularly applies when a solicitor is asked to sign a certificate to the effect that an individual is a proper person:
  - (a) to be admitted as a solicitor;
  - (b) to be restored to the Roll; or
  - (c) to be employed as a solicitor.

## APPENDIX

### PRINCIPLE 11.03 COMMENTARY 4

CIRCULAR 99-160

21 June 1999

#### SOLICITORS' UNDERTAKINGS

##### Duty To Report Misconduct

Principle 11.03 of *The Hong Kong Solicitors' Guide to Professional Conduct*, Volume 1, 2nd Edition, states:

'A solicitor is under a duty to report to the Council, where necessary after having obtained his client's consent, any professional misconduct or dishonesty on the part of another solicitor or a member of his staff, or of any other person purporting to represent or to be in the employment of another solicitor or firm.'

The necessity to comply with the Principle is highlighted in the Judgment of the Court of Appeal in a recent case: *The Law Society of Hong Kong v. Re: Solicitors* CACV24/1999. Members should note the Judgment indicates that a solicitor should under normal circumstances report a breach of undertaking by another solicitor within 24 hours of the breach coming to his notice. Should he fail to do so, he would himself be guilty of professional misconduct in failing to report the breach.

# 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

### 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

### 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. A barrister does not have a contractual relationship with his instructing solicitor or the client and therefore cannot sue for his fees.
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.

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.

### 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. 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*).
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.
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).

## 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

# CHAPTER 13

## RELATIONS WITH THIRD PARTIES

### 13.01 Fair dealing

1. Unrepresented third party
2. Try to contact other solicitor
3. Documents submitted by unrepresented third party
4. Character references
5. Offensive behaviour
6. Self reporting of serious criminal charges
7. Agent's fees

### 13.02 Dishonoured cheques

1. Client account cheque
2. Office account cheque

### 13.03 Stopping client account cheques

1. Notice
2. Where recipient is another solicitor
3. Action in law unaffected
4. Good reason

### 13.04 A solicitor must not assist an unqualified person to act as a solicitor

1. Purpose of LPO, section 49(1)
2. Section 49(1) and supervision obligations

### 13.05 Other person represented by an unqualified person

1. Definition of 'unqualified person'
2. Report to Law Society

### 13.06 Conveyancing contract: give time to purchaser to obtain legal advice Principle applies even if purchaser entitled to terminate

### 13.07 Letters before action

1. Letters of enquiry to employers
2. Offensive behaviour
3. Unlawful demand

### 13.08 Oaths, affirmations and declarations

1. Powers as Commissioner for Oaths
2. Group practice
3. Responsibility for affidavit or declaration
4. Refuse to administer oath if false

13.09 When an oath must not be administered

1. Contentious and non-contentious matters
2. Examples of forbidden involvement or interest
3. Statutory declarations taken by a China-Appointed Attesting Officer

13.10 Attestation, Certification and Notarization of Documents outside Hong Kong

1. Limitation of jurisdiction
2. Attestation as if document executed in Hong Kong
3. Notary no powers outside Hong Kong

Appendix

Circular 00-127 'Attestation, Certification and Notarization of Documents by Hong Kong Solicitors and Notaries Outside Hong Kong'  
see Chapter 1

### 13.01 Fair dealing

**A solicitor must not act, whether in his professional capacity or otherwise, towards anyone in a way which is fraudulent, deceitful or otherwise contrary to his position as a solicitor, nor must he use his position as a solicitor to take unfair advantage either for himself or another person.**

#### *Commentary*

1. A solicitor must take particular care when dealing and corresponding with an unrepresented third party to ensure that no solicitor-client relationship arises by implication between the solicitor and the third party.
2. Problems can arise, particularly in conveyancing transactions, where a solicitor is instructed by a client and is aware of the name and address of the other party, but not of his solicitor. The normal practice is for him to write to the other party asking to be put in touch with his solicitor.
3. Where a solicitor is dealing with an unrepresented third party, he should amend any draft document sent to him if it contains errors which could be put right by a reasonable amount of correction, provided that it is in his own client's interests to do so. If it is so badly drawn as to be inappropriate, there is no objection to his returning it to the unrepresented third party and advising him to consult a solicitor on its preparation.
4. When giving a reference as to character and financial standing, a solicitor must take care to give one that is true. A solicitor may be guilty of professional misconduct and may incur a potential liability where a false or misleading reference is given. The same Principle applies where a solicitor makes or corroborates a statement on an application by another person for a passport or on other documents.
5. A solicitor should not behave offensively or communicate in an offensive manner (with regard to offensive letters written to other solicitors see Principle 11.01 Commentary 4).
6. A solicitor should bear in mind the obligation to report to the Law Society any serious criminal charges against him (see Principle 11.03 Commentary 3).
7. With regard to a solicitor's duty to pay professional, non-lawyer or other agents' fees or witness expenses, see Principles 4.14, 10.20 Commentary 2, 11.01 Commentary 6 and Principles 12.04 & 12.05.



### 13.02 Dishonoured cheques

**A client account cheque must never be dishonoured. A solicitor must take care to ensure that any cheque for use in connection with his practice will be honoured upon presentation.**

#### **Commentary**

1. Dishonour of a client account cheque will other than in exceptional circumstances indicate a breach of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F).
2. Dishonour of an office account cheque may amount to misconduct depending on the circumstances and on whether it will impair or is likely to impair the independence and integrity of the solicitor or the reputation of the profession (see Principle 1.01).

### 13.03 Stopping client account cheques

**A client account cheque must not be stopped except for good reason and with prompt and effective notice to the payee or his agent.**

#### **Commentary**

1. For the purpose of this Principle, notice will be prompt and effective if it is received before the recipient has committed himself to an action which was reasonably foreseeable by the giver as likely to follow the receipt of a cheque, e.g. effecting exchange of contracts.
2. Where the recipient of the cheque is another solicitor who has paid it into his client account, it is open to the giver to place a stop even where the receiving solicitor has not awaited clearance before accounting to the client.
3. This Principle does not affect any action in law the recipient may have if a cheque is stopped.
4. A solicitor who has good reason for stopping a cheque would not be considered to be in breach of this Principle if he uses his best endeavours to give prompt and effective notice but is nevertheless unable to contact the payee or his agent.

**13.04 A solicitor must not assist an unqualified person to act as a solicitor**

Section 49 of the *Legal Practitioners Ordinance* (Cap. 159) provides:

‘(1) No solicitor shall wilfully and knowingly:

- (a) act as agent in any action or in any matter in bankruptcy for any unqualified person; or
  - (b) permit his name to be made use of in any such action or matter upon the account or for the profit of any unqualified person; or
  - (c) (repealed)
  - (d) do any other act enabling any unqualified person to appear, act or practise in any respect as a solicitor in any such action or matter.
- (2) Where it appears to a Solicitors Disciplinary Tribunal or to the Court that a solicitor has acted in contravention of this section, the Solicitors Disciplinary Tribunal or the Court shall order his name to be struck off the roll of solicitors.
- (3) Where the Court orders the name of a solicitor to be struck off the roll in respect of an offence under this section, it may further order that the unqualified person who was enabled by the conduct of the offender to act or practise as a solicitor shall be imprisoned for any period not exceeding one year.’

**Commentary**

1. This section prohibits a solicitor from allowing an unqualified person or a body corporate to act as his principal or use his name in any action or in any bankruptcy matter.
2. This section underlines the importance of the rules for the supervision of staff and offices prescribed by rule 4A of the *Solicitors’ Practice Rules* (Cap. 159 sub. leg. H): see Principle 2.04.

### 13.05 Other person represented by an unqualified person

**If a solicitor discovers that another person is represented by an unqualified person who is carrying out acts prohibited to unqualified persons, then, subject to the interests of his own client, his proper course is to decline to communicate with the unqualified person.**

#### **Commentary**

1. For a definition of 'unqualified person' see sections 2 & 51 and for details of the acts prohibited to them, see sections 45–51 of the *Legal Practitioners Ordinance* (Cap. 159).
2. A solicitor is under a duty to report to the Law Society any cases that come to his notice where it appears that an unqualified person has acted in breach of the law.

### 13.06 Conveyancing contract: give time to purchaser to obtain legal advice

**A solicitor acting for the vendor of property must not require an unrepresented purchaser to sign a contract unless that purchaser has obtained or has had a proper opportunity to obtain legal advice.**

#### **Commentary**

Even if a contract allows the purchaser to terminate without penalty during a stated period, this Principle will still apply. This is because although the purchaser may consult a solicitor during that period, it could then be too late for him to negotiate amendments to the contract and, in practice, it may be impossible to make the necessary searches and enquiries within that period.

### 13.07 Letters before action

**When writing a letter before action, a solicitor must not demand or threaten anything other than that recoverable under the due process of the law.**

#### **Commentary**

1. Where a solicitor is instructed by a creditor to collect a debt, there is nothing improper in his communicating with the employer of the debtor in order to obtain information as to his status or means. He should not, however, use the threat of reporting to the employer or the media as a means of obtaining payment. (As to a solicitor instructing an enquiry

agent to enquire into the means of the debtor, see Principle 11.02 Commentary 5.)

2. See also Principle 13.01 Commentary 5.
3. A solicitor must never make a demand by or accompanied by a threat to report the matter to any authority for criminal prosecution unless the demand is met.

### **13.08 Oaths, affirmations and declarations**

**When administering oaths and affirmations or taking declarations, a solicitor is under a duty to ascertain:**

- (a) **that the person in his presence is the deponent, if necessary by checking the identity card or other document of identity and, if the document has already been signed, to include in the oath or affirmation or declaration a statement that the signature is that of the deponent;**
- (b) **that the deponent is apparently competent to depose to the affidavit or declaration;**
- (c) **that the deponent knows he is about to swear, affirm or declare to the truth of the statement; and**
- (d) **that the exhibits, if any, are the documents referred to.**

#### **Commentary**

1. The *Legal Practitioners Ordinance* (Cap. 159), section 7A authorises a solicitor who is in practice holding a practising certificate to exercise the powers of a Commissioner for Oaths.
2. Solicitors in a group practice may administer oaths and affirmations or take declarations in respect of a solicitor or a client of a different firm in the same group practice but not of a solicitor or a client of the same firm.
3. The responsibility for the contents of the affidavit or declaration rests with the deponent and the solicitor who prepared it. However, if it comes to a solicitor's notice that the affidavit and declaration is incomplete, for example, because it contains blanks, he should refuse to administer it.
4. Although a solicitor is under no duty to read through the affidavit or declaration, if a solicitor has good reason to believe that the affidavit or declaration is false (even if that is unknown to the deponent), he must refuse to administer it.

### 13.09 When an oath must not be administered

**A solicitor must not administer oaths and affirmations nor take declarations in proceedings or matters in which he or his firm is acting for any of the parties, or is otherwise interested. This Principle does not apply where a solicitor is taking declarations in his capacity also as a China-Appointed Attesting Officers ('CAAO') for the purpose of such declarations being used in Mainland China or pursuant to the applicable laws regulations or administrative directions of any competent authority for purpose(s) connected with Mainland China, provided that a note stating such purpose of the declarations should be endorsed thereon.**

#### **Commentary**

1. This Principle applies to both contentious and non-contentious matters.
2. Because the administering of oaths and affirmations and the taking of declarations involve the discharge of a public office, this Principle would, for example, prevent a solicitor from administering oaths and affirmations or taking declarations in the following circumstances:
  - (a) a solicitor must not take affidavits regarding proofs in bankruptcy when acting for a proving creditor or regarding the winding-up of an estate when acting for the personal representative of the testator;
  - (b) a solicitor who is employed part-time by another solicitor must not administer oaths for a client of such other solicitor;
  - (c) a solicitor who is in the full or part-time employment of a company must not administer oaths in matters in which the company is concerned.
3. The exception to this Principle applies only to statutory declarations taken by a CAAO and not to oaths or affirmations.

### 13.10 Attestation, Certification and Notarization of Documents outside Hong Kong

**A solicitor is not allowed to administer oaths and affirmations or take declarations under the *Oaths and Declarations Ordinance* (Cap. 11) outside Hong Kong, but a solicitor who holds a current practising certificate may attest the execution of documents and certify copy documents outside Hong Kong for use in Hong Kong.**

#### **Commentary**

1. The power given to a solicitor to administer oaths and declarations under the *Oaths and Declarations Ordinance* (Cap. 11) is confined to the jurisdiction of Hong Kong.

2. 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.
3. A solicitor appointed as a Notary Public in Hong Kong may not notarize or otherwise exercise his office as Notary outside Hong Kong (see Circular 00-127).

**APPENDIX**

**PRINCIPLE 13.10 COMMENTARY 3**

**CIRCULAR 00-127 'ATTESTATION, CERTIFICATION AND  
NOTARIZATION OF DOCUMENTS BY HONG KONG SOLICITORS AND  
NOTARIES OUTSIDE HONG KONG' SEE CHAPTER 1**

# CHAPTER 14

## PROFESSIONAL UNDERTAKINGS

### 14.01 Binding nature of an undertaking

1. Definition
2. Personal capacity
3. Undertaking by non-partner on behalf of the firm
4. Undertaking by partner
5. Responsibilities continue
6. Oral, written or implied
7. Evidence of an oral undertaking
8. No obligation to give or receive undertakings
9. Future undertakings
10. Avoid 'usual undertakings'
11. Pay for copies from solicitors
12. Conditional delivery
13. Undertaking to accept service of an originating process
14. Undertaking fulfilled in reasonable time
15. Fraudulent undertakings
16. Undertakings only to be accepted from qualified persons
17. Implied undertaking deemed to be given by the firm

### 14.02 Performance of undertakings

1. Must be able to comply personally
2. No counter-undertaking
3. Fulfilment of undertaking from a solicitor's resources
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14.11 Demanding payment for not complaining

#### 14.01 Binding nature of an undertaking

**An undertaking shall only be given by a solicitor and is binding upon him personally, and if given in the course of practice, also binds his firm.**

##### **Commentary**

1. An undertaking is any unequivocal declaration of intention made orally, in writing or by conduct by a solicitor addressed to someone who reasonably places reliance on it.
2. A solicitor is personally bound by an undertaking given by him in his personal capacity.
3. Where a solicitor gives an undertaking on behalf of his firm, the undertaking binds him personally and the firm.
4. Where a partner gives an undertaking on behalf of his firm, the undertaking binds him and his partners personally and the firm.
5. A partner will remain responsible for his firm's undertakings given while he was a partner notwithstanding his ceasing to be a partner or dissolution of the firm.
6. A professional undertaking need not necessarily include the word 'undertake'.
7. Although an oral undertaking has the same effect as a written one, there may be evidential problems as to its existence unless there is available a contemporaneous note, transcript or written confirmation of its terms. If the recipient confirms the terms of the oral undertaking and the giver does not promptly repudiate those terms, this is likely to be accepted as sufficient evidence of the existence and terms of the undertaking.
8. There is no obligation on a solicitor either to give or accept an undertaking. Although there is a duty to act in a client's best interests this does not imply a duty to assume or underwrite a client's financial or other obligations.
9. A promise to give an undertaking at some future date will be treated as an undertaking, provided the promise sufficiently identifies the terms of the undertaking and provided any conditions precedent have been satisfied.
10. Promises to give the 'usual undertaking' or an undertaking on the 'usual terms' should be avoided as there may be doubt as to what is 'usual'. The terms of an undertaking should always be set out with clarity in order to avoid disputes.
11. When a solicitor asks another solicitor to supply him with copies of documents, there is an implied undertaking to pay a proper charge for them. The charges for photocopying are set out in the *Solicitors (General) Costs Rules* (Cap. 159 sub. leg. G).

12. If a solicitor sends to another solicitor documents or money subject to an express condition, the recipient is subject to an implied undertaking to return the documents or money forthwith, without making copies of the documents, if he is unwilling or unable to comply with the condition upon which they were sent. Further, if documents or money are sent to a solicitor subject to the condition that they should be held to the sender's order, the recipient is subject to an implied undertaking that he will return the documents or money to the sender on demand. In these circumstances, cheques or drafts must not be presented for payment without the consent of the sender.
13. A solicitor who has undertaken to accept service of an originating process on behalf of a client should as far as practicable endorse acceptance of service and return it on the day of receipt.
14. In the absence of an express term, there is an implied term in a professional undertaking that it is to be performed within a reasonable time having regard to its nature. If there is any delay, the giver is under an obligation to keep the recipient of the undertaking informed.
15. A fraudulent undertaking given by one partner without any actual or implied authority may still be binding upon the innocent partners. See *United Bank of Kuwait Ltd v Hammoud* [1988] 3 All ER 418.
16. A solicitor should take care only to accept an undertaking given by a person qualified to give such an undertaking.
17. Any implied undertaking given on behalf of the firm shall be deemed to be given by the partners of that firm.

#### 14.02 Performance of undertakings

##### **A solicitor must honour the terms of a professional undertaking.**

##### **Commentary**

1. The wording and extent of any undertaking should be carefully considered before it is given since a solicitor becomes personally bound by any undertaking given by him or his partners. The giving of an undertaking by a solicitor is not to be taken lightly and an undertaking should never be given unless the solicitor giving it is certain that he personally can comply with it.
2. A solicitor who has given an undertaking should not subsequently seek to impose a further condition or undertaking in return for compliance with the original undertaking, e.g. a solicitor who has undertaken to return documents cannot subsequently impose a further undertaking on the recipient of the original undertaking.

3. An undertaking to pay money out of proceeds of sale of a property does not imply that such an undertaking takes effect only if the proceeds of sale come into the hands of the solicitor giving the undertaking. If such a restriction is intended, it must be incorporated in the undertaking itself, otherwise the solicitor giving the undertaking may be required to satisfy the payment from his own resources.
4. A solicitor must honour an undertaking for so long as his name remains on the Roll and regardless of whether he holds a current practising certificate or not.
5. The Law Society cannot intervene where there is a genuine dispute as to whether the undertaking has been performed or where the performance of the undertaking turns on a disputed point of law. These are matters for the court to resolve.
6. The Law Society has no power to order the release of a solicitor from the terms of an undertaking. This is a matter for the person entitled to the benefit of the undertaking or the court.
7. A solicitor cannot claim to be released from an undertaking on the basis that the recipient has been slow in drawing his attention to the breach.
8. An undertaking procured by the fraud or deceit of the recipient will not bind the maker. (see also Principle 14.01 Commentary 15).
9. The responsibilities in respect of undertakings given in conveyancing matters are no different from those in relation to undertakings given in any other types of transactions and the Principles applicable to undertakings in general will apply.

### 14.03 In-house solicitors

**A solicitor in employment outside private practice is personally responsible for honouring his professional undertakings.**

#### **Commentary**

1. A solicitor in employment outside private practice must carefully consider the personal implications of an undertaking, particularly those given in the course of his employment, for example, because of the possibility that the employer might become insolvent or otherwise refuse to fulfil the undertaking. This will not affect the personal responsibility of the solicitor for the undertaking.
2. A solicitor who is the head of a legal department in commerce, industry or Government is responsible for undertakings given by members of his department qualified to give an undertaking.

3. Solicitors who accept an undertaking from legal departments in commerce, industry or Government should take particular care where the head of the department is an unadmitted person to ensure that the undertaking was given by a solicitor.
4. See also Practice Direction N and in particular to paragraph 9.

#### **14.04 Undertaking binds giver and receiver only**

**An undertaking will normally be required to be honoured only as between the giver and the recipient.**

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

1. Where a solicitor has received an undertaking for the benefit of his client and the client instructs another solicitor in his place, then unless for good reason the former solicitor objects or by its terms the undertaking provides to the contrary, the benefit of the undertaking will remain vested in the client and can be enforced at the client's request by the new solicitor.
2. A solicitor cannot assign the burden of an undertaking (and thus claim to be released from its terms) without the express approval of the recipient.
3. Where a solicitor acquires a practice from another and consequently takes over the conduct of a matter in which there is an undertaking outstanding, the acquiring solicitor is not liable on the undertaking unless he accepts liability by expressly or impliedly adopting the undertaking. If he does adopt the undertaking, the giver of the original undertaking nevertheless remains liable under it until he expressly obtains a release from the recipient.
4. There is no implied term in an undertaking that a solicitor is deemed to be released should he subsequently cease to act for the particular client. If this term is desired, it should be incorporated in the undertaking.

#### 14.05 Ambiguous undertakings

**An ambiguous undertaking is generally construed in favour of the recipient.**

##### **Commentary**

1. Care should be taken to word undertakings in precise terms and this is particularly applicable to an undertaking given to a layman.
2. Care should be taken when giving or accepting an undertaking which includes words such as 'to use best endeavours' or 'best efforts'. What constitutes 'best endeavours' or 'best efforts' is arguable and each case must be construed on its own facts. Generally, such phrases and other such potentially ambiguous terms should be avoided.

#### 14.06 Implied terms

**In general no terms will be implied into a professional undertaking. Some exceptions are:**

1. In an undertaking as to the payment of costs:
  - (a) when a solicitor gives an undertaking to pay another solicitor's costs in connection with a matter, the undertaking will be discharged if the matter does not proceed unless, in the undertaking, there is an express provision that the costs are payable in any event;
  - (b) an undertaking to pay another solicitor's costs is deemed to be an undertaking to pay 'proper costs' whether expressed to be so or not. Unless otherwise stated proper costs are those which would be allowed on taxation. For this reason it is always open to the giver of an undertaking to require the bill to be taxed, provided that this requirement is communicated promptly and the undertaking then takes effect on the bill as taxed;
  - (c) an undertaking to pay the costs of a professional agent other than a solicitor is similarly an undertaking to pay 'proper costs'. However, unless the agent's professional body has means whereby it can determine whether the costs are proper or not, a bona fide dispute as to quantum will have to be resolved through the court.
2. If an undertaking is given to pay money out of a fund at some specified time, there is an implied warranty that the fund will be sufficient for that purpose. Accordingly, if so desired, it is crucial that this warranty is negated in the undertaking itself.

3. Where an undertaking is given to pay a sum of money out of the proceeds of sale of an asset, there is no implied term that the sum is payable out of the net proceeds. Consequently, it is essential that any undertaking of this nature should stipulate what deductions have been agreed.

#### 14.07 Consideration

**An undertaking does not have to constitute a legal contract for disciplinary action to be taken in respect of a breach.**

##### *Commentary*

1. Breach of an undertaking can give rise to disciplinary action even if no consideration was given for the undertaking.
2. If an undertaking is expressed to be given for consideration but through no fault of the solicitor giving the undertaking, that consideration has failed, the undertaking will be discharged. Consequently, where there is consideration, it should be expressly stated in the undertaking itself.

#### 14.08 Undertakings binding even if beyond control

**An undertaking is still binding even if it is to do something outside the solicitor's control.**

##### *Commentary*

1. Before giving an undertaking a solicitor must carefully consider whether he will be able to implement it. It is no defence to a complaint of professional misconduct that the undertaking was to do something outside the solicitor's control (for example, that it was dependent upon action being taken by a third party and that the action has not been taken) unless the undertaking was suitably qualified (see also Principle 14.02 Commentary 1).
2. If an undertaking involves the payment of money, a solicitor must decide whether he is able to give such an undertaking, since he can be required to discharge this out of his own and his partners' resources. If asked to give such an undertaking, a solicitor must consider the possibility of his client being made bankrupt; a client's bankruptcy will not discharge such an undertaking. Further, the client's trustee in bankruptcy may have a prior claim over the fund from which the

solicitor has agreed to remit monies, as may a garnishee (see also Principle 14.06 Commentary 2).

3. An undertaking will not be affected by events which occur subsequently, unless these events are provided for in the undertaking itself.

#### **14.09 Undertakings 'on behalf of' clients and others**

**A solicitor will be held personally liable to honour an undertaking which he has given on behalf of a client or another person unless such liability is expressly and clearly disclaimed in the undertaking itself.**

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

1. Accordingly, where it is not the solicitor's intention to be personally bound, the undertaking should be worded so as to exclude personal liability on the part of the solicitor.
2. There is a distinction between a professional undertaking (including one given on behalf of a client) and a mere statement of a client's intentions or an agreement between solicitors as agents for their clients which is clearly without the assumption of any personal liability.
3. Since a solicitor will be personally bound to honour his undertakings, it is essential that before giving an undertaking he has his client's express or implied authority to do so. Where a solicitor gives an undertaking without such authority and as a result, his client suffers loss, the client's remedies may include, where appropriate, a claim in negligence against his own solicitor.

#### **14.10 Clients' instructions**

**A solicitor cannot avoid liability on an undertaking by pleading that to honour it would be a breach of his duty owed to his client.**

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

1. A solicitor cannot avoid liability on an undertaking on the ground that his client has changed his instructions. Furthermore, a solicitor should not act on his client's instructions where to do so would breach an undertaking given by him on or in accordance with his client's previous instructions.



2. A solicitor cannot avoid the obligations on an undertaking by claiming set-off or lien unless he has qualified the undertaking appropriately.

#### **14.11 Demanding payment for not complaining**

**A solicitor must not demand compensation for refraining from reporting an alleged breach of undertaking.**

# CHAPTER 15

## COMPLAINTS AND DISCIPLINE

This Chapter is primarily concerned with the powers of the Law Society and applicable procedures in relation to allegations of misconduct. For this reason, it does not contain Principles and Commentaries.

### THE LAW SOCIETY'S POWERS

#### 1. Power of investigation

Article 18(d) of the Articles of Association of the Law Society empowers the Law Society to investigate any charge of misconduct against any solicitor (whether a member or not) or employee of a solicitor and to institute and (if the Council thinks fit) prosecute any disciplinary proceedings.

Under article 18(e) the Council of the Law Society ('Council') has the power to call for an explanation of conduct that appears to the Council to be dishonourable, improper or unprofessional.

Article 18(f) further provides that the Council may carry out such statutory functions and exercise such powers as may be delegated to it by the *Legal Practitioners Ordinance* (Cap. 159), Regulations, Order-in-Council or otherwise.

#### 2. Delegation

Section 73C of the *Legal Practitioners Ordinance* (Cap. 159) provides that 'The Council may delegate to any person or to a committee of the Council any of the powers or duties granted or imposed on the Council or the Society under this Ordinance, other than the power to make rules under sections 73 and 73A.'

The process of investigation has been delegated to the Conduct Section of the Compliance Department, the adjudication of complaints to Investigation Committees and the review of Investigation Committee decisions and the institution of disciplinary proceedings to the Standing Committee on Compliance.

Details of the role of the Conduct Section, the composition and functions of an Investigation Committee and the Standing Committee on Compliance can be found in the *Notes to Parties to a Complaint* which can be downloaded from the Law Society's Web-site at [www.hklawsoc.org.hk](http://www.hklawsoc.org.hk).

### 3. Members' undertaking

Members undertake when they apply to become members, to comply with the Articles of Association, the Practice Directions, rules and the regulations of the Law Society. Thus breach of the undertaking is automatically a matter for discipline.

### 4. Disciplinary proceedings against non-members

The Council has power to investigate solicitors who are not members of the Society and those solicitors may be the subject of discipline, while they are on the Roll of Solicitors (see section 2(1) of the *Legal Practitioners Ordinance* (Cap. 159)). Registered foreign lawyers are also subject to the disciplinary process by virtue of section 9A of the *Legal Practitioners Ordinance* (see Cap. 159), as are trainee solicitors and employees of a solicitor or foreign lawyer (see section 2(2) of the *Legal Practitioners Ordinance* (Cap. 159)).

## INSPECTION

### Inspection powers of the Council

The Council's statutory powers of inspection are set out in:-

- (a) Sections 8AA and 8AAA of the *Legal Practitioners Ordinance* (Cap. 159);
- (b) *Inspectors Powers Rules* (Cap. 159 sub. leg. T);
- (c) Rule 5B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H);
- (d) Rule 10 of the *Foreign Lawyers Practice Rules* (Cap. 159 sub. leg. R);  
and
- (e) Rule 11 of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F).

Section 8AA of the *Legal Practitioners Ordinance* (Cap. 159) provides for an inspector to be appointed by the Council to verify compliance by solicitors, foreign lawyers, trainee solicitors or employees of solicitors or foreign lawyers with the provisions of the *Legal Practitioners Ordinance*

(Cap. 159) or any Practice Direction issued by the Law Society, and to determine whether such conduct should be inquired into or investigated. The section stipulates the powers of an inspector in making such enquiries and investigations.

Section 8B provides that documents required by an inspector under section 8AA must be produced or delivered notwithstanding any claim of legal professional privilege. Documents that are subject to a legal professional privilege may only be used for the purposes of an inquiry or investigation under the *Legal Practitioners Ordinance* (Cap. 159) (See also *Citic Pacific Ltd. v. Secretary for Justice & Another* [2012 ] HKCU 685).

The Council may also appoint Monitoring Accountants to conduct visits to law firms under Rule 5B of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and Rule 11 of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F) to ensure compliance with the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H) and the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F).

In addition, the Council may appoint an Inspector to conduct court inspections at courts (see Practice Direction C.3).

Failure by a solicitor to comply with a Notice of Inspection is a breach of section 8AA of the *Legal Practitioners Ordinance* (Cap. 159) which can result in disciplinary proceedings or other sanctions and is unjustifiable delay in complying with a Notice of Inspection.

## COMPLAINTS

Complaints against solicitors are investigated by the Conduct Section but decisions are made by the Standing Committee on Compliance or by Investigation Committees. In exceptional circumstances the Council can of its own motion refer a complaint direct to the Convenor of the Solicitors Disciplinary Tribunal Panel. The Law Society may also continue any investigation despite the withdrawal of the original complaint.

The Standing Committee on Compliance consists of Council members and non-Council members. Investigation Committees are ad hoc committees of the Standing Committee on Compliance.

### 1. Investigation procedures

A written complaint (in a Complaint Form) usually initiates an investigation but the Standing Committee on Compliance can also investigate matters of its own motion.

Details of the investigation procedure can be found in the *Notes to Parties to a Complaint*. The Law Society may publish notes for guidance from time to time.

## 2. Privilege and Defamation

Complaints to the Law Society about the professional conduct of solicitors are protected by qualified privilege in the absence of malice. It may be improper for a solicitor to issue defamation proceedings in respect of material contained in a complaint made to the Law Society.

## 3. Sanctions

The sanctions that can be imposed are the issue of letters of regret or letters of disapproval to the respondent solicitor (which are signed by the Chairman or the Vice-Chairman of the Standing Committee).

If warranted, the Standing Committee can refer a matter to the Convenor or Deputy Convenor of the Solicitors Disciplinary Tribunal Panel.

## 4. Review

It is open to either party to seek a review of an Investigation Committee decision by the Standing Committee on Compliance.

Should one party seek a review of a decision, the other party may be informed of the application and invited to make representations.

The representations made on review should not generally include facts previously disclosed during the course of the investigation. Any solicitor seeking to do so may be asked to explain why a full explanation was not provided at the outset.

There is no time limit for seeking a review but excessive or unjustifiable delay in doing so will be taken into account at the review.

## DISCIPLINE

The Solicitors Disciplinary Tribunal Panel is established under section 9 of the *Legal Practitioners Ordinance* (Cap. 159). The Panel consists of not more than 120 practising solicitors of at least 10 years standing, not more than 10 foreign lawyers and not more than 60 lay members. All the members of the Panel and its Convenor are appointed by the Chief Justice.

Tribunals are appointed from time to time by the Convenor to hear and determine complaints. Each Tribunal consists of 2 solicitors and 1 lay member drawn from the Panel. Complaints about the conduct of a foreign lawyer or an employee of a foreign lawyer are dealt with by a Tribunal consisting of 2 solicitors, 1 foreign lawyer and 1 lay person.

Where a complaint is made to the Council which is not submitted to the Tribunal Convenor within six months of receiving the complaint, the Chief Judge may submit the matter to the Tribunal Convenor, if he considers that the Council ought to have done so (see section 9A(2) of the *Legal Practitioners Ordinance* (Cap. 159)).

A Tribunal has jurisdiction to hear applications in respect of a solicitor, a foreign lawyer, a trainee solicitor, or an employee of a solicitor or foreign lawyer under section 9A(1) of the *Legal Practitioners Ordinance* (Cap. 159). A Tribunal's authority is defined by section 10 of the *Legal Practitioners Ordinance* (Cap. 159) which grants it power to make such order as it thinks fit including striking off, suspension from practice and payment of a penalty. It need not make a finding of 'professional misconduct'. It is sufficient for there to have been a breach of statutory duty, this Guide or of Law Society Practice Directions for a solicitor to be sanctioned.

## INTERVENTION

The Council has the power to intervene in a solicitor's or foreign lawyer's practice in the circumstances set out in sections 26A, 26B and 26C of the *Legal Practitioners Ordinance* (Cap. 159). The powers of the Council are set out in section 26D and Schedule 2 of the *Legal Practitioners Ordinance* (Cap. 159). Grounds for intervention include dishonesty, undue delay, bankruptcy, abandonment of practice, incapacity, not having a practising certificate and failure to comply with practising certificate conditions.

The Council does not take over the practice of an intervened firm. It will appoint an intervention agent to wind down the practice of the intervened firm. Functions of an intervention agent are mainly to

- (i) identify the current files to return them to clients or pass them to the clients' new solicitors; and
- (ii) distribute money held on client account. The intervention agent is not responsible for the handling of the firm's files, accounts or administration. The costs of the intervention shall be recoverable from the solicitor or foreign lawyer of the intervened firm or his personal representatives.

# APPENDIX 1

## MEMORANDUM OF UNDERSTANDING ('MOU') BETWEEN THE LAW SOCIETY OF HONG KONG AND THE STOCK EXCHANGE OF HONG KONG

### EXPLANATORY NOTE ON THE MEMORANDUM OF UNDERSTANDING BETWEEN THE LAW SOCIETY OF HONG KONG AND THE STOCK EXCHANGE OF HONG KONG PREPARED BY THE SECURITIES LAW COMMITTEE

A memorandum of understanding ('MOU') has been agreed between the Stock Exchange of Hong Kong and the Law Society regarding the circumstances in which the Stock Exchange can make rules on standards of conduct of solicitors in connection with matters relating to the listing or continued listing of securities on the Exchange and impose sanctions for breach of these rules. The MOU also sets out the circumstances in which the Stock Exchange is obliged to refer its investigation of a solicitor to the Law Society. The MOU was entered into on 18 December 1996 and applies only to circumstances giving rise to the imposition of sanctions under the *Listing Rules* which occur on and after that date. The MOU does not give any third party rights and no third party is entitled to require compliance by either the Exchange or the Law Society with any of their respective obligations arising under the MOU. The purpose of these notes is to bring to the attention of members the salient features of the MOU and its implications for members. The sections in bold type reflect the Law Society's Commentary on certain provisions of the MOU but do not form part of the MOU itself.

The arrangements set out in the MOU only apply to solicitors 'in private practice'. Under the *Stock Exchanges Unification Ordinance* (Cap. 361), a person is regarded as acting in the capacity of 'a solicitor in private practice' if in the course of private practice he provides legal services to a client. He is not regarded as so acting where in respect of the matters governed by rules made by the Exchange he is also connected with that matter in any other capacity. **This is an important point for persons involved in such a matter in a capacity such as an in-house lawyer and for solicitors in private practice who sit on the board of listed companies or who, for example, hold some special office as consultant to a listed company. For a person who is not acting in the capacity of a solicitor in private practice the Exchange's right to make rules and/or impose sanctions for breaches of its rules are not**

**restricted by the arrangements now agreed between the Exchange and the Law Society under the MOU.**

Under the MOU, the Exchange recognises that the Law Society regulates conduct of solicitors in Hong Kong and that the Law Society has established well defined disciplinary procedures. The Exchange has therefore agreed that save in relation to the following three circumstances it will not make rules in the *Listing Rules* or make any public finding or impose any penalty or sanction or take other disciplinary action under the *Listing Rules* in respect of conduct of solicitors in private practice.

The three circumstances specified in the MOU are as follows:

1. If a solicitor makes an untrue representation to the Exchange:
  - (a) made on the instructions of his client, and purporting to be so made, and which the solicitor knows to be untrue or made with reckless disregard as to its truthfulness; or
  - (b) made otherwise than on instructions of a client by the solicitor knowing it to be untrue or without having made reasonable inquiries as to its truthfulness.
2. Where a solicitor knowingly or recklessly facilitates or participates in a breach of the *Listing Rules*.

**'Knowingly participates' in a breach is a wide concept but see below the Exchange's express recognition of certain examples where a solicitor will not be deemed to have acted improperly.**
3. Where acting for a client in relation to a listing matter, a solicitor knowingly or unreasonably fails to advise his client in relation to relevant requirements of the *Listing Rules*, or incorrectly advises his client in relation to such requirements, knowing such advice to be incorrect or with reckless disregard as to its correctness.

**Members are reminded that the *Listing Rules* give to the Listing Division discretion in interpretation of the applicability of the rules to certain situations and the Listing Division has its own internal guidelines in respect of interpretation and applicability of the *Listing Rules* to certain situations. This should be considered when members advise clients of relevant requirements of the *Listing Rules*.**

It is acknowledged by the Exchange that other than representations made to the Exchange on the instructions of a client, the *Listing Rules* do not require solicitors to make any representations to the Exchange except for the solicitor's certification in each of Form B and Form H of Appendix 5 of the *Listing Rules*.

In determining whether the conduct of a solicitor falls within the three circumstances the Exchange is obliged to have regard to all relevant factors. These include:



- (i) whether instructions have been given by a client to advise or not to advise on the issue in question and the extent of those instructions; and
- (ii) the degree of knowledge the solicitor has of the underlying facts after making such enquiries as are appropriate in the circumstances. Knowledge means actual knowledge of the solicitor concerned and the knowledge of other legal staff of his firm who are engaged in the same matter and whose knowledge should in the circumstances reasonably be imputed to him.

**Members are advised to ensure that the scope of advice being sought from them from a client is clearly agreed with the client in advance. Whilst it is for each solicitor to develop his own procedures in such matters, it may in certain circumstances be appropriate to record the agreement with the client in writing. Particular care needs to be taken when answering enquiries from clients with whom the solicitor's firm has a long standing relationship as the solicitor may be deemed thereby to have knowledge of information which is relevant to the specific matter then under consideration and the relevant interpretation of the *Listing Rules*. Similarly, where a number of solicitors of the same firm are involved in the same matter care should be exercised.**

**Given the structure of a number of Hong Kong listed groups (particularly where there is more than one Hong Kong listed company in the group) members are also advised to clarify the identity of the clients to whom advice is being given and if necessary to whom it is not being given.**

The Exchange recognises that, under *The Hong Kong Solicitors' Guide to Professional Conduct*, solicitors are under a duty to act in their clients' interests and in accordance with their clients' instructions as well as to maintain strict confidentiality of the business and affairs of their clients. It is also recognised that a client is always at liberty to disregard his solicitor's advice in whole or in part. The Exchange therefore accepts under the MOU that:

- (i) mere knowledge of an actual or potential breach by a client of the *Listing Rules* is not a breach by the solicitor of the *Listing Rules* and the solicitor is under no obligation whatsoever to inform or report the matter to the Exchange; and
- (ii) a solicitor may not be considered to have acted improperly if his client decides not to act in accordance with his solicitor's advice and instead to act in a manner which, in the solicitor's view, may constitute a breach of the *Listing Rules*, whether or not the solicitor continues to act for his client. The Exchange acknowledges that these two examples are not exhaustive.

Where the Exchange has reasonable grounds to believe that the conduct of a solicitor falls within one of the three circumstances and constitutes a breach of the *Listing Rules*, the Exchange must describe the matter in reasonable detail to the solicitor concerned and give a reasonable opportunity to the solicitor to answer the allegation before issuing any ruling or statement. Pending such issue the Exchange shall keep confidential all aspects of the investigation. **Members are reminded that they have a duty to hold in strict confidence all information concerning the businesses and affairs of their clients acquired through the professional relationship and must not divulge such information unless the client has expressly or impliedly authorised the disclosure or waived the duty. Members must therefore consider carefully what information can be disclosed to the Exchange in answer to an allegation by the Exchange that the conduct of the solicitor constitutes a breach of the *Listing Rules*. For example under *The Hong Kong Solicitors' Guide to Professional Conduct* a solicitor shall not without the client's consent disclose that the solicitor has been consulted or retained by a person in relation to a particular matter. A member should advise the Exchange if to divulge such information in answering the allegation would cause the member to breach an obligation of confidentiality.**

If the solicitor contends he is unable to adequately respond to the allegation without breaching a duty owed to his client by law or rules of professional conduct, the Exchange shall request the solicitor to obtain such consent or authorisation as necessary to enable the solicitor to respond. If the solicitor fails to request such consent the Exchange will be entitled to deal with the matter. If the solicitor requests such consent but the client refuses to give such consent and the solicitor lawfully continues to refuse to disclose information, and the Exchange is therefore unable to deal with the matter in question, the Exchange will refer the matter to the Law Society ('Law Society Referral') which shall investigate the matter in accordance with its then current procedures and advise the Exchange of its findings. If a Law Society Referral is made the Exchange shall not be entitled to make any findings or impose any sanctions on the solicitor concerned without the consent of the Law Society, which is not to be unreasonably withheld.

Where the Exchange has reasonable grounds to believe that the conduct of a solicitor falls within one of the three circumstances and constitutes a breach of the *Listing Rules* and may also involve a breach of duty imposed upon the solicitor by law or by virtue of rules of professional conduct, the Exchange shall refer the matter to the Law Society. The Law Society shall promptly notify the Exchange of its findings and any action taken by it in connection with any matter referred to it, but is not obliged to disclose to the Exchange any information on which it based its findings or which comes to its attention during the course of its investigations for this purpose. Subject always to the matter not subsequently becoming a Law

Society Referral, the Law Society's proceedings will neither affect the Exchange's conduct of its own disciplinary proceedings nor affect the Exchange's right to impose sanctions.

In circumstances where it appears to the Exchange that the matter may not have involved a breach of duty imposed on the solicitor by law or by rules of professional conduct, the Exchange may refer the matter to the Law Society and the Law Society can determine whether or not to bring its own disciplinary proceedings for breach of professional conduct. Subject always to the matter not subsequently becoming a Law Society Referral, these proceedings will neither affect the Exchange's conduct of its own disciplinary proceedings nor affect the Exchange's right to impose sanctions.

Upon the Exchange making a finding that a solicitor's conduct falls within one of the three circumstances and constitutes a breach of the *Listing Rules*, the Exchange may impose sanctions on the solicitor in accordance with the *Listing Rules*.

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