do anything that a solicitor is required to do by law.[3] It is, however, a criminal offence for any person to offer or invite the public to subscribe for, or purchase, shares in, or debentures of, a solicitor corporation or foreign lawyer corporation.[4] Solicitor-client privilege will exist between a solicitor-corporation and a client of the corporation in the same way as it exists between a solicitor and a client of the solicitor.[5] As noted above, these provisions have not yet been brought into effect.

1.3 Prohibition on any separate business which offers services normally offered by a solicitor as part of his practice.

[4-3] A solicitor is prohibited from setting up a separate business offering services normally offered by a solicitor as part of his practice. The Solicitors' Guide, however, expressly excludes from the prohibition a wholly owned executor and trustee company and a company providing company secretarial services.[6] The extent of the prohibition is not made clear. This prohibition will not, of course, apply to solicitor corporations once such are permitted.

1.4 No right to form multi-disciplinary practices

[4-4] Solicitors in Hong Kong are not permitted to ether into partnerships with other professionals such as accountants, estate agents, merchant bankers and surveyors, as an arrangement of this nature would breach the rule against profit sharing with non-qualified persons.[7] Multi-disciplinary practices are, therefore, prohibited.

1.5 Solicitors may form a service company to carry out administrative functions

[4-5] Solicitors may, however, form a service company to carry out necessary administrative functions concerned with the running of their practice.[8] 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.[9] Such service companies should be incorporated in Hong Kong so

3 Sections 7D(1), Legal Practitioners Ordinance (Cap 159).
4 Sections 7F(1) and 39BB, Legal Practitioners Ordinance (Cap 159).
5 Sections 7J, Legal Practitioners Ordinance (Cap 159).
6 Principle 2.07, Solicitors' Guide. Presumably a business supplying translation services, or a computer service company, would be exempt also.
7 Rule 4, Solicitors' Practice Rules.
8 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.
9 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.

as to be fully governed by the provisions of the Companies Ordinance (Cap 622). The advantage of such an arrangement lies in the greater administrative simplicity in hiring staff and purchasing equipment through a corporate structure.

2. Limited Liability Partnerships

2.1 Introduction

[4-6] Before 1 March 2016 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.[10] Solicitors were therefore very cautious about whom they would take on as partners and consequently Hong Kong had many sole practitioners and small firms.

[4-7] Limited liability partnerships (LLPs) are partnerships where a solicitor will only be liable for his own negligence and not the negligence of his partners. Such an arrangement would, of course, 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.

2.2 Amending legislation[11]

[4-8] In July 2012, new provisions were added to the Legal Practitioners Ordinance (Cap 159) via the Legal Practitioners (Amendment) Ordinance (Ordinance No 22 of 2012) ('the Ordinance') to permit solicitor firms to practise as limited 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.[12] 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.[13]

[4-9] The Ordinance came into effect as from 1 March 2016. In brief its major provisions are:

(i) partners will not be personally liable for the negligent acts or omissions or misconduct of any other partner or an employee of the firm;
(ii) each partner will, however, be liable for his or her own default and for the defaults of those employees he or she directly supervises;

10 See ss 11, 12 and 14, Partnership Ordinance (Cap 38).
11 There is a valuable article on the legislation and on the experience of LLP's in other jurisdictions by Meggitt G, 'Limited liability partnerships in Hong Kong: Challenges and conundrums' available at: http://ssrn.com/abstract=2290112.
12 Section 7AB(a), (b), Legal Practitioners Ordinance (Cap 159).
13 Section 7AR(1), (2), Legal Practitioners Ordinance (Cap 159).

(iii) the firm must inform all clients of the identity of at least one partner with responsibility for overall supervision of each matter that the firm handles within 21days after its accepts instructions and must keep the client informed of the identity of at least one partner with responsibility for overall supervision of the matter throughout the time that the matter is handled by the firm; and

(iv) the firm must maintain top-up insurance of not less than $10 million per claim in addition to the statutory professional indemnity cover of $10 million per claim.

2.3 Liability of partners

[4-10] 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.[14]

[4-11] 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.

[4-12] 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.[15]

2.4 Requirement for top-up insurance

[4-13] Where lawyers form a limited liability partnership every such firm must have in existence, in addition to the present indemnity requirement of $10 million,

14 Section 7AC(1)(a), (b) Legal Practitioners Ordinance (Cap 159). This applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise: s 7AC(2), Legal Practitioners Ordinance.

15 Section 7AH(a), (b), Legal Practitioners Ordinance (Cap 159).

a policy of insurance indemnifying the partnership for not less than $10 million in respect of any one claim.[16]

2.5 Other matters

[4-14] Other features of the limited liability provisions include:

(a) Requirements relating to overall supervising partners; at least one must be appointed for the client matter.[17]

(b) Limitations on the protection of partners who knew of the default and did not exercise reasonable care to prevent it.[18]

(c) Agreements for Indemnification between the partners are not affected by the legislation.[19]

(d) Advance notice to the Law Society.[20]

(e) Name of the partnership must include full or abbreviated 'LLP'.[21]

(f) Notice to clients about becoming an LLP.[22]

(g) Claw-back provisions.[23]

(h) List of LLP's to be kept by the Law Society Council.[24]

(i) No dissolution just because the firm ceases to be a LLP.[25]

(j) Offences.[26]

3. Associations of Firms and Group Practices

[4-15] Hong Kong firms are permitted to form an Association with one or more foreign law firms and this Association must be registered in Hong Kong. A Hong Kong firm is also permitted to form an Association with a Mainland firm which has no place of business in Hong Kong. Hong Kong firms may also form associations with one another and solicitors and firms may also choose to operate by way of a group practice. An arrangement of this nature may assist small forms in competing with the larger firms.

16 Section 7AD(3), Legal Practitioners Ordinance (Cap 159) (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 (Cap 159H).

17 Section 7AE, Legal Practitioners Ordinance (Cap 159).

18 Section 7AF, Legal Practitioners Ordinance (Cap 159).

19 Section 7AF, Legal Practitioners Ordinance (Cap 159).

20 Section 7AI, Legal Practitioners Ordinance (Cap 159).

21 Section 7AJ, Legal Practitioners Ordinance (Cap 159).

22 Section 7AL, Legal Practitioners Ordinance (Cap 159).

23 Section 7AN, Legal Practitioners Ordinance (Cap 159).

24 Section 7AO, Legal Practitioners Ordinance (Cap 159).

25 Section 7AP, Legal Practitioners Ordinance (Cap 159).

26 There are fixed penalties for breach of certain of the obligations, under amendments made to the Schedule to the Summary Disposal of Complaints (Solicitors) Rules (Cap 159AD).

3.1 Associations of two or more Hong Kong firms

[4-16] A Hong Kong firm may form an 'association' with one or more Hong Kong firms and, provided they form a 'formal association', they may share premises, personnel and facilities. Different provisions apply where the firms form a group practice (see below).

3.1.1 Sharing premises, personnel and facilities

[4-17] Where the firms form a 'formal association', which is defined as an association between Hong Kong firms of solicitors where there is at least one partner[27] common to each of the associated firms,[28] then, subject to the need to maintain clients' confidentiality, the firms may share premises, personnel and facilities.[29] The firms forming such a formal association are also required to make reference to the association on their letterheads.[30]

3.2 Group practices

[4-18] The concept of group practices was introduced in 2003 and is a device whereby sole practitioners or firms may join together to practise from one shared office. A group practice does not create any partnership between the participating solicitors, but it facilitates the sharing of premises, facilities and unqualified staff, thereby reducing the overheads of the participating solicitor. No member of a group practice or principal of a member firm may publicise or otherwise promote his, it's or his firm's practice or permit his, it's or his firm's practice to be publicised or otherwise promoted in a manner that gives the impression that the group practice is a firm or a legal entity of any kind or that any member of the group practice is in partnership with any other member of the same group practice.[31]

3.2.1 Formation of group practices

[4-19] Solicitors wishing to practise by way of a group practice should enter into a group practice agreement which provides for them to practise as members of a group practice. Only a solicitor or firm that is conducting his or its business

27 The Council has decided that the word 'partner' means an equity partner and does not include a salaried partner: Law Society Circular No 14 of 2000. This means that a formal association will not arise for the purpose of Practice Direction D5 if the common partner is only a salaried partner and those firms will not be permitted to share premises, staff and facilities unless a waiver is granted by Council in accordance with paragraph (9) of the Practice Direction. There will, however, still be an 'association' for the purposes of the Solicitors' Practice Rules and both firms are required to make reference to the association on their letterheads.

28 See Practice Direction D5, paragraph (5).

29 Practice Direction D5, paragraph (3)(iii).

30 Ie in compliance with Rule 2B(2)(c)(i)–(iii), Solicitors' Practice Rules (Cap 159H).

31 Rule 10(1), Solicitors (Group Practice) Rules (Cap 159X).

as a member of a group practice may be a party to the group practice agreement in relation to that group practice.[32]

3.2.2 Effect of forming a group practice

[4-20] Where a group practice has been established, two or more solicitors may conduct their practice from the same address separately but in mutual co-operation[33] and, unless a group practice is formed, two or more solicitors or firms may not conduct their business from the same address.[34] A member of a group practice may not conduct his business or any part of his business or hold himself out as conducting his business or any part of his business from an address other than the address of the group practice.[35] Nor may a solicitor who practises within a group practice practise or hold himself out to practise other than within the group practice.[36] Nor may a member of a group practice employ or engage as a consultant, or continue to engage or employ as a consultant, any solicitor whom he knows to be otherwise practising within the group practice (whether as an employee of or consultant to any other member or in any other capacity).[37]

3.2.3 Name of the group practice

[4-21] A group practice must be identified by a Chinese name or an English name that has been approved by the Council, or both. The words 'Group Practice' must be included in the name.[38]

3.2.4 Group practice management company

[4-22] The members of each group practice must maintain an incorporated company with limited liability registered under the Companies Ordinance to manage the affairs of the group practice and this company must also maintain registration as a business under the Business Registration Ordinance (Cap 310).[39] 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.[40]

3.2.5 Reporting to the Law Society

[4-23] Where a group practice has been approved, the members must, within 14 days of any one of the members beginning to practise as a member

32 Rule 4(4), Solicitors (Group Practice) Rules (Cap 159X).

33 Rule 3(1), Solicitors (Group Practice) Rules (Cap 159X).

34 Rule 3(2), Solicitors (Group Practice) Rules (Cap 159X).

35 Rule 4(1)(a), (b), Solicitors (Group Practice) Rules (Cap 159X)

36 Rule 4(2), Solicitors (Group Practice) Rules (Cap 159X).

37 Rule 4(3), Solicitors (Group Practice) Rules (Cap 159X).

38 Rule 5(1), (2), Solicitors (Group Practice) Rules (Cap 159X).

39 Rules 7(1), (3), Solicitors (Group Practice) Rules (Cap 159X).

40 Rule 7(6), Solicitors (Group Practice) Rules (Cap 159X).

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.[41] They must also notify the Law Society in an approved form the specified details of the group practice management company.[42]

3.2.6 Employment of unqualified staff by group practice

[4-24] 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 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.[43]

3.2.7 Professional relationship of solicitors within the group practice

[4-25] 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.[44] Although the Rules make it abundantly clear that solicitors practising by way of a group practice are not practising in partnership[45], 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.[46] This means that confidential information may be disclosed to members of the group practice.[47]

4. New Firms Establishing a Practice in Hong Kong

[4-26] The following rules apply when a solicitor commences a new practice either as a sole practitioner/principal or by way of a partnership.

41 Rule 8(1)(a), Solicitors (Group Practice) Rules (Cap 159X).
42 Rule 8(1)(c), Solicitors (Group Practice) Rules (Cap 159X).
43 Rule 9(1), (2), Solicitors (Group Practice) Rules (Cap 159X).
44 Rule 11(1), Solicitors (Group Practice) Rules (Cap 159X).
45 Rule 11(3), Solicitors (Group Practice) Rules (Cap 159X).
46 Rule 11(2), Solicitors (Group Practice) Rules (Cap 159X).
47 Commentary 15 of principle 8.01, Solicitors' Guide and Law Society Circular No 16 of 2003.

4.1 Notification to the Law Society of particulars of firm and any service company

[4-27] 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;
(v) the firm name;
(vi) evidence that they have complied with the Solicitors (Professional Indemnity) Rules; and
(vii) the accounting period to be used by the firm.[48]

[4-28] The principal or principals must also, within 14 days of commencing the firm, advise the Law Society in writing in a form approved by the Law Society, of certain particulars of any service company engaged by the firm.[49] They must also provide the date of commencement of business.

4.2 Notification to the Law Society of any changes in the particulars

[4-29] Further a principal must advise the Law Society in writing in a form approved by the Law Society within 14 days of such occurrence of any change in any of the particulars referred to above.[50]

4.3 Annual return of employees

[4-30] A principal who is in practice at any time during a calendar year must also, not later than 31 January in the next calendar year, furnish to the Secretary General a declaration in respect of the relevant calendar year providing details, *inter alia*, of all staff in the firm.[51]

48 Rule 5(1)(a)–(f), Solicitors' Practice Rules (Cap 159H). A similar requirement applies to the principal of a foreign firm: rule 9(1), Foreign Lawyers Practice Rules (Cap 159R).
49 Rule 5(1A)(a)–(c), Solicitors' Practice Rules (Cap 159H).
50 Rule 5(2), Solicitors' Practice Rules (Cap 159H). A similar provision applies to the principal of a foreign firm: see rule 9(2), Foreign Lawyers Practice Rules (Cap 159R). See also Law Society Circular No 1027 of 2017.
51 Rule 5(3), Solicitors' Practice Rules (Cap 159H). A similar provision applies to the principal of a foreign firm: see rule 9(3), Foreign Lawyers Practice Rules (Cap 159R).

4.4 Sole practitioners and partners must hold unconditional practising certificates

[4-31] All sole practitioners and partners must hold unconditional practising certificates.[52]

4.5 Membership of the Professional Indemnity Scheme

[4-32] A receipt for professional indemnity cover must be forwarded to the Law Society, together with the notice of commencement of practice.

4.6 Office premises

[4-33] Solicitors should ensure that they comply with Practice Direction D5 (sharing an office and staff) as regards the premises to be used.

4.7 Other prudent action which may be taken by a new law firm

[4-34] In addition to the obligations set out above, a newly established firm may well wish to see to the following matters:

4.7.1 Legal visits by unqualified staff

[4-35] If the new firm wishes to secure access by its unqualified staff to clients in custody,[53] it must comply with the rules laid down by the Law Society. Each firm is permitted to have a maximum of ten clerks authorised to visit persons in custody. A principal of a firm must ensure that (a) each authorised clerk in his firm must be properly supervised by a full-time solicitor in his firm who is ordinarily resident in Hong Kong; (b) the supervising solicitor named in the application for authorisation of a clerk to visit persons in custody must have sufficient relevant experience capable of affording appropriate supervision to the clerk; (c) for the above purpose (i) any full time solicitor in his firm with less than two years of post-qualification experience in the litigation practice may not be made responsible for supervising any authorised clerk; (ii) any full time solicitor in his firm with at least two years of post-qualification experience in the litigation practice may be made responsible for supervising not more than two authorised clerks; and (iii) any full time solicitor in his firm with at least five years of post-qualification experience in the litigation practice may be made responsible for supervising not more than four authorised clerks.[54]

52 Section 6(6), Legal Practitioners Ordinance (Cap 159) and Principle 2.01, Solicitors Guide.

53 This includes the custody of the Correctional Services Department, the ICAC, the Customs and Excise Department and the Immigration Department.

54 Practice Direction D6 paragraphs (1), (2)(a)–(c).

4.7.2 Computer code for use in conveyancing practice

[4-36] The Land Registry is now fully computerised and each firm is allocated a computer code number for its personal use. New firms should contact the Land Registry to arrange for the allocation of a code number for the firm.

5. Practising as a Sole Practitioner

5.1 The right to practise as a sole practitioner

[4-37] As we have already seen, a solicitor who has not been in practice for at least two years prior to his application for a practising certificate will only be granted a conditional practising certificate. One of the conditions attached to the practising certificate is that he is prohibited from practising as a solicitor on his own account or in partnership until he satisfies the Council that, since being admitted as a solicitor, he has been *bona fide* employed in the practice of a solicitor for at least two years.[55] This is often referred to as the 'period of limited practice'. The effect of this provision is that the solicitor must have been employed in the practice of a solicitor for two years or more before he is entitled to practise on his own and supervise his own office, although Council is empowered to reduce the two year period of limited practice.

5.2 Absence of sole practitioner from the office due to holidays, sickness etc

[4-38] A sole practitioner must make suitable arrangements for the running of his practice during any period of absence.[56] When a sole practitioner is absent from his office for whatever reason (holidays, sickness etc) he owes a continuing duty to his clients to ensure that his practice will be carried on with the minimum interruption to his clients' business. Consequently he *must* make adequate arrangements for his practice (including his clients' bank account) to be administered and properly supervised during his absence.[57] The degree of supervision required will depend upon the circumstances, but particular regard must be had to the sole practitioner's minimum standards of supervision required by Rule 4A of the Solicitors' Practice Rules.[58]

[4-39] A sole principal should make adequate arrangements in advance to cope with the difficulties which might arise in the conduct of the clients' affairs and in the administration of the solicitor's own business in the event of his incapacity. For example, an accountant's report must be submitted annually, a practising certificate must be applied for annually and indemnity cover must be obtained notwithstanding the solicitor's incapacity. Consequently, a sole practitioner must have a standing arrangement with another solicitor (who is of sufficient seniority

55 Section 6(6), Legal Practitioners Ordinance (Cap 159).

56 Principle 2.05, Solicitors' Guide.

57 Commentary 1 of Principle 2.05, Solicitors' Guide.

58 Commentary 1 of Principle 2.05, Solicitors' Guide.

and holds a current practising certificate) to supervise the sole practitioner's practice until such time as he returns to work. Further the sole practitioner should notify his bankers in advance of these arrangements so that the incoming solicitor can operate the practitioner's client and office accounts.[59] Before any responsibilities or duties are assumed by the nominated solicitor he must contact the manager appointed by the Hong Kong Solicitors Indemnity Fund Limited to ensure that cover remains in force under the Solicitors (Professional Indemnity) Rules against the risks of professional negligence. Unless the absence of the sole practitioner is likely to be of a short duration, clients of the practice should be notified, as should the Law Society.[60] As a last resort, the Council of the Law Society has the power to intervene in a sole practice where the principal is incapacitated by illness or accident to such an extent as to be unable to attend to his practice.[61]

5.3 Sole practitioner retiring from practice or emigrating from Hong Kong so that his firm ceases to practise

[4-40] Where a sole practitioner decides to retire from his practice or emigrate from Hong Kong with the result that his firm will cease to practise, he has several obligations in relation to the closure of his practice.

5.3.1 Notification to the Law Society

(a) Notice of cessation of practice

[4-41] Where a sole practitioner intends to cease practice, the firm must notify the Law Society of the intended cessation in writing in the form approved by the Law Society at least eight weeks prior to the date of cessation.[62] The Law Society must also be informed of the identity of the firm of solicitors who will act as the retiring solicitor's agent (see below).

(b) Final employee's return

[4-42] Notwithstanding the requirement in rule 5(3) of the Solicitors' Practice Rules to furnish a declaration in respect of the relevant calendar year, a solicitor who was a principal of a firm as at the date of cessation must advise the Law Society in writing in the approved form within 14 days of the date of cessation of

59 Commentary 2 of Principle 2.05, Solicitors' Guide.
60 Commentary 3 of Principle 2.05, Solicitors' Guide.
61 Section 26A(1)(f), Legal Practitioners Ordinance (Cap 159) provides that the powers laid down in Schedule II of the Ordinance are exercisable where the Council is satisfied that a solicitor or foreign lawyer who practises as a solicitor in his own name or as a sole solicitor or foreign lawyer under a firm name is incapacitated by illness or accident to such an extent as to be unable to attend to his practice. The powers are similarly exercisable where the powers under sections 10D or 11 of the Mental Health Ordinance have been exercised in respect of him: section 26A(1)(g), Legal Practitioners Ordinance (Cap 159).
62 Practice Direction D7, paragraph (1). See also Law Society Circular No 629 of 2017.

practice of any change in the employment of staff of the firm that occurred as a result of the cessation.[63]

(c) Final notification of changes to practice

[4-43] The Law Society will send to the retiring sole practitioner the prescribed Notification of Changes to Practice form following receipt of the Cessation Notice and this must be completed and filed with the Law Society within 14 days of the date of cessation of practice.[64]

5.3.2 Appointment of firm of solicitors to act as agent

[4-44] Where a sole practitioner intends to cease to practise, he must appoint a firm of solicitors with at least two partners as its agents to deal with all consequential matters and this information must be notified to the Law Society.[65]

5.3.3 Notice to the Hong Kong Solicitors Indemnity Fund Ltd

[4-45] When notification is given to the Law Society, notice of cessation of practice must also be given to the Manager of the Indemnity Fund, Essar Insurance Services Ltd.[66] Further, a final Quarterly Return and Gross Fee Income Report must be filed with ESSAR. ESSAR will confirm the deadline for filing the firm's final Quarterly Return and Gross Fee Income Report following receipt of the Cessation Notice. Solicitors are reminded that failure to provide this Report will render any principal liable to pay an amount equal to 200% of the rate of contribution for the preceding indemnity period until such principal has complied with such reporting requirements.[67]

5.3.4 Notice to clients

(a) Where there is no successor firm

[4-46] The retiring sole practitioner must give sufficient notice to his clients of the fact of his cessation of practice so that they may have an adequate opportunity to take such steps as they consider appropriate in the circumstances (for example, instructing other solicitors).[68] What will be sufficient notice will depend upon the particular circumstances of the firm and of the cessation and it may well be necessary to give notice well before the official notification to the Law Society. For example, there may be files due for completion at about the date of cessation or there may be numerous 'live' files to wind up. Failure to give sufficient notice to clients could amount not only to an act of negligence, but also might lead

63 Practice Direction D7, paragraph (5).
64 Paragraph 14a, Law Society Circular No 629 of 2017.
65 Practice Direction D7, paragraph (2) and paragraph (3)(a)–(b). See also Law Society Circular No 629 of 2017, paragraph 4.
66 Law Society Circular No 629 of 2017, paragraph 5(a).
67 Law Society Circular No 629 of 2017, paragraph 5(b). See also para 2(1)(c)(ii) of Schedule I to the Solicitors (Professional Indemnity) Rules.
68 See Commentary 8 of Principle 5.22, Solicitors' Guide.

to disciplinary action. If the solicitor is planning to cease to practise, he should be open and frank with his clients when obtaining instructions where it appears likely that the matter will continue beyond the planned date of retirement.[69] Of course, the solicitor must ensure that, by ceasing to practise, he does not breach his contractual and ethical obligations to his clients. He must complete all work that he has been retained to do and he can only discharge himself for good reason upon reasonable notice to the client. If a client's matter will not be completed before cessation, extra care should be taken to ensure that the client is not left unrepresented. Representation in litigation imposes a special burden upon the principal to ensure that the client is not left unrepresented and compliance with this obligation is all the more important where there is no successor firm.

(b) Where there is a successor firm

[4-47] Where a sole practitioner is retiring but his practice will be taken over by a successor firm, his clients must be informed of their right to choose their own legal advisors as it would not be proper for the successor firm to take over the clients' business without the clients having been first given sufficient notice of the change.[70] Notification, therefore, by circular letter is essential.

5.3.5 Publication of cessation of practice in Law Society's circulars

[4-48] The Law Society will advise its members of the firm's intention to cease practice in the weekly circulars once the Cessation Notice has been filed. If the firm changes its decision on cessation, a Notice of Rescission together with the payment of a fee, as prescribed by Council, must be filed before the expiration of the date of cessation and a Notice of the Rescission will be circulated to members in the weekly circulars.[71]

5.3.6 Delivery of final accountant's report

[4-49] The retiring sole practitioner must deliver a final accountant's report in respect of his firm. The last date for delivery of the report is six months from the date the firm ceased business.[72] The report must comply with section 8(2) of the Legal Practitioners Ordinance. The Law Society will confirm the date for delivery of the final accountant's report following receipt of the Cessation Notice. The firm's books should be made up as at the date of cessation of practice and post-cessation events should be recorded in supplemental or reconciliation statements provided to the Law Society.[73] A firm may maintain its office account after the date of cessation in order to deal with post-cessation settlement of bills and accounts receivable. However, any correspondence referring to the firm thereafter should

69 Paragraph 6(a), (b), Law Society Circular No 629 of 2017.
70 'Prompt notice' is required by Commentary 8 of Principle 5.22, Solicitors' Guide.
71 Paragraph 8(a), (b), Law Society Circular No 629 of 2017.
72 Section 8(2)(c), Legal Practitioners Ordinance (Cap 159) and rule 8(2), Accountants' Reports Rules.
73 Paragraph 10, Law Society Circular No 629 of 2017.

make reference to the firm having ceased practice which is achieved by clear notification on the firm's stationery eg letterhead, compliments slips, receipts etc: for example, 'ABC & Co, ceased practice'.[74]

5.3.7 Preservation of files and books of account

[4-50] The retiring sole practitioner should also ensure that he complies with his obligations as to the proper preservation of files[75] and books of account[76]. No problems will arise if his practice is to be taken over by a successor firm. If, however, his firm will not be taken over, all files and books of account must be stored at such a place and in such a manner that they are reasonably accessible, if required. Further some competent person must be given access and the storage information from which he can trace any file that is properly sought. Since the information on the files is confidential, it would follow that the competent person given access should be a solicitor, although he will obviously send his own clerk to make the search. The cost of storage should be borne by the retiring solicitor or at least it is his responsibility to make the necessary arrangements before retirement. Full details of the location of the firm's old files must be given to the Law Society in the Cessation Notice. It is a mandatory requirement that old physical files must be stored in Hong Kong.[77]

5.3.8 Outstanding professional fees and undertakings

[4-51] The liability of a sole practitioner for outstanding professional fees and undertakings is a continuing one and is not cancelled or superseded by the cessation of practice.[78] For example, the transfer or cessation of a practice does not cancel the liability of instructing solicitor to pay counsel's or witnesses' outstanding fees.[79]

5.3.9 Money in clients' account

[4-52] Funds in the client account do not, of course, belong to the solicitor and when a sole practitioner ceases to practise, the funds in the clients' account must be returned to the appropriate clients or dealt with as they direct. If a client cannot be readily traced, the solicitor should advertise. At the date of cessation of practice all outstanding balances in the clients' accounts must be transferred to the firm appointed to act as the firm's agent in accordance with directions from Council (pursuant to the firm's application for permission to transfer the money to another

74 Paragraphs 11 and 19, Law Society Circular No 629 of 2017.
75 Law Society Circular No 475 of 2012.
76 Law Society Circular No 629 of 2017, paragraph 13.
77 Law Society Practice Direction D7, para (6): see Law Society Circular No 475 of 2012.
78 Law Society Circular No 629 of 2017, paragraph 13.
79 See Commentary 3 of Principle 12.04, Solicitors' Guide (counsel's fees), Commentary 2 of Principle 10.20 (witnesses' fees) and Commentary 4 of Principle 14.04 (no implied term in an undertaking that a solicitor is deemed to be released should he subsequently cease to act for the particular client).

account under section 8(2) of the Solicitors' Accounts Rules). The firm must notify the Law Society in writing within seven days of the date of cessation of practice of the total aggregate amount in the firm's clients' accounts transferred to the agent, such notification to be countersigned by the agent by way of acknowledgement.[80]

5.3.10 Cessation and the retainer; the entire contract rule

[4-53] A current retainer with the firm may be entire: ie one to complete the work for which the retainer was given and therefore one which cannot be terminated by the solicitor before completion unless there is good cause and reasonable notice. It would therefore be prudent for a retiring solicitor to plan in advance and try and complete all retainers to which the entire contract rule applies before cessation of practice. If this is not possible and the solicitor intends to terminate the retainer for good cause, the client should be given sufficient and adequate notice of the cessation and the solicitor should take appropriate steps to ensure that the client is not left unrepresented.[81]

5.3.11 Client's papers to be handed over

[4-54] All documents and materials belonging to a client, for example title deeds, original wills, codicils etc, should, subject to any lien, be returned to him or disposed of according to his instructions.[82]

5.4 The death of a sole practitioner

5.4.1 Duty of sole practitioner to make a will and provide notification to Law Society

[4-55] The Solicitors' Guide requires a sole practitioner to make a will containing provisions for the management of his practice after his death[83] and, although it is not essential for him to appoint a solicitor as an executor, if he does so, this will greatly facilitate the conduct of his practice after his death.[84] The Guide further provides that, in any event, clear instructions should be left by the sole practitioner to ensure that his executors are able to make arrangements immediately after his death for the continuance of his practice by a solicitor of sufficient seniority, pending the disposal of his practice.[85] The sole principal should also ensure that all computer passwords and their functions are included in the documentation to be passed to his or her personal representative.

80 Law Society Circular No 629 of 2017, paragraph 9.
81 Law Society Circular No 629 of 2017, paragraph 17(a), (b).
82 Law Society Circular No 629 of 2017, paragraph 18.
83 Principle 2.06, Solicitors' Guide.
84 Commentary 1 of Principle 2.06, Solicitors' Guide.
85 Commentary 2 of Principle 2.06, Solicitors' Guide.

[4-56] These requirements have now been strengthened by an addition to the Solicitors' Practice Rules.[86] A solicitor who commences practice as a solicitor in his own name or under a firm name, where he is the sole proprietor of the firm (a sole practitioner), must:

(a) ensure that, at the commencement of his practice, there is in effect a testamentary provision which provides
  (i) for the management of his practice after his death, pending the disposal or cessation of that practice; and
  (ii) for such management to be carried out by a person who is a solicitor holding an unconditional practising certificate and who has consented in writing to so manage that practice; and
(b) within 14 days of commencement of practice as a sole practitioner advise the Law Society in writing in the approved form of the following particulars:
  (i) the name, address, telephone number, fax number, telex number and DX number, where appropriate of:
    (A) the executor of the will which contains the testamentary provision as required above; and
    (B) the solicitor mentioned above; and
  (ii) if that will has been lodged with another person by the sole practitioner, the name and address of that person.[87]

[4-57] Further, a solicitor who practises as a sole practitioner must:

(a) ensure that a testamentary provision as required above remains in effect at all times during his practice as a sole practitioner, except for a period of 14 days after any change in the solicitor mentioned in (a) (ii) above; and
(b) advise the Law Society in the approved form within 14 days of such occurrence of any change in any of the particulars required in (b) above.[88]

5.4.2 After death of sole practitioner, clients' accounts to be managed by Council of Law Society

[4-58] A personal representative of a deceased sole practitioner, even when he is a solicitor, is not empowered to sign cheques on the clients' accounts of the deceased sole practitioner after the death of the latter and this power is vested solely in the Council of the Law Society under section 26D(1) and the Second

86 According to Law Society Circular No 128 of 2000 the purpose of the amendments is to avoid a situation where a sole practitioner dies without having appointed a solicitor (or foreign lawyer) to run his practice until its disposal, so that Council is faced with the prospect of having to intervene in that practice. Interventions are costly and the costs would have to be met by the beneficiaries of the estate.
87 Rule 5AA(1)(a), (b), Solicitors' Practice Rules (Cap 159H).
88 Rule 5AA(2)(a), (b), Solicitors' Practice Rules (Cap 159H).

2.1 The contractual duty

[8-3] There is an implied term in the retainer requiring a solicitor to keep confidential all information communicated to him concerning his client's affairs.[2] Of this duty Diplock LJ has said in *Parry-Jones v The Law Society*:[3]

> What we are concerned with here is the contractual duty of confidence, generally implied, though sometimes expressed, between a solicitor and client. Such a duty exists not only between solicitor and client, but, for example, between banker and customer, doctor and patient and accountant and client. Such a duty of confidence is subject to, and overridden by, the duty of any party to that contract to comply with the law of the land. If it is the duty of such a party to a contract, whether at common law or under statute, to disclose in defined circumstances confidential information, then he must do so, and any express contract to the contrary would be illegal and void.

[8-4] Breach of this duty would, of course, lead to an action by the client for breach of contract and perhaps injunctive relief.

2.2 The duty in equity (or perhaps tort)

[8-5] An action for breach of confidence has become firmly established. It has been described as 'a civil remedy affording protection against the unauthorised disclosure or use of information which is of a confidential nature and which has been entrusted to a person in circumstances which impose an obligation to respect its confidentiality'.[4] It is important as it arises independently of any contractual duty and, although its precise legal basis is somewhat unclear, it is usually regarded as equitable (or perhaps tortious) in nature. That damages may be awarded for breach of confidence in circumstances where no contractual relationship existed has been confirmed in two Hong Kong cases.

[8-6] The first is the decision of the Court of Appeal in *Koo Chih-ling, Linda v Lam Tai-hing*,[5] where liability was established for copying confidential research material. The second is *China Light and Power Co Ltd v Michael Edward Ashton Ford*,[6] where a barrister employed in-house made public allegations that his instructions had involved him in matters which positively indicated criminal misconduct if not conspiracy to pervert the course of justice on the part of his employers. The Court of Appeal confirmed that an award of damages was now available for cases involving a breach of confidence and upheld the trial judge's award of damages.

[8-7] An award of damages may be awarded where a solicitor, having confidential information about a former client (or 'quasi-client') is then retained by the opposing party and the solicitor discloses the confidential information. That

2 Principles 5.13 and 5.14, Solicitors' Guide.
3 [1968] 1 All ER 177 at 180 (CA, Eng).
4 Law Commission (England and Wales) Working Paper No 58, 1974, paragraph 6.
5 [1992] 2 HKLR 314, [1992] 1 HKC 193 (CA).
6 [1996] 2 HKC 23 (CA).

occurred in *William Allan v Messrs Ng & Co (a firm) & Anor*[7] where the solicitor was involved in a conflict of interest situation and was held liable for exemplary damages for breach of confidence. The Court of Appeal decided that although exemplary damages were rightly ordered by the trial judge his award was excessive and he had made an inappropriate award of interest on the exemplary damages.

[8-8] The duty of confidentiality in equity has subsequently undergone considerable expansion beyond the misuse of confidential information given to the recipient and has developed into a duty not to invade a person's privacy.[8]

2.3 The ethical duty

2.3.1 The general principle

[8-9] A solicitor has an ethical duty to hold in strict confidence all information concerning the business and affairs of all his clients acquired in the course of the professional relationship and must not divulge such information, unless disclosure is expressly or impliedly authorised by the client, required by law or unless the client has expressly or impliedly waived the duty.[9] Breach of this duty could lead to disciplinary proceedings against the solicitor.[10] The duty extends to

7 [2012] 2 HKC 266, [2012] 2 HKLRD 160. See also the main discussion of the case at paragraph [6-96] onwards.
8 See *Campbell v MGN Ltd* [2004] 2 AC 457 (HL) (defendant newspaper published information about the claimant's drug addiction, the fact that she was receiving therapy and provided details of the group meetings she attended; held by a majority that the threshold test whether information was private was to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than its recipient, would find the disclosure offensive; 'A duty of confidence arises when confidential information comes to the knowledge of a person … in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others'); *Sim Kon Fah v JBPB & Co* [2011] 4 HKLRD 45, [2011] HKCU 1189 (disclosure of business information; traditionally, breach of confidence was an equitable remedy and the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it; the principles relating to breach of confidence had recently undergone substantial development and it was no longer necessary to identify a prior confidential relationship before a duty of confidence could arise; the touchstone was whether the claimant had 'a reasonable expectation of privacy', per Recorder Anderson Chow, SC); *Chor Ki Kwong David v Lorea Solabarrieta Cheung* [2013] 2 HKLRD 95, [2013] 5 HKC 525 (video about life of a Hong Kong Tai Tai uploaded on YouTube; whether the information was confidential in nature and gave rise to a duty of confidence depended on whether it was provided in circumstances where one would expect confidentiality to be respected).
9 Principle 8.01, Solicitors' Guide.
10 Commentary 5 of Principle 8.01, Solicitors' Guide. An unusual illustration of a solicitor being found to have committed professional misconduct by reason of his improper disclosure of confidential information about his client is *Legal*

the solicitor's staff, whether admitted or unadmitted, and it is the responsibility of the solicitor to ensure compliance.[11] The rationale for the duty is that a solicitor cannot render effective professional service to a client unless there is full and unreserved communication between solicitor and client. At the same time a client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on his part, matters disclosed to or discussed with a solicitor will be held secret and confidential.[12]

2.3.2 Illustrations of the ethical duty[13]

[8-10] Several helpful provisions relating to the solicitor's duty of confidentiality can be found in the Solicitors' Guide and Law Society Circulars.

(a) Disclosure of the fact that the solicitor has been retained by a particular client

[8-11] As a general rule, a solicitor should not disclose that he has been consulted or retained by a person in relation to a particular matter. Certain communications from a client, however, are not confidential if a matter of public record; for example, a solicitor has been instructed by a named client in a contentious matter, but the type of business involved may be subject to the duty of confidentiality.[14]

(b) Disclosure of client's address

[8-12] A solicitor must not disclose the address of his client without his client's consent.[15] Where a solicitor is asked for his client's address, he may, as a matter of courtesy, offer to send on to his client, at his last known address, a letter from the enquirer addressed to the client, care of the solicitor.[16]

(c) Disclosure of contents of a will

[8-13] Where a solicitor has acted in the drafting of a will, he must certainly not disclose its contents to potential beneficiaries or indeed to anyone else during the testator's lifetime; nor should he do so after the death of the testator until

Practitioners Complaints Committee v Trowell [2009] WASAT 42. The client, who had retained the solicitor to defend her, had been sentenced to 20 year's imprisonment in Indonesia and appealed. Her solicitor criticised her Bali appeal team in the Australian press mentioning, inter alia, that they had requested money from the Australian Government to bribe the appeal judges in Bali. The solicitor was reprimanded and ordered to pay the costs of the disciplinary proceedings.

11 Commentary 3 of Principle 8.01, Solicitors' Guide.

12 Commentary 2 of Principle 8.01, Solicitors' Guide.

13 The exposition that follows is simply a listing of the ethical principles described in chapter 8 of the Solicitors' Guide. That is because most detail and analysis derives from case law on the topic of legal professional privilege and a fuller discussion can be found within that topic.

14 Commentary 21 of Principle 8.01, Solicitors' Guide.

15 Commentary 29 of Principle 8.01, Solicitors' Guide. See also paragraph [8-65] below.

16 Commentary 29 of Principle 8.01, Solicitors' Guide.

probate has been granted, except to or with the consent of, the executors.[17] The Law Society takes the view that, after the death of the testator, it is not a breach of this duty for a solicitor who holds a will to disclose that fact and the date of execution of the will in response to an inquiry made through the Law Society. The solicitor must, however, then seek instructions from the executors named in the will before disclosing the contents of the will and the identity of the named executors to any person.[18]

(d) Confidentiality where there are joint retainers

[8-14] Where there is a single retainer, the solicitor must keep information received from one client confidential from another client unless he has obtained the consent of the client providing the information to divulge it to the other client. Where, however, there is a joint retainer both law and ethics require a sharing of communications and the Solicitors' Guide, therefore, provides that, where there is a joint retainer, a solicitor should explain to his joint clients that any information in respect of matters covered by the retainer is to be fully disclosed to every client who is a party to that retainer.[19] The purpose of this provision is to minimise the risk of conflict of interest on the part of the solicitor, since he owes a duty to all his clients to keep them fully informed of all relevant information coming to his knowledge.[20] Where, however, a solicitor acts for two or more clients jointly, information communicated to the solicitor in his capacity as solicitor acting for only one of the clients in a separate matter must not, however, be disclosed to the other clients without the consent of that one client.[21]

(e) Problems relating to confidentiality where firms amalgamate

[8-15] The amalgamation of two firms may cause problems with regard to the duty of confidentiality. On amalgamation the information which each firm or solicitor has obtained when acting for its particular client is presumed to pass to the new amalgamated firm[22], but where the amalgamation has brought about the position that clients with conflicting interests are represented within the amalgamated firm, it might be necessary for the firm to cease to act for one or both clients unless an effective Chinese Wall can be erected. This situation is dealt with in Chapter 9 below.

(f) Solicitor moving to a new firm

[8-16] A solicitor moving to a new firm must keep confidential information he has about a previous client's affairs unless he has obtained the consent of the previous client to divulge that information.[23] Again a conflict of interest might

17 Commentary 13 of Principle 8.01, Solicitors' Guide.

18 Commentary 14 of Principle 8.01, Solicitors' Guide.

19 Commentary 24 of Principle 8.01, Solicitors' Guide.

20 Principle 8.03, Solicitors' Guide.

21 Commentary 25 of Principle 8.01, Solicitors' Guide

22 Commentary 27 of Principle 8.01, Solicitors' Guide.

23 Commentary 28 of Principle 8.01, Solicitors' Guide.

arise necessitating the new firm to cease to represent a present client unless an effective Chinese Wall can be erected.[24]

(g) Solicitor should not sell book debts to a factoring company for collection

[8-17] To preserve the confidentiality of the client's affairs, a solicitor should not sell his book debts to a factoring company to collect the fees owed by the client.[25]

(h) Written communications with the client by way of postcards

[8-18] Where a solicitor sends postcards to acknowledge receipt of communications sent to him, care must be taken to ensure that no confidential information of any kind appears on them. The use of open postcards should be discouraged since it is preferable to use cards which can be folded and sealed, or secured in some other way.[26] The means of written communication is nowadays almost inevitably by email and fax or sealed letter. The usual precaution taken by solicitors is to head the letter, fax or e-mail with a bold-type announcement that the material is confidential and request that it not be read by anyone other than the proper recipient. There is a further request that, if the fax is received by the wrong person, it should be returned immediately and the sender informed as to the mistake.

(i) Indiscreet conversations and speculation about a client's affairs

[8-19] A solicitor should avoid indiscreet conversations or communication, even with his spouse or family, about a client's affairs and should shun any gossip about such things, even though the client is not named or otherwise identified. Likewise a solicitor should not repeat any gossip or information about a client's business or affairs that may be overheard by or recounted to the solicitor. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between solicitors, if overheard by third parties able to identify the matter being discussed, could result in prejudice to a client. Moreover, the respect of the listener for the solicitors concerned and the legal profession generally will probably be lessened.[27] Certain communications from a client are not, however, confidential if they are a matter of public record, for example, the fact that a solicitor has been instructed by a named client in a contentious matter, but the type of business involved will usually be subject to the duty of confidentiality.[28] Further, although some facts concerning a client's affairs may be public knowledge, nevertheless, a solicitor should not participate in or comment upon speculation about a client's affairs.[29]

24 See Chapter 9.
25 Commentary 33 of Principle 8.01, Solicitors' Guide. Such factoring might also lead to a breach of rule 4, Solicitors' Practice Rules, which prohibits the sharing of profit costs with unqualified persons. See further Chapter 7 above at paragraph [7-95].
26 Commentary 30 of Principle 8.01, Solicitors' Guide. It is submitted that this cautionary advice is really out of date.
27 Commentary 22 of Principle 8.01, Solicitors' Guide.
28 Commentary 21 of Principle 8.01, Solicitors' Guide.
29 Commentary 23 of Principle 8.01, Solicitors' Guide.

(j) Confidentiality where firm shares office services

[8-20] Problems of confidentiality can arise where a solicitor or his firm shares office services provided by independent contractors (such as computers, equipment or typing services) with another person or business. A solicitor should only make use of these services where strict confidentiality of client matters can be maintained.[30] Also, to prevent leakage of confidential information, a solicitor may not employ unqualified staff who are in the employment of another solicitor.[31]

(k) Special instances of protection of confidentiality in interviews with the client

[8-21] The Law Society has provided guidance to solicitors where there are multiple-client interviews in project conveyancing.[32]

[8-22] Guidance has been given to solicitors who represent and advise clients in criminal litigation, of steps necessary to protect the client's confidentiality in interviews when the client is in custody. The Guidance also includes essential advice for when the law enforcement agency wants to hold an identification parade.[33]

2.4 The duration of the duty of confidentiality

[8-23] The duty to keep confidential the client's affairs continues indefinitely until the client waives the right to confidentiality and does not determine when the solicitor has ceased to act for the client whether or not differences have arisen between them.[34] Following the death of a client, the right to confidentiality passes to the personal representatives of the client and can only be waived by them.[35] An interesting illustration showing the continuing obligation of confidentiality is *Stewart v Canadian Broadcasting Association*.[36] A lawyer acted for a client in the sentencing and appeal stages of a criminal case in which the client was convicted. The lawyer appeared in a television programme some 12 years later in which he exaggerated the culpability of the client and disclosed certain confidential matters. The court held that the lawyer had a continuing fiduciary obligation to his client which he had breached by causing publicity adverse to the client. He was, therefore, liable in damages for the emotional harm that he had caused to his client and accountable for the profits he had derived from his participation in the programme.

30 Commentary 19 of Principle 8.01, Solicitors' Guide. For the detailed rules governing the sharing of office and staff, see Practice Direction D5 and Chapter 4 above at paragraph [4-18].
31 Rule 4B, Solicitors' Practice Rules and Commentary 20 of Principle 8.01, Solicitors' Guide.
32 See Law Society Circular No 25 of 2002 'Breaches of Confidentiality in Multiple-Client Interviews in Project Conveyancing'.
33 See Law Society Circular No 321 of 2004 'Criminal Litigation-Guidelines on Steps to Take to Protect Clients' Confidentiality in Interviews' (now withdrawn).
34 Commentary 4 of Principle 8.01, Solicitors' Guide.
35 Commentary 11 of Principle 8.01, Solicitors' Guide.
36 (1997) 150 DLR (4th) 24.

2.5 Use of confidential information which comes into the solicitor's possession from another client or third party

[8-24] What is the solicitor's ethical duty when he comes into possession of confidential information from a third party which will favour his client's case? There is no question here of the solicitor being in breach of his obligation to his client to keep information confidential. On the contrary, he has a fiduciary duty under his retainer to keep his client informed of all information which comes into his possession relating to the client's case regardless of the source of the information[37] and breach of this rule might well be actionable in law and involve the solicitor in disciplinary action[38]. These different situations must be distinguished.

2.5.1 Confidential information from another client

[8-25] A solicitor should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline instructions where there is a reasonable likelihood that such disclosure would be required.[39]

2.5.2 Confidential information from another solicitor communicated on the basis that it is kept confidential

[8-26] A solicitor should not pass on information to the other side's solicitor on the understanding that it is kept confidential. A solicitor should not also seek to pass on to the solicitor representing the other side, information which he does not wish to be disclosed to the other solicitor's client.[40]

2.5.3 A solicitor should refuse to accept information offered on the terms that it must be kept confidential from his client

[8-27] If a solicitor is offered information from another solicitor, or any other source, which he is asked to keep confidential and not disclose to his client, he should decline to accept it. For example, if a letter disclosing confidential information is written to the solicitor on the other side, the writer cannot complain if the letter is shown to the other solicitor's client.[41]

2.5.4 Confidential information harmful to the client

[8-28] There may be circumstances where the disclosure of information received confidentially by the solicitor could be harmful to the client, as on the grounds that it might affect his mental or physical condition. Consequently it will be necessary

37 Principle 8.03, Solicitors' Guide.
38 Commentary 1 of Principle 8.03, Solicitors' Guide.
39 Commentary 2 of Principle 8.03, Solicitors' Guide.
40 Commentary 3 of Principle 8.03, Solicitors' Guide.
41 Commentary 3 of Principle 8.03, Solicitors' Guide.

for a solicitor to decide whether to disclose this information to his client. An example would be where the solicitor receives a medical report revealing that the client is suffering from a terminal illness of which the client is unaware.[42]

2.6 Confidential information received by solicitor at a social occasion

[8-29] What is the position where a solicitor is given confidential information at a social gathering? Has he a duty to keep this information confidential? This situation occurred in *Time Success Profits Ltd v Andrew Lam & Co*.[43] The plaintiff intended to sue the defendant for recovery of a loan. At a dinner party the plaintiff met a solicitor employed by the defendant firm of solicitors and sought his advice about the loan, disclosing certain confidential information. The solicitor gave some advice as to ways in which the loan could be recovered. Subsequently, the defendant retained the solicitor to act for him, but the plaintiffs sought an injunction to restrain the solicitor from acting. Deputy Judge To said firstly that, at some time during the dinner party, the solicitor's role had changed from being a guest to that of a 'quasi-solicitor'. A quasi-solicitor owed the same duty of confidence to the 'quasi-client' as to a formal client. He continued that, in order to restrain a quasi-solicitor from acting for another client in the same matter, the former client had to establish that the quasi-solicitor was in possession of information which was confidential and relevant to the proceedings. An injunction would not be granted unless there was a real risk of misuse of the information given. Here there was a real risk and an injunction was granted.

2.7 Confidential information received from a 'quasi-client'

[8-30] Recall that a formal retainer is not essential in order for a relationship of solicitor-client to arise. Implied retainers can arise on the facts.[44] Also the fiduciary duty of confidence may arise merely from the fact that the advice was sought with expectations that the information provided to the solicitor would be kept confidential as in *William Allan v Messrs Ng & Co (a firm) & Anor*.[45] Though no retainer is implied nevertheless the court may regard the applicant for relief as a 'quasi-client' to whom the duty of confidence is owed by the solicitor and his firm.[46] It is clear from the various cases in different jurisdictions that the outcome of each case of an attempt to disqualify a firm or lawyer in a 'potential' or 'near' solicitor client relationship will depend totally on the particular facts keeping in mind that the burden of proof is on the person seeking removal of the lawyer . One example of facts that did not persuade the judge that a solicitor-client relationship

42 Commentary 4 of Principle 8.03, Solicitors' Guide.
43 [2004] 1 HKC 214.
44 See Chapter 6 above, paragraph [6-87] onwards.
45 [2012] 2 HKC 266, [2012] 2 HKLRD 160 (CA). See also Chapter 6 above, paragraph [6-96].
46 See *Re a Firm of Solicitors* [1992] 1 QB 959, [1992] 1 All ER 353 (CA, Eng).

was established nor that the communication was intended to be confidential is to be found in an Ontario case[47] where the plaintiff tried to have disqualified from representing the defendant, a solicitor who had received a telephone call from an employee of the plaintiff whilst he was being driven in his car; the solicitor made notes and subsequently exchanged emails. The judge considered the evidence which included the fact that the caller's employer was already legally represented. Mesbur J found that the intent of the calls was to pass information to the solicitor's firm and not intended to be confidential. He therefore declined the application for the defendant's firm to be disqualified.

2.8 Confidential correspondence or documents disclosed to the other party or his solicitor as a result of fraud or mistake

2.8.1 The ethical duty of a solicitor receiving a privileged document by mistake

[8-31] A solicitor should not seek to obtain access to or information from private correspondence or documents belonging to or intended for the other party. This includes not opening or reading letters addressed to someone other than himself or his firm.[48] Where it is obvious to a solicitor that privileged (and not merely confidential) documents have been mistakenly disclosed to him on discovery or otherwise, he must immediately cease to read the documents, inform the other side, and return the documents without making copies. The solicitor should inform his client. He should advise the client that the court is likely to grant an injunction to prevent the overt use of any information gleaned from the documents and that both the client and the solicitor may find costs awarded against them in respect of such an injunction.[49]

2.8.2 The legal duty

[8-32] Several issues are involved. First what is the duty at law of a solicitor who receives confidential documents by mistake? Secondly, what is the common law position of the party who supplied the documents in error? Can he obtain an injunction to restrain the use of the documents and order for their return?

(a) Inadvertent disclosure in civil litigation

[8-33] The first point to note with regard to the inadvertent disclosure of documents to one's opponents in civil proceedings is that, whether or not one's opponent will be permitted to use those documents in support of his case is

47 *Wyn Re Network LP v Vanden Broek* [2011] OJ No 3592.

48 Commentary 5 of Principle 8.03, Solicitors' Guide.

49 Commentary 6 of Principle 8.03, Solicitors' Guide. See also *English and American Insurance Company Ltd v Herbert Smith* [1988] FSR 232, [1987] NLJLR 148; *Ablitt v Mills & Reeve (a firm)* [1995] TLR 635; *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716; and *Pizzey v Ford Motor Co Ltd* The Times, 8 March 1993 (CA, Eng).

essentially a matter of admissibility, not legal professional privilege. As Hoffman J said in *Black & Decker Inc v Flymo Ltd*:[50]

> Once a statement has passed into the hands of the other party the question is no longer one of privilege but of admissibility.

[8-34] The law can best be understood if we consider two situations separately; the first where the documents have been obtained by fraud or a trick; the second where they have been disclosed accidentally.

(b) Documents obtained by fraud or a trick

[8-35] The position is clear, that, where one party has come into possession of confidential document belonging to the other party by way of fraud or a trick the court is very likely to grant an injunction to restrain their use. Thus, for example, in *Lord Ashburton v Pape*[51] the defendant obtained by way of a trick letters written by the plaintiff to his solicitors. The plaintiff applied for an injunction to restrain the defendant from disclosing the letters and the Court of Appeal granted the injunction. In *High Wealth International Ltd v China United Holdings Ltd*,[52] correspondence belonging to the plaintiffs had come into the hands of the defendant in circumstances where the plaintiff did not know how this had occurred. The defendants and their solicitors, however, remained silent as to how they had acquired the correspondence. Suffiad J said that the only inference he could properly draw was that the correspondence had come into the hands of the defendants by improper means. The learned judge accordingly granted an injunction restraining the defendants from using the correspondence in the instant action.

[8-36] What if a party or firm of solicitors have obtained privileged material by deliberate act? In *Canadian Bearings Ltd v Celanese Canada Inc*,[53] the plaintiffs, pursuant to an *Anton Piller* order had seized documents on the defendant's premises which were copied onto a CD-ROM and placed into a sealed envelope since some of the documents were clearly privileged. A lawyer from the plaintiff's law firm opened the envelope, copied the CD-ROM and sent the copy to its associated American law firm. The defendants applied to have the plaintiff's law firm barred from acting in the litigation. The Supreme Court of Canada held that the law firm had not shown that the reasonably informed person would be satisfied that no use would be made of the confidential information and the law firm should be removed as solicitors on record.

(c) Documents obtained as a result of a mistake

[8-37] The second situation to be considered is where a party has come into possession of confidential documents other than by way of a trick or improper tactics. Perhaps they have been accidentally disclosed to the other party. The position here is more complex. One of the earliest cases in which this situation was considered is *Goddard v Nationwide Building Society*,[54] where the plaintiffs

50 [1991] 1 WLR 753 at 755.

51 [1913] 2 Ch 469.

52 (unreported, HCA 456/2000, 19 December 2000).

53 (2006) 269 DLR (4th) 193 (Can SC).

54 [1986] 3 WLR 734 (CA, Eng).

had purchased a house assisted by a mortgage from the defendants, the same solicitor acting for both the mortgagor and mortgagee. A dispute arose as to defects in the property and proceedings were instituted against the defendant in negligence. The solicitor, who had acted for the parties to the conveyance, sent to the defendant copies of notes of conversations that he had held with the plaintiffs and the defendants pleaded the substance of them in their defence. In response to an application for injunctive relief by the plaintiff, the Court of Appeal held that a party applying to restrain the use of privileged material must do so before the other party has adduced evidence of the privileged material or sought to rely on it at the trial. If application is made in time, the court, in the exercise of its equitable jurisdiction has no discretion to refuse to allow an injunction.

[8-38] The position where documents are disclosed by mistake as part of the civil pre-trial discovery process was also considered in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*.[55] In the course of discovery a privileged letter was inadvertently included in the Part I list of documents and inspection took place. The defendant's solicitors, when they realised that a confidential document had been disclosed, applied for an order to prevent the plaintiffs from making use of the document at the trial and the court ruled that privilege had not been lost by the inadvertent disclosure. Slade LJ laid down three principles:

(i) where solicitors have mistakenly included a privileged document in Part I of the list, the court will ordinarily allow the list to be amended at any time before inspection.

(ii) Subject to (iii) below, once inspection has taken place, it is generally too late for a party to claim injunctive relief.

(iii) If the recipient party or his solicitor has (a) procured inspection of the document by fraud; or (b) on inspection realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene for the protection of the mistaken party by the grant of an injunction in exercise of its equitable jurisdiction as illustrated by the *Ashburton*, *Goddard* and *Herbert Smith* cases. In the case of (iii), the court should normally intervene, unless the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy – for example, delay.[56]

[8-39] The next clear development of the law was to recognise that, if some blame rested upon the disclosing party, the courts, in deciding whether to grant injunctive relief, had to conduct a balancing exercise to reach a conclusion that was fair in all the circumstances of the case. In *Webster v James Chapman (a firm)*,[57] Scott J first

55 [1987] 2 All ER 716, [1987] 1 WLR 1027 (CA, Eng).

56 The High Court of Australia has made it clear that a superior court (here the Supreme Court of New South Wales) had the necessary supervisory powers to ensure that a party be permitted to cure a mistake in the discovery process. There was no issue about whether privilege had been waived. The documents should be returned promptly as a matter of normal ethical conduct. A party should, however, act promptly to try and recover the mistake. See *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46.

57 [1989] 3 All ER 939.

recognised that the issue was one of confidentiality and not privilege. In this case an expert's report had been disclosed to the defendant as the result of carelessness on the part of the plaintiff's solicitors. Scott J held that, since the document had come into the defendant's hands as a result, not of fraud on the defendant's side, but through carelessness on the part of the plaintiff's solicitors, on a proper balance, the court should exercise its discretion by permitting the report to be put into evidence by the defendants. He ruled that the defendant's case would be seriously embarrassed if he and his legal advisers were not permitted to make use of their knowledge, knowledge which had come into their possession through no fault of their own.

[8-40] The present state of the law was clearly summarised by Lawrence Collins J in *ISTIL Group Inc v Zahoor*.[58] After a privileged document had been seen by the opposing party, the court might intervene by way of granting an injunction if the circumstances warranted such intervention on equitable grounds. If the party into whose hands the document had come (or his solicitors) either had procured inspection of the document by fraud or on inspection realised that he had been permitted to see the document only be reason of an obvious mistake, the court had power to intervene by the grant of an injunction. In such a case the court should ordinarily intervene unless the case was one where the injunction could properly be refused on general grounds affecting the grant of a discretionary remedy.[59]

(d) Accidental disclosure through the court process

[8-41] Where the documents in question have been accidentally disclosed to the other party to an action through the court process, further considerations of policy might apply. For example, in *Hayward v Wegg-Prosser*,[60] letters written by a solicitor to his client accidentally came into the possession of another party as a result of taxation of the costs and the receiving party commenced an action for defamation based upon the contents of the letters. The solicitor sought to have the action stayed and Tudor-Evans J held that the plaintiffs had no right to use a document which had been produced to an officer of the court as part of the compulsory process of taxation, and which they had obtained accidentally, since it was also in the public interest to restrain the plaintiffs. It was necessary for the proper function of a legal process that a solicitor should be able to disclose any papers to an officer of the court without the risk that the papers might be used against him or his client in subsequent litigation. The injunction sought was granted.

58 [2003] 2 All ER 252.

59 The issue of whether the mistake was 'obvious' is key. In *Al Fayed & Ors v Commissioner of Police for the Metropolis & Ors* [2002] EWCA Civ 780 where it had not been obvious to the claimants' solicitors that privileged documents had been disclosed by mistake, the Court of Appeal held that the judge at first instance had been wrong to grant an injunction restricting their use and to have ordered their return, and both the injunction and the order would therefore be discharged. The principles laid down in *Al Fayed* were approved and applied by Bharwaney J in *Koay Ai See v Dr Chan Kung Ngai* [2015] 5 HKC 58.

60 (1978) 122 Sol Jo 792.

(e) Criminal litigation

[8-42] The principles that apply to civil litigation do not, however, appear to apply in criminal cases in the light of considerations of public policy. The position in England is clear. In *Butler v Board of Trade*,[61] Goff J said:

> In my judgment it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged.[62]

[8-43] This principle was approved by the Court of Appeal in *Goddard v Nationwide Building Society*,[63] Nourse LJ commenting that the distinction rested on grounds of public policy.

[8-44] The opposite situation may arise where there is privileged material that may be useful to the defence to establish the innocence of the accused or to cast a doubt upon his guilt. In this event the accused may ask the court to override the privilege.

(f) The ethical duty of counsel receiving a confidential document by mistake

[8-45] The ethical duty of counsel who receives a document belonging to the other side is prescribed by Paragraph 10.45 of the Bar Code which provides that a barrister must return his instructions without delay if, having come into possession of a document belonging to another party by some means other than the normal and proper channels and having read it before he realises that it ought to have been returned unread to the person entitled to possession of it, he would thereby be embarrassed in the discharge of his duties by his knowledge of the contents of the document provided that he may retire or withdraw only if he can do so without jeopardising the client's interests.[64]

2.9 Cases where the duty of confidentiality is inapplicable or is overridden

2.9.1 Disclosure to prevent commission of crime

[8-46] There are certain cases where the solicitor's duty of confidentiality is inapplicable or is overridden. For example, a solicitor may, in exceptional

61 [1970] 3 All ER 593 at 599.

62 The learned judge relied partly upon the principle laid down in *Elias v Pasmore* [1934] 2 KB 164 to the effect that the police were justified in retaining and using at the trial of a defendant documents which they had seized irregularly and also the principles stated by Lord Denning MR in *Ghani v Jones* [1970] 1 QB 693 at 708–9.

63 [1986] 3 WLR 734 (CA, Eng) (see above).

64 The ethical duty of a solicitor receiving a confidential document by mistake to quickly return the documents unread or ceased to be read, differs from the ethical duty of a barrister, who is not required to return the documents immediately under paragraph 10.45 of the Bar Code.

circumstances, breach his duty of confidentiality to the extent of revealing information that he believes necessary to prevent a client or any other person from committing or continuing a criminal act that the solicitor believes on reasonable grounds does involve or is likely to result in the abduction of or serious violence to a person (including child abuse). Even then the solicitor must exercise his professional judgment and decide whether there are any other means of preventing the crime and, if not, whether the public interest in protecting persons at risk from serious harm outweighs his duty to his client.[65] Communications made by a client before the commission of a crime or during the commission of a continuing crime for the purpose of being guided or helped in the commission of that crime are not confidential, since they fall outside the scope of the professional retainer.[66]

2.9.2 Disclosure to recover costs or in defence of allegations of misconduct

[8-47] A solicitor may be justified in disclosing confidential information in order to recover costs from a client or in defence of allegations of malpractice or misconduct, but only to the extent reasonably necessary for such purpose.[67]

2.9.3 Disclosure to establish defence to criminal charge or civil claim

[8-48] 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 (including an investigation as to entitlement to indemnity under the Professional Indemnity Scheme) against him or his firm or where the solicitor's conduct in under investigation by the Law Society or the Solicitors' Disciplinary Tribunal.[68]

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

(a) Duty to comply with court order

[8-49] 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.[69] 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*,[70]

65 Commentary 16 of Principle 8.01, Solicitors' Guide. See further paragraph [8-128] below.

66 Commentary 9 of Principle 8.01, Solicitors' Guide.

67 Commentary 17(a) of Principle 8.01, Solicitors' Guide. See further paragraph [8-120] below.

68 Commentary 17(b) of Principle 8.01, Solicitors' Guide. See further paragraph [8-118] below.

69 See Commentary 6 of Principle 8.01, Solicitors' Guide.

70 [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.

[8-50] Where a warrant permits a police officer or other authority to seize confidential documents a solicitor should comply with the terms of the warrant. If, however, 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.[71] 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 *subpoena* so that he may where appropriate claim privilege and leave the court to decide the issue.[72]

(b) Duty to assert legal professional privilege where applicable

[8-51] 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 right unilaterally to waive a client's privilege and the consent of the client or a court order must be obtained.[73]

2.9.5 Disclosure in compliance with statute

[8-52] There are circumstances in which disclosure is required under various Ordinances, for example, the Prevention of Bribery Ordinance (Cap 201), the Inland Revenue Ordinance (Cap 112) and sections 8A, 8AA, 8B(2) and Part IIA of the Legal Practitioners Ordinance (Cap 159). In relation to anti-money laundering provisions, see the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405); the Organized and Serious Crimes Ordinance (Cap 455); the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575); The Law Society Practice Direction P and Law Society Circulars 59 of 2008, 361 of 2008, 362 of 2008, 756 of 2008

71 Commentary 6 of Principle 8.01, Solicitors' Guide.
72 Commentary 7 of Principle 8.01, Solicitors' Guide. See further paragraph [8-177] below.
73 Commentary 8 of Principle 8.01, Solicitors' Guide.

and 360 of 2009. It should be noted that the anti-money laundering provisions specifically exclude from the duty of disclosure information subject to legal professional privilege ie legal advice and related documents prepared or given in contemplation of or in connection with legal proceedings. Such provisions, however, do not exclude the duty to disclose information that is merely confidential.[74]

2.9.6 No more information should be disclosed than is required

[8-53] When disclosure is required by law or by order of a court of competent jurisdiction a solicitor should always be careful not to divulge more information than is required. Privileged information should not be revealed unless the law or a court order clearly overrides legal professional privilege and not merely the duty of confidentiality.[75]

2.10 Waiver by the client and the solicitor's implied authority to disclose confidential information

[8-54] The client may, of course, waive the duty of confidentiality either expressly or by implication.[76] Where there is a joint retainer, the consent of all the parties must be obtained before the duty to preserve confidentiality can be waived.[77] 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, disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. This implied authority to disclose places the firm under a duty to impress upon its own lawyers and staff and those of any firm with which it may be associated the importance of non-disclosure both during their employment and afterwards.[78] Waiver is discussed at greater length under legal professional privilege.[79]

2.11 Duty of solicitor to advise client promptly that disclosure has occurred

[8-55] Where disclosure has taken place, a solicitor should inform his client promptly that he has done so.[80]

74 See Commentary 11 of Principle 8.01, Solicitor's Guide. See also paragraph [8-154] below.
75 Commentary 11 of Principle 8.01, Solicitors' Guide. For a summary of the distinction between confidentiality and legal professional privilege see *PCCW-HKT Telephone Ltd v Aitken* [2009] 2 HKLRD 274, [2009] 2 HKC 342 (CFA); *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4 HKC 579. As to limited waiver by the client see *Citic Pacific Ltd v Secretary for Justice & Anor* [2012] 4 HKC 1.
76 Principle 8.01, Solicitors' Guide.
77 Commentary 24 of Principle 8.01, Solicitors' Guide.
78 Commentary 14 of Principle 8.01, Solicitors' Guide.
79 See paragraph [8-102] below.
80 Commentary 34 of Principle 8.01, Solicitors' Guide.

They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their clients and to the court. They must respect the same confidences. They and their clients must have the same privileges.

[14-2] In this chapter we will discuss the ethical rights and duties of employed lawyers without distinction between employed lawyers and government lawyers. Chapter 24 below deals specifically with employed barristers.

2. Employed Solicitors Admitted to Practise in Hong Kong are Subject to the Profession's Rules of Professional Conduct

[14-3] The overriding principle of conduct is that a solicitor who works for a non-solicitor employer must comply with the Solicitors' Practice Rules (Cap 159H), Practice Directions and the rules and principles of professional conduct[3] and this principle applies whether or not the solicitor holds a current practising certificate.[4] This obligation takes priority over any conflicting demands or requirements of the non-solicitor employer.[5] Employed solicitors, who are admitted in Hong Kong,[6] are also subject to the disciplinary processes of the profession laid down in the Legal Practitioners Ordinance (Cap 159).

[14-4] By contrast, solicitors employed in-house in Hong Kong who are *not* on the roll of solicitors in Hong Kong are not subject to discipline in Hong Kong and, in an appropriate case, any misconduct committed in Hong Kong is likely to be reported to their home jurisdiction for appropriate disciplinary action to be taken there. Of course, in the case of Government lawyers, disciplinary action may be taken by virtue of the solicitor being a member of the civil service.

3. Independence

[14-5] Employed solicitors are obliged to comply with the Solicitors' Practice Rules, Practice Directions and the rules and principles of professional conduct

3 Principle 2.08, Solicitors' Guide. Specific guidance is provided by Law Society Practice Direction N 'Employed Solicitors' which is considered below. Other guidance for solicitors employed by non-solicitor employers is found in commentary 2 of Principle 12.04 (employed solicitors personally liable for barrister's fees) and Principle 14.03 (employed solicitor liable on professional undertakings).

4 This is because of the definition of a 'solicitor' in section 2(1), Legal Practitioners Ordinance (Cap 159), which provides that 'solicitor' means a solicitor enrolled on the roll of solicitors and not suspended from practice. Thus a solicitor, whether or not he holds a practising certificate, is subject to the disciplinary regime of the Legal Practitioners Ordinance (Cap 159).

5 Commentary 2 of Principle 2.08, Solicitors' Guide.

6 The disciplinary provisions of the Legal Practitioners Ordinance (Cap 159) apply to 'solicitors', who are defined in section 2 of the Ordinance as 'solicitors who are enrolled on the roll of solicitors'.

and this obligation takes priority over any conflicting demands or requirements of the non-solicitor employer.[7]

[14-6] Therefore the employed solicitor is required to maintain his professional independence while employed and ought to make it clear to the employer that his professional obligations are paramount when there is any conflicting demand by the employer.

4. Legal Professional Privilege and Employed Lawyers[8]

[14-7] Many communications will pass between employed lawyers and their client-employers and the issue arises as to whether legal professional privilege will attach to these communications in the same way as for lawyers in private practice. As we have already seen, Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*,[9] expressed the view at 376 that salaried legal advisers were regarded by the law as being in every respect in the same position as those who practised on their own account. He expressly said that they, and their clients, enjoy the same privileges. Legal professional privilege would, therefore, attach to communications between the employed lawyer and his employer. This view gains support from the decision of the High Court of Australia in *Attorney-General for the Northern Territories v Kearney*.[10]

[14-8] In *R v Dainer, ex parte Pullen*,[11] Kelly J, ruling that a brief from the police to the Director of Public Prosecutions was protected by privilege, held that communications to the Director of Public Prosecutions, which were brought into existence for the sole purpose of obtaining advice or for use in litigation, would be subject to legal professional privilege, either because the Director was the legal adviser to the Australian Federal Police, when the police instituted criminal proceedings, or because, in exercising his statutory functions as a prosecutor, the Director was necessarily the legal adviser of the Crown in connection with such proceedings.

[14-9] The position was considered again by the High Court of Australia in *Waterford v Commonwealth*,[12] where the court was called upon to decide whether the Commonwealth could claim legal professional privilege in respect of documents containing legal advice from within the Commonwealth Government. The High Court unanimously rejected the proposition that legal professional privilege could never be claimed in respect of communications passing between the Government and a salaried Government lawyer. The court, however, taking account of the reservations expressed by the European Court of Justice in *AM &*

7 Commentary 2 of Principle 2.08, Solicitors' Guide.

8 This topic is also dealt with in Chapter 8 above at paragraphs [8-97] to [8-99].

9 [1972] 2 All ER 373 (CA, Eng).

10 (1985) 59 ALJR 749 (Aust HC).

11 (1988) 78 ACTR 25.

12 (1987) 61 ALJR 350 (Aust HC).

S Europe Ltd v Commission of the European Communities,[13] were of the opinion that, to be accorded the protection of legal professional privilege, the advice given by the employed lawyer must be independently given, notwithstanding the fact of the employment relationship. Brennan J expressed some doubt as to whether salaried lawyers could be independent for the purpose of the protection afforded by legal professional privilege, but was prepared to concede that, in the instant case, the legal officers enjoyed sufficient professional independence. The court was also of the opinion that employed lawyers had to be qualified to practise law and be subject to the duty to observe the professional standards and be liable to professional discipline. Deane J went further in requiring the lawyer to hold a practising certificate.

[14-10] In Hong Kong in *Citic Pacific Ltd v Secretary for Justice*,[14] Wright J considered whether communications from the Group Legal Department to the Company's employees would attract legal professional privilege. He referred to Lord Denning's view, in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*,[15] that legal professional privilege does attach to communications between the employed lawyer and his employer (see above). He pointed out that sometimes the legal adviser did work other than legal work for his employer, perhaps of an executive nature. Their communications in that capacity would not attract legal professional privilege. In-house legal advisers were more likely to become involved in aspects of business that were essentially managerial or administrative in nature. To that extent it was less easy to maintain that *all* communications passing between them and the company's management attracted privilege.

[14-11] In *Sombahamphe Tanka v The Secretary of Justice on behalf of the Commissioner of Police*,[16] the question arose as to whether communications from the police to the Department of Justice seeking legal advice on the prosecution of a rape charge were protected by legal professional privilege. The court held that the police investigation report into the matter and submitted to the Department of Justice had been brought into existence for the dominant purpose of seeking legal advice and would be protected from disclosure by legal professional privilege.[17]

[14-12] It must, in conclusion, be admitted that there exists a degree of uncertainty as to the present scope of legal professional privilege enjoyed by employed lawyers. It would seem to be wise in the circumstances for employed lawyers to gain admission to the local profession and take out practising certificates.

13 [1983] QB 878 at 950.
14 [2011] HKCU 2465 (unreported, HCMP 767/2010, 19 December 2011).
15 [1972] 2 QB 102 at 109.
16 [2013] 1 HKLRD 311, [2012] HKCU 2347.
17 Also see *Re Dainer, ex parte Pullen* (1988) 78 ACTR 25 (ACT SC) and *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (Vic SC).

5. Permitted Activities of Employed Solicitors

[14-13] We will now turn our attention to solicitors who are employed in-house. Government lawyers will be considered separately.

5.1 Services that may be performed by employed solicitors holding practising certificates

[14-14] The services that may be performed by employed solicitors are now prescribed by Practice Direction N 'Employed Solicitors' which came into effect as from 1 June 2007. The Practice Direction applies to all solicitors employed by non-solicitor employers except for Government legal officers[18] or those solicitors who are employees of statutory bodies and who are empowered by law to act in a legal capacity in the discharge of their duties with such employer. An employed solicitor must satisfy the following conditions (which apply to him under section 7 of the Legal Practitioners Ordinance) before he can act as a solicitor in accordance with this Practice Direction:

(a) his name is for the time being on the roll of solicitors;
(b) he is not suspended from practice; and
(c) he has in force a current practising certificate.

5.1.1 The general provision: employed solicitors acting in the course of their employment are in the same position as solicitors acting for private clients

[14-15] Practice Direction N 'Employed Solicitors' significantly liberalised the rights of employed solicitors to practise on behalf of their employers in the course of their employment. It provides that, subject to the provisions in the Practice Direction, an employed solicitor acting in the course of his employment as a solicitor for his employer and any related body[19] of such employer is in the same

18 The Practice Direction does not apply to any legal officer within the meaning of section 2 of the Legal Officers Ordinance (Cap 87), any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap 91), or any person deemed to be a legal officer for the purposes of the Legal Officers Ordinance (Cap 87) by virtue of section 3(3) of the Director of Intellectual Property (Establishment) Ordinance (Cap 412) or section 75(3) of the Bankruptcy Ordinance (Cap 6) or require any such person or any clerk, trainee solicitor or officer appointed to act for him to be admitted in any case where it would not have been necessary for him to be admitted if this Ordinance had not been enacted.

19 (a) Where the employer is a company, a 'related body' of the employer means a subsidiary or an associated company or holding company of the employer. (i) a company is a subsidiary of another company if the company is deemed to be a subsidiary of that other company for the purposes of the Companies Ordinance (Cap 622); (ii) a company is the holding company of another company if that other company is a subsidiary of the company; and (iii) a company is deemed to be an associated company of another company if both of them are subsidiaries of the same holding company.

position as a solicitor acting for a client. He must, however, advise the parties involved in the matter in which he is acting as a solicitor that he is not covered by the Professional Indemnity Scheme referred to in the Solicitors (Professional Indemnity) Rules.[20]

5.2 Restrictions upon employed solicitors' right to practise

5.2.1 Conveyancing transactions

[14-16] An employed solicitor may act as a solicitor in conveyancing transactions only in the following circumstances:

(a) For his employer where the employer is not in the capacity of a trustee and is:

(i) either the purchaser or lessee;

(ii) the landlord, provided that the employed solicitor does not act for the tenant as well and that the tenant has been advised to seek independent legal advice;

(iii) the mortgagee, provided that the mortgagor is represented by another solicitor and that the mortgagee should not be entitled to charge the mortgagor for any legal costs or disbursements;

(iv) the vendor of a completed development provided that the purchaser is represented by another solicitor who is not in the same employment and provided that the vendor should not be entitled to charge the purchaser for any legal costs or disbursements.

[14-17] An employed solicitor may also act in a conveyancing transaction in the following circumstances:

(a) For both his employer and a related body of his employer where none are in the capacity of a trustee and:

(i) one of them is the vendor and the other is the purchaser in the sale and purchase of any land;

(ii) one of them is the lessor and the other is the lessee in the lease of any land;

(iii) one of them is the borrower or mortgagor and the other is the lender or mortgagee in the mortgage of any land.[21]

(b) Where the employer is a partnership, a 'related body' of the employer means a partnership or company beneficially owned or controlled by the employer.

20 Practice Direction N, paragraph 3.

21 Practice Direction N, paragraph 4(a)(i), (ii).

[14-18] Where an employed solicitor acts as a solicitor in a conveyancing transaction, he must not act as stakeholder or give professional undertakings in the transaction.[22] Further, where an employed solicitor acts as a solicitor for his employer or a related body in conveyancing transactions, he must hold a current practising certificate which does not bear any condition restricting him not to practise as a solicitor on his own account or in partnership (referred to as an 'unconditional practising certificate') or be supervised by a solicitor holding a current unconditional practising certificate.[23]

5.2.2 Civil and criminal litigation

[14-19] Under Practice Direction N, employed solicitors have been placed in generally the same position as solicitors acting for private clients. Where, however, an employed solicitor acts as a solicitor for his employer or a related body[24] *in litigation,* he must hold a current practising certificate which does not bear any condition restricting him not to practise as a solicitor on his own account or in partnership (referred to as an 'unconditional practising certificate') or be supervised by a solicitor holding a current unconditional practising certificate.[25] Further, an employed solicitor's right to act in litigation requires him to advise the parties involved in the matter in which he is acting as a solicitor that he is not covered by the Professional Indemnity Scheme referred to in the Solicitors (Professional Indemnity) Rules.[26]

5.2.3 Administering oaths etc

[14-20] An employed solicitor may, as a solicitor, administer oaths, affidavits, affirmations or declarations or certify that a document is a true copy of the original produced to him in the same manner as a solicitor in private practice.[27]

5.2.4 Conducting weddings

[14-21] An employed solicitor may act as a civil celebrant in the same manner as a solicitor in private practice provided that he advises the couple that he is not covered by a Professional Indemnity Scheme referred to in the Solicitors (Professional Indemnity) Rules.[28]

22 Practice Direction N, paragraph 4(b).

23 Practice Direction N, paragraph 5.

24 See Law Society Circular No 31 of 2001.

25 Practice Direction N, paragraph 5.

26 Practice Direction N, paragraph 3.

27 Practice Direction N, paragraph 7.

28 Practice Direction N, paragraph 8.

6. Liability of Employed Solicitors in Respect of Their Undertakings

[14-22] A solicitor in employment outside private practice is personally responsible for honouring his professional undertakings.[29] Further, he must carefully consider the personal implications of an undertaking, particularly those given in the course of his employment, for example, because of the possibility that the employer might become insolvent or otherwise refuse to fulfil the undertaking, since such default will not affect the personal responsibility of the solicitor for the undertaking.[30] A solicitor who is the head of a legal department in commerce, industry or government is responsible for undertakings given by members of his department and this principle applies whether the undertaking is signed by admitted or unadmitted staff in his department.[31] Solicitors who accept an undertaking from legal departments in commerce, industry or local Government are advised to take particular care where the head of department is an unadmitted person to ensure that the undertaking is given by a solicitor.[32]

6.1 Employed solicitors, their fees and their employer

[14-23] Employed solicitors will often act in contentious or non-contentious matters on behalf of their employers and may be awarded costs to be paid by third parties in respect of such work. We have already seen that, as a general principle,[33] a solicitor may not share his profit costs with an unqualified person.[34] As an exception, however, the Solicitors' Practice Rules provide that a solicitor, who has agreed in consideration of a salary to do the legal work of an employer who is not a solicitor, may agree with such employer to set off his profit costs received in respect of contentious business from the opponents of such employer or the costs paid to him as the solicitor for such employer by third parties of non-contentious business, against the salary so paid or payable to him and the reasonable office expenses incurred by such employer in connection with such solicitor and to the extent of such salary and expenses.[35]

[14-24] If, however, the fees (less overhead expenses) exceed the employed solicitor's salary, it would appear to follow that he must either retain the excess or decline to accept the money. All bills that the employed solicitor delivers must be in his own name and the employer must be in a position to apportion the overheads of its legal department between the fee earners in the company so that the proportion of each is readily ascertainable.[36]

29 Principle 14.03, Solicitors' Guide.
30 Commentary 1 of Principle 14.03, Solicitors' Guide.
31 Commentary 2 of Principle 14.03, Solicitors' Guide.
32 Commentary 3 of Principle 14.03, Solicitors' Guide.
33 See Chapter 7 above.
34 Rule 4, Solicitors' Practice Rules.
35 Rule 4(b), Solicitors' Practice Rules.
36 Opinion of the Guidance Committee given on 22 June 1993.

7. Some Ethical Problems for Employed Solicitors

7.1 Conflict of interest

[14-25] The employer corporation is the sole client of the employed solicitor, but the solicitor will also be concerned with the day-to-day problems of the company directors and company employees. What is the solicitor's position, for example, where a conflict of interest arises between the interests of his employer and his fellow employees? For example, an employee might be injured at work and wish to claim compensation from his employer. Should the employed solicitor be ready and willing to negotiate a settlement or does this involve him in a conflict of interest? It is suggested that, since the employer is the only client of the solicitor, it would be sensible for the solicitor to recommend that the employee seek separate legal representation.

[14-26] There might also arise a conflict of interest between the employer and the directors or shareholders. For example, a director might inform the solicitor that he has committed a breach of his duties as director, which might have adverse effect upon the interests of the company and shareholders. Again the interests of the company must prevail, but the solicitor is placed in a very difficult position. Not only should he refuse to assist the director by concealing the breach of duty, but there is strong argument to the effect that he should inform his employer - his client. But whom does he inform if, for example, it is the managing director who has made the admission? Has he a duty to notify all the shareholders. It is suggested that, since it is the corporation that is the client, the solicitor should advise the director to seek legal advice elsewhere and should notify the other directors of what he has been told.

7.2 Knowledge of improper dealings

[14-27] The second problem that might arise for the employed solicitor is where he becomes aware that his employer is involved in improper business dealings; for example, where the employer has, to his knowledge, made incorrect returns, or intends to do such, to the Inland Revenue. Does the lawyer have a duty to report these activities to the appropriate authorities? The general principle of ethics is that a lawyer has no duty to report previous illegal acts of his client, which are protected by the duty of confidentiality, but communications made in furtherance of fraud or criminal activity are not protected by legal professional privilege. Clearly the solicitor has a duty to try to persuade his client to refrain from such activity and he should report the matter to a senior member of the firm. If, however, the fraud is not stopped, does the lawyer have a positive duty to report such proposed fraud or illegality? It might be argued that he has a duty to do so by virtue of his higher duty to the administration of justice, but this places the in-house lawyer in a very difficult position. It can also be stated with confidence, of course, that the lawyer must ensure that he himself is not implicated in any such activity.

8. Employed Solicitors Who Also Maintain a Private Practice

8.1 Employed solicitors may establish private practices

[14-28] There is no principle of conduct which forbids an employed solicitor from establishing a private practice, although a prohibition or limit on practice of this nature may be prescribed by the solicitor's contract of employment. In the absence of such a restriction the employed solicitor who wishes to undertake, in addition to his work for his lay-employer, some private practice on his own account must conform to the standard requirements of obtaining an appropriate practising certificate (unconditional if a sole principal or partner) and comply with the Solicitors (Professional Indemnity) Rules and the Solicitors' Accounts Rules. He may then accept clients and act for them, whether they are fellow staff of his employer, customers of his employer or strangers. In doing business with clients who are fellow staff or customers of his employer, however, the solicitor must be alert to possible breach of rule 2 of the Solicitors' Practice Rules and ensure that the clients are aware that they are free to instruct a solicitor of their choice.[37]

8.2 Practising from an office in the employer's workplace; independence and confidentiality may be in jeopardy

[14-29] The employed solicitor should not conduct his private practice from an office in his employer's workplace for fear that he will contravene rules 2 and 4 of the Solicitors' Practice Rules and also the obligations of confidentiality which he owes to both his employer and his clients. If the employed solicitor chooses to operate from his employer's premises when acting as a solicitor in private practice, then the fundamental obligations of confidentiality and loyalty owed to his private clients are in jeopardy. For example, a telephone call from a private client to the employer's premises may be logged and even recorded by the employer; this would breach the duty to keep such information confidential.[38] The solicitor's files will be accessible to the employer's staff who assist the solicitor in his private practice and who owe duties of fidelity and loyalty to the employer. Further the employer will have the right at any time to enter the solicitor's office. Also, despite efforts being made to show that the solicitor is 'independent' of his employer, the intimate association of place and staff and lack of control over confidentiality all add up to the appearance of the solicitor being the employer's agent.[39]The authors, therefore, conclude that attempts to safeguard confidentiality will be useless and, no matter what is agreement is reached between the solicitor

37 See rule 2(b), Solicitors' Practice Rules and Principle 2.09, Solicitors' Guide (restrictions on other business).

38 Principle 8.01, Solicitors' Guide.

39 This would be tantamount in effect to allowing an unqualified person (the employer) to act as a solicitor contrary to section 49, Legal Practitioners Ordinance (Cap 159).

and his employer, the risk of breach of confidentiality will be too great to permit a solicitor to practise from an office in his employer's workplace. He should set up his own office elsewhere.

8.3 Conflict of interest and the private practice of employed solicitors

[14-30] One issue that might arise for the private practice solicitor who is also employed by a lay employer is that there may arise a conflict of interest between his private clients and either his own interests because of his employment or the interests of his employer client. This issue is, however, the same for any solicitor in private practice who has a general on-going retainer with a long-standing client of substance.

any privilege from disclosure. It is plainly in the public interest, as well as the interests of the profession, that the Institute should be enabled to obtain all such information in the profession of its members as is relevant to complaints of their professional misconduct.[29]

5.3 Consideration of the complaint and possible consequences

[15-19] When a response is received, the response may be sent to the complainant for his comments. After a report has been prepared, the complaint will be considered by an Investigation Committee and many complaints are dismissed at this point without further reference to any other committee, unless one of the parties objects. The sanctions that can be imposed at this stage are a letter of regret or of disapproval signed by the Chairman of the Standing Committee and sent to the solicitor against whom the complaint has been made. If the explanation from the solicitor or foreign lawyer is not satisfactory, however, the complaint will be placed before the full Standing Committee on Compliance who, on behalf of the Council, may deal with the complaint by way of reprimanding the solicitor or, if the conduct complained of merits further investigation, may refer the complaint by way of affidavit to the Convenor or Deputy Convenor of the Solicitors Disciplinary Tribunal Panel. It is open to either party to seek a review of an Investigation Committee decision by the Standing Committee on Compliance.[30]

5.4 Swift submission of a complaint to the Convenor of the Solicitors Disciplinary Tribunal

[15-20] It is important that the Council of the Law Society (the Council) investigates complaints fully and quickly if public confidence is to be maintained. When a complaint to the Council is not submitted to the Convenor of the Solicitors' Disciplinary Tribunal within six months of receiving it, section 9A(2) of the Legal Practitioners Ordinance empowers the Chief Justice to submit the matter to the Convenor. Note the Council need not wait until there is a conviction:

29 The same reasoning was subsequently applied to solicitors' disciplinary proceedings in England and Wales (*Macpherson v Law Society* [2005] EWHC 2837 (Admin) at paragraph 10; *Holder v Law Society* [2005] EWHC 2023 (Admin) at paragraphs 34–42) and has seen the courts paying significant regard to the nature of a regulator's responsibilities and the public interest inherent in their work. Provided that the public interest is sufficiently great, any regulator exercising supervisory functions of its members is likely to be able to require information or assistance from them, notwithstanding that this may expose the member in question to further regulatory proceedings. It would appear then that the same would apply to a Hong Kong solicitor/respondent answering questions in the course of the Disciplinary Hearing itself. See also Chapter 4 above, paragraphs [4-234]–[4-235].

30 Section 9A(1), Legal Practitioners Ordinance (Cap 159). See also Chapter 15, Solicitors' Guide, 'Complaints'; para 3, 'Sanctions'.

where the Council has reason to suspect a solicitor has been guilty of dishonesty it can intervene in the solicitor's practice.[31]

5.5 Summary disposal

[15-21] The Standing Committee may refer the complaint to the Convenor of the Solicitors Disciplinary Tribunal Panel. The Council can choose to have the matter settled by the Convenor when the conditions prescribed by s 9A(1A) are satisfied; the Convenor then has the power to fine the respondent solicitor a 'fixed penalty' of $10,000 together with the fixed investigation costs of $15,000.[32]

6. What Misconduct is Subject to the Disciplinary Process?

6.1 Matters referred to the Solicitors' Disciplinary Tribunal

[15-22] Conduct 'which the Council considers should be inquired into or investigated' is referred to the Solicitors' Disciplinary Tribunal (SDT). There is no requirement that the SDT must determine that it amounts to a statutorily defined act of 'professional misconduct' or of 'unprofessional conduct' before it may penalise. In many other jurisdictions the equivalent Disciplinary Tribunals have to declare a finding of 'professional misconduct' or 'unprofessional conduct' which is statutorily defined. Article 18(d) and (e) of the Articles of Association of the Law Society of Hong Kong refers to conduct which can be investigated as 'misconduct', 'improper, dishonourable or unprofessional' conduct.

> At common law, (serious) professional misconduct has been defined as conduct which 'would reasonably be regarded as disgraceful, dishonourable or discreditable by a solicitor of good repute'.[33]

[15-23] The Hong Kong Solicitors Disciplinary Tribunal is required to inquire into and make orders upon 'complaints' made to it[34] and references from the Council of alleged 'unfitness to practise'.[35] This explains why there is no definition in the Legal Practitioners Ordinance of professional misconduct or unprofessional conduct in relation to a solicitor and indeed acts which might constitute

31 Section 26A, Legal Practitioners Ordinance (Cap 159). See also paragraph [15-13] above.

32 Section 9AB, Legal Practitioners Ordinance (Cap 159). See also the Summary Disposal of Complaints (Solicitors) Rules (Cap 159AD), reg 34. See paragraph [15-93] below.

33 The common law definition is adopted by section 2(2), Legal Practitioners Ordinance (Cap 159) (Cap 159).

34 Section 9A, Legal Practitioners Ordinance (Cap 159).

35 Section 8A(3), Legal Practitioners Ordinance (Cap 159). The Tribunal need not make a finding of 'professional misconduct'. It is sufficient for there to have been a breach of statutory duty, this Guide or of Law Society Practice Directions for a solicitor to be sanctioned; See 'Discipline' Chapter 15, Solicitors' Guide.

misconduct are so diverse that the courts have tended to avoid attempting any comprehensive definition. Clearly a breach of any of the principles and rules laid down in the Legal Practitioners Ordinance, the Solicitors' Practice Rules, the Solicitors' Accounts Rules and other statutory rules will constitute misconduct. So will a breach of any Practice Direction. Of particular significance in this regard is Practice Direction I2, which requires solicitors to comply with the standards of practice and rules of conduct set out in the Hong Kong Solicitors' Guide to Professional Conduct and a breach of such standards and rules may constitute misconduct.[36] The consequences of a breach of Law Society Circulars will depend upon whether the Circular is mandatory and the nature of the guidance given to practitioners.

6.2 Rule 2 of the Solicitors' Practice Rules is the touchstone of professional misconduct

[15-24] Rule 2 of the Solicitors' Practice Rules provides the touchstone for acts by a solicitor that will constitute professional misconduct. Thus even if there is not a precise 'fit' for an alleged act of misconduct in the statutory rules and so on, it will be misconduct if he acts so as to compromise or impair:

(a) his independence or integrity;
(b) the freedom of any person to instruct a solicitor of his choice;
(c) his duty to act in the best interests of his client;
(d) his own reputation or the reputation of the profession;
(e) a proper standard of work; or
(f) his duty to the court.

7. Submission of Complaint to the Solicitors Disciplinary Tribunal Panel and Appointment of a Solicitors Disciplinary Tribunal

7.1 Decision of Council on action to be taken

[15-25] Once a complaint has been submitted to the full Standing Committee (which acts on behalf of the Council) three possible outcomes are provided for in the Ordinance.

7.1.1 Submission of the complaint to the Tribunal Convenor for resolution by the Tribunal

[15-26] Where the Council considers that the conduct of a solicitor, a foreign lawyer, a trainee solicitor or an employee of a solicitor or a foreign lawyer

36 The Tribunal need not make a finding of 'professional misconduct'. It is sufficient for there to have been a breach of statutory duty, this Guide or of Law Society Practice Directions for a solicitor to be sanctioned; See 'Discipline' Chapter 15, Solicitors' Guide.

should be inquired into or investigated as a result of a complaint made to it or otherwise, the Council must submit the matter to the Tribunal Convenor of the Solicitors Disciplinary Tribunal Panel.[37] This is the conventional route whereby the complaint is sent to the Tribunal who will investigate whether there is a prima facie case and, if so, will determine the guilt or otherwise of the solicitor against whom the complaint has been made. This route is appropriate for all complex complaints and complaints which are not likely to be admitted. Where the Council decides to submit a matter to the Tribunal Convenor and considers that the solicitor or foreign lawyer is unfit to practise, it may suspend the solicitor from practice or suspend the foreign lawyer's registration pending a decision of the Solicitors Disciplinary Tribunal.[38]

7.1.2 Submission of simple complaints for which fixed penalties have been provided for summary adjudication to the Tribunal Convenor

[15-27] An alternative procedure was introduced in 2004 to deal quickly and inexpensively with simple complaints in respect of which fixed penalties have been prescribed.[39] Under this route the Council may submit the case to the Tribunal Convenor for disposal rather than to the Disciplinary Tribunal. This alternative route is dealt with at below.

7.1.3 Submission of complaint by the Chief Judge

[15-28] There is a third route which involves the submission of a complaint by the Chief Judge. Where a complaint has been made to the Council which the Council does not submit to the Tribunal Convenor within 6 months after receiving the complaint, the Chief Judge may, on application by any person or on his own initiative, submit the matter to the Tribunal Convenor, if he considers that the Council ought to have done so.[40] In the case of a submission of a case by the Chief Judge, there would appear to be some lack of clarity as to the proper procedure to be adopted. The position was considered and clarified by the Court of Appeal in *Philippe Frederic Delhaise v Solicitors*,[41] where the Chief Judge had referred a complaint to the Tribunal. Notwithstanding the submission, the Law Society concluded that it was inappropriate that they should take over the prosecution of the complaint and the complainant himself set out the charges in an affidavit. The complainant then, with the permission of the Tribunal, prosecuted the complaint before the Tribunal. The complaint was dismissed and the complainant sought to appeal to the Court of Appeal.

[15-29] Rogers V-P first held that the Tribunal had been in error in allowing the complainant to act as prosecutor. If the Law Society, despite the submission of a

37 Section 9A(1), Legal Practitioners Ordinance (Cap 159).
38 Section 8A(3), Legal Practitioners Ordinance (Cap 159).
39 Sections 9A and 9AB, Legal Practitioners Ordinance (Cap 159).
40 Section 9A(2), Legal Practitioners Ordinance (Cap 159).
41 [2005] HKCU 731 (unreported, CACV 147/2004, 8 June 2005).

complaint from the Chief Judge, did not consider it right to bring a prosecution, the Tribunal should have considered the matter and made its own inquiry. Secondly, as to whether the complainant had a right to appeal to the Court of Appeal, section 13 of the Legal Practitioners Ordinance only related, and had always been treated as only relating, to an appeal by the person whose conduct had been inquired into and investigated and not to an appeal by the prosecutor. That was the reason why section 13(2A) of the Ordinance had been added expressly conferring a right of appeal on the Council of the Law Society. No right of appeal had been conferred, however, on a prosecutor who was not the Council of the Law Society. The mere fact that the Tribunal allowed the complainant to act as prosecutor, did not constitute the complainant as acting for the Council of the Law Society. The Court of Appeal, therefore, had no jurisdiction to entertain an appeal from the complainant.

7.2 Suspension of solicitor pending outcome of disciplinary proceedings

[15-30] According to section 8A(3) of the Legal Practitioners Ordinance, if the Council considers that a solicitor or foreign lawyer is unfit to practise, it may suspend the solicitor from practice or suspend the foreign lawyer's registration pending a decision of the Solicitors Disciplinary Tribunal.

[15-31] The Law Society Council's decision to suspend, pending the outcome of disciplinary proceedings, a solicitor who had been convicted of a serious criminal offence against which he had appealed was challenged by way of judicial review in *Lam Ping Cheung Andrew v The Law Society of Hong Kong*.[42] The applicant, a solicitor, had been convicted of the offence of conspiracy to pervert the course of justice and had been sentenced to four years' imprisonment. He appealed and was granted bail pending the hearing of the appeal which was due to be heard in 18 months' time.

[15-32] Following the conviction, the Council, having considered the representations made by the applicant, concluded that the applicant was unfit to practise and referred the matter to the Solicitors Disciplinary Tribunal. It also suspended the applicant from practice pursuant to its powers of interim suspension pending the outcome of disciplinary proceedings under section 8A(3) of the Ordinance and also refused to issue a practising certificate for the year 2007. The applicant sought judicial review of these decisions on the grounds that the Council has acted unfairly. In particular the applicant contended that he had not been shown copies of certain reports.

[15-33] A Cheung J, having considered the principle of fairness as explained by the House of Lords in *R v Secretary of State for the Home Department, ex parte Doody*,[43] concluded that fairness required that a person accused should be informed of the gist of the case which he was called upon to answer. In the instant case the applicant should have been shown one of the reports involved. Since,

42 [2007] 1 HKC 123.
43 [1994] 1 AC 531 (HL).

however, the remedy of judicial review was discretionary in nature, the applicant had to show that he had been prejudiced (or there was a risk of prejudice) by the breach of the principle of fairness. The learned judge noted that the applicant had made further representations after being notified of the decision to suspend him pending the outcome of the disciplinary proceedings and Council had reconvened to consider these further submissions. It had, nonetheless maintained its position in favour of suspension. Any prejudice or risk of prejudice had been removed by the applicant being given the opportunity to make further representations. Looking at the picture broadly, the applicant had been convicted after a lengthy trial of a serious criminal offence. That he was appealing did not alter the fact of conviction unless and until such conviction was overturned on appeal. It was difficult to fault the decision to suspend him from practice pending the outcome of the disciplinary proceedings. This was one of the rare cases where there had been a breach of the procedural requirements of natural justice which had not resulted in prejudice or risk of prejudice to the applicant. Since the decision to suspend the applicant from practice was upheld, it followed that the Council's decision to refuse the applicant a practising certificate had also been properly made. The application was, accordingly, dismissed.

7.3 Appointment of a Tribunal

[15-34] On receipt of a submission (other than for the complaint to be dealt with summarily by the Tribunal Convenor) the Tribunal Convenor must appoint from the Panel two solicitors and one lay person to constitute a Solicitors Disciplinary Tribunal to inquire into and investigate the matter and where a complaint is made against a foreign lawyer or his employee, the Tribunal Convenor must additionally appoint from the Panel one foreign lawyer.[44] The Tribunal members elect their own chairman, who must be a solicitor.[45] The Council of the Law Society may be represented at proceedings before the Tribunal.[46] The person laying the complaint, ie either the complainant or the Law Society, is referred to as the applicant and the person against whom the complaint has been laid as the respondent. They become the parties to the action.[47] Upon the submission of a complaint to a Disciplinary Tribunal, the Council must transmit all documents in its possession relating to the complaint to the Panel Convenor.[48]

[15-35] The court has ruled in *Ng Shek Wai v Medical Council of Hong Kong*[49] that the names of tribunal members and lawyers involved in disciplinary hearings are not protected from disclosure to the public and should normally be disclosed. In this case a panel of the Medical Council of Hong Kong, sitting in public, had found a doctor guilty of professional misconduct. Irregularities had, however, occurred which necessitated a further hearing. This was largely because defence

44 Section 9B(1A), Legal Practitioners Ordinance (Cap 159).
45 Section 9B(2), Legal Practitioners Ordinance (Cap 159).
46 Section 9B(3), Legal Practitioners Ordinance (Cap 159).
47 Rule 7, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
48 Rule 4, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
49 [2015] 3 HKC 455, [2015] 2 HKLRD 121.

counsel had failed to inform the Council that the doctor had a previous disciplinary record. The applicant, a member of the public, being infuriated with what counsel had done, sought disclosure of the name of defence counsel and subsequently the names of legal counsel for the Council and the names of all the members of the panel. The Council refused to reveal their identities. On an application for judicial review, G Lam J held that such basic information about the identities of the key persons who had taken part in a public judicial hearing should normally be published. This was required in the public interest in the administration of justice and the accountability of the judicial process. The instant case had been determined by the Council acting as a judicial body and it was irrelevant whether or not the public and press had been excluded from the hearing. The decision of the Council not to disclose the information would, accordingly, be quashed and the matter remitted to the Council for reconsideration.

8. Compliance with the Rules of Natural Justice in the Disciplinary Process

8.1 The Disciplinary Tribunal is not a court but still must abide by the rules of natural justice

[15-36] To what extent does the Disciplinary Tribunal have to abide by the rules of natural justice in its adjudication process? The Court of Final Appeal in *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*[50] concluded that tribunals were not 'courts' and therefore fell outside the constitutional protection afforded by Article 35 of the Basic Law[51] so that a respondent could not demand that his counsel be permitted to question witnesses. Notwithstanding the inapplicability of Article 35 of the Basic Law, however, the Investigation Committee and the Solicitors Disciplinary Tribunal, when exercising their respective disciplinary functions, had to abide by and apply the rules of natural justice. In other words they had to act 'fairly'. This proposition was clearly accepted by the Court of Appeal in *Re a Solicitor*[52] and there have been many instances of the application of the rules of natural justice to hearings before the Solicitors Disciplinary Tribunal.

[15-37] The rules of natural justice require, inter alia, that the solicitor against whom the complaint has been made has a right to be heard in his defence and has a right to know the case against him. A startling illustration of failure to abide by the rules of natural justice leading to the quashing of the decision is *A Solicitor v The*

50 [2006] 2 HKC 533 (CFA).

51 Article 35 [Legal Remedies]: (1) Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies. (2) Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

52 [2002] HKCU 734 (unreported, CACV 2/2001, 14 June 2002).

Law Society of Hong Kong.[53] A solicitor had been charged with 119 complaints made by 33 firms of solicitor and 12 members of the public. They all related to conveyancing transactions conducted over a period of 5 years and most fell into the categories of failure to comply with undertakings, failure to deal promptly with correspondence from other solicitors and failure to answer inquiries from the Law Society. After the hearing before the Tribunal the solicitor was found guilty and appealed on the grounds that the hearing had been procedurally flawed. Counsel for the solicitor contended that the Tribunal had failed to deal individually with the circumstances of each complaint, the prosecutor had failed to disclose all relevant documents and the Tribunal had made hostile interventions during the hearing and put pressure on the solicitor to plead guilty.

[15-38] The Court of Appeal, noting that many of the problems had been occasioned by the hearing of too many complaints together, concluded that the Tribunal should have better case-managed the hearing, perhaps by selecting some only of the charges to be heard and responded to. There were further problems in that there had been inadequate findings of material fact and the Tribunal had failed to deal with the main issues properly. Having regard to the unsatisfactory manner in which the proceedings had been conducted the decision of the Tribunal was quashed.

9. Application of the Doctrine of Res Judicata to Disciplinary Proceedings

[15-39] There is clear authority to the effect that the doctrine of res judicata applies in the context of disciplinary proceedings. This was made clear by the Supreme Court of England and Wales in *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales*.[54] In this case the applicant had been convicted of an offence under Jersey law and the Institute of Chartered Accountants had commenced professional disciplinary proceedings against him. The complaint was, however, dismissed. A second disciplinary complaint was then raised against the applicant in respect of the same conduct for which the first complaint had been dismissed. The applicant then sought judicial review in respect of the making of the second complaint. The Supreme Court first ruled that disciplinary proceedings were civil rather than criminal and so fell to be considered applying principles of res judicata rather than the principles governing autrefois acquit. Res judicata applied just as much to disciplinary proceedings as to court proceedings. Since both complaints related to the same subject matter and since the first adjudication had been final and on the merits, the second complaint would be barred by res judicata (or more specifically cause of action estoppel).

[15-40] For res judicata to apply, however, the earlier decision had to be final and reached on the merits of the case. This was made clear by Zervos J in

53 [1996] 1 HKLRD 293 (CA).

54 [2011] UKSC 1, [2011] 2 All ER 1.

Dr U v The Preliminary Investigation Committee of the Medical Council of Hong Kong.[55] In this case a complaint had been made against the applicant doctor but the complaint had been dismissed by the Preliminary Investigation Committee (PIC) of the Medical Council of Hong Kong in 2012. In 2015 the same allegations were referred to the PIC for reconsideration. The applicant sought judicial review of this decision on the grounds of res judicata. The learned judge, observing that the main issue was whether the first decision of the PIC had been a final decision on the merits, ruled that the dismissal of the complaint at the first stage of the disciplinary process was not a decision giving rise to the doctrine of res judicata. There had been no final determination of the complaint and no decision on the merits as to whether the medical practitioner had or had not been guilty of professional misconduct in the sense that there had been an evaluation and resolution of factual or other relevant matters and an adjudication according to relevant principles of law upon which a conclusion had been reached.

[15-41] Similarly in *A Solicitor (60/12) v Law Society of Hong Kong*,[56] the Court of Appeal had ruled that a decision of the Investigation Committee of the Law Society that a complaint had not been substantiated was not a judicial decision since the Investigation Committee merely endorsed the result of an investigation rather than acted as a tribunal deciding specific issues between defined parties. In the instant case, since the first decision of the PIC had not been a final decision on the merits, the application for judicial review would be dismissed.

10. Investigation as to Whether There is a Prima Facie Case

[15-42] The first task of the Disciplinary Tribunal is to investigate the conduct about which the complaint has been made and an investigating officer will compile a report, which he will place before the Disciplinary Tribunal. The Tribunal is empowered to require the applicant to supply further information or documents in his possession or under his control.[57] The Tribunal is then required to decide whether or not a prima facie case has been made out. If the Tribunal is of the opinion that no prima facie case has been shown meriting disciplinary action, the Tribunal may dismiss the complaint without hearing the applicant or respondent.[58] In such a case, if required to do so either by the respondent or applicant, the Tribunal must make a formal order dismissing the application.[59] The Court of Appeal has jurisdiction to entertain an appeal by the Law Society from a dismissal of a complaint by the Tribunal on the grounds that a prima facie case has not been established.

55 [2016] HKCU 1501 (unreported, HCAL 195/2015, 23 June 2016).
56 [2013] 4 HKC 198 (CA).
57 Rule 5, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
58 Rule 6(1), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
59 Rule 6(2), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).

11. Fixing a Date for the Hearing and Drawing Up the Charges

[15-43] If the Disciplinary Tribunal concludes that a prima facie case has been shown against the respondent, it will fix a date for the hearing and notice of the hearing must be served on each party to the proceedings and a copy of the affidavit and the application will also be served upon the respondent.[60] The appropriate mode of service is prescribed in the Rules.[61] The charge or charges against the solicitor should be drawn up with particulars and, in so doing, care should be taken to ensure that the charges are precise and clear. Any possible duplicity in the charges should be avoided.[62] The date fixed for the hearing must be at least 21 days after the service of the notice.[63]

12. Discovery, Inspection of Documents and Notice to Admit

[15-44] Either party may require the other party to furnish to the clerk to the Tribunal and to the other party, at least 14 days before the date fixed for the hearing, a list of documents on which he intends to rely and the party receiving the list may inspect those documents listed and require that he be supplied with a copy within 7 days.[64] Provision has also been made for the service of notices to admit. Any party may, by notice in writing served not later than 9 days before the date fixed for the hearing, call upon any other party to admit any document and, if the other party desires to challenge the authenticity of the document, he must, within 6 days after service of the notice, give notice that he does not admit the document in question and requires it to be proved at the hearing.[65] If the other party fails to serve this notice, he will be deemed to admit the document.[66] Where notice of non-admission is given and the document is proved at the hearing, the

60 Rule 8(1), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
61 Rule 31, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C) provides that service of any notice or document may be effected personally or by registered letter addressed to the solicitor's place of business or abode and, in the case of service by post, service will be deemed to have been effected at the time when the letter would be delivered in the ordinary course of post. The Tribunal is also empowered to order substituted service.
62 It was argued in *Re a Solicitor* (unreported, CACV 134/1987, 3 March 1988) that the rules of natural justice had been breached because the charges against the solicitor had not been drawn up with sufficient particularity. The Court of Appeal, whilst noting that the charges should contain full particulars, ruled that, on the facts, the solicitor could not have been under any misapprehension as to the nature of the Law Society's case against him.
63 Rule 8(2), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
64 Rules 9 and 10, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
65 Rule 36(1), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
66 Rule 36(2), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).

costs of proving the document will be borne by the party not admitting it, unless the Tribunal finds that there were reasonable grounds for such non-admission.[67]

13. The Hearing Before the Disciplinary Tribunal

13.1 The standard of proof for disciplinary hearings

[15-45] There is a considerable body of case law interpreting the standard of proof applicable to proceedings before disciplinary tribunals. There is long-standing authority for holding that the civil standard of proof obtains to criminal allegations made in civil proceedings - that is proof on the balance of probabilities. There had been some confusion about the standard of proof in the courts where in some instances the criminal standard was applied to 'criminal' allegations; however the Hong Kong Court of Final appeal has clearly settled upon the civil standard as the appropriate standard. In *Aktieselskabet Dansk Skibsfinansiering v Brothers*,[68] Lord Hoffmann held that the standard of proof in civil cases in which serious allegations of misconduct such as fraud were in issue was proof on the preponderance of probabilities. The degree of probability had, however, to be commensurate with the occasion. This did not mean that the court was looking for a degree of probability higher than the civil standard. Rather, it meant that the more inherently improbable the act in question, the more compelling would be the evidence needed to satisfy the court on the balance of probabilities. This approach was again adopted by the Court of Final Appeal in *A Solicitor v The Law Society of Hong Kong*.[69] The evidence must be sufficiently compelling to overcome the improbability of the serious allegation being true.[70]

13.2 The conduct of the hearing

[15-46] In the conduct of the hearing, a Disciplinary Tribunal has the same powers as a court or judge in respect of the following matters:

(a) enforcing the attendance of witnesses and examining them upon oath or otherwise;
(b) compelling the production of documents;
(c) punishing persons guilty of contempt;
(d) ordering the inspection of property;
(e) conducting the examination of witnesses; and
(f) adjourning the hearing.[71]

[15-47] A summons under the hand of the Chairman of the Tribunal will be the equivalent to any form of process capable of being issued in any action or suit for compelling the attendance of witnesses or the production of documents and any

67 Rule 36(3), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
68 (2000) 3 HKCFAR 70 (CFA), [2000] 1 HKC 511.
69 [2008] 2 HKLRD 576, [2008] 2 HKC 1 (CFA).
70 And see In *Re H (Minors)* [1996] AC 563, 586–587 per Lord Nicholls of Birkenhead.
71 Section 11(1), Legal Practitioners Ordinance (Cap 159).

warrant for committal to prison for the purpose of enforcing any such powers. The Chairman is not, however, empowered to imprison any offender for more than a period of one month's imprisonment.[72]

[15-48] The Tribunal elects its own Chairman[73] and must sit in camera in the places and at the times it directs.[74] The constitutionality of the statutory duty of the Tribunal to sit in camera was challenged by a solicitor in *Tse Wai Chun Paul v Solicitors Disciplinary Tribunal*[75] on the grounds, inter alia, that it contravened Article 10 of the Hong Kong Bill of Rights which provides that 'in the determination … of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The Court concluded that the Tribunal was not a 'court of the classic kind' and, since an appeal lay to a 'classic court' ie the Court of Appeal, there would be no breach of the Bill of Rights if proceedings were conducted in camera.

[15-49] If any party fails to appear at the hearing, the Disciplinary Tribunal may, on proof of due service of the notice of hearing, proceed with the hearing in the party's absence and, in the absence of the applicant, the Tribunal may, in their discretion, dismiss the application without a hearing.[76] Where it is the solicitor against whom the complaint has been made who fails to appear at the hearing, the Tribunal may consider this as negatively impacting on his defence.[77] Any party who fails to appear may, however, apply within one month for a re-hearing and, if the Tribunal is of the opinion that it is just that the case be re-heard, the Tribunal may grant the application on such terms as to costs as they think fit.[78] At the re-hearing the Tribunal may amend, vary or reverse their previous findings.[79]Any party may be represented at the hearing by a solicitor or counsel.[80]

[15-50] The disastrous consequences that can arise where numerous complaints of misconduct are considered by the Disciplinary Tribunal together are clearly illustrated in *A Solicitor v Law Society of Hong Kong*,[81] which has been discussed above at paragraph [15-37].

13.3 The statement of findings of the Disciplinary Tribunal

[15-51] The Tribunal must make a statement of its findings in relation to the facts of the case as a preface to its order and these findings must be signed by the

72 Section 11(1), Legal Practitioners Ordinance (Cap 159).
73 Section 9B(2), Legal Practitioners Ordinance (Cap 159).
74 Section 9B(4), Legal Practitioners Ordinance (Cap 159).
75 [2002] 3 HKLRD 712, [2002] 4 HKC 1.
76 Rule 11, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
77 See *Law Society (NSW) v Donnelly* [2017] NSWCATOD 34.
78 Rules 13(1) and (2), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
79 Rule 13(3), Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
80 Rule 12, Solicitors Disciplinary Tribunal Proceedings Rules (Cap 159C).
81 [1996] 1 HKLRD 293.