A further illustration is *Hong Kong Scaffold Building Contractor Co Ltd v On Lee General Contractors Ltd* (2000) HCCT No 1 of 1998. A barrister had been acting for the plaintiff company in an action for money allegedly owed to it by the defendant. The barrister was, however, a director of the plaintiff company at the material time, which constituted a breach of paragraph 58 of the Bar Code (embarrassment and conflict of interest). The defendant applied to the court for an injunction to prevent the barrister from continuing to act for the plaintiff. In fact, the barrister in question had already been censured by the Bar Council for breaching the Bar Code and had ceased to act for the plaintiff. The court held that, even had the barrister not ceased to act, a barrister's actions in breach of his Code did not by themselves affect his right of audience. It was only where the representation would constitute contempt of court that the court would act and the present situation did not seem to fall within such parameters. The proper course of action would have been for the court to refer the case to the Bar Council for an inquiry as to whether disciplinary proceedings should be instituted. This had already been done. In response to an argument by the defence that the barrister might try to assume his brief again, the court said that such suggestion was hypothetical; if it were to happen, the case would be referred back to the Bar Council.

Courts May Take Professional Codes into Account

Although, as we have seen above, the courts will not directly enforce the professional codes, they may, however, take the provisions of those codes into account when determining the proper standards of practice to be applied by lawyers. on the reasoning that the codes indicate public policy. Thus, Rogers JA said in *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)* [2000] 2 HKC 445 (CA),[5] at p 460:

> Although the [Solicitor's Guide] is not directly enforceable at the suit of a litigant, its provisions do illustrate appropriate professional conduct such as may assist the court in deciding whether and how it may enforce its supervisory power. In my view, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy.

Similar views were expressed by Richardson J in *Black v Taylor* [1993] 3 NZLR 403 (NZCA), at p 409:

> An ethical code of this kind expresses the profession's own collective judgment as to the standard to be expected of practitioners. While it does not impose legal obligations or have the force of law, it is some indication of relevant public policy concerns.

5 This case involved the question of whether the defendant had been guilty of a conflict of interest.

Conflict between Lawyers' Duties under the Law and their Duties as Prescribed by their Professional Codes

Since the professional codes are not part of the law, they will not bind the courts. The situation might arise, however, in an exceptional case, that there is a variance between the legal duties imposed upon lawyers by the courts and the duties imposed by their professional codes. There are several illustrations of such situations arising.

With regard to the legitimate extent to which counsel for the defence may cross-examine a witness, the Bar Code provides that counsel may put questions suggesting fraud, misconduct or the commission of a crime to a witness in cross-examination which goes to a matter in issue if he is satisfied that the matters suggested are part of his client's case and he has no reason to believe that they are put forward merely for the purpose of impugning the witness' character.[6] In *R v Callaghan* (1979) 69 Cr App R 88 (CA), counsel for the defence made an attack upon the honesty of a prosecution witness and persisted in the attack, although the accused declined to testify in his defence so as to support the allegations made. The Court of Appeal severely criticised counsel's conduct, but following representations from the Bar Council to the effect that such criticism was at variance with counsel's duties as laid down in the Code of Conduct, Waller LJ subsequently issued a statement[7] to the effect that counsel may make such an attack, although such conduct should be exceptional and was likely to attract adverse comment from the Bench.

Another illustrative area of possible variance is that governing the duty of defence counsel to draw the attention of the trial judge to an error in the summing-up. The Bar Code provides that, if some *procedural* irregularity comes to the knowledge of defence counsel before the verdict is returned, he should inform the court as soon as practicable and should not wait with a view to raising the matter later on appeal.[8] There is, therefore, an inference that there is *no* ethical obligation to inform the judge of *non-procedural* irregularities (eg an error of law). In *R v Edwards* (1983) 77 Cr App R 5 (CA), defence counsel had remained silent during the summing-up, although being aware that the judge had failed to direct the jury as to the standard of proof. Notwithstanding the fact that the supposed error was not a matter of procedure, the court expressed surprise when counsel took this point on appeal, saying that counsel, acting in the best interests of his client, should have drawn the trial judge's attention to the omission. The same issue came before the Court of Appeal in Hong Kong in *R v Leung Chi Yuen* [1989] 2 HKC 24 (CA). The trial judge had invited both prosecuting and defence counsel, before he summed-up to the jury, to address him on a point

6 Paragraph 138, Bar Code. See *Clyne v New South Wales Bar Association* (1966) 104 CLR 186, p 188 (HCt Aust).
7 (1980) 70 Cr App R 232 (CA).
8 Paragraph 154, Bar Code.

to manage the affairs of the group practice and this company must also maintain registration as a business under the Business Registration Ordinance.[16] Only a person who is either a party to the group practice agreement or a principal of a member firm that is a party to a group practice agreement is eligible to be a director or shareholder of the group practice's management company.[17] Any goods, services, facilities or premises provided by a third party or unqualified staff to be engaged for the members of the group practice must be provided or engaged by or through the group practice's management company.[18] The management company is not permitted to engage in any activity other than an activity related to the management of the affairs of the group practice or the members of the group practice as such.[19] Included in the name of the company must be the words 'Group Practice Management Company Limited'.[20]

Reporting to the Law Society

Where a group practice has been approved, the members must, within 14 days of any one of the members beginning to practice as a member of the group practice, furnish the Law Society with a declaration in an approved form signed by all member solicitors and all principals of each member firm, declaring that they have entered into a group practice agreement and specifying the date of the agreement, the commencement date of the agreement and the parties to the agreement.[21] They must also notify the Law Society of the name and address of the group practice, together with the telephone, fax, telex and DX numbers, the names of the members of the group practice and the date on which each member began to conduct his business as a member of the group practice.[22] They must also notify the Law Society in an approved form the specified details of the group practice management company.[23] Any change in these particulars must be notified to the Law Society within 14 days of such occurrence.[24]

Employment of unqualified staff by group practice

The number of unqualified staff employed within a group practice (whether employed by a member of the group practice or by the group's management company) must not exceed six plus eight times the number

16 Rules 7(1), (3), Solicitors (Group Practice) Rules.
17 Rule 7(4), Solicitors (Group Practice) Rules.
18 Rule 7(5), Solicitors (Group Practice) Rules.
19 Rule 7(6), Solicitors (Group Practice) Rules.
20 Rule 7(7), Solicitors (Group Practice) Rules.
21 Rule 8(1)(a), Solicitors (Group Practice) Rules.
22 Rule 8(1)(b), Solicitors (Group Practice) Rules.
23 Rule 8(1)(c), Solicitors (Group Practice) Rules.
24 Rule 8(2), Solicitors (Group Practice) Rules.

of solicitors practising within the group practice and the number of unqualified staff employed by any member of a group practice must not exceed eight times the number of solicitors employed full time by the member.[25]

Professional relationship of solicitors within the group practice

A solicitor practising within a group practice who wishes to instruct any other solicitor practising within the group practice to undertake work entrusted to the instructing solicitor by a client, must obtain the written authorisation of the client before instructing the other solicitor.[26] Although the Rules make it abundantly clear that solicitors practising by way of a group practice are not practising in partnership,[27] for the purpose of any rule of professional practice, conduct or discipline relating to conflict of interest or confidentiality, the various member solicitors and principals of member firms are to be regarded as practising in partnership with each other.[28] This means that confidential information may be disclosed to members of the group practice.[29]

NEW FIRMS ESTABLISHING A PRACTICE IN HONG KONG

The following rules apply when a solicitor commences a new practice either as a sole practitioner/principal or by way of a partnership.

Notification to the Law Society of Particulars of Firm and Any Service Company

Where a firm commences business, the principal or principals must, within 14 days of the commencement of the practice of the firm, advise the Law Society in writing in a form approved by the Law Society, of:

(i) the names of all the principals in the firm and whether they are engaged by the firm full time or part time;
(ii) the names of all the other solicitors in the firm and whether they are engaged by the firm full time or part time;
(iii) the names and such other details of all unqualified members of the firm, whether full time or part time, remunerated or otherwise, as may be required by the Law Society;
(iv) the address or addresses of the firm together with telephone, fax, telex and document exchange numbers, where appropriate;

25 Rule 9(1), (2), Solicitors (Group Practice) Rules.
26 Rule 11(1), Solicitors (Group Practice) Rules.
27 See rule 11(3), Solicitors (Group Practice) Rules.
28 Rule 11(2), Solicitors (Group Practice) Rules.
29 See Commentary 14 of Principle 8.01, Solicitors' Guide and Law Society Circular No 16 of 2003.

(iii) obtain information on the purpose and intended scope and nature of the business relationship; and
(iv) conduct ongoing due diligence and scrutinise transactions to ensure that they are being carried out within the law.

Solicitors' firms were also required to establish procedures of internal control to prevent money laundering, including:

(i) verifying the identity of clients;
(ii) reviewing information provided;
(iii) checking whether clients are acting on behalf of third parties; and
(iv) reviewing the firm's vulnerability to being used for money laundering activities.

Firms should be especially alert where there were:

(i) unusual settlement requests such as for settlement in cash;
(ii) unusual instructions such as from foreign clients who could be serviced by firms in their local jurisdiction;
(iii) large sums of cash to be invested or retained in a client account or simply retained for transmission to a third party;
(iv) secretive clients who are reluctant to disclose their identities;
(v) instructions from clients in suspect countries where production of drugs is known to be prevalent; and
(vi) suspect clients who are suspected to be triads or drug dealers or traffickers.

The three Law Society Circulars noted above were replaced in December 2007 by Practice Direction P, which consolidates and updates the guidelines on anti-money laundering and aims at the prevention of the financing of terrorist activities.[99] The Practice Direction is extensive and prescribes, inter alia, mandatory requirements for law firms regarding client identification and verification, client due diligence exercises, procedures required to be implemented by law firms including record keeping, the identification of especially suspicious transactions and risk areas and the reporting of suspicious transactions. Only the most important matters will be mentioned briefly here:

(i) Client identification

Solicitors must take reasonable measures to identify their clients and verify their identities by using reliable and independent sources. Special care must be taken where the client is not present and where instructions are given by third parties.

99 The Practice Direction was admirably summarised in a lecture given by Michael Lintern-Smith in January 2008, which can be found on the Law Society's website, which has been gratefully relied upon by the authors.

(ii) Due diligence

Special diligence must be undertaken when dealing with financial transactions, including the buying and selling of real estate; managing clients' money, securities and other assets; the management of bank accounts and securities; the formation, structure, reorganisation and management of companies and other entities; dealing with insolvency cases and tax advice; and other transactions involving the custody of clients' funds or the transfer of clients' funds through their bank accounts.

(iii) Enhanced due diligence

Enhanced due diligence is required where the solicitor is retained to deal with complex or unusually large transactions; where unusual patterns of transactions are involved; in respect of overseas companies where corporate information is not readily accessible or there are nominee shareholders; when dealing with politically exposed persons; and when dealing with persons or entities from non-cooperative countries.

(iv) Record keeping

Records as to client identification and due diligence should be kept for the following periods: (a) conveyancing matters — 15 years; (b) tenancy matters — 7 years; (c) criminal cases — 3 years; and (d) other matters — 7 years.

(v) Staff training and awareness

Staff must be given training in the operation of the guidelines.

The Practice Direction also deals with the consequences of non-compliance, which may include disciplinary proceedings and the possibility of criminal prosecution.

In this day and age where global crime is prevalent, solicitors must be alert to avoid their being involved in money laundering and must take this advice from the Law Society very seriously.

RESTRICTION UPON EMPLOYMENT OF CERTAIN PROHIBITED EMPLOYEES

The Employment of Competent Staff and the Duty to Reject 'Prohibited Employees'

A solicitor is not permitted to employ any person whose employment is prohibited as a result of an order made by the Solicitors Disciplinary Tribunal under section 10(2)(g) of the Legal Practitioners

(which are similar to those exercisable by the Council of the Law Society in Hong Kong) contravened the fundamental rights laid down in the Human Rights Act 1998. The Court of Appeal rejected this contention holding that, although the powers were indeed draconian in some respects, they were necessary for the protection of the public interest and, on a balancing exercise, were fair and entirely justified.

Grounds for Intervention by Council of the Law Society

The Council of the Law Society is empowered in certain cases to intervene in a solicitor's practice. The Council may take such action in the following cases:

Council has reason to suspect dishonesty on the part of a solicitor or foreign lawyer or an employee or trainee solicitor of a solicitor or foreign lawyer

Where the Council of the Law Society has reason to suspect dishonesty on the part of a solicitor or foreign lawyer or any employee or trainee solicitor of a solicitor or foreign lawyer, and the Council considers that it is in the interests of the public or the clients of the solicitor or foreign lawyer that it should exercise the powers laid down in the Second Schedule to the Legal Practitioners Ordinance, it may do so.[187] This will, of course, be the case where, for example, a sole practitioner has absconded with clients' funds.

A decision by the English Law Society to exercise its powers of intervention on the grounds of a suspicion of dishonesty on the part of a solicitor met judicial challenge in *Sheikh v Law Society* [2007] 3 All ER 183 (CA). Investigations carried out by the Law Society led it to conclude that the respondent solicitor was in breach of certain of the Solicitors' Accounts Rules and the Law Society decided to exercise its powers of intervention in the respondent's practice. The respondent sought an order from the court directing the Law Society to withdraw its intervention notice and such order was made at first instance on the grounds that the Law Society had insufficient grounds to suspect that the respondent had acted dishonestly. On appeal by the Law Society, the Court of Appeal ruled that the trial judge had been wrong to conclude that any suspicion held by the Law Society should have been dispelled. The court had to give proper respect to the view of the Law Society and should be slow to substitute its own view on a question which was peculiarly within the experience and expertise of the Law Society as the regulatory body. The appeal was accordingly allowed.

187 Section 26A(1)(a)(i), (ii), Legal Practitioners Ordinance.

It was contended in *Yogarajah (Practising as Rajah & Co) v The Law Society* (1982) 126 Sol Jo 430 that, if a charge of dishonesty were made, the rules of natural justice required that the solicitor should be given notice of it and be given an opportunity to refute it before the Council took action. The court, however, held that the provision only required a suspicion of dishonesty and that actual dishonesty need not be proved. The rules of natural justice had no application to a suspicion of dishonesty because otherwise a substantial delay might occur, and, if dishonesty had existed, the interests of clients would suffer.

Solicitor or foreign lawyer guilty of undue delay

Where a complaint has been made to the Council that there has been undue delay on the part of the solicitor or foreign lawyer in connection with any matter in which he or his firm has been instructed and the solicitor or foreign lawyer, having been given notice in writing by the Council of such complaint, has failed, within a period of not less than eight days as specified in the notice, to give an explanation of the matter which the Council regards as satisfactory and the solicitor or foreign lawyer has been notified in writing that he has so failed, the Council may take action as authorised by the Second Schedule of the Legal Practitioners Ordinance.[188]

Other grounds for the Council's intervention

There are several other grounds on which the Council may intervene in a solicitor or foreign lawyer's practice. They include the situations where (i) the Council has reason to suspect dishonesty by the personal representative of a deceased solicitor or foreign lawyer in administering his practice; (ii) there has been undue delay on the part of personal representatives of a deceased solicitor or foreign lawyer; (iii) a solicitor or foreign lawyer fails to comply with his duties in respect of keeping of accounts or with the Professional Indemnity Rules; (iv) a solicitor or foreign lawyer has been adjudged bankrupt or has entered into a voluntary arrangement with his creditors within the meaning of the Bankruptcy Ordinance; (v) a solicitor or foreign lawyer has been committed to prison; (vi) a sole practitioner is incapacitated by illness or accident; (vii) a solicitor or foreign lawyer is mentally incapacitated; (viii) a solicitor has been struck off the roll or suspended or the registration of a foreign lawyer has been suspended or cancelled; (ix) a solicitor or foreign lawyer has abandoned his practice; (x) a solicitor or foreign lawyer is incapacitated by age (xi) a solicitor is not holding a valid practising certificate; (xii) a solicitor has failed to comply with the conditions subject to which his practising certificate was granted; and

188 Section 26C(a)–(d), Legal Practitioners Ordinance.

Oppression by solicitors

A solicitor representing the vendor might apply pressure on a purchaser, who is separately represented, to instruct the solicitor representing the vendor on the grounds that such would be cheaper and the transaction would proceed more quickly. Similarly, it would be improper for a solicitor acting for the mortgagee in respect of the sale and purchase of a flat to put pressure upon the purchaser/mortgagor, who is already represented by his own solicitor, to withdraw his instructions from his solicitor and instruct the mortgagee's solicitor to act for him on the grounds that such will avoid trouble and inconvenience. There would also appear to be cases where the solicitor for the vendor exerts pressure on a purchaser to borrow money from a bank with whom the solicitor has a 'friendly' arrangement.

Remuneration of the Agent

In the case of agents approaching persons under arrest or ambulance chasing, they would either receive an 'introduction' fee from the client, which they would keep, or receive a commission payment from the solicitors' firm. In some cases, part of the fee received would subsequently be paid over to the solicitor. Receipt of money in these circumstances is improper.

Action Taken by the Profession to Deter the Improper Obtaining of Business

Over the last decade, the Law Society has taken several measures to deter the improper obtaining of business. Several of these measures are set out below.

Onerous duties placed on solicitors retained in criminal cases

In order to stifle the improper obtaining of business and the receipt of 'introduction money' by clerks, the Law Society now requires that, where a solicitor has agreed to act in a criminal case for a client, the solicitor in charge of that matter must, as soon as practicable and not more than seven days after receiving instructions, confirm by letter to the client (i) the instructions given; (ii) the services to be provided; (iii) the name of the solicitor in charge of the matter; (iv) the fee to be charged or an estimate of that fee; and (v) counsel's name, his fee and any refreshers or an estimate of such fee and refreshers.[18] Further, the firm must secure the written and signed agreement of the client to those terms.[19] If any

18 Rule 5D(a)(i)–(v), Solicitors' Practice Rules.
19 Rule 5D(a), Solicitors' Practice Rules.

material change occurs to the information contained in the letter (for example, the identity of counsel), the firm must, within seven days, notify the client in writing of that change and secure the client's written and signed agreement to the change.[20] When money is received from a client in payment of fees or on account of costs or disbursements, the firm must deliver a receipt to the client.[21] Further, at the conclusion of the case, the firm must promptly deliver to the client an account, signed by the solicitor personally, specifying (i) the name and number of the case; (ii) the name of any counsel retained; (iii) the dates of any court appearances; (iv) a note of any fees paid to counsel; and (v) a statement of the solicitor's profit costs and disbursements.[22] The purpose of these rules is to combat the practice where touts, who are either middle-men or clerks employed by solicitors, receive payments from members of the public, only part of which is applied towards legal fees, whilst the balance is retained by the middle-man or clerk.

Restriction upon the number of unqualified employees in each firm and computer record kept of all changes in employment of unqualified staff

Restriction On Number Of Unqualified Staff

The maximum number of unqualified persons who may be employed in a practice has been restricted to six plus eight times the number of resident principals and solicitors employed full time in that firm.[23] The Law Society is, however, entitled to waive the limit where a firm unexpectedly finds itself in breach of the provision. All firms must report to the Law Society the names of all unqualified persons employed by the firm when the firm commences business[24] and submit annual returns of its employees.[25] The primary purpose of this rule is to prevent firms from employing numerous unidentified employees who cannot be properly controlled and whose purpose may be to obtain business by improper means.

Notification To Law Society Of Employment Of Unqualified Staff

In order to keep a check on the movement of unqualified staff, the Law Society requires that firms provide information about the employment of all unqualified staff[26] and a computer record of such staff is maintained

20 Rule 5D(b), Solicitors' Practice Rules.
21 Rule 5D(d), Solicitors' Practice Rules.
22 Rule 5D(c)(i)–(v), Solicitors' Practice Rules.
23 Rule 4B(1), Solicitors' Practice Rules. Persons employed by a service company are deemed to be employed by the firm — rule 4B(3)(a), Solicitors' Practice Rules.
24 Rule 5(1)(ba), Solicitors' Practice Rules.
25 Rule 5(3), Solicitors' Practice Rules.

Authority to receive money in non-contentious matters

The common law principle is that, in respect of contracts for the sale and purchase of land, a solicitor has no implied authority to receive payment of the purchase price from the purchaser on behalf of the vendor: *Viney v Chaplin* (1858) 2 De G & J 468; 44 ER 1071. This principle has, however, been the subject of statutory change. According to the Conveyancing and Property Ordinance, where a solicitor produces a deed, such as an assignment, having in the body of the deed a receipt for money and the deed has been executed by the person entitled to give a receipt, the deed itself authorises payment to be made to the solicitor without the need for any separate authority, unless the payer has notice in writing that the solicitor is not so authorised.[72] Similarly, where a mortgagee is selling in exercise of his power of sale, his solicitor, on producing a deed having the necessary receipt, will be authorised to receive the purchase money.

Authority to commence proceedings

A solicitor has no general authority to commence proceedings on behalf of his client: *Wray v Kemp* (1884) 26 ChD 169, although it is always open to the client subsequently to adopt or ratify the proceedings: *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680. Indeed, the Court of Appeal has held in *Presentaciones Musicales SA v Secunda* [1994] 2 All ER 737 (CA) that proceedings commenced by a solicitor without authority may be ratified even after the limitation period has expired.

Authority of solicitor on the record in contentious proceedings

A solicitor whose name is on the record in contentious proceedings has authority to accept service of all documents,[73] to make written admissions,[74] to conduct interlocutory applications,[75] to refer the matter to arbitration,[76] and to receive payment of tender,[77] of a debt,[78] of

72 Section 18(2), Conveyancing and Property Ordinance. Of course, where completion is by way of mutual undertakings, this provision will be inapplicable since the residue of the purchase price is paid by the vendor before the assignment is executed and handed over by the vendor.

73 See Order 10 rule 1(4), Rules of the High Court, which provides that, where a defendant's solicitor indorses on the writ that he accepts service of the writ on behalf of the defendant, the writ shall be deemed to have been duly served.

74 See *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 Ch D 61, p 72.

75 In *Ex parte Maxwell; Re a Bill of Costs* (1955) 72 WN (NSW) 333 (NSW SC), the court held that a retainer to conduct a suit covered all things necessary and proper for the conduct of the suit. Whether to issue interrogatories was a matter for the solicitor, who was not required to refer such matters to his client for further instructions.

76 *Faviell v Eastern Counties Railway Co* (1848) 2 Exch 344.

77 *Wilmot v Smith* (1828) 3 C & P 453, 172 ER 498.

78 *Vorley v Garrad* (1834) 2 Dowl 490.

damages[79] and of costs.[80] He also has implied authority to incur ordinary expenses such as disbursements and court fees, but he should secure express authority before incurring expenses of an unusual nature. Thus, Baggallay LJ has said in *Re Blyth and Fanshawe* (1882) 10 QBD 207 (CA), at p 210:

> If an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform the client fully of it and not to be satisfied simply by taking his authority to incur the additional expense, but to point out that such expense will or may not be allowed in taxation as between party and party whatever the result of the trial.

Authority to brief counsel

A solicitor has authority to brief counsel, but should only do so after consulting his client in view of the additional costs involved. The Solicitors' Guide strongly suggests that a solicitor should advise his client as to when it is appropriate to instruct a barrister and obtain the client's authority before doing so.[81] Although the solicitor will normally recommend the instruction of a particular counsel, if the client refuses to agree to the instruction of that particular counsel, the client's wishes should prevail. For example in *Re Harrisson* [1908] 1 Ch 282, it was held that the solicitor could not recover from his client the costs of instructing counsel or counsel's fees where the client had strongly objected to a particular counsel being instructed.

A solicitor assigned to act for a legally aided litigant by the Department of Legal Aid, however, has no right to brief counsel to attend a hearing without the prior approval of the Director of Legal Aid. This was the decision of Her Honour Judge Marlene Ng in *Chan Wai Yin v Wong Sau Ping Ada* [2006] 4 HKC 461 (DC). In reaching this conclusion, the learned judge explained that legal aid was a creature of statute and the rights of legal practitioners to appear and act for legally-aided persons derived from the Legal Aid Ordinance (Cap 91). That Ordinance provided for the establishment of separate panels of solicitors and barristers who could only be assigned to act for a legally-aided person by the Director of Legal Aid. Since it was not permissible under the Ordinance for an assigned solicitor to brief counsel without the approval of the Director of Legal Aid, counsel could not be heard.

79 *Bevins v Hulme* (1846) 15 M & W 88, p 96.

80 *Cox v Salmon* (1836) 2 M & W 127.

81 Commentary 3 of Principle 5.17, Solicitors' Guide.

respect of fees owing to the solicitor. If the solicitor has been retained for an 'entire contract' and the work involved has not yet been completed, clearly no lien will arise until the work has been completed, thereby entitling the solicitor to his fees: see *Re Birmingham Savage v Stannard* [1959] Ch 253. Once the work has been completed, however, it would appear that the lien will arise irrespective of whether or not a bill for those fees has been sent to the client. This point was considered by Deputy Judge Carlson in *Li Fu Yat Tso v George YC Mok & Co (a firm)* [2007] 1 HKC 150 where the learned judge pointed out that it would be very curious indeed if a solicitor, who had done much work for a client and was asked to pass over papers as a matter of urgency to another solicitor before he had time to draw up his bill, could then be said to have no retaining lien over those papers. It was not the law that a bill had to be prepared before a lien could be asserted.

Property Over Which the Lien Extends

The solicitor's lien will only embrace property belonging to the client. It could not, therefore, extend, for example, to title deeds in the possession of the solicitor which belong to some other party than the client. The usual property over which the lien is exercised comprises the client's papers and documents; it also extends over the client's chattels and money, even though placed in a client's trust account; cheques; bills of exchange; shares; and letters of administration, subject to the limitation that the property must have been transferred to the solicitor in his professional capacity. The plaintiff's solicitor's lien does not, however, extend to money paid into court by a defendant under Order 22 of the Rules of the High Court, where the money is held jointly by the solicitors representing the plaintiff and defendant,[160] because the money remains the property of the defendant. Nor does the lien extend to money held by the solicitor as trustee[161] or to the will of his client,[162] or to money held in a stakeholder account.[163]

Extent of the Lien

The solicitor, in exercising his lien, has only the same right to possession of the documents as the client. If, therefore, the client is obliged to hand over the documents to a third party, so is the solicitor. This principle is clearly illustrated by *Re Hawkes, Ackerman v Lockhart* [1898] 2 Ch 1. A client died indebted to his solicitor who duly exercised his right to a lien

160 *Halvanon Insurance Co Ltd (in liquidation) v Central Reinsurance Corp* [1988] 3 All ER 857.

161 *Re Clarke, Ex Parte Newland* (1876) 4 Ch D 515; *Stumore v Campbell & Co* [1892] 1 QB 314.

162 *Balch v Symes* (1823) Turn & R 87, 37 ER 1028.

163 *Rockeagle Ltd v Alsop Wilkinson (a firm)* [1991] 3 WLR 573 (CA).

over the client's documents. The conduct of an administration action was given to a creditor who needed sight of some documents held subject to the lien and the court held that the creditor was entitled to the documents because the existence of the lien was no bar to a rightful demand for production by a third party.

Solicitor's Right to a Lien in the Event of Termination of the Retainer

Whether or not the solicitor will be entitled to exercise a lien over his client's documents will depend upon several factors. The court will take into account the circumstances surrounding the termination of the retainer and whether the action is continuing and the client has appointed fresh solicitors to take over the conduct of the action.

Termination by the solicitor

Where Retainer Properly Terminated

Where the solicitor properly terminates his retainer, he will be entitled to exercise his lien. As we have seen above, proper termination may occur where, in the case of an entire contract, the subject matter of the retainer has been concluded or, in a case falling outside the entire contract rule, at an appropriate stage in the proceedings and upon reasonable notice. Additionally, the solicitor will be entitled to his lien where he has terminated the retainer for justifiable reason as, for example, where the client has failed to pay reasonable disbursements when they have been properly demanded.

Qualified Lien Where Litigation Is Ongoing And New Firm Appointed

Where, however, the client is involved in ongoing litigation and has instructed a second firm of solicitors to take over the conduct of the action, the former solicitor may be required by the court to hand over the client's documents to the second firm of solicitors, subject to an undertaking by that second firm to hold all the papers subject to the lien and re-deliver them at the conclusion of the proceedings. This practice was approved by the Court of Appeal in *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 WLR 614, [1980] 1 All ER 1049 (CA), which concluded that the practice was to be supported because of the overriding consideration that a solicitor discharging himself should not be allowed to exert his lien so as to interfere with the course of justice and, therefore, the original solicitor should only have a qualified lien on the papers. Accordingly, where a solicitor discharged himself, the court would normally make an order requiring him to hand over the client's papers to the new solicitor against an undertaking to preserve his lien.

The Costs Committee and its Rule-Making Power

The Costs Committee established under the Legal Practitioners Ordinance[93] has power, inter alia, to make rules (i) providing for the remuneration of solicitors in respect of non-contentious business and (ii) prescribing that, as regards the mode of remuneration, it shall be according to the scale of rates or percentage varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode, and partly in another.[94] Every rule made under this section is subject to the prior approval of the Chief Justice.[95]

The Solicitors (General) Costs Rules, which lay down rules relating to the remuneration in respect of solicitor's non-contentious business, have been made under this provision and so too have the Solicitors (Trade Mark and Patents) Costs Rules governing costs to be charged in trade mark or patent business which is non-contentious.

Non-Contentious Business Agreements

The parties are at liberty to enter into a non-contentious business agreement

According to section 56(1) of the Legal Practitioners Ordinance, whether or not rules have been made under section 74 of the Ordinance, the parties may enter into an agreement as to the remuneration of the solicitor. The agreement may make provision for the remuneration of the solicitor by way of a gross sum, commission, percentage, salary or otherwise and it may be made on the terms that the amount of the remuneration therein stipulated for either shall or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees or other matters.[96] Provided that the agreement is in writing signed by the client or his agent,[97] it may be sued upon as any other contract.[98]

The Court of Appeal was called upon to decide whether a mandate agreement made between a client and a firm of solicitors constituted a non-contentious business agreement in *ETC Environmental Technology Ltd v Alvan Liu & Partners* [2004] 4 HKC 433, [2006] 1 HKLRD 787 (CA). The work to be done involved the listing of the client company on the Growth Enterprise Market. The client and solicitors' firm signed a letter of mandate providing that the total fee to be charged would be

93 Section 74(1), Legal Practitioners Ordinance.
94 Section 74(3)(a) and (b), Legal Practitioners Ordinance.
95 Section 74(4), Legal Practitioners Ordinance.
96 Section 56(2), Legal Practitioners Ordinance.
97 Section 56(3), Legal Practitioners Ordinance.
98 Section 56(4), Legal Practitioners Ordinance.

$1,2000,000 to be paid in three instalments; the first, upon acceptance of the mandate letter, the second, upon the listing being achieved and the final instalment upon the commencement of dealings with the client's shares. A further clause provided that, if the agreement were terminated, the solicitors would charge on an hourly basis, the total fee not to exceed $1,200,000. The final instalment was not paid. The judge at first instance held that the mandate letter did not constitute a non-contentious business agreement since the agreement provided for payment at an hourly rate if the agreement was terminated. The Court of Appeal agreed.

The non-contentious business agreement may provide for fees which are either greater or lesser than any prescribed scale fee

Prior to 1997, undercutting (ie charging less than) the scale fee as prescribed by the Solicitors (General) Costs Rules in conveyancing matters was considered to constitute professional misconduct. However, following a vote by legislators to allow solicitors to negotiate fees freely with clients,[99] the Law Society in 1997 recognised that solicitors were permitted to negotiate by way of a contentious business agreement made in accordance with section 56 of the Legal Practitioners Ordinance a fee which might be less than scale fee and that such did not constitute professional misconduct.[100] It is now the position, therefore, that a contentious business agreement may be entered into, whether or not a scale fee has been prescribed in respect of the subject matter of the agreement.

The remuneration provided for must be fair and reasonable

Where the parties have entered into a non-contentious business agreement, however, the solicitor's charges must be fair and reasonable. Otherwise, it might be cancelled or reduced on taxation (see below).[101]

99 The circumstances surrounding this vote were interesting. First, in an attempt to avoid the issue of scale fees being voted upon, the Law Society had proposed that scale fees be reduced by 40%–50%, but this proposal was not accepted. Legislators then first voted down by 27 votes to 23 a section of the Legal Services (Miscellaneous Amendments) Bill which would have effectively abolished scale fees. They subsequently, however, voted on a amendment proposed by the Attorney General Jeremy Matthews to permit clients to negotiate conveyancing fees freely with clients. The vote being tied at 26 to 26, President Andrew Wong cast his deciding vote in favour of the Government's proposal. This meant that, although scale fees were not formally abolished, consumers could freely negotiate their own conveyancing fees.
100 See Law Society Circular No 270 of 1997 (now withdrawn).
101 Section 56(4), Legal Practitioners Ordinance.

Disclosure to establish defence to criminal charge or civil claim

A solicitor may reveal information which would otherwise be confidential to the extent that it is reasonably necessary to do so to establish a defence to a criminal charge or civil claim against him or his firm or where the solicitor's conduct in under investigation by the Law Society or the Solicitors' Disciplinary Tribunal.[39]

Disclosure by order of court or in compliance with terms of warrant

DUTY TO COMPLY WITH COURT ORDER

In certain circumstances, the duty of confidentiality may be overridden by order of the court that the information must be disclosed and, in such cases, a solicitor must reveal the required information. The court has a discretion whether to order the disclosure of confidential information that does not attract legal professional privilege. For example, in *Ho Yee-sup v Dr May Chan Yuk-may* [1991] 1 HKC 499, a plaintiff sued two doctors in negligence. A medical report setting out the plaintiff's medical history had been drawn up by a doctor before litigation was contemplated and did not, therefore, attract legal professional privilege. When counsel for the defence sought to cross-examine the plaintiff on the report, counsel for the plaintiff objected on the grounds that the report was confidential and that confidentiality had not been waived. Liu J ruled that there was no privilege against its production. He did, however, recognise that the court had a discretion to refuse to permit confidential information to be disclosed and in exercising that discretion the court had to balance the competing public interest claimed by the party who sought to produce it and the interest of the party who sought to resist its production. In this case, the interest of the plaintiff in suppressing the information was clearly outweighed by the public interest in its disclosure.

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.[40] A solicitor may be asked by the police to give information or 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

39 Commentary 17(b) of Principle 8.01, Solicitors' Guide. See further p 221, below.
40 Commentary 6 of Principle 8.01, Solicitors' Guide.

subpoena, so that he may, where appropriate, claim privilege and leave the court to decide the issue.[41]

DUTY TO ASSERT LEGAL PROFESSIONAL PRIVILEGE WHERE APPLICABLE

A client has the right to refuse to disclose, even to a court, confidential communications 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 authority unilaterally to waive a client's privilege and the consent of the client or a court order must be obtained.[42]

Disclosure in compliance with statute

There are circumstances where disclosure is required under various ordinances such as the Prevention of Bribery Ordinance, the Inland Revenue Ordinance, and the Legal Practitioners Ordinance;[43] these situations are dealt with at length below when we consider legal professional privilege.[44]

No more information should be disclosed than is required

Where disclosure is required by the court or by law, a solicitor should always be careful not to divulge more information than is required and privileged information should not be revealed unless the court order clearly overrides the privilege and not merely the duty of confidentiality.[45]

Waiver by the Client and the Solicitor's Implied Authority to Disclose Confidential Information

The client may, of course, waive the duty of confidentiality either expressly or by implication.[46] Where there is a joint retainer, the consent of all the parties must be obtained before the duty to preserve confidentiality can be waived.[47] As to implied authority to disclose confidential information, some disclosure may be necessary, for example, in a pleading or other document delivered in litigation being conducted for the client. Again a solicitor may, unless the client directs otherwise,

41 Commentary 7 of Principle 8.01, Solicitors' Guide. See further pp 235–238, below.
42 Commentary 8 of Principle 8.01, Solicitors' Guide.
43 Commentary 9 of Principle 8.01, Solicitors' Guide.
44 See pp 230–239, below.
45 Commentary 10 of Principle 8.01, Solicitors' Guide.
46 Principle 8.01, Solicitors' Guide.
47 Commentary 24 of Principle 8.01, Solicitors' Guide.

Representing Parties with Conflicting Interests in the Same Transaction

We have previously discussed the arguments for and against simultaneous representation of clients with conflicting interests.[22] Briefly, the argument against solicitors being permitted to represent both sides who have conflicting interests is that the obligations of loyalty and of confidentiality are under constant threat. The solicitor may eventually prefer the interests of one client over another.

An argument in favour of permitting such simultaneous representation is that clients may have good reasons for wanting it, despite their conflicting legal interests, because they have other relevant interests which are shared and which they regard as paramount. The cost of simultaneous representation may be less, the differences in legal interest may be minor and they both prefer this particular solicitor or firm. Also tactically, it may be better to have a unified front and single representation. Further, the clients may agree that a single solicitor will reduce the prospects of friction between them. The client is supposed to have freedom to instruct a solicitor of his choice.[23]

Consent of the clients for solicitor to act where there are conflicting interests

Case authority suggests that the clients' autonomy can be preserved, despite the conflict, if they both consent to the simultaneous representation after adequate advice of the dangers involved. The solicitor may then act, but only while the co-operation continues; any indicators that the mutual co-operation of the clients is breaking-down should cause the lawyer to reflect and probably cease the representation.

The legal right of a lawyer to act for present clients with opposing legal interests where there is informed agreement was clearly stated by Wilson JA in *Davey v Woolley* (1982) 133 DLR (3d) 647 at p 650:

> Although the law is fairly well settled as to the duty owed by a solicitor to his client, it is not always easy to apply it to a particular context. A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests: see *Boardman v Phipps* [1966] 3 All ER 721 at p 756. This is not confined to situations where his client's interest and his own are in conflict, although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so.

The concept on informed consent was carefully considered in *Taylor v Schofield Peterson* [1999] 3 NZLR 434 (NZ HCt), where a solicitor was

22 At p 246 above.
23 Rule 2(b), Solicitors' Practice Rules.

retained to advise on the terms of a loan between the partners of a firm so that she would, in effect, be representing one partner as lender and another as borrower in those negotiations. Problems as to the agreed terms of the loan inevitably arose and one partner sued the solicitor. The court held first that there was no absolute rule that a fiduciary such as a solicitor could not act for two clients but, where there was a conflict of interest, in order to act, the solicitor had to prove that both parties had agreed on the terms of the transaction and had given informed consent to the dual representation. To establish informed consent, the solicitor must have: (i) recognised the conflict of interest; (ii) explained what that conflict was to the client; (iii) explained the ramifications of that conflict; (iv) ensured that the client understood those ramifications; and (v) obtained the informed consent of the client. In the instant case, there was a clear conflict of interest as no agreement had been reached on the materials terms of the loan at the point at which the solicitor's services had been engaged. The solicitor should not have acted for both parties in negotiating the terms of the loan and was, accordingly, liable in damages. Additionally, it seems that the clients can agree beforehand not to require full disclosure and that the solicitor is not to advise one or other of the clients on an issue of conflict. The lawyer may then act; see *Clarke Boyce v Mouat* [1993] 4 All ER 268 (PC).

It is now appropriate to consider those common situations in which a conflict of interest may arise.

Joint representation in conveyancing transactions

Introduction

Joint representation in conveyancing transactions has attracted considerable attention from both the profession and the judiciary. Examples include the simultaneous representation of the vendor and purchaser in the sale and purchase of property, the landlord and tenant in the negotiation of a lease and the mortgagor and mortgagee in the negotiation of a mortgage. The interests of the respective clients are obviously antagonistic. In the case of a sale and purchase agreement, there are issues such as determining the price, description of the property to be sold and terms of the sale and purchase agreement, which have to be negotiated. The terms upon which payment will be made, the date of payment of the deposits, whether there are any defects in title, the date and time for completion, risk of loss, stamp duty issues and many other details all ought to be dealt with by a solicitor dedicated to each party. There are further complications when banks and tenants become involved or when there are linked sales that depend upon the timely performance of a prior agreement.

On the other hand, in Hong Kong joint representation is likely to be rewarding to the client as the cost of the solicitor's representation of the

documents are sent to counsel and that those instructions are sent in good time.[35]

Common Law

What is the common law position where a solicitor instructs counsel, receives advice from him and acts upon that advice? Two distinct issues must be considered. The first is whether a solicitor will be liable for the negligent acts of counsel whom he has instructed. The second is whether the solicitor will automatically be protected from suit in negligence where he has sought counsel's advice and acted upon it.

As for the first question, as a general principle, a solicitor is not liable to his client for the negligence of counsel whom he instructs: *Lowry v Guildford* (1832) 5 C & P 234. In order, however, to gain protection from personal liability, instructing solicitor has a duty to provide counsel with all relevant information and the means of making any further information which is required available, so that counsel will be enabled to conduct the case effectively; otherwise, the solicitor may himself be liable to the client: *Hawkins v Harwood* (1849) 4 Exch 503, 154 ER 1312. As to the second situation, in most cases a solicitor will not be liable in negligence where he has properly instructed competent counsel and acted upon his advice. Thus, the Court of Appeal said in *Somasundaram v M Julius Melchior & Co (a Firm)* [1989] 1 All ER 129 (CA) that, where, as for example occurred in that case, the solicitor's advice as to plea was confirmed by counsel, any action against the solicitor would be likely to fail, either on the ground that the solicitor had also been advised by counsel and had not been negligent in relying on such advice, or that, as a matter of causation, counsel's intervention had broken any link between the solicitor's advice and the eventual plea.

Three additional points must, however, be borne in mind. The first is that counsel who is instructed must be, or at least appear to the solicitor to be, competent.[36] Thus, in *Re A (a minor)* [1988] NLJLR 79 (CA), the Court of Appeal held that a solicitor has a duty independent of counsel to protect the interests of his client and that duty may require the instruction of different counsel if it appears that the client's interests are not being fully protected because counsel is incompetent. Secondly, the solicitor must act strictly within the terms of that advice. Finally, the solicitor's duty is more onerous than merely blindly following counsel's advice because he must exercise his own independent judgment as to whether the advice given is proper. For example, a solicitor cannot relieve himself

35 Principle 12.01, Solicitors' Guide.

36 See Commentary 6 of Principle 6.01, Solicitors' Guide. The Director of Legal Aid may also incur tortious liability for selecting incompetent counsel if he does so directly: see *Ngao To-Ki v Attorney-General* [1984] HKLR 261, p 268, where McMullin J said that the Director has a duty to provide competent advisers.

of responsibility on a matter where the law would presume him to have knowledge: *Godefroy v Dalton* (1838) 6 Bing 460, at p 469. Thus, advice from a barrister who errs as to the limitation period and so gives bad advice should not excuse instructing solicitor who blithely acts upon that advice.

The duty to exercise independent judgment was made clear in *Davy-Chiesman v Davy-Chiesman* [1984] 1 All ER 321, where the court ruled that the solicitor was not entitled to rely blindly and with no mind of his own on counsel's views. The solicitor must exercise his own independent judgment and intercede with counsel in appropriate cases. In *Davy-Chiesman*, a solicitor was held guilty of serious dereliction of duty when he failed to demand an explanation from counsel who opened the client's case to the court by making an obviously hopeless submission, which was absolutely contrary to counsel's previous advice to the solicitor. The solicitor was, as a consequence, ordered to pay costs personally. By contrast, in *Oxfordshire Education Authority, ex parte W* [1987] The Times April 11, a solicitor had sought counsel's advice as to the parties against whom proceedings should be brought and the form of the proceedings, but, that advice having proved wrong, the proceedings had been discontinued early in the hearing. The trial judge had awarded costs personally against the solicitor, but the Divisional Court, distinguishing *Davy-Chiesman*, reversed the decision, holding that the solicitor had acted upon counsel's advice without any notice as to the inaccuracy of the advice and he should not be penalised as to costs.

Immunity of the solicitor-advocate and instructing solicitor

The scope of the advocate's immunity is considered at length in Chapter 22, 'The Barrister's Duty to the Lay Client and Opposing Parties'[37] and should be consulted as the immunity of the solicitor-advocate is generally co-extensive with that of the barrister.

ILLUSTRATIONS OF NEGLIGENCE IN CONTENTIOUS MATTERS

Introduction

Every decision involving a question of negligence will, of course, depend upon its own facts and the words of Fuad JA in *Wharf Properties Ltd v Eric Cumine Associates, Architects, Engineers and Surveyors (a firm)* (1989) Civ App No 52 of 1988 (CA) must be borne in mind:

> Every case where professional negligence is in issue depends very much on its own facts and it is dangerous to attempt to extract principles of general application from such cases.

37 At pp 621–627.

> The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked.

The ethical responsibility

There is a special ethical duty to be candid in ex parte proceedings. According to the Solicitors' Guide:

> 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.

A party seeking relief ex parte must, therefore, make full and frank disclosure to the court of all material matters within his knowledge and failure to do so may result in the discharge of any order obtained with consequent loss to the client. If a solicitor has not fully advised his client of his obligations or he himself has not adequately investigated the material to be disclosed, the solicitor may be in contempt and be exposed to legal action and justifiable complaint to the Solicitors Disciplinary Tribunal.[55] Further, if an ex parte order has been obtained and there is subsequently a material change in circumstances, that change must be disclosed to the court by the solicitor who obtained the order.[56]

Duty not to Waste the Court's Time and Courtesy to the Court

The solicitor's paramount duty to the court requires him not to waste the court's time. There are many ways in which a solicitor, through his inefficient or deliberate conduct of an action, can cause the court unacceptable delays and waste its time and the courts have made it clear on many and diverse occasions that they will not tolerate such behaviour. It might be helpful to consider some illustrations:

Solicitor being late for court or failing to appear

It is a breach of court etiquette to fail to appear in court at the proper time and a solicitor-advocate must ensure that he is present in court at whatever time of the day the case is called: *Cottam v Banks* (1847) 1 Saund & C 302.

55 Commentary 1 of Principle 10.04, Solicitors' Guide.
56 Commentary 2 of Principle 10.04, Solicitors' Guide.

Making late applications for adjournments

It is improper for a solicitor to make a late application for an adjournment and the courts may award costs against a solicitor personally in such a case. The Law Society has advised solicitors that, where a solicitor has been instructed to appear before a particular court at a specified time, he has an obligation to do so unless previously excused by the court. If for some good reason the solicitor wishes to change the date or time of the hearing and provided the consent of the prosecution has been sought, the solicitor should notify the court as soon as possible that a request will be made for an adjournment of the case. In these circumstances, the solicitor can either make arrangements for a colleague to appear on his behalf or instruct counsel to apply for an adjournment. It is only in exceptional circumstances that a case may be stood down on the morning of a fixed hearing. Such an exceptional case may be that an existing trial has overrun or the solicitor is suddenly taken ill.[57]

In *Fowles v Duthie* [1991] 1 All ER 337 (CA), the Court of Appeal warned solicitors that late applications for adjournments of hearings or to vacate fixtures, whether before a master or judge, were highly undesirable, would be subject to close scrutiny and, if the application had been necessitated by delay or lack of preparation on the part of the legal advisers, costs would be disallowed or ordered to be paid by solicitors personally.

Failing to contact a party or a witness in proper time

In *Holden v Crown Prosecution Service* [1990] 1 All ER 368 (CA), the Court of Appeal made it clear that it would be a breach of a solicitor's obligation to the court to fail to contact a party in time for him to appear at a hearing. Lord Lane CJ said at p 377:

> In our judgment it would be serious dereliction of a solicitor's duty to the court not to notify a defendant that the case was in the warned list and that it might come on for trial at short notice and he should either remain available at his home address or keep in daily touch with his solicitors.

The solicitor was ordered to pay costs personally. The court imposed a similar penalty in *Limbu Netra Kumar v Yau Lee Construction Co Ltd* (2006) HCPI No 234 of 2002. A personal injuries action had been set down in the Fixture List, but about two weeks before the trial dates the plaintiff applied for the dates to be re-fixed on the grounds that his expert witness would be unavailable to attend on the dates fixed. Chu J granted the application to re-fix the trial dates, but made trenchant criticism of the solicitor involved. Noting that the solicitor had failed to check the expert witness' diary before fixing the trial dates, she concluded that the solicitor had been guilty of a gross dereliction of duty. There were strong

57 Law Society Circular No 275 of 1994.

undertaking will only, therefore, be subject to the sanction of the court and the profession where it has been given by a solicitor in his capacity as a solicitor and not in a personal capacity. In the words of Williams J in *Re Fairthorne* 15 LJ (QB) 131, at p 132:

> The question therefore in this, as in every other case, is whether the attorney was acting in that character when he gave the undertaking.

An interesting illustration of this point is *Geoffrey Silver & Drake v Baines* [1971] 1 QB 396, where the plaintiff advanced money to a client of a firm of solicitors in return for an undertaking, signed by a solicitor employed by the firm on the firm's notepaper, to repay the sum with interest. A partner of the firm was subsequently sued upon the undertaking. The court held that the undertaking had not been given by the solicitor in his capacity as a solicitor, but was given in his personal capacity, for in regard to money an undertaking given by a person in his capacity as a solicitor was usually one to pay money which he held on trust or an undertaking to apply money in a particular way. The court, accordingly, declined to enforce the undertaking, leaving the plaintiff to resort to any remedy he might have at law.

An undertaking may be given to the court, to a client, to a solicitor, to another party or to the Law Society. Further, a promise to give an undertaking at some future date will be treated for professional purposes as an undertaking, provided the promise sufficiently identifies the terms of the undertaking and provided any conditions precedent have been satisfied.[3] It is, however, necessary to distinguish a professional undertaking (including one given on behalf of a client) from a mere statement of the client's intentions and from an agreement between solicitors as agents for their clients which is obviously without the assumption of any personal liability, notwithstanding the absence of any disclaimer.[4] The distinction will lie in the intention of the parties as evidenced by the words used and the surrounding circumstances.

THE FORM OF THE UNDERTAKING

A professional undertaking may be given orally or in writing and it is not necessary that the word 'undertake' is used.[5] Further, in certain circumstances, an undertaking may be implied by the court.[6] 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

3 Commentary 4 of Principle 14.01, Solicitors' Guide.
4 Commentary 2 of Principle 14.09, Solicitors' Guide.
5 Commentary 1 of Principle 14.01, Solicitors' Guide.
6 See pp 397–398, below.

does not promptly repudiate those terms, this is likely to be accepted by the Council as sufficient evidence of the existence and terms of the undertaking.[7]

COMMON EXAMPLES OF UNDERTAKINGS

Express Undertakings

Examples of express undertakings are, of course, countless, but it might be useful to provide some illustrations of undertakings commonly given by solicitors:

(i) An undertaking given by a solicitor representing a vendor to send title documents duly executed by his client to the purchaser within a fixed period by way of completion.
(ii) An undertaking by a solicitor representing a mortgagor to the solicitor representing the mortgagee to deliver title deeds against a cheque from the mortgagee by a certain date.
(iii) Upon the making of an ex parte application, for example for the grant of an interlocutory injunction, before issue of the writ, the applicant will be required to give an undertaking to issue proceedings forthwith.
(iv) An undertaking by a party applying to an interlocutory injunction to pay to the respondent damages for any loss sustained by the respondent if it subsequently transpires that the injunction should not have been granted.
(v) An undertaking to stamp a document.
(vi) An undertaking to pay money or repay a loan.
(vii) An undertaking to pay costs or to provide security for costs.
(viii) An undertaking to return documents.
(ix) An undertaking to hold documents to the order of another firm.
(x) An undertaking to discharge a mortgage.

Implied Undertakings

In some situations undertakings will be implied. Common examples are:

(i) Where discovery of documents is made through the civil process of the courts, the party in whose favour discovery is made is bound by an implied undertaking not to use the documents for any improper purpose and breach of this implied undertaking might constitute a contempt of court — see *Home Office v Harman* [1983] 1 AC 280.

7 Commentary 2 of Principle 14.01, Solicitors' Guide.

Qualifications to Serve as Pupil Masters

Pupil masters are required to be of not less than 5 years standing at the Bar[28] and will normally be junior barristers.[29] Subject to the Bar Council's approval, however, the period of approved pupillage may include any period not exceeding 3 months as a pupil with Senior Counsel.[30] A junior barrister taking silk is permitted, for the period of one year following his appointment as a Senior Counsel, to continue with his pre-existing commitments as a pupil master and any period of pupillage undertaken in such circumstances will be counted towards the required period of pupillage to be undertaken by a barrister intending to practise.[31] Barristers who are qualified to take on pupils are generally encouraged to do so.[32]

Approval of Pupillage by the Bar Council and Ineligibility for Pupillage

A practising barrister may not receive a pupil into his chambers until he has first obtained the approval of the Bar Council to the pupillage.[33] Save in exceptional circumstances, the Bar Council is unlikely to approve pupillage of less than 3 months with any one barrister.[34] The Bar Council may at any time approve the transfer of pupillage from one practising barrister to another or from a practising barrister to the Department of Justice, or from the Department of Justice to a practising barrister.[35] A person shall not be eligible to become a pupil if:

(i) he is an undischarged bankrupt;

(ii) he has been convicted of a criminal offence of such a nature that, in the opinion of the Bar Council, he is unsuitable to be a pupil;

(iii) he is engaged in any occupation which in the opinion of the Bar Council is incompatible with pupillage; or

(iv) for any other reason, he is considered by the Bar Council to be unsuitable as a pupil.[36]

28 Rule 10(1)(a), Barristers (Qualification for Admission and Pupillage) Rules.

29 According to paragraph 29(1)(a), Bar Code, a person who intends to practise as a barrister must serve the period of approved pupillage which shall, subject to reduction by the Chief Judge, be (a) a period of not less than 12 months with a junior barrister who, save in exceptional circumstances established to the satisfaction of the Bar Council, has continuously practised for not less than 5 years after commencement of full practice at the Bar in Hong Kong.

30 Paragraph 29(2)(b), Bar Code.

31 Paragraph 29A, Bar Code. See also Bar Association Circular No 32 of 1993.

32 Annex 5, Bar Code, paragraph 1.

33 Rule 13(1), Barristers (Qualification for Admission and Pupillage) Rules.

34 Paragraph 29(3), Bar Code.

35 Rule 13(2)(b), Barristers (Qualification for Admission and Pupillage) Rules.

36 Rule 14(1)(a)–(d), Barristers (Qualification for Admission and Pupillage) Rules.

If the Bar Council makes a decision that a person is ineligible for pupillage, it should notify that person of its decision and the reasons for the decision within 28 days of the application for pupillage.[37]

No Pupillage Fees

A barrister who acts as a pupil master may not seek or accept any pupillage fee.[38]

Acceptance of instructions and the period of limited practice

During the first six months of the period of approved pupillage, pupils may not accept instructions as barristers to conduct cases, since they are not yet admitted. They may, however, undertake paid devilling work for his pupil master and, as a result of an amendment to the Bar Code in 2006, may receive payment for devilling work at any stage of his pupillage from any other barrister who asks the pupil to do such work for him.[39]

As we have seen above, after the first six months of qualifying pupillage, the pupil may apply for a limited practising certificate and, upon receipt of this certificate, may undertake limited practice, but all work undertaken must be approved by his pupil master.[40] The advantages provided by this period of limited practice are:

(i) The work is supervised and the young barrister can take his first steps more easily since he has experienced advice at hand;

(ii) some income will be earned during this period;

(iii) there are no overheads for the pupil during this period and he may be able to save some money to cover the initial expenses incurred in setting up practice.

The usual nature of work undertaken at this stage will be bail applications, pleas in mitigation, civil interlocutory applications and some minor criminal matters in the magistrates' courts.

37 Rule 14(2), Barristers (Qualification for Admission and Pupillage) Rules.

38 Paragraph 30, Bar Code.

39 See Bar Code paragraph 82, which provides 'Although a pupil has no right or expectation to receive remuneration from another barrister for whom the pupil has undertaken devilling work at any stage of his pupilage, the said barrister should remunerate the pupil where the pupil has done work of value to him at any stage of the pupilage'.

40 Paragraph 29(4) of the Bar Code provides that a person who is a pupil may not accept instructions to act as a barrister unless he has been admitted as such, holds a valid limited practising certificate issued by the Bar Council and has the consent of his pupil master to accept such instruction.

conclusion of the prosecution's case, but defence counsel did not make use of them at the trial. The appellant was convicted. It was submitted on appeal that the transcripts ought to have been brought to the attention of the jury because they showed the complainant trying to suborn prosecution witnesses and, if the jury had known of the conversations, the verdict might have been different. The Court of Appeal held that the lack of safety of a conviction could not be based upon a decision of counsel merely because other counsel might not have made the same decision. Only a significant fault could found a challenge to the safety of the jury's verdict. In the instant case, the failure to adduce the tapes was not just a mistake or an understandable tactical decision within counsel's direction, but a matter of very serious misjudgment. The verdict was, therefore, unsafe and the appeal was allowed.

The latter situation of adducing evidence which was best left out formed the basis of an appeal in *R v Miletic* [1997] 1 VR 593 (Vict SC). Defence counsel had sought admission at trial of a record of a police interview with the defendant who was subsequently convicted. This evidence had proved considerably adverse to the defendant's case. On appeal against conviction on the grounds of counsel's incompetent advocacy, the court held that this had been an error of judgment on counsel's part, but was not an egregious or flagrantly incompetent error causing a miscarriage of justice.

A Criminal Conviction May be Set Aside on the Grounds of Counsel's Flagrantly Incompetent Advocacy

There have been of late many occasions in Hong Kong and elsewhere involving criminal trials where an accused has applied to have his conviction set aside on the grounds that counsel has ignored his instructions and handled the defence case in such a manner as to be flagrantly incompetent, with the result that the conviction is unsafe and unsatisfactory,[8] and in several of these cases, convictions have been set aside on the basis of the advocate's mishandling of the defence. The fact that the client has given specific instructions which have been ignored has been a matter that has been taken into account on occasion in assessing whether counsel has been flagrantly incompetent. The significance of counsel's failure to follow instructions was, however, accorded little weight by Roberts CJ in *R v Keung Ping-kai* [1981] HKLR 239, where the learned judge said at p 248:

> We can see no difference (since it is the practical effect that matters) between counsel conducting a case in a manner which conflicts with his instructions

8 See Sandor and Wilkinson, 'An Advocate's Mishandling of a Defence as the Basis for an Appeal Against Conviction', (1989) 19 HKLJ 193–208; and Sandor and Wilkinson, 'Further Authorities on an Advocate's Mishandling of the Defence as the Basis for an Appeal Against Conviction', (1991) 21 HKLJ 200–203.

> and conducting it in that same manner where he receives none. In each instance, it is to be assumed, in the absence of evidence to the contrary, that he acted in accordance with his own assessment of the best way in which to conduct the case on behalf of his client. It is not for the court to substitute their judgment on how a case should be conducted for that of counsel. In the result, even if the defendant issues instructions as he claims, we do not consider that the refusal of his counsel to conduct the case as his client wanted can, in the circumstances of this case, be a ground for regarding the conviction as unsafe.

By contrast, in *R v Wong Hung-fung* (1990) Mag App No 772 of 1990, Kaplan J considered counsel's disregard of instructions to be serious. He said:

> It seems to me that this was advocacy which ran quite contrary to the clear instructions which were given by this appellant and by ignoring these instructions on the most crucial points in the case I can only characterize it as a flagrant breach of instructions and one which, in the circumstances of this case, comes well within the very high threshold necessary to allow an appeal on the basis of what was or was not done by an advocate in court.

Perhaps the most robust statement of counsel's duty to follow instructions can be found in *R v McLoughlin* [1985] 1 NZLR 106 (NZCA), where Hardie Boys J concluded that counsel must withdraw if the client insists upon a particular course of conduct of the litigation which counsel finds unacceptable. The learned judge said at p 107:

> It does happen from time to time that a barrister will find himself unable or unwilling to act in accordance with his client's wishes. They may, for example, be incompatible with his duty to the Court or with his professional obligations; or he may consider that compliance would be prejudicial to his client's best interests. Should such a circumstance arise, then he must inform the client that unless the instructions are changed he will be unable to act further. If the difficulty arises during a trial he should immediately inform the Judge and seek leave to withdraw. It will then be the Judge's responsibility to determine what should be done, whether in terms of arranging for an adjournment or otherwise. But certainly counsel may not take it upon himself to disregard his instructions and then to conduct the case as he himself thinks best.

In *R v McLoughlin*, the court set aside the conviction and ordered a new trial on the grounds that the accused had not been afforded the opportunity of a full and fair trial as a result of counsel's refusal to follow his client's instructions.

The Court of Final Appeal has now made it clear in *Chong Ching Yuen v HKSAR* [2004] 2 HKLRD 681 (CFA) that, as a general rule, an accused person was bound by the way the trial was conducted by counsel, regardless of whether that was in accordance with the wishes of the client and it was not a ground for setting aside a conviction that decisions made by counsel were made without, or were made contrary to, instructions or involved errors of judgment or even negligence. On an appeal made on