Requirements as to Residency

3.04 The first requirement is that the court may not admit a person unless it has received from the Law Society a certificate to the effect that the Society is satisfied that the person–

(a) has resided in Hong Kong for at least three months immediately before his admission;

(b) intends to reside in Hong Kong for at least three months immediately after his admission;[3]

(c) has been ordinarily resident in Hong Kong for at least seven years; or

(d) has been present in Hong Kong for at least 180 days of each of at least seven years.[4]

Compliance with Examination and Course Requirements

3.05 The second requirement is that the applicant has complied with the requirements prescribed by the Council with respect to the passing of examinations and the completion of courses.[5]

3.06 These requirements are laid down in the Trainee Solicitors Rules. A person may only enter into a trainee solicitor contract if he:

(a) has passed or received a certificate of completion or a certificate of satisfactory completion as the case may be in:

(i) the Postgraduate Certificate in Laws and such other examination or course as the Law Society may require and set or approve; or

(ii) such other examination or course as the Law Society may require and set or approve; or

(b) has been granted total exemption by the Law Society from the requirements in paragraph (a).[6]

3.07 At present no other examination in addition to the Postgraduate Certificate in Laws has been required by the Law Society.

Compliance with Required Period of Employment as Trainee Solicitor

3.08 The third requirement is that the applicant has complied with the obligation prescribed by the Law Society with respect to employment

3 Section 4(3), Legal Practitioners Ordinance provides that, where such a person was admitted on the basis of an intention to reside in Hong Kong for at least three months immediately after his admission but fails to reside in Hong Kong for that period, the court may, on the application of the Society, order that the person's name be removed from or struck off the roll of solicitors.

4 Section 4(1A), Legal Practitioners Ordinance.

5 Section 4(1)(a), Legal Practitioners Ordinance.

6 Rule 7, Trainee Solicitors Rules.

as a trainee solicitor.[7] Subject to certain exceptions[8], no person may be admitted as a solicitor by the local qualifications route unless he has duly completed two years' period of employment as a trainee solicitor under one or more trainee solicitor contracts.[9] If the period of two years is not a continuous period of two years, it is nevertheless an effective employment as a trainee solicitor if the trainee solicitor has been employed under one or more trainee solicitor contracts equal in total to two years during the three years, or such further period as the Council may allow, immediately preceding his application for admission as a solicitor.[10]

Persons Who May Employ Trainee Solicitors and Restrictions upon the Number of Trainee Solicitors

3.09 Save with the special written leave of the Law Society, only solicitors who have been in continuous practice as solicitors in Hong Kong for a period of five years or more may employ a trainee solicitor or act as his principal[11] and no solicitor is permitted to employ or act as principal for more than two trainee solicitors at the same time.[12] Further, unless special written leave is given by the Law Society, the principal must be practising on his own account or in partnership.[13]

3.10 There is also provision for 'in-house' solicitors employing trainees upon their securing special leave to do so. Also, solicitors who have been admitted via the Overseas Lawyers Qualification Examination may be granted conditional special leave to employ a trainee solicitor.[14] Further, solicitors and qualified persons[15] working in certain Government Departments[16] may act as principals to trainee solicitors.[17] The object of the arrangement is to enable trainees to gather experience in the work of these bodies so as to gain an understanding of the manner in which they function which will be beneficial to trainees when they commence practice.[18]

7 Section 4(1)(a), Legal Practitioners Ordinance.

8 See rules 9, 9A and 20, Trainee Solicitors Rules.

9 Rule 6(1), Trainee Solicitors Rules.

10 Rule 6(2), Trainee Solicitors Rules.

11 Section 20(1), Legal Practitioners Ordinance.

12 Section 20(2), Legal Practitioners Ordinance.

13 Section 20(3), Legal Practitioners Ordinance.

14 Section 20(4A), Legal Practitioners Ordinance. The conditions are set out in Law Society Circular No. 115 of 2004.

15 'Qualified person' means a person qualified to be a solicitor: s 2(1), Legal Practitioners Ordinance.

16 These are: the Department of Justice, the Legal Advisory and Conveyancing Office of the Lands Department, the Land Registry, the Companies Registry, the Legal Aid Department, the Official Receiver's Office, the Intellectual Property Department and the Securities and Futures Commission: s 20(5), Legal Practitioners Ordinance.

17 Section 20(5), Legal Practitioners Ordinance.

18 See Law Society Circular No 322 of 2009 which identifies the participating organisations and the duration of secondments. It also provides details of the

Solicitors May Form a Service Company to Carry Out Administrative Functions

4.02 Solicitors may, however, form a service company to carry out necessary administrative functions concerned with the running of their practices. These functions include the provision of professional and non-professional staff, the hiring of premises, the purchasing of furniture and office equipment, and general maintenance.[5] Such service companies should be incorporated in Hong Kong so as to be fully governed by the provisions of the Companies Ordinance. The advantage of such an arrangement lies in the greater administrative simplicity in hiring staff and purchasing equipment through a corporate structure.

LIMITED LIABILITY PARTNERSHIPS

Introduction

4.03 Before 2012, solicitors in Hong Kong were only permitted to practise through partnerships with unlimited liability; this meant that, if one partner was at fault and was successfully sued for damages, upon the execution of judgment against that partner, the assets of the firm and of all other partners would be at risk.[6] Solicitors were therefore very cautious about whom they would take on as partners and consequently Hong Kong had many sole practitioners and small firms.

4.04 Limited liability partnerships (LLPs) are partnerships where a solicitor will only be liable for his own negligence and not the negligence of his partners; this could be adverse to the interests of clients unless adequate insurance cover is ensured to compensate the firm's clients for any potential negligence in handling client matters. Before 2012, the position was that solicitors had insurance cover up to $10 million (though with options to 'top-up'); but this sum would need to be increased if LLPs were introduced into Hong Kong.

Amending Legislation[7]

4.05 In July 2012, new provisions were added to the Legal Practitioners Ordinance via the Legal Practitioners (Amendment) Ordinance (Ordinance No 22 of 2012) to permit solicitor firms to practise as limited

4 Principle 2.07, Solicitors' Guide. Directors and shareholders must be solicitors or other professionals as required by Law Society Circulars Nos 389 of 1997, 155 of 2000 and 337 of 2006.

5 Commentary 1 of Principle 2.07, Solicitors' Guide. Commentary 2 of Principle 2.07 requires that a service company must not be used to evade the requirements of the Solicitors' Practice Rules; for example, to share profits with unqualified persons.

6 See ss 11, 12 and 14, Partnership Ordinance (Cap 38).

7 There is a valuable article on the legislation and on the experience of LLP's in other jurisdictions by Meggit G, *'Limited liability partnerships in Hong Kong: Challenges and conundrums'* at: http://ssrn.com/abstract=2290112.

liability partnerships. Local and foreign law firms may practise this way; what is required is that the partners agree in writing to form a limited liability partnership.[8] They are partnerships, not separate legal entities, and continue to be governed by the laws relating to partnerships, save to the extent of any inconsistency with the new statutory provisions.[9]

4.06 The Ordinance will come into effect on a date to be Gazetted.

Liability of Partners

4.07 When the firm is constituted as a limited liability partnership a partner is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises from the provision of professional services by the partnership as a limited liability partnership as a result of a default of (a) another partner; or (b) an employee, agent or representative of the partnership.[10]

4.08 This limited liability applies only if at the time of the default – (a) the partnership was a limited liability partnership; (b) the client knew or ought reasonably to have known that the partnership was a limited liability partnership; (c) the partnership had complied with section 7AD (that is the requirement for top-up insurance); and (d) the partnership had complied with section 7AE(2) which requires the partnership to inform the client of the identity of at least one supervising partner for the matter in respect of which the default occurred.

4.09 If a partner is protected from liability by section 7AC(1) – (a) the partner is not, separately, a proper party to any proceedings brought against the partnership for the purpose of recovering damages or claiming other relief in respect of the liability; and (b) the proceedings may, if they could apart from this section be brought against the partnership, continue to be so brought.[11]

Requirement for Top-up Insurance

4.10 Where lawyers form a limited liability partnership every such firm must have in existence, in addition to the present indemnity requirement of $10 million, a policy of insurance indemnifying the partnership for not less than $10 million in respect of any one claim.[12]

8 Section 7AB(a), (b), Legal Practitioners Ordinance.

9 Section 7AR(1), (2), Legal Practitioners Ordinance.

10 Section 7AC(1)(a), (b) Legal Practitioners Ordinance. This applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise; s 7AC(2), Legal Practitioners Ordinance)

11 Section 7AH(a), (b), Legal Practitioners Ordinance.

12 Section 7AD(3), Legal Practitioners Ordinance (there is more detail to be found in section 7AD). Evidence of compliance must be provided to the Law Society within 14 days of commencement of the firm: r 5(1B), Solicitors Practice Rules.

suspicious transactions and risk areas and the reporting of suspicious transactions. Solicitors should be alert to:

(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;
(vi) suspect clients who are suspected to be triads or drug dealers or traffickers;
(vii) Clients or counter-parties from non-compliant jurisdictions;
(viii) The use of powers of attorney or trusts where a third party is authorised to deal with assets on behalf of the ultimate client, particularly where there is no discernible reason for such relationships to exist.

Update of the International Standards in 2012

4.99 On 23 April 2012, the Law Society issued Circular 12–307(SD) noting that the Financial Action Task Force ('FATF') had issued the 2012 International Standards on Combating Money Laundering and Financing of Terrorism & Proliferation in February 2012 (the '2012 Recommendations'). The Law Society pointed out that Recommendations 10–12, 15, 17 and 21 of the 2012 Recommendations apply to lawyers, notaries and independent legal professionals in the following situations:

a) buying and selling of real estate;
b) managing of client money, securities or other assets;
c) management of bank, savings or securities accounts;
d) organisation of contributions for the creation, operation or management of companies;
e) creation, operation or management of legal persons or arrangements and buying and selling of business entities.[112]

Practice Direction P Matters

4.100 Only the most important matters will be mentioned briefly here:

Client Identification

4.101 Solicitors must take reasonable measures to identify their clients and verify their identities by using reliable and independent sources. Special

112 The discussion below incorporates material from the International Bar Association's (IBA) Anti-Money Laundering Forum summary of the position in Hong Kong (updated on 13 July 2012) as well as summarising elements of Practice Direction P.

care must be taken where the client is not present and where instructions are given by third parties.

4.102 In general, they should satisfy themselves with the identity of the client and the beneficial owner(s) of a client which is not a natural person at the time of the instruction (i.e. when establishing lawyer/client relationship; or carrying out occasional transactions). This may be done by obtaining (i) an individual's identification documents, proof of address and particulars of occupation or business, and (ii) a corporate entity's incorporation and business registration certificates, identification documents for directors, authorising board resolutions and details of beneficial ownership or control.

In exceptional or urgent circumstances where this is not reasonably practicable, the verification procedure should be made as soon as practicable after the preliminary identification. Verification refers to the information a solicitor needs to obtain to confirm that his clients are who or what they say they are. 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 following circumstances, namely: financial transactions (e.g. buying and selling of real estate, business, company, securities and other assets and property); managing client money, securities or other assets; management of bank or securities accounts; the formation, structure, re-organisation, operation or management of companies and other entities; insolvency cases and tax advice; other transactions involving custody of funds as stakeholder or escrow agent or transfer of funds through their bank accounts.

Due Diligence

4.103 Special diligence must be undertaken when dealing with financial transactions including the buying and selling of real estate; managing client 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.

4.104 The following steps of due diligence should be undertaken: the lawyers should obtain information on the nature and intended purpose of the transaction; obtain information on the business relationship between the client and other interested parties to the transaction; obtain information on the source of funding; and where appropriate, check the new client's name against the published list of terrorist suspects.

4.105 The timing required for conducting client due diligence is similar to that required for client identification and verification (i.e. at the time of the instruction). However, in exceptional or urgent circumstances where this is not practicable, it would be permissible to have the due

newspapers. It had also been reported that the solicitor would offer to his clients his girlfriend's services as a marriage counsellor and offer free condoms. The gravamen of the complaint was the sheer scale of the solicitor's attempts to promote himself. The solicitor was found to have breached paragraph 6(h) (and 6(l)) of the Promotion Code by the Solicitors Disciplinary Tribunal. On appeal the Court of Appeal upheld the finding. By themselves the advertisements on buses and in the Mass Transit Railway might not have been objectionable either as to content or frequency, but they assisted in providing the context in which the allegation of breach had been made. The solicitor's constant exposure to the public through the press and mass media justified the conclusion reached by the Tribunal and the appeal was accordingly dismissed.

5.24 A further instance of conduct unbefitting (which might also have been considered as 'offensive' advertising) was the subject of disciplinary proceedings in *Re A Solicitor (Paul Tse No 1)* [2006] 2 HKC 159, CA. The solicitor had demonstrated in Central wearing only swimming trunks and holding a banner covering his lower parts which stated 'Legal Rights Are Inborn: Mine Too'. He was also charged with publishing a circular in his name which was distributed to members of the legal profession advertising the protest and containing disparaging remarks about the Law Society as well as an invitation for members to attend a disciplinary hearing against him which was to be held on the same day, notwithstanding a previous ruling by the Solicitors Disciplinary Tribunal that the hearing was to be heard in camera. He was found to have committed conduct unbefitting a solicitor by the Solicitors Disciplinary Tribunal and appealed to the Court of Appeal. The Court held that, as an officer of the court, a solicitor was expected to abide by rulings made by the Tribunal. If there was dissatisfaction with a ruling or if the law was somehow deficient, appropriate representations could be made to the authorities. Rulings could not, however, be flouted. This had been done in respect of the second complaint. Although there was no doubt that a solicitor was entitled to exercise his right to freedom of expression guaranteed by the Basic Law, that right was not unrestricted. The solicitor clearly had a right to demonstrate in public and send circulars to his fellow lawyers, but the prohibition upon conduct unbefitting a solicitor could not be said to constitute an unjustifiable limitation on the right of expression. Lawyers enjoyed public respect and occupied a central role in the administration of justice. In the case of professional misconduct, apart from the solicitor's own reputation, the reputation of the legal profession was also affected. Public confidence in both the solicitor and the profession were prejudiced by such conduct. The same would equally be true in situations involving serious misconduct of a solicitor in his private affairs. It was difficult to envisage a situation in which tarnishing the solicitor's own reputation would not also tarnish the reputation of the profession. It was clear that any restriction on a fundamental freedom had to be formulated with sufficient precision so that a person might be able to regulate his conduct and foresee to a reasonable degree the

consequences of any given action. However, the need for rigidity, albeit desirable, must be balanced against the danger of excessive rigidity. The level of precision required depended to a considerable degree on the content of the instrument in question, the field it was designed to cover and the number and status of those to whom it was addressed. In the case of the conduct of professionals such as solicitors in both their private and professional capacities, this balance was particularly acute. Principle 1.02 was not too vague or uncertain that no clear guidance was afforded to solicitors in knowing what might amount to professional misconduct or unprofessional conduct. The solicitor's behaviour was unbecoming, undignified and completely inappropriate given his position as an officer of the court. The finding of the Tribunal should be upheld.

Shall Not Be Calculated or Likely To Take Advantage of the Weak or Weakened Mental, Physical or Emotional State of the Intended Recipient: Para 6(i)

5.25 The personal solicitation of patients in hospitals or old person's homes, whether for a retainer in respect of litigation or for the drafting of a will would plainly be forbidden under this head. Clearly, personal visits or solicitation of persons charged with offences could fall within it. Mailed information to such persons might also fall within its prohibition if the content of the letter falls within the description.

Shall Not Take Place In or in the Immediate Vicinity of a Court, Police Station or Place of Detention in relation to a Person Who Has Been or May Be Charged With, or Has Been Convicted of, Any Offence: Para 6(j)

5.26 This prohibition constitutes one element of the bundle of anti-'touting' measures in criminal cases promulgated by the Law Society.[12] The provision overlaps with the previous paragraph, as the person targeted is likely also to be in a highly emotional state. If the approach in the first instance is to the parents or relatives of a young defendant, that also is prohibited. Not just personal solicitation but also handing out flyers (one page promotion) in the 'vicinity' is forbidden.

Shall Not Be Directed at a Person Who Has Made Known a Desire Not To Be Contacted: Para 6(k)

5.27 If a faxed promotional letter receives a return fax 'No more please' that should end the communications.

12 See the discussion of the improper obtaining of business later in this chapter at paragraph 5.50.

MANDATORY INITIAL CHECKS BEFORE CONDUCTING ANY TRANSACTION ON BEHALF OF A CLIENT

Check for Conflicts of Interest

Ethics

6.64 Principle 5.01 Solicitors' Guide states that:

> A solicitor must not act, or must decline to act further, where there is, or is a significant risk of, a conflict of interest.

6.65 If there is, or a significant risk of conflict of interest, the solicitor will likely be compromising or impairing his 'independence or integrity' and 'his duty to act in the best interests of his client', which is forbidden by Rule 2 (a) and (c) of the Solicitors' Practice Rules.

The Law

6.66 The ethical directives lay down a duty of professional responsibility that the courts fully recognise:

> When a client appoints an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements which interfere, in any degree, with his exclusive devotion to the cause confided in him; that he has no interest which may betray his judgement or endanger his fidelity (per Story J in *Williams v Reed* (1824) Mason 405, 418).

6.67 This is why a full conflict check by the firm is a necessary and crucial preliminary step before a new client or new client matter is taken on.[68]

The First Meeting with the Prospective Client – Practice Direction P: Mandatory Requirements Regarding Anti-Money Laundering Etc

6.68 At the first meeting with a potential client a solicitor must comply with the requirements of Practice Direction P 'Guidelines on Anti-Money Laundering and Terrorist Financing'. These Guidelines are summarised in Chapter 4 paragraphs 4.97 *et seq.* The requirements apply to new and existing clients.

THE FORM OF THE RETAINER

6.69 The retainer may either be made expressly or it may be implied from conduct. Where it is expressly made, it may be made either orally or in writing, although there are exceptional cases where the retainer must be in writing. A prudent solicitor will, however, ensure that he has a written retainer in case the client subsequently denies the existence of the retainer. The Solicitors' Guide states that 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

68 Conflict of Interest is discussed in Chapter 8.

the scope of responsibilities taken up by the solicitor.[69] In every case the solicitor should consider whether it is appropriate to confirm in writing the advice given and the instructions received.[70]

Written Retainers

Desirable in Civil Matters

6.70 Although there is no rule of law requiring a written retainer in civil matters, as a matter of good sense, the solicitor should always ensure that he has a written retainer.[71] Registrar Christopher Chan recommended in *Holiday Resorts (Management) Co Ltd v Chan Yuk Yan* HCA No 7665 of 1998, a case involving uncertainty as to the mode and rate of the solicitor's charging, that, in order to avoid uncertainty as to the client's liability to pay his solicitor's fees, the Law Society should introduce a practice direction similar to paragraph 12 of UK Practice Direction No 2 of 1998 which required the production of a written retainer for the purposes of taxation.

6.71 An issue about the quantum of fees arose, in the absence of a written retainer, in *Wong & Fuk (a firm) v Ronstar (Asia) Ltd* (2010) HCA No 1476 of 2009, [2010] HKCU 1804 in which the Court did not accept that the client's word should prevail, as had been suggested in past cases. In that case what was in dispute was the rate of charging. There had been no written retainer but the plaintiff contended that the client had agreed to pay the usual High Court taxation rates of $4,000 per hour for a partner's work. The client maintained that what had been agreed was a *daily* charge of $4,000. The solicitor had made an attendance note on the day of the first meeting with the client which set out specifically the charging rate of $4,000 per hour. Recorder Ambrose Ho, SC, stated that it was not an immutable rule that the client's word would prevail in the absence of a written retainer; in this case the contemporaneous attendance note made by the plaintiff was a material piece of evidence to which considerable weight should be attached. On the evidence the plaintiff had established that the client had agreed to the hourly charging rate of $4,000 and judgement would be given for the plaintiff.

6.72 It is especially important to have a written retainer in the following cases:

Representation in Civil Litigation Where Unusual Expenses Will Be Incurred

6.73 A solicitor can act in civil litigation without a written retainer, however the onus is on him to prove that he has authority to act and it is much

69 Commentary 7 of Principle 5.12, Solicitors' Guide.

70 Commentary 3 of Principle 5.12, Solicitors' Guide. See also on the desirability of written instructions and communications, Principle 4.04, Solicitors' Guide; Commentary 8 of Principle 5.01, Solicitors' Guide; Commentary 9 of Principle 6.01, Solicitors' Guide and Principle 7.02, Solicitors' Guide.

71 See Commentary 8 of Principle 5.01, Solicitors' Guide.

Duty to Act With Due Care and Skill

6.136 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.[129] This obligation is reinforced by rule 2(e) of the Solicitors' Practice Rules which provides that a solicitor shall not do or permit anything to be done which compromises or impairs or is likely to compromise or impair a proper standard of work.

Duty to Obey Instructions

6.137 As a general principle the solicitor must obey the instructions given him by the client. A rather unusual illustration of this principle is *MF v JL* (2002) 211 DLR (4th) 350 (Quebec CA). A lawyer was retained by the court to represent a boy aged ten in divorce proceedings. The lawyer believed that the best interests of the boy lay with a renewed relationship with his father, but the boy wished to live with his mother. On an application by the mother that the lawyer be replaced, the court granted the application. Rothman JA held that, since the boy was capable of expressing his wishes and of instructing counsel, the lawyer should act as his advocate and urge the court to respect the boy's wishes. The lawyer had, of course, the professional right and duty to advise the boy as to the possible consequences of his wishes and to counsel him as to what she believed to be in his best interests. But, in the end, she had to ensure that his wishes were heard and his rights respected irrespective of her personal opinion.

6.138 The duty to obey instructions will not, however, apply where the instructions would involve the solicitor in illegal or improper conduct.[130] However, it is not his or her duty to assess the client's credibility and to investigate whether the client is engaged in illegal activities when the solicitor may be sceptical of the client's veracity.

6.139 In the Court of Final Appeal in *HKSAR v Kevin Egan & Ors* [2010] 5 HKC 180, Ribeiro PJ said of the appellant solicitor Andrew Lam:

> Assuming that when Derek Wong and Chui went to see Lam on 13 July, Chui's instructions were that she believed that Becky Wong was being unlawfully detained by the ICAC against her wishes, Lam was entitled to act on those instructions unless he knew them to be false. Even if the Court should regard Chui's asserted belief with scepticism, it would be wrong in principle for it to allow such scepticism to taint its assessment of the solicitor's state of mind as to the truth or falsity of her instructions. A finding that the solicitor knew of the relevant falsity and was complicit in a perversion of the course of justice calls for unequivocally clear evidence to that effect. In the absence of actual knowledge, a solicitor (or barrister) is bound to adopt an agnostic approach towards the client's instructions in carrying out his professional duties since it is not his business to judge their truth or falsity. The solicitor or barrister may privately harbour distinct feelings of scepticism about his client's story but that is wholly beside the point. Professionally, he is required to abstain from forming any belief one way or the other on the topic. For a court to attribute guilty knowledge or belief and criminal liability to the legal adviser in such circumstances would gravely endanger the fundamental right to legal advice and representation.[131]

129 Principle 5.12, Solicitors' Guide. The legal duty of care owed to clients is dealt with in detail in Chapter 10 'Competence, Quality of Service and Negligence'.

130 See Principles 5.02 and 5.14, Solicitors' Guide.

6.140 Special considerations apply, however, where the solicitor conducts a case for his client. The Court of Final Appeal has 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.[132]

6.141 In commercial and conveyancing transactions the application of this principle generally occasions no difficulties. Its application in the area of litigation may, however, prove problematical especially with regard to the manner in which the litigation is conducted and the acceptance of settlement terms. This is dealt with in detail in Chapter 11 'The Litigation Solicitor'.

Duty to Keep Matters Confidential

6.142 The solicitor must keep confidential matters that come to his notice in carrying out the instructions.[133]

Duty to Keep One's Client Informed

The Ethical Duty

6.143 A solicitor has an ethical duty to keep his client properly informed and to comply with all reasonable requests from the client for information concerning his affairs.[134] At the outset the 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

131 Similar guidance is given in the Solicitors' Guide in Commentary 2 of Principle 10.03: 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. Ribeiro PJ's dicta was cited and applied by the Court of Final Appeal in *Vivien Fan & Ors v HKSAR* (2011) FACC No 6 of 2010 when quashing the convictions of all the solicitor defendants (And see paragraph 6.16 *et seq.*)

132 See further Chapter 22 'The Barrister's Duty to the Lay Client and Opposing Parties' at paragraph 22.21.

133 Principle 5.13 of the Solicitors' Guide. This duty is dealt with in detail in Chapter 8, 'Confidentiality and Legal Professional Privilege'.

134 Principle 5.17, Solicitors' Guide.

the agreement is not fair and reasonable, the solicitor must draw up an itemised bill for taxation purposes.[63] Practice Direction B1, which applies to contentious and non-contentious business, requires that, if requested, an *itemised* 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.[64] This applies to contentious and non-contentious business. If there are counsel's fees, these must be separately disclosed even if the total agreed sum includes counsel's fees. As a matter of ethics the requirement of the Practice Direction must be followed.

Bills for Contentious Business Where There Is No Contentious Business Fee Agreement

Gross sum bills

7.40 Where the remuneration of a solicitor in respect of contentious business done by him is *not* the subject of a contentious business fee agreement, the solicitor's bill may either contain detailed items or be for a gross sum.[65] There are, however, special provisions in the Legal Practitioners Ordinance which apply where a gross sum bill is submitted. At any time before action is commenced upon the bill by the solicitor and within three months of delivery to him of the bill, the client may require the solicitor to deliver an itemised bill and, in this case, the gross bill ceases to have effect.[66] Further, if the solicitor sues upon his bill, the court must order the bill to be taxed if the client so requests within one month of the service of the writ upon him.[67] Finally, if a gross sum bill is referred to taxation in a case where the above two provisions are inapplicable, the solicitor must furnish the taxing master with such details of any of the costs covered by the bill as the taxing master may require.[68] Again, however, the provisions of Practice Direction B1 must be borne in mind so that, if requested, an itemised 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 counsel's fees, these must be separately disclosed even if the total agreed sum includes counsel's fees.

63 Section 60(2)(b), Legal Practitioners Ordinance.
64 See also Commentary 5 of Principle 4.02, Solicitors' Guide.
65 Section 63, Legal Practitioners Ordinance.
66 Section 63(a), Legal Practitioners Ordinance and Commentary 3 of Principle 4.10, Solicitors' Guide.
67 Section 63(b), Legal Practitioners Ordinance. Section 63(c) provides that, if a gross sum bill is referred to taxation, nothing in section 63 shall prejudice any rules of court with respect to taxation and the solicitor must furnish the taxing officer with such details of any of the costs covered by the bill as the taxing officer may require.
68 Section 63(c), Legal Practitioners Ordinance.

Time At Which the Bill Should Be Sent

The bill should be rendered within a reasonable time

7.41 A solicitor should deliver his bill of costs to the client within a reasonable time of concluding the matter to which the bill relates.[69] In the course of protracted litigation he may wait until the conclusion of the representation to send his bill. If the solicitor fails to deliver his bill, the court has jurisdiction to order the solicitor to deliver his bill even where no business has been done by the solicitor in the court.[70]

Interim bills and bills in respect of distinct transactions

(i) Interim bills

7.42 Experience has shown that firms which have introduced a system of interim billing are more likely to be paid by their clients. If a solicitor wishes to render interim bills in respect of a continuing representation, however, he must first secure the agreement of his client[71] and the agreement should be evidenced in writing.[72] In the absence of such an agreement, a solicitor cannot sue for his profit costs until the work which is the subject matter of the retainer has been completed and a bill rendered, nor can he justifiably terminate his retainer if the client refuses to make such a payment.[73] Where interim bills are sent, the client has no right to have the bill taxed until the final bill is sent. The interim bill must state the period to which it relates.[74] If there is prior agreement for interim billing and the solicitor requires a client to pay a sum on account of costs to be incurred, that sum must be a reasonable sum in all the circumstances.[75] There is no requirement for the agreement to pay interim bills to be in written form and the solicitor is free to make such an arrangement orally. However, if there is no written agreement the solicitor may face a problem of enforcement if the client is subsequently reluctant to pay an interim bill and a written agreement recording the agreement may be highly desirable in the long run.

7.43 Bills for disbursements paid may be sent without prior agreement at any time and refusal to pay is a justifiable cause for termination of the retainer, although reasonable notice is required: *Underwood & Son & Piper v Lewis* [1984] 2 QB 306, 309.[76]

69 Principle 4.09, Solicitors' Guide.
70 Section 65(1), Legal Practitioners Ordinance.
71 Principle 4.08, Solicitors' Guide.
72 Commentary 1 of Principle 4.08, Solicitors' Guide.
73 Commentary 2 of Principle 4.08 and commentary 4 of Principle 5.22, Solicitors' Guide.
74 Principle 4.10, Solicitors' Guide.
75 Commentary 2 of Principle 4.13, Solicitors' Guide.
76 Commentary 2 of Principle 5.22, Solicitors' Guide repeats the legal position.

> Communications may happen to be made with a man who happens to be a solicitor, which would be of exactly the same character as, and neither more or less privileged or confidential than, communications between a man and his steward, or between a man and his land agent, who did not happen to be a solicitor.

8.75 In *Minter v Priest* [1930] AC 558 (HL), two persons approached a solicitor with a request for a personal loan related to their purchase of a house and, during the course of their discussions, the solicitor slandered the vendor of the property. He claimed professional privilege, but the House of Lords ruled that he was not so protected. Lord Buckmaster said at 584:

> I am not prepared to assent to a rigid definition of what must be the subject of discussions between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor's business is shown by the case of *Hagart and Burn-Murdoch v Inland Revenue Commissioners* [1929] AC 386.

Information Imparted at the Initial Interview

8.76 We must now consider the situation where important confidential information is imparted to the solicitor at the initial interview. Dicta suggest that preliminary discussions between a solicitor and a potential client may be protected by legal advice privilege. Thus in the words of Lord Atkin in *Minter v Priest* [1930] AC 558 (HL):

> [In order to attract the privilege it] is not necessary that the relation should have reached the definite status of solicitor and client. The solicitor may not be willing to be employed as a solicitor by the person with whom he may be communicating. If a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give him professional advice, communications made for the purpose of indicating the advice required will be protected.[66]

Not All Communications within a Continuing Relationship of Solicitor and Client Will Be Automatically Protected

8.77 Once the relationship of solicitor and client has been established, many communications will pass between the parties. Does this mean that every communication will be protected by privilege? There is, regrettably, no simple answer. In the words of Lord Buckmaster in *Minter v Priest* [1930] AC 558 (HL):

66 This can lead to difficulties of course, which may be the result of an unwelcome prospective client unburdening themselves of 'confidential' information before the solicitor has the chance to check for any conflict or before he is able to say no. Also the current notion of the 'quasi-client' and its limits, enters into the discussion: see paragraph 8.27 previously.

> The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client, affords no protection.

8.78 To decide which communications fall outside the privilege where there are ongoing communications between the solicitor and the client may be no easy task. The Court of Appeal analysed the position with care in *Balabel v Air India* [1988] 2 WLR 1036 (CA). The plaintiffs sued for specific performance of a contract for the sublease of business premises and sought discovery of three classes of documents from the defendants, namely communications between the defendants and their solicitors other than those seeking and giving legal advice; drafts, working papers, attendance notes and memoranda of the defendant's solicitors relating to the sub-lease; and internal communications of the defendant other than those seeking advice from its legal advisers – in other words all communications falling outside the strict ambit of the rule. The Court of Appeal noting that there was authority to the effect that not all communications were protected once the relationship of solicitor and client had been established, held, on the facts, that the documents sought were privileged. Taylor LJ said that the appropriate test was whether the communications or other documents were made confidentially for the purposes of legal advice and these purposes had to be construed broadly. Privilege obviously attached to any document conveying legal advice, but it did not follow that all other communications lacked privilege. In most solicitor-client relationships there would be a continuum of dealings and meetings and, where information was passed by the solicitor or client to the other as part of that continuum aimed at keeping both informed so that advice may be sought and given as required, privilege would attach. It is, therefore, too restrictive to suggest that a communication only enjoys privilege if it specifically seeks or conveys advice.

Legal Advice Privilege: Communications between Client and Third Party for the Purpose of Obtaining Legal Advice from a Lawyer

8.79 Does legal advice privilege extend to communications made between the client and third parties (such as requests for experts, accountants etc to prepare a report) where the client maintains that it was his intention to pass that communication, or its substance, to his solicitor for the purpose of receiving legal advice? This may be akin to and possibly merge into a claim for litigation privilege if the client was contemplating litigation at the time of the communication. Though not yet tested in Hong Kong courts there is overseas authority for the view that if the request for a report was made with the dominant

Joint Representation of Co-Defendants in Criminal Cases

Joint Representation Permitted

9.21 Joint representation of co-accused persons in criminal trials is permitted because the mere fact that they are co-accused does not make their interests adverse. However, the potential for a conflict of interest is high. The Solicitors' Guide acknowledges there may be representation of co-defendants in criminal cases, as does the Bar Code.[7] However, both the Guide and Code indicate that the lawyer should be alert to conflict. The Solicitors' Guide selects one situation of risk of conflict as an illustration. Commentary 5 of Principle 9.04, Solicitors' Guide says:

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

9.22 *R v Ataou* [1988] 2 All ER 321 (CA), provides a good illustration. A firm represented A and B who were co-defendants on charges of drug offences. The retainer with A was terminated when A decided to plead guilty and to be a witness for the Crown against B, who was represented by the same firm. A testified in-chief casting all blame upon B, contrary to the instructions he originally gave to the firm that he was the main culprit. A solicitor of the firm who was in the court-room told B's counsel about the change of story, and gave A's previous statement to counsel. If allowed, counsel could have conducted a devastating cross-examination of A. However, the trial judge refused to permit the information to be used on the grounds that the information was privileged. The trial judge and the Court of Appeal ruled that the solicitor's conduct in revealing the confidential information was unacceptable. The firm ought not to have continued to represent B.[8]

7 Paragraph 153, Bar Code. [Draft Revised Bar Code: Paragraph 10.54].

8 The key issue discussed in the case was what a judge should consider when privileged information is sought to be used by an accused in order to demonstrate his innocence or, at least, to cast doubt on his guilt. The cases of *R v Barton* [1972] 2 All ER 1192 (which had been cast into the wilderness prior to *R v Ataou* [1988] 1 QB 798) and *R v Craig* [1975] NZLR 597, were applied. The Court of Appeal said that the trial judge should have weighed the appropriate factors for and against the use of the information, the burden being on the accused to show that the balance should come down in his favour. **In so far as the decisions in *R v Ataou* and *R v Barton* allowed for the overriding of the privilege of another in the interests of a person trying to establish his innocence at trial, they have now been overruled by the House of Lords in *R v Derby Magistrates Court, ex parte B* [1996] 1 AC 487, [1995] 4 All ER 526 (HL).**

Common Conflict of Interest Situations Involving Co-Defendants in Criminal Trials

9.23 There are several common situations in which a solicitor is instructed to act for co-defendants and which might involve the solicitor in a conflict of interest. In these situations, a solicitor should be especially astute in looking for potential conflict. They are:

(1) co-defendants who are charged as joint principals in the crime admit to their legal representatives that they are culpable, but in different degrees;

(2) one co-defendant might wish to enter into a plea bargain with the prosecution;

(3) co-defendants who are charged with differing culpability;

(4) co-defendants, of whom one only has a criminal record and their defence necessitates an attack on the character of a prosecution witness[9]; and

(5) co-defendants, one with an unblemished character (A) and one with a conviction (B). The problem here is that counsel will be reluctant to promote the good character of client A as relevant to his credit (if he testifies) and his innocence because, to do so, might prejudice client B.[10]

9.24 Some of these issues (and others) became apparent in *Queen v Chan* (2002) 53 OR (3d) 264. Five persons including A and B were charged with conspiracy to smuggle persons into the USA illegally. In particular L and, to a lesser extent, his partner F represented A for the preliminary inquiry. F was subsequently retained by B in his defence. On an application by the Crown to remove F as counsel for B on grounds of conflict of interest, Stinson J granted the order applied for. He pointed out that, even though L had been more significantly involved in A's defence than F, F, being a member of the same firm, had the same duties of loyalty to B. Several issues might arise whereby a conflict of interest was likely to arise between A and B in their defences. First, the case against A was far more comprehensive than that against B so that B might wish to canvass with the Crown, through his solicitor, whether he might provide assistance to the Crown in return for a lighter sentence. He might even be prepared to

9 Leading to the loss of the 'shield' of the accused who has a criminal record: s 54(1)(f)(ii), Criminal Procedure Ordinance. However, this problem may be overcome in certain circumstances and with the fully informed consent of the accused with the criminal record.

10 The Hong Kong Court of Appeal has followed the English line of authorities (see, for example, *R v Vye* [1993] 1 WLR 471 (CA)) which hold that the judge is bound to direct a jury on the good character of one co-accused, even if it means that the other co-accused, who has a record, is prejudiced by the implications of the silence of the judge as to the other's character. See *R v Chan Kwok Keung* (1994) Crim App No 357 of 1993.

protection, the solicitor should obtain written instructions to pursue the action to trial.

Delay in Prosecuting an Action

The Ethical Duty

10.52 It is the duty of the solicitor to act without unreasonable delay and it is professional misconduct for a solicitor to fail to serve his client in a conscientious, diligent, prompt and efficient manner.[52] For example, he must reply fully and promptly to correspondence from a client or former client[53] and must not resort to excessive delay in dealing with his client's affairs. This occurred, for example, in *Re WC Moseley* (1925) 25 SR (NSW) 174, where the solicitor was responsible for an excessive period of delay in securing for his client a divorce. The client might well not have been able to sue in negligence, as he might have sustained no quantifiable loss, but the solicitor was nonetheless subject to the discipline of the profession. Street CJ said:

> I agree that mere neglect or delay in the transaction of a client's business does not necessarily amount to misconduct of such a character as to be punishable by the court in the exercise of its disciplinary jurisdiction...and each case must depend upon its own circumstances. It may be difficult sometimes to know where to draw the line, but wherever it should properly be drawn, I think that, in the present instance, the neglect was of such a character, and took place in such circumstances, as to carry the case well over it and into the region of professional misconduct.

The Legal Duty

10.53 The solicitor might be liable in damages if the action is dismissed for want of prosecution. For example, in *Mainz v James & Chow & Dodd (a Firm)* (1978) 122 Sol Jo 645, solicitors took six months to obtain counsel's opinion over a pending action which was subsequently dismissed for want of prosecution and their clients claimed damages. The court held that, in the exercise of his duty to a client, a solicitor was always expected to use a reasonable degree of skill, care and knowledge. He had to act expeditiously, particularly in stale actions, to protect his client's case from being struck out due to delay caused by his neglect. Further the solicitors were responsible not only for their own, but for counsel's, delay

incurred in the proceedings'. See also *Delhaise v Ng & Co* (2004) CACV No 386 of 2003, where an ex-client had commenced an action in negligence against the first and second defendant for negligence in having failed to advise him that the case had very little chance of success. The learned judge at first instance pointed out that the disgruntled client 'came to the solicitor already knowledgeable in the law and of his case's shortcomings. He was further advised of the difficulties by counsel. Thus he had ample opportunity to withdraw from the action'. The solicitor had not been negligent. This conclusion was upheld by the Court of Appeal.

52 Principle 6.01(b), Solicitors' Guide.

53 Principle 6.04, Solicitors' Guide.

in the matter, as they could have rectified the situation by seeking advice elsewhere. The clients were awarded damages.

10.54 A more recent example is *Sharif v Garrett & Co* [2002] 3 All ER 195 (CA). The plaintiffs retained the defendant firm of solicitors to sue a firm of insurance brokers, but the claim was eventually struck out on the grounds of want of prosecution. The plaintiffs then sued their solicitors for negligence. In concluding that the solicitors were liable in damages the court explained in some detail how the trial judge should deal with a claim of this nature. The court said that, where a claim had been struck out on the grounds that a fair trial of the issue was no longer possible as a result of delay by the plaintiff's solicitors, the judge, in assessing the plaintiff's prospects of success in the original claim, had to start with the conclusion, reached by the judge on the striking out application, that no fair trial had been possible. He could not, therefore, and should not, attempt to try the issue himself. That did not mean that those issues had been assumed against the solicitor since the legal burden remained on the plaintiff to show that he would have succeeded on them. However, such a result might be produced in practice by the application of two settled principles, namely (i) that the evidential burden lay on the solicitors to show that the litigation had been of no value to their client, so that the client had lost nothing by their negligence in causing it to be struck out; and (ii) that, if and in so far as the court might have greater difficult in discerning the strength of the plaintiff's original claim, such difficulty should not count against him but rather against the solicitor. In such a case the plaintiff would normally be expected to be able to show that he had real and substantial prospects of success. The judge had to evaluate these prospects by making a realistic assessment of the plaintiff's prospects of success if the original litigation had been fought out. If he were asked to hear evidence, he could agree to do so, but he should not feel bound to do so if he were of the opinion that he could otherwise make a fair evaluation.

Failure to Issue Process within the Limitation Period

10.55 Further, it is essential that the solicitor pays due regard to any limitation period. Thus in *Fletcher v Jubb, Booth & Helliwell* [1920] 1 KB 275 a solicitor was held liable in negligence for failing to commence suit before the limitation period expired or to advise his client as to the consequences of failing to initiate action within that time.[54]

54 If the solicitor's poor management of the time limits has resulted in a lost appeal, the court may in its discretion, allow an extension of time to lodge a notice of appeal; if the same solicitor represent the applicant at the hearing for extension, he should be ordered to pay the costs personally: See *Chiu Sin Chung v Yu Yan Yan, Angela* (1992) HCA No A4089 of 1991.

Solicitor's Duty when Instructing Counsel

Duty to Instruct Counsel in Adequate Time for the Hearing

11.25 The solicitor's duty when instructing counsel was succinctly stated by Lam J in *Chow Wong Wai Hung Margaret v Wong Hau Tak* (2005) HCMP No 798 of 2005: 'It is unsatisfactory for solicitors to instruct counsel at a very late stage.' A solicitor who fails to instruct counsel in sufficient time for him to appear at the hearing may be in breach of his duties to the court, to his client and to the profession and there are several instances of the solicitor being made to pay costs of the abortive hearing as a result of such default. For example, the court ruled in *De Roufigny v Peale* (1811) 3 Taunt 484, 128 ER 192 that, if a cause which is meant to be defended is called on and tried as an undefended cause in consequence of the defendant's attorney neglecting to deliver the briefs to counsel, the court will grant a new trial and compel the defaulting attorney to pay the costs out of his own pocket.

Duty to Provide Backsheet to Counsel

11.26 Whenever counsel is briefed in proceedings in court, the instructing solicitor must deliver to him a formal brief or backsheet with the fee marked. Failure to deliver a brief or backsheet or failure to mark the fee would result in counsel being unable to comply with the Code of Conduct of the Bar of Hong Kong. Further, in a criminal matter, the requirements of rule 5D(e) of the Solicitors' Practice Rules must be complied with. Every backsheet must contain the following information:

(a) the name of the solicitor in charge of the matter;
(b) the name of the firm of the instructing solicitors;
(c) the name of the case (and the court number if known at the time);
(d) the name of counsel; and
(e) the agreed fee and any agreed refresher or 'Legal Aid' or 'No Fee' as appropriate.[33]

11.27 Where counsel is briefed in a criminal matter, the instructing solicitor must personally sign the backsheet or other written instructions to counsel (rule 5D(e) of the Solicitors' Practice Rules). Where counsel is briefed in any other matter, the instructing solicitor must sign the backsheet or other written instructions to counsel either in his personal signature or in the name of the firm of the instructing solicitors. 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 purposes.[34]

11.28 Whenever counsel is instructed, counsel should always be approached in the first instance by the instructing solicitor and not by the solicitor's staff and only such instructing solicitor, and not the solicitor's staff, is

32 Practice Direction F(1)(a).
33 Practice Direction F(1)(b).
34 Practice Direction F(2)(a), (b).

entitled to negotiate a fee with counsel or counsel's staff.[35] Whenever a solicitor agrees with a client to charge a lump sum for the conduct of a case, and the sum agreed includes counsel's fees, this fee should be clearly indicated in writing to the client at the time the lump sum is agreed.[36]

Duty to Give Clear and Full Instructions and to Exercise Independent Judgment Even When Counsel Briefed

11.29 As we have seen in Chapter 10 'Competence, Quality of Service and Negligence',[37] a solicitor has a duty to instruct counsel in a case where he reasonably believes that counsel's assistance is required and the client agrees to this course of action. The duty is threefold: first the solicitor must ensure that the counsel he instructs is competent: *Re A (a minor)* [1988] NLJLR 79 (CA). Secondly the solicitor's duty extends not just to instructing counsel, but to instructing him properly.[38] The law has been clearly stated by Pollock CB in *Hawkins v Harwood* (1849) 4 Exch 503, 505–6, where he said:

> I am of the opinion that instructing counsel cannot mean merely putting a piece of paper into his hands, professing to be instructions in the cause in which he is to appear. It must mean the putting him into such a situation, both with respect to the information which is given him and the means of making that information available, as will enable him to conduct the cause properly, whether he appear for the plaintiff or defendant. In this way, in reality instructing counsel means properly instructing him. A person who is so improperly and imperfectly instructed as to be unable to do what is required of him, is not instructed at all.

11.30 In the same case Parke B added:

> I agree with my Lord Chief Baron as to the sense which is to be attributed to the words 'instructing counsel', namely that, in order properly to instruct counsel, it is necessary not merely to hand him a brief, but that the attorney himself, or some competent clerk of his, should be present to explain the subject matter of the brief, and to give any information upon the matter that counsel may require.

11.31 It is, therefore, an important duty of the solicitor, in a case where counsel is briefed, to give him clear, thorough and full instructions in good time for him to prepare for the hearing.[39] Failure to instruct counsel in good

35 Practice Direction F(3).
36 Practice Direction F(4).
37 At paragraph 10.60.
38 This is an ethical requirement also. Principle 12.01, Solicitors' Guide provides that, when instructing a barrister, it is the 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 are sent to him in good time.
39 According to Principle 12.01, Solicitors' Guide, when instructing counsel, it is the solicitor's responsibility to ensure so far as practicable, that adequate instructions,

> The Court cannot, merely because the officer has been guilty of misconduct, mulct him in damages.[188]

11.172 The jurisdiction will only be exercised, however, where the solicitor has been guilty of some act of misconduct. In the words of Lord Denning MR in *R & T Thew v Reeves (No 2)* [1982] 1 QB 1283 (CA), at p 1286:

> It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof. In *Myers v Elman* [1940] AC 282, 292 Lord Maugham put it as 'serious dereliction of duty'. Lord Atkin at p 304 spoke of 'gross negligence'. Lord Wright at p 319 says that 'gross neglect or inaccuracy' may suffice.

188 See also *John Fox v Bannister King and Rigbeys* [1987] 3 WLR 480.

CHAPTER 12

Professional Undertakings

INTRODUCTION

Special Care Should Be Taken by Solicitors before Giving Undertakings as they are Binding

12.01 Undertakings play a significant role in legal practice and the Solicitors' Guide advises solicitors to take special care before giving undertakings because of the possible serious consequences that will follow. The Guide provides that 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.[1] 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] This advice was repeated by Mortimer V-P in *Law Society of Hong Kong v Solicitors* (1999) CACV No 24 of 1999:

> An undertaking given by one member of the profession to another is a serious and solemn matter. So it should never be given unless it can be complied with. And if it becomes clear for reasons beyond the control of the person giving the undertaking that it may not be complied with, then the undertaker should take steps to have the matter regularised before the breach takes place.

WHAT IS A PROFESSIONAL UNDERTAKING?

12.02 An undertaking is defined in the Solicitors' Guide as any unequivocal declaration of intention made orally, in writing or by conduct of a solicitor addressed to someone who reasonably places reliance on it.[3]

12.02A The previous edition of the Guide stated that a solicitor was bound (ethically) also by undertakings made by his (unqualified) staff (where

1 Principle 14.01 : 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. Also see Commentaries 2, 3 & 4 of Principle 14.01, Solicitors' Guide.

2 Commentary 1 of Principle 14.02, Solicitors' Guide. Also see Commentary 2 of Principle 11.01.

3 Commentary 1 of Principle 14.01, Solicitors' Guide.

latter alleges, of his own accord, he should have refused to negotiate with him personally.

13.35 The situation arose more recently in another Canadian case, *Everingham v Ontario* (1991) DLR (4th) 354, affirmed (1992) 88 DLR (4th) 755, where applicants who had been detained in a mental hospital had applied for relief to the court. Counsel employed by the Crown was visiting the hospital on unrelated business when he engaged in a conversation with one of the applicants in which he told the applicant that he would interview him the following day. As a result of this conversation the court disqualified the counsel from further involvement in the matter as he had violated the rule against contact with an opposite party who was professionally represented.

Communications with the opposing party

13.36 As we have seen above, 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 for him in that matter, save with the other solicitor's consent.[23] Thus a solicitor should not write directly to the client of another solicitor where he has no reason to believe that the other solicitor's retainer has been determined.[24] It might, however, be proper for him to do so where the solicitor has failed to reply to his letters or has refused, for no adequate reason, to pass on a message to his client. This step should, however, only be taken after warning the solicitor of such intention; it is also courteous to copy such correspondence to the other solicitor.[25] This does not prevent a solicitor from suggesting to his client that he communicates directly with the client of the solicitor on the other side directly.[26]

Inquiries about the Opponent by way of an Inquiry Agent

The General Principle

13.37 Where a solicitor considers it appropriate, and his client agrees, a solicitor may instruct an inquiry agent in an endeavour to ascertain, for example, the whereabouts or means of the other side or to serve documents. However, where a third party is already represented, a solicitor should not instruct an inquiry agent to approach the other party to obtain a

23 Principle 11.02, Solicitors' Guide.

24 Commentary 1 of Principle 11.02, Solicitors' Guide. Note that 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).

25 Commentary 2 of Principle 11.02, Solicitors' Guide.

26 Commentary 4 of Principle 11.02, Solicitors' Guide.

statement, until he has given notice of his intention to do so to the other party's solicitor.[27]

No Bar to Instruction of Inquiry Agent by the Client

13.38 First it should be noted that this principle, like all the others in the Guide, binds solicitors not their clients. If the client of his own initiative and without any prompting from his solicitor hires an inquiry agent who obtains a statement from the opposing party, then the Guide has nothing to say. For example, it is common practice for 'disguised' loss adjusters to trick an insured who is suspected of having made a false claim into making an admission that his claim was fraudulent. This will usually have occurred before the insurance company has retained a solicitor to defend a disputed claim.

Situations in Which It Is Proper For a Solicitor to Instruct an Inquiry Agent to Make Inquiries about the Opposing Party

13.39 What then may a solicitor properly do by way of investigation in the interests of his client? These days it is common practice for solicitors, if it has not already been done by the insurance company, to hire agents to secretly photograph or video 'injured' plaintiffs with, for example, allegedly 'permanent' and 'severe' back pain lifting heavy loads or the agent may trap the defendant by asking for help or assistance in undertaking such a task. Further, an inquiry agent might be needed after the court has made an order. For example, an interlocutory injunction may have been obtained in respect of copyright infringements where the plaintiff believes that the defendant, who still retains a solicitor, is continuing to manufacture and sell infringing articles through agents. It ought to be permitted for a solicitor to instruct an inquiry agent to attempt to purchase forbidden items from the infringing party or his agent direct or to inquire from an employee of the party whether the article is otherwise obtainable. The solicitor is laudably seeking to establish that there has been a contempt of court as well as seeking to benefit his client. To summarise, common situations which may justify a solicitor instructing an inquiry agent to approach the other party who is legally represented may include:

- trap purchases following a breach of copyright action;
- cases involving disposal of assets by the defendant in breach of a Mareva injunction or to establish evidence on which to found an application for a Mareva injunction;
- suspected destruction of evidence or documents otherwise discoverable in order to found an application for an Anton Piller order;
- exaggerated personal injuries claims;
- fraudulent statement of means; and
- evasion of maintenance orders.

27 Commentary 5 of Principle 11.02, Solicitors' Guide.

Re Andrew White, QC (2005) HCMP No 1509 of 2005 the matter for which overseas counsel seeks to be admitted must be a substantial one. Where, for example, admission was sought only for a minor hearing, such as a directions hearing, it was unlikely that the application would be granted even where the overseas counsel had appeared in the arbitration proceedings. The arbitration factor was, however, a powerful factor.

The continuity factor

16.56 Where overseas counsel has been involved in the trial before the court(s) below it would be strange if overseas counsel who had been admitted to appear in the trial below, were not permitted to appear in a subsequent appeal (or application for leave to appeal). Usually continuity of representation would be permitted unless special circumstances existed.[88]

Admissions of overseas counsel for applications for leave to appeal

16.56A This matter was considered by Cheung CJHC in *Re Robin Mark Dickery* (2013) HCMP No 2844 of 2012, judgement 1 February 2013. In this case an application was made in a commercial tax case for the admission of a London silk to apply for leave to appeal, first to the Court of Appeal and if such application failed, to the Court of Final Appeal. Admission was also sought for admission for the subsequent hearing before the Court of Final Appeal if leave was granted. On behalf of the applicant, it was argued that the admission was supported by several factors: the public interest factor, the development of local jurisprudence factor the unusual difficulty or complexity factor and, in respect of leave to the court and any subsequent hearing, the Court of Final Appeal factor. The Bar opposed the application for leave to appeal to the Court of Appeal, but did not oppose the application for leave to appeal to the Court of Final Appeal. The Secretary for Justice opposed any admission simply for making a leave application. Cheung CJHC ruled that leave would be refused for the application for leave to the Court of Appeal, as input from an overseas counsel could easily be obtained by electronic means and incorporated into written submissions; however, as to applications for leave for the Court of Final Appeal, the Court of Final Appeal factor came into play. This was an important factor in determining the matter. In this instance, leave would be granted for any further application for leave to the Court of Final Appeal and, if the need arose, to be admitted for the substantive hearing before the Court of Final Appeal.

88 See Ma CJHC in *Robert Alun Jones* (2008) HCMP No 2446 of 2008.

Where overseas counsel has been admitted to represent one party, fairness requires that overseas counsel be admitted to represent the other party

16.56B The courts have recognised that fairness requires that if overseas counsel is admitted to represent one party, that fairness and the perception of fairness requires that overseas counsel be admitted, if application were made, to represent the other party.[89]

The need to make serious efforts to locate suitable local counsel

16.57 It is clearly necessary that proper efforts must be made to locate suitable local counsel and, if they can be found, there are no good grounds for admitting overseas counsel. *Re Kosmin QC* [1999] 1 HKLRD 641 involved an application for the admission of overseas counsel in litigation involving the liquidation of two related securities and finance firms. The case was one of unusual difficulty and complexity. Local counsel had been approached, but were unavailable or involved in a previous related inquiry. Chan CJHC ruled that the fact that the case was one of unusual difficulty or complexity did not absolve the solicitors from having to approach local counsel first before turning to overseas counsel. It would be unacceptable for solicitors to decide at the outset to brief London counsel and merely look for local counsel as a matter of formality. However, although insufficient efforts had been made to locate suitable local counsel, in the light of the special circumstances of the case including the complexity of issues and the fact that several experienced local counsel had been involved in the inquiry, the application was granted.[90] The decision in *Re Badenoch QC* [1999] 2 HKLRD 209 which involved a medical negligence action against a hospital provides helpful contrast. Overseas counsel had been briefed to provide an opinion and the solicitors for the applicant argued that the case was of unusual difficulty and involved legal principles which would lead to the development of local jurisprudence, that no local counsel of sufficient experience was available and that, overseas counsel having been briefed to provide a written opinion, he should be retained for the trial; otherwise the plaintiff would suffer prejudice. Chan CJHC refused the application. He ruled that the court had not been satisfied that no local counsel of appropriate skill and experience were available, since there were a number of local counsel who specialised in personal injury claims. Further, if the applicant's argument that overseas counsel should be instructed since he had already provided a written opinion were to succeed, instructing

89 See Ma CJHC in *Re Collingwood Thompson QC* (2007) HCMP No 2190 of 2007; Tang Ag CJHC in *Re David Perry, QC* (2010) HCMP No 1550 of 2010; *Re Edward Fitzgerald, QC* (2010) HCMP 1545 of 2010; *Re David Perry QC, Clare Montgomery QC, John Kelsey-Fry QC* (2012) HCMP 2381 of 2012.

90 Similarly, see the comments of Ma CJHC in *Re David Pannick QC* (2005) HCMP No 1512 of 2005.

of approach or surrounding circumstances; or by paragraph 101(h) taking place in or in the immediate vicinity of a hospital or similar medical establishment, court, tribunal, police station or place of detention. The vague and subjective measure of 101(j), being 'inappropriate having regard to the best interest of the public' is a catch-all that may test the more imaginative promotional material.

Barristers May Not Appear on Television or Film in Robes or Appear in Public in Court Dress Save in Vicinity of Court

21.20 A barrister may not appear in robes in any film or television programme without the leave of the Bar Council.[11] Paragraph 107[12] of the Bar Code also provides that a barrister shall not without leave of the Bar Council provide or publish a photograph of himself in wig and/or gown for the purpose of practice promotion. (Bar Circular Nos. 105/08, 014/09). The Bar Association has declared that it is unacceptable for counsel to take lunch in a hotel or restaurant wearing bands. It is equally unacceptable for counsel to appear in public wearing bands unless dressed in a bar jacket or waistcoat or wearing a winged collar shirt without bands or a shirt with a detachable collar without a collar attached.[13]

21.21 In 2011, a barrister was censured for wearing a barrister's robe and holding a barrister's wig whilst distributing election leaflets and lobbying support from constituents in a District Council election in 2007 on grounds that such conduct failed to uphold the dignity and high standing of the profession and brought the profession of barrister into disrepute (Bar Association Circular No 26 of 2011).

Visiting Cards

21.22 There are no restrictions on the form and content of visiting cards. However there should be no massive distribution which might offend the 'frequency of approach' restriction in the Bar Code (paragraph 101(2)(f)) nor any feature that might bring the profession into disrepute (paragraph 101(2)(b)).[14]

11 Paragraph 105, Bar Code. A barrister shall not without leave of the Bar Council appear in wig and/or gown outside the precincts of the court except upon the occasion of the opening of the legal year. (Bar Circular Nos. 105/08, 014/09). [Paragraph 105 of the present Bar Code is Paragraph 8.3 (a) and (b), DRBC].

12 [Now Paragraph 8.4, DRBC].

13 See Bar Association Circular No 126 of 2006.

14 Paragraph 101(2)(f) is para 8.1(b)(vi) and Paragraph 101(2)(b) is para 8.1(b)(ii) of the DRBC.

Notice of Change of Address of Chambers and Notice of Return to Practice

21.23 Such notices may be sent to all present and potential clients provided there is no breach of paragraph 101(2) of the Bar Code.[15]

IMPROPER OBTAINING OF BUSINESS

21.24 Prior to the 2009 liberalisation of advertising and promotion by barristers, the Bar Code severely restricted any promotion or attempt to obtain business by barristers and forbad 'touting' for business under Para 100 of the Bar Code. There was no definition of 'touting' and people had different perceptions of the ingredients of touting. The extreme examples of paying a commission to agents in return for business or 'ambulance chasing' came, of course, within its ambit. But these extreme examples did not exhaust the concept. It seems to us that, since the word and its shifting connotations are no longer part of the official vocabulary of the Bar Code it should be honourably retired from Hong Kong lawyers' vocabulary. Instead, promotional activity which breaches the Code should be described as 'improper obtaining of business'. The Solicitors Practice Promotion Code (SPPC) provided assistance in drafting the new provisions in the Bar Code and, like the SPPC, now states specifically the conduct that is disallowed. The new provisions in the Bar Code, in paragraph 101(2), borrow from the SPPC[16] in providing, with other matters, that practice promotion must not:

(f) be offensive or otherwise inappropriate having regard to the manner, medium, frequency of approach or surrounding circumstances;

(g) be calculated or likely to exploit or manipulate the weak or vulnerable state of the recipient or intended recipient;

(h) take place in or in the immediate vicinity of a hospital or similar medical establishment, court, tribunal, police station or place of detention;

21.25 Improper obtaining of business may occur of course where there are breaches of the Bar Code in other ways, such as a barrister directly approaching a prospective client without the intervention of a solicitor, which is contrary to paragraph 50(a).[17]

15 Paragraph 101(2) is para 8.1.(b) of the DRBC.

16 The discussions about the SPPC restrictions may provide useful guidance; see Chapter 5 'Practice Promotion and the Obtaining of Business'.

17 See *Mui Kwok Keung Louie v The Bar Council* [2011] HKCU 621, (2011) CACV No 102 of 2010. [Paragraph 5.16, DRBC replaces 5.16(a) Bar Code].