



Wilkinson's
Professional Conduct of
Lawyers in Hong Kong

Desk Edition 2022

Gary Meggitt



LexisNexis®

Student

TABLE OF CONTENTS

<i>Introduction to the 2022 Desk Edition</i>	v
<i>Introduction to the First Edition</i>	vii
<i>Table of Cases</i>	xxxv
<i>Table of Legislation</i>	xcii
<i>Table of Subsidiary Legislation</i>	xcix
<i>Table of Circulars, Practice Directions and Professional Codes and Guides</i>	cv

CHAPTER 1 INTRODUCTION TO THE LEGAL PROFESSION IN HONG KONG..... 1

1. The Legal Profession in Hong Kong.....	1
2. The Organisation and Administration of the Solicitors' Profession	1
2.1 The Law Society: Objects and membership.....	1
2.2 Administration of the Law Society	3
3. The Organisation and Administration of the Bar	5
3.1 The Hong Kong Bar Association	5
3.2 The Bar Council	6
3.3 All barristers bound to comply with the Bar Code	6

CHAPTER 2 THE SOURCES OF HONG KONG LAWYERS' LEGAL AND ETHICAL RESPONSIBILITIES 7

1. Solicitors	7
2. Barristers	7
3. The Role of the Profession in Guiding its Members in Cases of Doubt.....	8
4. Enforcement of the Law and Professional Codes	8
4.1 Breaches of the law and breaches of the Professional Codes are distinct and may be punished separately	8
4.2 The Professional Codes will not be enforced directly by the courts.....	9
4.3 Courts may take Professional Codes into account	10
4.4 Conflict between lawyers' duties under the law and their duties as prescribed by their Professional Codes.....	11

CHAPTER 3 ADMISSION TO PRACTICE — SOLICITORS 15

1. Conditions Governing Eligibility for Admission	15
1.1 Admission based upon local qualifications	15
1.2 Admission based upon overseas qualifications	20
1.3 The Legal Practitioners (Risk Management Education) Rules	21
2. Suitability for Admission	23
3. The Procedure for Making Application for Admission.....	25
3.1 Application for certificate of eligibility for admission.....	25
3.2 Application for admission	26
3.3 Hearing of the motion	26
4. Entry on the Roll of Solicitors	27
4.1 Entry on the Roll	27

5.	Practising Certificates	
5.1	Application for a practising certificate	
5.2	Effect of publication of names of practising solicitors in the Gazette	
6.	Solicitors' Professional Indemnity Scheme	
6.1	The Solicitors' (Professional Indemnity) Rules and the Professional Indemnity Scheme	
7.	The Admission of Foreign Lawyers and Foreign Law Firms to Practice in Hong Kong	
7.1	The trend towards the internationalisation (or globalisation) of legal practice	
7.2	Provisions regulating the right of foreign lawyers and foreign law firms to practise in Hong Kong	
7.3	Registration of foreign law firms	
8.	Hong Kong Law Firms and the People's Republic of China	
8.1	The Closer Economic Partnership Agreement	
8.2	Association of local and Mainland firms	
9.	Unqualified Person Acting as a Solicitor	

CHAPTER 4 THE NATURE OF THE SOLICITOR'S PRACTICE AND THE SOLICITOR'S MANAGEMENT OF HIS OFFICE

1.	The Nature of the Solicitor's Practice	
1.1	What is permitted and what is forbidden; corporate and multi-disciplinary practices	
1.2	Solicitor and foreign lawyer corporations; the provisions of the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997	
1.3	Prohibition on any separate business which offers services normally offered by a solicitor as part of his practice	
1.4	No right to form multi-disciplinary practices	
1.5	Solicitors may form a service company to carry out administrative functions	
2.	Limited Liability Partnerships	
2.1	Introduction	
2.2	Amending legislation	
2.3	Liability of partners	
2.4	Requirement for top-up insurance	
2.5	Other matters	
3.	Associations of Firms and Group Practices	
3.1	Associations of two or more Hong Kong firms	
3.2	Group practices	
4.	New Firms Establishing a Practice in Hong Kong	
4.1	Notification to the Law Society of particulars of firm and any service company	
4.2	Notification to the Law Society of any changes in the particulars	
4.3	Annual return of employees	
4.4	Sole practitioners and partners must hold unconditional practising certificates	
4.5	Membership of the Professional Indemnity Scheme	
4.6	Office premises	
4.7	Other prudent action which may be taken by a new law firm	
5.	Practising as a Sole Practitioner	
5.1	The right to practise as a sole practitioner	
5.2	Absence of sole practitioner from the office due to holidays, sickness etc	
5.3	Sole practitioner retiring from practice or emigrating from Hong Kong so that his firm ceases to practise	

5.4	The death of a sole practitioner	55
6.	Practising by Way of a Partnership	57
6.1	All partners must hold current unconditional practising certificates	57
6.2	Salaried partners and equity partners	58
6.3	Names of all the principals on business letters	58
6.4	Cessation of partnership practice	58
7.	Solicitors Employed in Private Practice	59
7.1	Solicitor employed in private practice must hold current practising certificate	59
7.2	Status of solicitor may be stated on professional stationery	59
7.3	Rights of solicitor employed in private practice to share profits etc	59
8.	Solicitors Employed by Lay-Employers ('Employed' or 'In-House' Solicitors)	60
9.	Solicitors Leaving Their Firm to Take Up Employment with another Firm	60
9.1	Restraint of trade clauses	60
9.2	Fiduciary duties owed by solicitors leaving the firm	61
9.3	Soliciting staff leaving firm from another firm	62
9.4	Soliciting clients to leave the firm	62
10.	Consultants	62
11.	Proper Management and Supervision of the Solicitor's Practice	63
11.1	Management and supervision of the practice	63
11.2	Sharing premises, staff and facilities	63
11.3	Control over the work carried out by unqualified employees and the liability of solicitors for the acts of their unqualified staff	65
11.4	Signatures on letters, pleadings etc	67
11.5	Privacy and corresponding with individual litigants via workplace fax numbers	68
11.6	Control over and use of electronic communications	68
11.7	Digital certificates	69
12.	Avoidance of Involvement in Money Laundering and Terrorist Financing	70
12.1	The substantive offence of money laundering and terrorist financing	70
12.2	Money laundering and terrorist financing; precautions that must be taken and guidelines from the Law Society: Practice Direction P	74
13.	Restriction upon Employment of Certain Prohibited Employees	80
13.1	The employment of competent staff and the duty to reject 'prohibited employees'	80
14.	Limitation upon Number of Unqualified Employees	81
14.1	Restriction upon numbers of unqualified employees	81
14.2	Annual return of employees	81
15.	Remuneration of Employees; Prohibition on Sharing Profit Costs with Unqualified Persons	81
16.	The Solicitor's Duty to Keep the Client's Financial Affairs in Good Order	82
16.1	The regime for solicitors' accounts	82
16.2	The principles governing the handling of clients' money and the keeping of accounts	83
16.3	Duty to operate a client account	84
16.4	Receipt of client money and trust money	84
16.5	Client receipts	86
16.6	Drawings from the client account	87
16.7	Cases where money need not be paid, and cases where money must not be paid into the client account	90

16.8	Cheque received including both profit costs and disbursements	94
16.9	Misuse of client's money	94
16.10	Duty to keep proper accounts	94
16.11	Computerised client accounting systems	94
16.12	Records of all bills of costs	94
16.13	Meaning of 'book', 'ledger' and 'record'	94
16.14	Reconciliations	94
16.15	Preservation of books of account	94
16.16	Production of books of account for inspection by council	94
16.17	The nature of the client account	94
16.18	Interest derived from clients' funds in the client account belong to the client	94
16.19	The opening of client accounts, payment into client accounts and solicitors' liability in the event of a bank failure	94
17.	The Accountant's Report	97
17.1	Duty of solicitors to provide an accountant's report	97
17.2	Duties of the accountant	97
17.3	Accounting periods	97
18.	The Annual Return	98
19.	Preservation of Clients' Files	98
19.1	Storage of old physical files in Hong Kong	99
19.2	Ownership of documents on file	99
19.3	Closed files and client access	99
19.4	How long should clients' files be preserved?	100
20.	Grounds for Intervention in a Solicitor's Practice by the Law Society	100
20.1	Grounds for intervention by Council of the Law Society	100
20.2	Guidance from the Court in Council's exercise of its powers following an intervention	103
20.3	Nothing to prevent solicitor suing for unpaid fees during an intervention into his practice	107
21.	Other Investigative Powers of the Council	109
21.1	Council may examine documents if it considers that a solicitor may be unfit to practise	110
21.2	Appointment of an inspector	110
21.3	Privilege claim does not attach to documents required to be produced	111
CHAPTER 5 PRACTICE PROMOTION AND THE OBTAINING OF BUSINESS		113
1.	Practice Promotion	113
1.1	Introduction	113
1.2	General principles governing practice promotion	115
1.3	Extraterritorial practice promotion	122
1.4	Practice promotion on television and radio and in public places is permitted	122
1.5	Waivers	123
1.6	Person to person solicitation and the Promotion Code	123
1.7	Direct mailing: Targeting or solicitation by fax, mail or e-mail	123
1.8	Other issues relating to practice promotion	124
2.	Improper Obtaining of Business and Commission Sharing	127
2.1	'Touting' and commission sharing	127
2.2	Improper obtaining of business in the context of litigation	128

2.3	Improper distribution of advertising material	130
2.4	Improper obtaining of business in the context of non-contentious business	130
2.5	Remuneration of the agent	131
2.6	Action taken by the profession to deter the improper obtaining of business	131
CHAPTER 6 THE RETAINER		137
1.	Introduction	137
2.	Should a Solicitor be Retained?	137
2.1	Non-contentious matters	137
2.2	Contentious matters	137
2.3	Cases where the litigant must be represented by a solicitor	138
3.	The Duty to Act	138
3.1	Solicitor free to accept or reject instructions: 'Cab-rank' principle not applicable	138
3.2	Circumstances where the solicitor should or must refuse to act or cease to act	139
4.	Mandatory Initial Checks Before Conducting Any Transaction on Behalf of a Client	157
4.1	Check for conflicts of interest	157
4.2	The first meeting with the prospective client — Practice Direction P: Mandatory requirements regarding anti-money laundering etc	158
5.	The Form of the Retainer	158
5.1	Written retainers	158
5.2	Implied retainers and ratification	161
6.	The Effect of the Retainer	167
7.	Limited Retainers	167
8.	Limiting Liability in the Retainer	167
8.1	Retainers to carry out contentious work	167
8.2	Retainers to carry out non-contentious work	167
9.	Entering into the Retainer	169
9.1	Retainers by agents	169
9.2	Retainers by infants and persons of unsound mind	169
9.3	Retainers by corporations	169
9.4	Instructions from a third party	170
9.5	Representation of co-plaintiffs	170
10.	The Scope of the Solicitor's Authority Under the Retainer	170
10.1	Express authority	171
10.2	Implied authority	171
10.3	Ostensible authority	176
11.	Solicitor Acting Without Authority	177
11.1	Contentious matters and subsequent ratification	177
11.2	Contentious matters and wasted costs	177
11.3	Non-contentious matters	177
12.	Legal and Ethical Obligations Imposed Upon the Solicitor by Virtue of the Retainer	177
12.1	Principles underlying the relationship and the retainer with a client: Loyalty and confidentiality	178
12.2	Duty to advise client on alternative dispute resolution procedures	180

12.3	Duty to give honest and candid advice.....	180
12.4	Duty to act expeditiously	181
12.5	Duty to act with due care and skill.....	182
12.6	Duty to obey instructions	182
12.7	Duty to keep matters confidential	184
12.8	Duty to keep one's client informed	184
12.9	Duty to charge reasonably.....	184
13.	The Duration of the Retainer	186
13.1	The 'entire contract' rule.....	186
14.	Termination of the Retainer	186
14.1	Automatic termination of retainer.....	189
14.2	Termination of retainer by the solicitor.....	189
14.3	Termination by the client	191
14.4	Termination by a third party.....	194
14.5	Solicitor's duty upon termination of the retainer	197
15.	The Solicitor's Retaining Lien	197
15.1	Nature of the lien.....	198
15.2	Property over which the lien extends	198
15.3	Extent of the lien	199
15.4	Solicitor's right to a lien in the event of termination of the retainer	199
15.5	Termination of the lien	200
15.6	The solicitor's ethical duties.....	202
16.	The Solicitor's Common Law Lien on Property or Funds Recovered.....	203

CHAPTER 7 REMUNERATION..... 205

1.	Providing Full Information to the Client or Prospective Client.....	205
1.1	Advice as to whether the likely outcome will justify the expense	205
1.2	Full information as to the likely cost of the matter	205
1.3	Agreed fees, estimates and information as to the solicitor's method of charging.....	206
1.4	Contentious matters: Information as to costs where client is not legally aided.....	210
1.5	Special obligations for representation in criminal matters.....	211
1.6	Contentious matters: information as to the client's entitlement to legal aid	211
1.7	Information as to when client is expected to pay; payment on account of costs and disbursements	213
1.8	Client setting a limit on costs	215
1.9	Provision of regular information as to costs.....	215
2.	Costs in Contentious Business	216
2.1	The meaning of 'contentious business'	216
2.2	Agreed fees and contentious business: section 58 of the Legal Practitioners Ordinance.....	216
2.3	Calculation of the fee	219
2.4	The solicitor's bill of costs	221
2.5	Challenging the fee: Taxation of costs	225
3.	Costs in Non-Contentious Business	229
3.1	Definition of 'non-contentious business'	229
3.2	The Costs Committee and its rule-making power	229
3.3	Non-contentious business remuneration agreements	229
3.4	Costs in matters for which a scale fee has been prescribed	231

3.5	Security for solicitor's costs	232
3.6	Recovery of costs: delivery of the bill and taxation of costs.....	233
4.	Interest on Clients' Funds	233
5.	Overcharging.....	233
5.1	Professional obligation not to overcharge	233
6.	Maintenance, Champerty and Contingency Fees.....	234
6.1	Maintenance	234
6.2	Champerty	235
6.3	No maintenance and champerty where maintainer or funding agency has a commercial interest in the outcome of the litigation.....	236
6.4	Contingency and conditional fees	237
7.	Solicitors Sharing Profit Costs with Others	239
8.	Responsibility for Paying the Fees of Counsel, Professional Agents, Witnesses and Overseas Lawyers	240
9.	Method of Payment of the Bill of Costs	241
10.	Failure by the Client to Pay the Solicitor's Bill of Costs: Enforcement Procedures	241
10.1	Enforcement by civil action	241
10.2	Indirect pressure through the solicitor's lien.....	243

CHAPTER 8 CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE..... 245

1.	Introduction.....	245
2.	The Duty of Confidentiality	245
2.1	The contractual duty.....	246
2.2	The duty in equity (or perhaps tort)	246
2.3	The ethical duty	248
2.4	The duration of the duty of confidentiality	252
2.5	Use of confidential information which comes into the solicitor's possession from another client or third party	252
2.6	Confidential information received by solicitor at a social occasion.....	253
2.7	Confidential information received from a 'quasi-client'	254
2.8	Confidential correspondence or documents disclosed to the other party or his solicitor as a result of fraud or mistake	255
2.9	Cases where the duty of confidentiality is inapplicable or is overridden.....	260
2.10	Waiver by the client and the solicitor's implied authority to disclose confidential information.....	263
2.11	Duty of solicitor to advise client promptly that disclosure has occurred.....	263
2.12	Fiduciary duty of solicitor not to profit from confidential information	263
3.	Legal Professional Privilege.....	264
3.1	Purpose of legal professional privilege	264
3.2	The difference between confidentiality and legal professional privilege.....	265
3.3	Scope of legal professional privilege	265
3.4	Whether legal professional privilege applies is governed by the <i>lex fori</i>	269
3.5	Joint interest privilege and common interest privilege.....	269
4.	Legal Advice Privilege: Communications Made for the Purpose of Giving or Receiving Legal Advice	270
4.1	The scope of legal advice privilege.....	270
4.2	'Once privileged, always privileged'.....	273
4.3	Limitations upon the scope of legal advice privilege.....	273
4.4	Legal advice privilege: Communications between client and third party for the purpose of obtaining legal advice from a lawyer.....	275

5. Litigation Privilege: Communications between Third Persons and the Solicitor or His Client Where the Communication is Made for the Dominant Purpose of Pending or Anticipated Litigation	
5.1 Litigation must be pending or anticipated	276
5.2 The communication must be made for the dominant purpose of pending or anticipated litigation	276
5.3 Copy documents where the originals are not privileged	277
5.4 The duration of litigation privilege	278
6. Legal Professional Privilege and In-house Lawyers	278
6.1 'Commercial' in-house lawyers	279
6.2 Government in-house lawyers	280
7. Waiver	280
7.1 Privilege may be waived by the client	280
7.2 Further examples of implied waiver	281
7.3 Waiver by way of exchange of witness statements	281
8. Cases Where Legal Professional Privilege is Inapplicable or is Overridden	285
8.1 Communications made in furtherance of a crime or fraud	289
8.2 Order of the court overriding the privilege	290
8.3 Situations in which privilege is overridden by statute	290
8.4 The solicitor and search warrants in respect of clients' documents when client's affairs are the subject of investigation	298
9. Without Prejudice Communications	300
9.1 Scope of the privilege	307
9.2 Cases in which the heading 'without prejudice' will be of no effect	312
9.3 Relationship of 'without prejudice communications' and legal professional privilege	312

CHAPTER 9 CONFLICTS OF INTERESTS AND DUTIES

1. Introductory Matters and Underlying Principles	315
1.1 Situations in which a conflict of interest might arise	315
1.2 Solicitor's ethical duty to avoid conflict	315
1.3 Common conflict situations	315
2. Conflict in Contentious Matters	318
2.1 Representing present clients as parties with opposing interests in the same action	319
2.2 Representing one client against another existing client in a related matter	319
2.3 Joint representation of co-defendants in criminal cases	321
2.4 Joint representation of co-plaintiffs and co-defendants	326
2.5 Representation of insured persons where claims control clause in policy of insurance	328
2.6 Representing a client against a former client in litigation	331
2.7 Representing a client in litigation where the advocate becomes personally involved in the litigation or where the advocate has a personal interest in the outcome	350
2.8 Jurisdiction of the court to disqualify a solicitor or firm of solicitors from appearing in an action or representing a client	354

3. Conflicts in Non-Contentious Matters	355
3.1 Representing parties with conflicting interests in the same transaction	355
3.2 Representing joint clients who are on the same side of a transaction: Undue influence and joint clients with conflicting interests	366
3.3 Conflict between solicitors and their own clients: Cases where solicitors have a personal interest in the matter	371

CHAPTER 10 COMPETENCE, QUALITY OF SERVICE AND NEGLIGENCE

1. Legal and Professional Liability for Poor Standard of Work: the Sources of the Solicitor's Duty	391
1.1 Introduction	391
1.2 Duty of care in contract under the retainer	391
1.3 Duty of care in tort	392
1.4 Breach of fiduciary duty	394
1.5 Ethical duty	394
2. The Ethical Duty of Competence	395
2.1 Introduction	395
2.2 Seeking assistance to achieve competence	395
2.3 Excluding or limiting liability in negligence	396
2.4 No exclusion of liability for professional misconduct	396
2.5 Ethical duty to serve the client in a conscientious, diligent, prompt and efficient manner	397
2.6 Duty to reply to correspondence from clients	397
2.7 Duty to respond to correspondence from the Law Society and the Solicitors Disciplinary Tribunal	397
2.8 Duty of solicitor where his client makes a claim against him	398
3. The Common Law Standard of Care Required of Solicitors: General Principles	401
3.1 Standard of care of the generalist practitioner	401
3.2 Standard of care of the specialist practitioner	404
3.3 Standard of care of the inexperienced practitioner	405
3.4 Standard of care will vary with the individual client	405
4. Defences to Claims for Breach of Duty	406
4.1 Solicitor acting on counsel's advice	406
5. Illustrations of Negligence in Contentious Matters	410
5.1 Introduction	410
5.2 Duty to advise as to the availability of legal aid	410
5.3 Duty to advise against hopeless litigation	410
5.4 Delay in prosecuting an action	412
5.5 Failure to issue process within the limitation period	414
5.6 A solicitor's duty in respect of pre-trial procedural aspects of the case	414
5.7 Duty to brief counsel properly and to exercise independent judgment even where counsel briefed	415
5.8 Duty in relation to the collection and presentation of evidence	415
5.9 General principles of ethical and legal responsibility regarding settlements	416
5.10 Failure to attend the hearing	418
5.11 Duty in respect of the conduct of the trial — Immunity for negligent acts?	418
6. Illustrations of Negligence in Non-Contentious Matters	420

6.1	Introduction.....	420
6.2	Failure to pass on to client relevant information that comes to solicitor's notice.....	420
6.3	Giving wrong advice on the law.....	421
6.4	Failure to give adequate advice or explanation.....	421
6.5	Failure to warn against significant risks.....	422
6.6	Failure to give adequate advice to unduly influenced clients.....	423
6.7	Advice as to necessary future action or continuing obligations.....	425
6.8	Failure to advise on matters falling outside the client's specific instructions.....	425
6.9	Advice on commercial and business aspects relating to the subject matter of the retainer.....	426
6.10	Checking title in conveyancing transactions; failure to make proper searches and advise as to encumbrances and other title defects.....	427
6.11	Failure to register deeds, cautions etc.....	428
6.12	Failure to protect client against fraud.....	430
6.13	Duty of solicitors who make wills for clients.....	431
7.	Damages.....	432
8.	Other Effects of Negligence.....	440
8.1	Solicitor will not be entitled to recover his profit costs and the client may recover any profit costs already paid.....	440
9.	Concurrent Actions in Negligence and Disciplinary Proceedings.....	440
10.	Who is to be Held Liable for the Negligence? The Solicitor, the Solicitor's Firm, or His Partners?.....	441
10.1	Solicitor personally liable in negligence where he fails to exercise proper control over his staff.....	441
10.2	The liability of the partners for the negligence of the firm's partners, employed solicitors and staff.....	442
10.3	Is the solicitor personally liable for his negligent actions when acting on behalf of his firm?.....	445
CHAPTER 11 THE LITIGATION SOLICITOR..... 447		
1.	Introduction.....	447
1.1	Duties of solicitors as officers of the court.....	447
1.2	Scope of this chapter.....	448
2.	The Litigation Solicitor's Professional and Common Law Duties to the Court and Client.....	449
2.1	First meeting with the prospective client.....	449
2.2	Duty to advise on alternative dispute resolution procedures.....	449
2.3	Authority to conduct litigation.....	450
2.4	Duty of Solicitors to Assist the Court in Furthering the Underlying Objectives in the Rules.....	450
2.5	Witnesses.....	451
2.6	Generally, no communication with the opposing party in the absence of his solicitor.....	458
2.7	Solicitor's duty when instructing counsel.....	459
2.8	Solicitor not to stand bail for his client or to agree to indemnify a surety for bail.....	466
2.9	Duty to make proper discovery.....	467
2.10	Duty in respect of affidavits.....	468
2.11	Duty to ensure that full and frank disclosure is made in ex parte applications.....	471

2.12	Duty not to waste the court's time and courtesy to the court.....	472
2.13	Duty not to abuse the process of the court.....	482
2.14	Duty not to threaten a criminal action.....	484
2.15	The solicitor as witness.....	485
2.16	The solicitor as litigant.....	488
3.	Solicitor's Duties as a Solicitor Advocate in Presenting a Case during the Trial.....	489
4.	Solicitors' Rights of Audience Where Not Solicitor Advocates.....	489
4.1	Rights of audience may be regulated by the judges by collective decision.....	490
4.2	No general rights of audience in the Court of Final Appeal and High Court.....	490
4.3	Higher rights of audience for solicitor advocates.....	494
5.	Exercise of Disciplinary Powers over Solicitors by the Court.....	498
5.1	The courts' jurisdiction over its officers.....	498
5.2	The summary nature of the courts' jurisdiction.....	499
5.3	The High Court's power to strike a solicitor off the roll or suspend him from practice has been abolished; however other penal sanctions are available.....	500
5.4	Committal for contempt of court.....	501
5.5	Power to order a solicitor and counsel personally to pay wasted costs ('wasted costs orders').....	506
5.6	Power to require solicitor to give undertaking not to charge client.....	513
5.7	Power to order a solicitor to perform an obligation incurred in his capacity as a solicitor.....	514
5.8	Power to order the solicitor to pay compensation.....	514
CHAPTER 12 PROFESSIONAL UNDERTAKINGS..... 517		
1.	Introduction.....	517
1.1	Special care should be taken by solicitors before giving undertakings as they are binding.....	517
1.2	The important role of professional undertakings.....	517
2.	What is a Professional Undertaking?.....	518
3.	The Form of the Undertaking.....	521
4.	Common Examples of Undertakings.....	522
4.1	Express undertakings.....	522
4.2	Implied undertakings.....	522
5.	Construction of Undertakings.....	523
5.1	The ethical approach.....	523
5.2	The legal approach.....	524
6.	Terms Implied in Undertakings.....	526
6.1	Undertakings as to the payment of costs.....	526
6.2	Other terms implied in undertakings.....	527
7.	Liability of Solicitors in Respect of Breach of Undertakings.....	527
7.1	Duty to honour undertakings.....	527
7.2	Undertakings to do something outside the solicitor's control.....	529
7.3	Undertaking generally binds giver and receiver only.....	530
7.4	Professional liability of solicitor for undertakings given on behalf of others.....	530

7.5	Responsibility of a law firm for undertakings given by the firm's employees	531
7.6	Liability of employed solicitors for their undertakings.....	531
7.7	Liability of all partners for an undertaking given by one partner	531
8.	Release of Solicitors from Undertakings	531
8.1	Release by the court or by the recipient.....	532
8.2	No release by reason of change of solicitor by recipient.....	532
8.3	No release by reason of partner who gave undertaking leaving firm or firm being dissolved.....	532
8.4	No release by reason of lapse of time	532
8.5	Undertakings obtained by fraud or dishonesty.....	532
9.	Enforcement of Undertakings	532
9.1	Enforcement by the courts	532
9.2	Breach of contract	532
9.3	The court's supervisory jurisdiction.....	532
9.4	Enforcement by the Council of the Law Society	532
10.	Solicitor Must Not Demand Compensation for Failing to Report Breach of Undertaking	532
11.	Undertakings Given by Officers of the Government	532

CHAPTER 13 SOLICITORS' DUTIES AND THEIR RELATIONS WITH THE PROFESSION, THE PUBLIC AND THIRD PARTIES

1.	Introduction.....	541
2.	Solicitors' Relations With and Duties to the Legal Profession.....	541
2.1	Solicitors' duty not to engage in 'unbefitting' conduct.....	541
2.2	Relations with other solicitors.....	541
3.	Relations with Clients of Other Solicitors: Duty Not to Interfere with Other Solicitor/Client Relations.....	548
3.1	Scope of the duty.....	548
3.2	Providing second opinions	548
3.3	Separate or distinct interest involved	548
4.	Solicitors' Relations with Opposing Parties	552
4.1	Solicitors' ethical duties when communicating with the opposing party	552
4.2	Inquiries about the opponent by way of an inquiry agent.....	552
4.3	Who is the opposing party where instructions are given by a corporation etc?	552
4.4	Communication with a former client now represented by other solicitors.....	552
4.5	Offensive or threatening letters and letters of demand.....	552
4.6	Relations with unrepresented parties	552
5.	Solicitors' Duties to Third Parties.....	558
5.1	Introduction: Duty of fair dealing	558
5.2	Duty to provide true references.....	558
5.3	Duty when communicating with third parties.....	559
5.4	Relationship with witnesses.....	559
5.5	Recording telephone conversations.....	561
5.6	Relations with professional witnesses and other witnesses and agents	561
5.7	Duties in relation to the issuing and stopping of cheques.....	562
5.8	Solicitor's duty when administering oaths and affirmations.....	563

CHAPTER 14 'EMPLOYED' (IN-HOUSE) SOLICITORS

1.	Introduction: The Role of Employed ('In-House') Solicitors.....	567
2.	Employed Solicitors Admitted to Practise in Hong Kong are Subject to the Profession's Rules of Professional Conduct	568
3.	Independence	569
4.	Legal Professional Privilege and Employed Lawyers.....	569
5.	Permitted Activities of Employed Solicitors.....	571
5.1	Services that may be performed by employed solicitors holding practising certificates.....	571
5.2	Restrictions upon employed solicitors' right to practise.....	572
6.	Liability of Employed Solicitors in Respect of Their Undertakings.....	574
6.1	Employed solicitors, their fees and their employer.....	574
7.	Some Ethical Problems for Employed Solicitors.....	575
7.1	Conflict of interest.....	575
7.2	Knowledge of improper dealings	575
8.	Employed Solicitors Who also Maintain a Private Practice.....	576
8.1	Employed solicitors may establish private practices.....	576
8.2	Practising from an office in the employer's workplace: Independence and confidentiality may be in jeopardy	576
8.3	Conflict of interest and the private practice of employed solicitors.....	577

CHAPTER 15 SOLICITORS AND THE DISCIPLINARY PROCESS.....

1.	Introduction: Disciplinary Powers Exercised by the Profession.....	579
1.1	The role of the profession in the disciplinary process.....	579
1.2	The purpose of disciplinary proceedings	580
1.3	Importance of powers of early investigation by the Council of the Law Society.....	581
2.	The Solicitors Disciplinary Tribunal Panel	582
3.	Manner of Making a Complaint to the Law Society.....	583
4.	Whether Disciplinary Proceedings Should be Stayed Pending the Outcome of Related Criminal or Civil Proceedings against the Solicitor	583
4.1	Criminal proceedings	583
4.2	Civil proceedings.....	584
5.	Investigation of the Complaint by the Law Society's Investigation Committee and Standing Committee on Compliance.....	585
5.1	The Law Society can make inquiries of a solicitor under investigation.....	585
5.2	In responding to the inquiry, the solicitor may not rely upon the privilege against self-incrimination.....	585
5.3	Consideration of the complaint and possible consequences	586
5.4	Swift submission of a complaint to the Convenor of the Solicitors Disciplinary Tribunal	587
5.5	Summary disposal	587
6.	What Misconduct is Subject to the Disciplinary Process?.....	587
6.1	Matters referred to the Solicitors' Disciplinary Tribunal	587
6.2	Rule 2 of the Solicitors' Practice Rules is the touchstone of professional misconduct	589
7.	Submission of Complaint to the Solicitors Disciplinary Tribunal Panel and Appointment of a Solicitors Disciplinary Tribunal.....	589

8.3	Procedure for making the application	664
8.4	Overseas barrister admitted for particular case may not accept instructions in any other case	664
9.	Unqualified Person Practising as a Barrister	666
10.	Legal Representation in Arbitration Proceedings	666

CHAPTER 17 THE ORGANISATION OF CHAMBERS

1.	Barristers must practise from Professional Chambers	667
2.	Formal Organisation of Chambers	667
3.	Administration of Chambers	669
3.1	Duty to ensure practice is efficiently and properly administered	669
3.2	Duty to ensure confidentiality	669
3.3	Duty to keep and preserve proper records	670
4.	Remuneration of and Responsibility for Barrister's Clerks	672
4.1	Remuneration of barristers' clerks	673
4.2	Responsibility for acts of barristers' clerks	673

CHAPTER 18 COUNSEL'S RELATIONSHIP WITH INSTRUCTING SOLICITOR: TAKING INSTRUCTIONS AND THE SCOPE OF COUNSEL'S AUTHORITY

1.	Taking Instructions	675
1.1	The general rule: A barrister may only act on the instructions of a solicitor	675
1.2	Breach of the rule prohibiting the taking of instructions without the intervention of a solicitor will constitute professional misconduct	685
1.3	Taking instructions directly from a solicitor client is ethically proper	686
1.4	Solicitor assigned to act for litigant on Legal Aid has no right to brief counsel without approval of Director of Legal Aid	686
2.	The Requirement of a Brief and Backsheet	686
2.1	The brief	687
2.2	The backsheet	687
3.	Appointment and Role of Senior Counsel	689
3.1	Appointment as Senior Counsel	689
3.2	The decision to instruct Senior Counsel	690
3.3	Abolition of the 'two-counsel' rule	690
3.4	Respective roles where Senior Counsel and junior counsel instructed	691
3.5	Fees for junior counsel where Senior Counsel is instructed	691
4.	Effect of Marking of Counsel's Diary and Right to Accept Brief from Another Solicitor	691
5.	Collection of the Brief	692
6.	The Duty to Accept Instructions: The 'Cab-Rank' Rule	692
6.1	The rule	692
6.2	The rationale for the rule	692
6.3	Even when instructed counsel may be unable to represent the client on the day	693
6.4	Special considerations where counsel is instructed in child custody cases	693
7.	Exceptions to the 'Cab-Rank' Rule — Refusal of Brief	694
7.1	Case outside counsel's expertise	694
7.2	Client unable to afford counsel's usual fee	694

7.3	Conflict of interest	695
7.4	Situations where the impartial administration of justice may be impaired	697
7.5	Cases in which counsel is likely to be a witness	699
7.6	Instructions which limit counsel's ordinary authority or discretion	699
7.7	Cases in which counsel has been previously concerned in the course of another profession	699
8.	Withdrawal by Counsel and Return of Brief	700
8.1	Counsel unable to perform the required work within a reasonable time or within a specified time limit	700
8.2	Justification for return of brief on the grounds of counsel's relationship with his client	700
8.3	Client refusing to accept counsel's advice	701
8.4	Client having committed perjury to the knowledge of counsel	702
8.5	Client insisting that counsel conducts the case in breach of his professional duties	702
8.6	Conflicting commitments of counsel	703
8.7	Conflict of interest arising	704
8.8	Legally aided cases where unjustifiable expense involved	705
9.	Special Situations Not Entitling Counsel to Withdraw	706
9.1	Inability of client to pay	706
9.2	Inadequate brief fee or refresher	706
9.3	Client absconding during the trial	707
10.	Barrister Not Permitted to Give a Gift or Loan to a Person Instructing Him	708
11.	The Legal Effect of the Brief	709
12.	The Scope of Counsel's Authority	709
12.1	Express authority	709
12.2	Implied authority	710
12.3	Ostensible authority	710
12.4	Limitations upon counsel's authority	710
12.5	Illustrations of counsel's implied and ostensible authority	711
13.	Delegation of Work by Counsel	717
13.1	Delegation of the duty of representing the client in court	717
13.2	Delegation of non-contentious work	718
13.3	Payment for work properly delegated	719
14.	Conferences with Instructing Solicitor and the Client	719

CHAPTER 19 NEGOTIATION AND RECOVERY OF FEES

1.	Negotiation of the Fee	721
1.1	Counsel must either negotiate the fee personally or through his clerk with the person instructing him	721
1.2	When instructed by a solicitor, counsel should negotiate the fee directly with instructing solicitor and not the solicitor's clerk	721
1.3	Professional misconduct for counsel to negotiate the fee directly with the client	722
1.4	Acceptance of the brief fee	722
2.	The Brief Fee and Refreshers	722
2.1	The brief fee	722
2.2	Refreshers	723

2.3	Prudent to make clear agreement as to what services are covered by brief fee and refreshers and what fees are payable if counsel unable to attend trial	724
2.4	The quantum of the fee and overcharging	725
2.5	Taxation of counsel's fees	725
2.6	Recovery of counsel's fee on taxation even if fee not marked on the brief	727
3.	Prohibition of Gifts of Money to Counsel	727
4.	Contingency Fees and Conditional Fees	727
4.1	The rationale for prohibiting contingency fees	727
4.2	Prohibition of contingency fees in Hong Kong	727
5.	Counsel May Not Demand an Increase in Fees During the Trial or After the Litigation has Ended	728
5.1	The fee must be fixed before the trial begins	729
5.2	It is improper to fix or increase the fee during the trial	729
6.	Recovery of Fees by Counsel	729
6.1	Issuance of fee note and mode of payment of fees	730
6.2	Counsel instructed by a solicitor	730
6.3	Counsel instructed by member of recognised professional body	731
6.4	Payment of counsel's fees by instalments and interest on counsel's fees	733
7.	Record Keeping	734
CHAPTER 20 THE DUTIES OF THE BARRISTER TO THE PUBLIC AND TO HIS PROFESSION		735
1.	The Barrister's Duty to the Public and to the Administration of Justice	735
2.	The Barrister's Duty to His Profession	736
2.1	The barrister's duty to his profession	736
2.2	The barrister's duty to uphold his code of professional conduct	736
2.3	Duty not to engage in conduct which will bring the profession into disrepute	737
2.4	Unprofessional conduct by barrister falling short of criminality	742
2.5	Duty to observe the ethics and etiquette of the profession	744
2.6	Barristers' duty to make their practice their primary occupation	745
CHAPTER 21 PRACTICE PROMOTION, ADVERTISING AND PUBLICITY		753
1.	Introduction	753
1.1	Before 2009 self-promotion by barristers was severely restricted	753
1.2	The lifting of restrictions in 2009	754
2.	Practice Promotion by Barristers	754
2.1	The new provisions governing advertising by barristers	756
2.2	Policing and enforcing the advertising provisions	756
2.3	Application of the provisions	757
3.	Advertising and Practice Promotion: Specifics	757
3.1	Use of e-mail	757
3.2	Contributing to blogs and Facebook	757
3.3	Occasions on which a barrister may describe himself as 'barrister'	758
3.4	Photographs or other illustrations of barristers and appearance in wig and gown outside court precincts	759
3.5	Visiting cards	759

3.6	Notice of change of address of chambers and notice of return to practice	759
3.7	Social visits to persons instructing counsel	760
4.	Improper Obtaining of Business	760
4.1	Prevention of improper obtaining of business via commission payments and 'kick-backs'	761
CHAPTER 22 THE BARRISTER'S DUTY TO THE LAY CLIENT		765
1.	Introduction	765
1.1	The interrelationship between the barrister's duties to the lay client and to the court: Overriding duty to the court	765
1.2	The nature of counsel's duties to the client: Counsel's legal and ethical duties	765
2.	Counsel's Duty to Act Competently and with Reasonable Care and Skill	766
2.1	Introduction	766
2.2	The scope of counsel's common law duty of care	766
2.3	A criminal conviction may be set aside on the grounds of counsel's flagrantly incompetent advocacy	776
3.	Counsel's Duty to Obey Client's Instructions	778
4.	Counsel's Duty of Confidentiality to the Client and Legal Professional Privilege	778
4.1	The ethical duty of confidentiality	778
4.2	The common law duty of confidentiality	781
4.3	Legal professional privilege	781
5.	Counsel's Duty to Uphold the Interests of His Client and Avoid Any Conflict of Interest	782
5.1	The professional duty to uphold the interests of the client	782
5.2	Counsel's duty to avoid a conflict of interest	783
6.	Counsel's Duty When Defending a Person Accused of a Crime	786
6.1	Introduction	786
6.2	Duty not to leave client unrepresented during criminal trial	786
6.3	Advice on the plea	787
6.4	Right of the accused to decide whether to testify and duty of counsel where client elects not to testify	788
6.5	Duties in respect of laying blame upon others or insulting others	789
6.6	Counsel suspecting that client is not telling the truth	789
6.7	Client making inconsistent statements to counsel	790
6.8	Client confessing his guilt to his counsel	790
6.9	Counsel's duty in respect of client's previous convictions	793
6.10	Duty to see client after conviction and sentence	793
6.11	Duty of counsel where client absconds	793
7.	Immunity of Counsel and Solicitor Advocates	794
7.1	Introduction	794
7.2	The scope of the advocate's immunity	796
CHAPTER 23 THE ADVOCATE'S CONDUCT BEFORE TRIAL AND IN COURT		803
1.	Introduction	803
2.	The Advocate Owes Duties to the Client, the Court, His Professional Standards and to the Public	803
2.1	What is 'the Court'?	803

2.2	Barristers and solicitors are 'officers of the court'	804
2.3	The duty to the court in particular is an overriding duty	805
3.	Advocates' Duties before Trial	805
3.1	Introduction	805
3.2	Duty to consider mediation	805
3.3	Barrister's duties in respect of interviewing the client and witnesses	806
3.4	Counsel's duties when settling pleadings in civil cases and grounds of appeal in criminal cases	808
3.5	Advocates' duty in respect of affidavits	809
3.6	Advocates' duty to take procedural steps to facilitate a speedy hearing: Skeleton arguments, lists of authorities, chronologies of events and dramatis personae	810
3.7	Advocate's duty to ensure legibility of documents	811
3.8	Advocates' duty not to waste the court's time	811
3.9	Duty in respect of appeals	813
3.10	Duty to inform court once settlement reached	816
3.11	Duty not to pursue hopeless cases	817
3.12	Barristers' duty when document belonging to the other side comes into their possession	818
4.	Advocates' Duty to Observe Court Ethics and Etiquette	819
4.1	Court dress	819
4.2	Use of information technology and text-based communications in courtrooms	821
4.3	Courtroom manner and the presentation of the case	823
4.4	Improper allegations of bias and rudeness to the court	823
4.5	Proper conduct when cross-examining witnesses	826
4.6	Impugning the character of third parties	828
4.7	Inflammatory or emotive language to the jury	829
5.	The Advocate's Duties When Presenting His Case in Court	829
5.1	Advocates must never express their own opinion of the case being tried	830
5.2	Advocates must never give evidence in the case whilst conducting the case from the Bar	830
5.3	Advocate's duty to provide independent and objective representation of client	831
5.4	Advocate's duty not to waste the time of the court	832
5.5	Advocates' duty not to abuse the process of the court	833
5.6	Advocates' duty to provide the court with all necessary assistance	833
5.7	Duty to ensure that court acts within its jurisdiction	834
5.8	Duties of prosecuting and defence counsel during the summing-up	835
5.9	Advocates' duty not to knowingly deceive or mislead the court	838
5.10	Advocate's duty not to leave his client unrepresented in criminal trial	849
5.11	Advocate's duty not to communicate with witnesses during their testimony or with jurors during or after the trial	849
5.12	Advocate's duty in the plea bargaining process	850
5.13	Advocate in case required to testify during trial	854
6.	Barristers' Rights of Audience	857
6.1	Barristers have rights of audience in all courts save where excluded by statute	857
7.	Solicitor Advocates' Rights of Audience	858
8.	The Disciplinary Jurisdiction of the High Court over Barristers	858
8.1	The inherent jurisdiction of the High Court over barristers	858

CHAPTER 24 EMPLOYED BARRISTERS AND NON-PRACTISING BARRISTERS 861

1.	Employed Barristers	861
2.	An Employed Barrister is not a Practising Barrister	861
3.	Application of the Provisions of the Bar Code to Employed Barristers	862
4.	Employed Barristers and Legal Professional Privilege	863
5.	Barristers Employed In-House as Corporate Lawyers	863
5.1	Services that may be provided by barristers privately employed as in-house lawyers	863
6.	Non-Practising Barristers	865
6.1	Application of the Bar Code to non-practising barristers	865
6.2	Restrictions upon work that may be done by non-practising barristers	866

CHAPTER 25 BARRISTERS AND THE DISCIPLINARY PROCESS 867

1.	Introduction	867
1.1	Jurisdiction over the conduct of barristers	867
2.	Supervision by the Court	867
2.1	The disciplinary process	868
3.	Professional Misconduct Under the Bar Code and the Laying of a Complaint	868
3.1	Barristers' professional duties	868
3.2	Laying a complaint	870
4.	Investigation by the Bar Council	870
5.	The Barristers Disciplinary Tribunal	871
5.1	Appointment of members of a Barristers Disciplinary Tribunal panel by the Chief Justice	871
5.2	Appointment of members of a Barristers Disciplinary Tribunal panel to inquire into the matter	872
5.3	Sittings of the Disciplinary Tribunal	873
5.4	Powers and privileges of the Disciplinary Tribunal	873
5.5	Procedure in respect of hearings before the Disciplinary Tribunal	874
5.6	Disciplinary powers of the Disciplinary Tribunal	877
5.7	The Disciplinary Tribunal must comply with the rules of natural justice	878
5.8	Names of tribunal members and lawyers involved in disciplinary hearings not protected from disclosure to public	879
6.	Findings of the Disciplinary Tribunal	880
6.1	Order as to costs	880
7.	Enforcement of the Order	882
7.1	Enforcement of the order by the court	882
7.2	Application for payment by instalments	882
8.	Appeal to the Court of Appeal	882
8.1	Jurisdiction and procedure	882
8.2	Grounds on which the Court of Appeal will interfere with the decision of the Disciplinary Tribunal	883
9.	Variation of the Order of Suspension or Striking Off	884
9.1	Jurisdiction of the Disciplinary Tribunal	884
9.2	Matters to be taken into account	885
10.	The Standard of Proof of Misconduct	886

11. Fixing the Appropriate Penalty	
11.1 Striking off	
11.2 Censure	
11.3 Penalty for unprofessional conduct	
12. Government Legal Officers and the Disciplinary Process	
13. Application of the Doctrine of <i>Res Judicata</i> to Disciplinary Proceedings	
14. Interrelationship Between Criminal Proceedings and Disciplinary Action — No Double Jeopardy	
15. Expenses of the Disciplinary Tribunal	
16. Applications by Barristers to Have Their Names Struck Off the Roll	
16.1 The inherent power of the court to strike a barrister off the Roll	
16.2 Restoration of barrister to the Roll	

CHAPTER 26 THE DUTIES OF COUNSEL FOR THE PROSECUTION

1. Introduction	
2. The Department of Justice's Prosecution Code	
2.1 The independence of the Department of Justice in the conduct of criminal proceedings	
2.2 The roles of the Secretary for Justice and Director of Public Prosecutions	
2.3 The ethical standards and duties of prosecuting counsel	
3. The Duties of the Prosecution in the Investigation of the Case	
3.1 The interdependence of the roles of the prosecutor and the investigative authorities	
3.2 Communications between the investigative authorities and the Department of Justice may be protected from disclosure by legal professional privilege	
3.3 Entrapment	
3.4 Bringing the accused within the court's jurisdiction by improper means	
3.5 Evidence improperly obtained	
3.6 Loss of important evidence	
3.7 Suppression of relevant evidence	
3.8 Other grounds constituting an abuse of process	
4. The Decision Whether or Not to Prosecute	
4.1 The decision to prosecute	
4.2 Prosecution taking over a private prosecution	
4.3 Review and discontinuation of prosecution	
4.4 Determining the appropriate venue for the trial	
4.5 The duty of prosecuting counsel to the court	
5. The Duty of Disclosure to the Defence	
5.1 Introduction	
5.2 Requirements of disclosure in the Prosecution Code	
5.3 The common law duty of disclosure	
5.4 Provision of copies of all original statements made by an accused and copies of statements of all prosecution witnesses that the prosecution intends to call	
5.5 Extent of prosecution's duty to call witnesses	
5.6 Names and addresses of witnesses whom the prosecution does not intend to call	
5.7 Statements of witnesses whom the prosecution does not intend to call	

5.8 Other unused material in the possession of the prosecution	915
5.9 Prior inconsistent statements of prosecution witnesses	918
5.10 Information of prior failure by witness to identify accused	918
5.11 Discrepancies between eye-witness descriptions and actual appearance of the accused	919
5.12 List of accused's known previous convictions	919
5.13 Known convictions of prosecution witnesses and other factors affecting their credibility	919
5.14 Copies of documents seized from the defendant	921
5.15 Forensic evidence supporting defence case	921
5.16 Copies of exhibits	921
5.17 Samples of substances	922
5.18 Disclosure of terms of offer of immunity from prosecution to a prosecution witness	922
5.19 Disclosure of use of undercover agents and identity of informers	923
6. Prosecuting Counsel Interviewing Witnesses	925
6.1 Coaching prosecution witnesses	926
7. The Duty of the Prosecution in Procedural Matters	926
7.1 Duty not to abuse the court process	926
7.2 Abuse of process in the decision to prosecute	926
8. Victims of Crime and Vulnerable Witnesses	928
9. Communications Between Prosecuting Counsel and the Media	929
10. Unrepresented Accused Persons	932
11. The Duty of the Prosecution in the Presentation of Evidence During the Trial	933
11.1 Introduction	933
11.2 The opening speech for the prosecution	933
11.3 Calling of witnesses and examination-in-chief by the prosecution	934
11.4 Cross-examination by the prosecution	935
11.5 Duty of prosecuting counsel during his closing address	936
11.6 Duty of prosecuting counsel during the summing-up	937
12. The Duty of Prosecuting Counsel to Attend Throughout the Trial	937
13. The Duty of the Prosecution on Appeals Against Conviction	938
14. The Role of the Prosecution in the Sentencing Process	939
14.1 Guidance from the Prosecution Code	939
14.2 Guidance from the court	941
14.3 Appeals against sentence and review of sentence	942
15. Discipline and Immunity from Disciplinary Action	943
<i>Index</i>	947

CHAPTER 1

INTRODUCTION TO THE LEGAL PROFESSION IN HONG KONG

1. THE LEGAL PROFESSION IN HONG KONG

[1-1] The legal profession in Hong Kong is divided into two separate branches: barristers and solicitors.

[1-2] According to statistics provided by the Law Society, as at 30 June 2022, there were 12,934 solicitors enjoying membership of the Law Society of whom 11,243 held practising certificates. Of these, 87 had qualified as Solicitor Advocates (81 in civil proceedings and 6 in criminal proceedings). The practicing solicitors worked in 937 Hong Kong law firms of which 53 were limited liability partnerships. There were also 81 registered foreign law firms of which 16 were limited liability partnerships. As to gender diversity, according to the Law Society, in 2021, women made up about 65 per cent of trainee solicitors, 51 per cent of all solicitors holding practicing certificates but only 30 per cent of partners.¹

[1-3] According to the Bar Association's website, as at 30 June 2022, there were 1,618 practising barristers (of whom 1,137 were men and 481 were women), including 103 Senior Counsel (of whom 91 were men and 12 were women), and 143 chambers.²

2. THE ORGANISATION AND ADMINISTRATION OF THE SOLICITORS' PROFESSION

2.1 The Law Society: Objects and membership

[1-4] The Law Society of Hong Kong is the professional body representing solicitors in Hong Kong as well as exercising statutory functions in the regulation of solicitors.

¹ Hong Kong Law Society Profile of the Profession, available at <https://www.hklawsoc.org.hk/en/About-the-Society/Profile-of-the-Profession>.

² See the Hong Kong Bar Association website, at www.hkba.org/Bar-List.

2.1.1 The objects of the Law Society

[1-5] Solicitors are organised and administered as a body by the Law Society of Hong Kong, presided over by its Council. The Incorporated Law Society of Hong Kong was incorporated as a company limited by guarantee on 8 April 1907, changing its name to The Law Society of Hong Kong in 1969, and has, *inter alia*, the following objects:

- (1) To support and protect the character, status and interests of solicitors in Hong Kong.
- (2) To establish and promote good standards of practice, to repress malpractice, to settle disputed points of practice and to decide all manner of questions of professional usage or courtesy between or amongst solicitors.
- (3) To consider all manner of questions affecting the interests of the profession, and to represent the profession whether by way of negotiation, correspondence, Petition or otherwise and to procure changes of law or practice, and the promotion of improvements in the principles and administration of the law.
- (4) To regulate charges for professional and other work and to provide for the enforcement of the same and to deal with and determine questions relating to costs and other remuneration whether by scale or otherwise.
- (5) To encourage the study of law by solicitors and trainee solicitors and students and to arrange for dissemination of information of assistance to the profession by all manner of means and generally to promote knowledge of legal subjects by lectures, discussions, books, correspondence, pamphlets or otherwise.

[1-6] Therefore, it can be seen that the Law Society has the role, not only of promoting the interests of its members and representing the profession but also of promoting good ethical standards and continuing professional development. Any income derived by the Law Society must be applied solely towards the promotion of the objects of the Society and may not be paid to the members by way of dividend or bonus. Members are, however, liable for the debts of the Society should it be wound up.

2.1.2 Membership of the Law Society

[1-7] All solicitors wishing to practise must be members of the Law Society, and any person eligible to hold a practising certificate entitling him or her to practise as a solicitor of the High Court of Hong Kong is entitled to apply for admission to membership of the Society. Amendments to the Law Society's Articles of Association in 2001 enable the Society to offer student membership

³ According to section 6(3), Legal Practitioners Ordinance (Cap 159), a practising certificate will not be issued unless the applicant has paid his membership subscription to the Law Society in respect of the year for which the practising certificate is to be issued.

to all trainee solicitors (including trainee solicitors seconded to Hong Kong from other common law jurisdictions) and to all law students at the institutions prescribed by the Council from time to time.

2.1.3 Members' obligations by virtue of membership

[1-8] On application for membership, every member undertakes to abide by the Articles of Association of the Law Society and all Practice Directions, and the rules and regulations issued from time to time issued by the Society and failure to do so will constitute in professional misconduct. Further, all solicitors are required to comply with the standards of practice and rules of conduct set out in the Hong Kong Solicitors' Guide to Professional Conduct (the Solicitors' Guide) as revised from time to time.⁴

2.2 Administration of the Law Society

2.2.1 The Council of the Law Society

[1-9] The Council, which must be elected in accordance with the provisions of the Articles of Association of the Law Society, is the governing body of the society and consists of 20 members with two vice presidents and one president; it has numerous functions to perform, many of which have been designated by statute. For example, the Council has the power to prescribe the fee payable for a practising certificate; power to discharge the contract of a trainee solicitor; power to submit a complaint to the Tribunal Convenor of the Solicitors' Disciplinary Tribunal Panel; power to deal with property of solicitor suspected of being guilty of dishonesty; power to deal with client's bank accounts of deceased solicitor; and power to make rules governing the discipline of solicitors. The Council meets twice monthly or more frequently, if necessary. It receives and considers reports from six Standing Committees. It also determines issues raised by the Council itself.

[1-10] The Law Society has a complex structure of Committees to deal with its administrative workload and with its involvement in professional standards, law reform, legal awareness within the community and legal education.

2.2.2 The Secretariat

[1-11] The Society has about 100 staff headed by the Secretary General. Within the Secretariat, there are six departments which support the responsibilities of the six Standing Committees. The Secretariat is the body responsible for the six standing committees within the Society. The chief administrator of the Law Society is the Secretary General, who is assisted by the Directors of the six Standing Committees.

⁴ Practice Direction I.2, referred to in Commentary 3 of Principle 1.06, Solicitors' Guide. The third edition of the Guide was issued on 1 January 2014. The full text of the Solicitors' Guide is available on the Law Society of Hong Kong website, at <https://www.hklawsoc.org.hk/en/Support-Members/Professional-Support/Professional-Guide>.

(a) **Standing Committee on Compliance**

[1-12] The Standing Committee on Compliance oversees the work of the Registration and Conduct Sections of the Secretariat. The Registration Section handles admission procedures for solicitors, issues annual practising certificates, registers trainee solicitors, foreign law firms and foreign lawyers; the Conduct Section handles complaints and carries out investigations, and prosecutes cases put before the Solicitors Disciplinary Tribunal. The Council has delegated its power to refer complaints to the Tribunal Convenor of the Solicitors' Disciplinary Tribunal Panel to the Standing Committee.

[1-13] The Standing Committee has two subcommittees, the Consents Committee, which deals with administration matters, and the Investigation Committee, which deals with complaints concerning solicitors' conduct.

(b) **Standing Committee on Practitioners Affairs**

[1-14] The Standing Committee on Practitioners Affairs handles a variety of different matters affecting practitioners and many Law Society subcommittees, including the Bilingualism Committee, the Civil Litigation Committee, the Criminal Law and Procedure Committee, the Company and Financial Law Committee, the Constitutional Affairs Committee, the Family Law Committee, the Insolvency Law Committee, the Insurance Law Committee, the Management and Technology Committee, the Probate Committee, the Property Committee and the Securities Law Committee report to it. The Committee issues many guidelines and directions and responds to questions from practitioners in relation to the running of their practices.

(c) **Standing Committee on Standards and Development**

[1-15] The Standing Committee on Standards and Development oversees a variety of important matters affecting the profession. It is responsible for keeping under review the relevant provisions of the Legal Practitioners Ordinance (Cap 159) and the regime to enable foreign lawyers to qualify by way of examination for admission in Hong Kong. Several subcommittees report to it. The Guidance Committee was established by the Law Society to ensure that the Legal Practitioners Ordinance and its subsidiary legislation meet the current needs of the profession and to formulate a code of conduct for solicitors. A Hong Kong Solicitors' Guide to Professional Conduct was issued in 1995, a second edition was issued in 1998 and a third in 2013 (effective from 1 January 2014). The Committee also has the duty of responding to inquiries about the ethics of practice and of monitoring professional standards of practice within the profession. It also has the duty to advise the Council on such matters. The Legal Education Committee's function is to monitor the quality of entrants to the profession and deal with all issues involving professional legal education. The Continuing Professional Development Committee oversees the Continuing Professional Development Scheme.

(d) **Standing Committee on External Affairs**

[1-16] The Standing Committee on External Affairs has many functions involving the Society's interface with the outside world. It is responsible for formulating the

Society's views of matters of public policy, addressing the media on topical issues and monitoring public opinion, liaising with the Government and other professional organisations both within and outside Hong Kong, organising press releases and conferences, overseeing publication of the Law Society's journal the 'Hong Kong Lawyer' and generally raising legal awareness among the public.

[1-17] The Committee has also taken the initiative in strengthening networks between Hong Kong lawyers and Mainland lawyers. The Committee is also responsible for the organisation of Law Week, which is held annually.

(e) **Standing Committee on Policy and Resources**

[1-18] The Standing Committee on Policy and Resources is responsible both for establishing and maintaining the policy framework of the Law Society and for the management and control of the Society's finances. It also prepares the annual budget of the Society.

(f) **Standing Committee on Member Services**

[1-19] The Standing Committee on Member Services formulates strategies that enhance members' benefits and interests. Its remit includes dealing with law firm management matters and promotion of legal services; it has responsibility for, amongst other matters, organising career development and networking opportunities for members; provision of online information services; dealing with the general ethics and practice enquiries by members; managing the members' hotline; provision of practice resources and tools, library and legal technology resources; disseminating practice notes, circulars, newsletters and other information to members; organising programmes, and special interest group and social functions.

3. THE ORGANISATION AND ADMINISTRATION OF THE BAR

3.1 The Hong Kong Bar Association

[1-20] The Bar is administered by the Hong Kong Bar Association and all barristers wishing to practise must be members of the Bar Association.⁵

[1-21] Founded in 1949, the Bar Association is an unincorporated association. It fulfils several purposes, but its main role is to provide a forum for all barristers to meet and formulate policy. For example, amendments to the Bar Code may be made by the Bar in General Meeting. The Bar Association often makes public statements, usually through the Chairman, on matters affecting the Bar and on

⁵ According to section 30(3), Legal Practitioners Ordinance (Cap 159), except in respect of barristers wishing to be admitted for a particular case under section 27(4) of the Ordinance, a practising certificate will only be issued to an applicant who has paid his membership subscription to the Bar Association in respect of the period for which the practising certificate is to be issued.

matters affecting the framework of the law in Hong Kong. The Bar has been especially concerned about matters affecting the rule of law and human rights.

[1-22] The Bar Association is run by a small secretariat housed in the High Court building.

3.2 The Bar Council

[1-23] The Bar Council has the dual function of regulating and representing its members. The Bar Council meets regularly and is responsible for issuing Bar Circulars and Directions and has appointed several subcommittees to assist it in its wide-ranging functions. These committees include the Arbitration Committee, Bar Insurance Committee, Bar Scholarship Committee, China Practice Committee, Bar Committee, Code of Conduct Committee, Criminal Law & Procedure Development Committee, Discipline Committee, Family Law Committee, Finance Committee, Greater China Affairs Committee, Land, Trust and Probate Committee, Legal Aid Reform Committee, Legal Education Committee, Mediation Committee, Professional Development Committee, Tax Law Committee and Young Barristers Committee.

[1-24] Many of the Council's powers are prescribed by statute or the Bar Code, and these include power to prescribe what work may be undertaken by pupils during their period of pupillage; power to lay a complaint against a barrister before the Barristers' Disciplinary Tribunal Panel; power to admonish barristers; power in certain specified circumstances, to grant approval for barristers to engage in or carry out certain activities which would not otherwise be permitted; and power to make amendments to the Code of Conduct of Barristers.

3.3 All barristers bound to comply with the Bar Code

[1-25] All barristers are bound to uphold the standards set out in the Bar Code and to observe the ethics and etiquette of the barrister's profession.⁶ The current version of the Bar Code became effective from 15 November 2018 (to be updated as from 2 August 2022).⁷

⁶ See Bar Code, paragraphs 4.1(a) and (c).

⁷ The full text of the Bar Code is available on the Bar Association website, at <http://www.hkba.org/content/code-conduct>.

CHAPTER 2

THE SOURCES OF HONG KONG LAWYERS' LEGAL AND ETHICAL RESPONSIBILITIES

[2-1] There are several sources from which the legal and ethical duties imposed upon solicitors and barristers are derived. These sources are statute, case law and the rules laid down by the profession itself for its better regulation. To identify and consider these sources in greater detail, we will consider solicitors and barristers separately.

1. SOLICITORS

[2-2] The requirements of solicitors' professional conduct derive from both statutory and non-statutory sources. The principal statutory provisions which regulate solicitors' professional conduct include the Legal Practitioners Ordinance (Cap 159), subsidiary legislation enacted thereunder and the Rules of the High Court (Cap 4A). The non-statutory sources are the common law, which has developed and elaborated the basic principles of conduct, Law Society guidance by way of the Hong Kong Solicitors' Guide to Professional Conduct, Law Society Circulars and statements, guidance issued by the Guidance Committee and Practice Directions issued by the Council of the Law Society. Decisions of the Solicitors' Disciplinary Tribunal and the court provide a further source.

2. BARRISTERS

[2-3] The requirements of barristers' professional conduct similarly derive from both statutory and non-statutory sources. The principal statutory provisions which regulate solicitors' professional conduct include the Legal Practitioners Ordinance (Cap 159),¹ subsidiary legislation enacted thereunder and the Rules of the High Court (Cap 4A). The non-statutory sources are the common law, the Bar Code, promulgated by the Bar Council, which provides a comprehensive set of rules governing the professional conduct of barristers and is primarily based upon the Code of Conduct for the Bar of England and Wales of 1981, with variations warranted by local conditions and practice, Bar Circulars and rulings of the Bar Council.

¹ Although the Legal Practitioners Ordinance (Cap 159) does not itself lay down any rules governing the conduct of barristers, it does provide the machinery for the disciplining of barristers by the court.

3. THE ROLE OF THE PROFESSION IN GUIDING ITS MEMBERS IN CASES OF DOUBT

[2-4] In most situations, it will be clear to the lawyer what his professional responsibilities are. If in doubt, a junior member of the profession should go to his seniors for advice. There are, however, some aspects of practice where it is not at all clear what the appropriate conduct should be. In such cases the safest course is for the lawyer to ask the appropriate body of the Law Society² or the Bar Association³ for guidance.

4. ENFORCEMENT OF THE LAW AND PROFESSIONAL CODES

4.1 Breaches of the law and breaches of the Professional Codes are distinct and may be punished separately

[2-5] Any breach of the law will be enforced in an appropriate manner by the courts. Similarly any breach of the codes of conduct will be enforced by the profession through the statutory disciplinary processes and any additional process laid down in the codes. There is, therefore, a need to draw a clear distinction between conduct which is in breach of the law and conduct which is in breach of a professional code.⁴

[2-6] In some cases, a particular act of misconduct will breach both the law and the lawyer's professional code. For example, insulting words spoken by an advocate in court might constitute both contempt of court, punishable by the court, and a breach of the advocate's professional duty to act with due courtesy to the court, punishable by the profession. Further, a criminal act committed by a lawyer may both receive punishment by the courts and lead to his subsequently being disciplined by the profession as a result of such criminal act, on the grounds that the act constituted unprofessional conduct. It is quite clear that, in such cases,

2 Commentary 2 of Principle 1.05 of the Solicitors' Guide says that the Law Society's Standards and Development Department will give written or telephone advice on the requirements of professional conduct. Further, if necessary, an opinion can be sought from the Guidance Committee. Advice is usually given on a confidential basis.

3 Bar Association Circular No 14 of 2008 reminds members wishing guidance to seek it through the Honorary Secretary.

4 This distinction was referred to by Cromwell J in *Perez v Galambos* [2009] 12 WWR 193, (2009) 312 DLR (4th) 220, 2009 SCC 48 thus: 'There is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but does not breach rules of professional conduct and breaching the rules of professional conduct is not necessarily negligence'.

no defence of double jeopardy will be available to the wrongdoer,⁵ although such factor might be taken into account by way of mitigation of punishment.⁶

4.2 The Professional Codes will not be enforced directly by the courts

[2-7] An important point to bear in mind is that the professional codes are not law and will not, therefore, be directly enforced by the courts. The inter-relationship of rules of law and rules of professional conduct was explained by Browne-Wilkinson V-C in *Supasave Retail Ltd v Coward Chance (a firm)*.⁷ When considering a possible conflict of interest arising by virtue of a merger of two firms of solicitors, he said:

I think I should make it clear that I am not at this hearing concerned with questions of the rules of the Law Society or the etiquette of the profession. As I understand it, that is a matter for the profession itself to regulate. To the extent that the rules of etiquette are inconsistent with and do not comply with the general law, then they would obviously be improper. But it is a common feature of professional rules that they impose a higher duty on the members of the profession than does the law itself. It seems to me that in this case I am concerned with legal obligations, not the obligations imposed by professional rules of conduct laid down by the Law Society.

[2-8] The distinction between the duty of care laid down in the professional codes and by the common law is exemplified in *Johnson v Bingley*,⁸ where the court made it clear that breaches of the Solicitors' Guide's standards of proper care did not ipso facto constitute common law negligence. In that case, the plaintiff had sued her solicitors in negligence on the grounds of failure to properly advise their client. The court pointed out that the provisions of the Solicitors' Guide laid down proper and accepted practice for solicitors; negligence, however, was a legal concept and neither the Law Society nor any other body could, by rules and edicts, alter the law of the land.⁹

[2-9] Ethical requirements were again held to be inapplicable by the court in *Portric Co Ltd v Golden Dragon Engineering Co Ltd*.¹⁰ In this case, the taxing master had disallowed counsel's fees on the grounds that they had not been marked on the brief but the court held that this was an ethical requirement, not a requirement of the law, and the fees should have been allowed. In the words of Mayo J:

5 See *Achtem v Law Society of Alberta* (1981) 61 CCC (2d) 153, (1982) 126 DLR (3d) 364 (CA, Alberta); *R v Ste-Marie* (1977) 40 CCC (2d) 81, (1978) 84 DLR (3d) 254 (CA, Quebec).

6 See *Re H (A Barrister)* [1981] 3 All ER 205, [1981] 1 WLR 1257.

7 *Supasave Retail Ltd v Coward Chance (a firm)* [1991] 1 All ER 668 at 672.

8 *Johnson v Bingley* The Times, 28 February 1995.

9 Similarly in Canada, where the distinction between the rules of conduct and rules of law was made clear by the Supreme Court of Canada in *Perez v Galambos* [2009] 12 WWR 193, (2009) 312 DLR (4th) 220, 2009 SCC 48.

10 *Portric Co Ltd v Golden Dragon Engineering Co Ltd* [1984] HKC 343 (HC).

There is no doubt in my mind that there is no requirement at law for counsel's fee to be marked on his brief. I do not think that it is any part of the function of a taxing master to attempt to impose upon either counsel or solicitors a requirement that they should comply with the respective Codes of their governing bodies. It is inappropriate that they should attempt to do so.

[2-10] A further illustration is *Hong Kong Scaffold Building Contractor Co Ltd v On Lee General Contractors Ltd*.¹¹ A barrister had been acting for the plaintiff company in an action for money allegedly owed to it by the defendant. The barrister was, however, a director of the plaintiff company at the material time, which constituted a breach of (the then) paragraph 58 of the Bar Code (embarrassment and conflict of interest).¹² The defendant applied to the court for an injunction to prevent the barrister from continuing to act for the plaintiff. In fact, the barrister in question had already been censured by the Bar Council for breaching the Bar Code and had ceased to act for the plaintiff. The court held that, even had the barrister not ceased to act, a barrister's actions in breach of his Code did not by themselves affect his right of audience. It was only where the representation would constitute contempt of court that the court would act and the present situation did not seem to fall within such parameters. The proper course of action would have been for the court to refer the case to the Bar Council for an inquiry as to whether disciplinary proceedings should be instituted. This had already been done. In response to an argument by the defence that the barrister might try to assume his brief again, the court said that such suggestion was hypothetical; if it were to happen, the case would be referred back to the Bar Council.

4.3 Courts may take Professional Codes into account

[2-11] Although, as we have seen above, the courts will not directly enforce the professional codes, they may, however, take the provisions of those codes into account when determining the proper standards of practice to be applied by lawyers on the reasoning that the codes indicate public policy. Thus Rogers JA said in *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)*:¹³

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

[2-12] Similar views were expressed by Richardson J in *Black v Taylor*:¹⁴

¹¹ *Hong Kong Scaffold Building Contractor Co Ltd v On Lee General Contractors Ltd* [1998] HKCU 266 (unreported, HCCT 1/1998, 31 March 1998) (HC).

¹² This would now be, among other things, a clear breach of paragraph 6.3(b), Bar Code.

¹³ *Nishimatsu-Costain-China Harbour Joint Venture v Ip Kwan & Co (a firm)* [2000] 2 HKC 445 at 460, [2001] 1 HKLRD 84 (CA). This case involved the question whether the defendant had been guilty of a conflict of interest.

¹⁴ *Black v Taylor* [1993] 3 NZLR 403 (CA, NZ) at 409.

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

[2-13] Further in *Bulloch-MacIntosh v Browne*,¹⁵ Firestone J said:

The Law Society of Upper Canada's Rules of Professional Conduct provide guidance for the courts on the question of disqualifying conflicts of interest. As the Supreme Court of Canada recognized in *Canadian National Railway Co v McKercher LLP* 2013 SCC 39, [2013] 2 SCR 649, courts and law societies are both involved in resolving issues relating to conflicts of interest and may have regard to each other's views. Courts are not 'bound by the letter of law society rules, although an expression of a professional standard in a code of ethics ... should be considered an important statement of public policy'.

4.4 Conflict between lawyers' duties under the law and their duties as prescribed by their Professional Codes

[2-14] Since the professional codes are not part of the law, they will not bind the courts. The situation might arise, however, in an exceptional case, that there is a variance between the legal duties imposed upon lawyers by the courts and the duties imposed by their professional codes. There are several illustrations of such situations arising.

4.4.1 Suggesting the witness's dishonesty in cross-examination

[2-15] With regard to the legitimate extent to which counsel for the defence may cross-examine a witness, the Bar Code provides that counsel may put questions suggesting fraud, misconduct or the commission of a crime to a witness in cross-examination which goes to a matter in issue if he is satisfied that the matters suggested are part of his client's case and he has no reason to believe that they are put forward merely for the purpose of impugning the witness' character.¹⁶ In *R v Callaghan*,¹⁷ counsel for the defence made an attack upon the honesty of a prosecution witness and persisted in the attack, although the accused declined to testify in his defence so as to support the allegations made. The Court of Appeal severely criticised the counsel's conduct, but following representations from the Bar Council to the effect that such criticism was at variance with counsel's duties as laid down in the Code of Conduct, Waller LJ subsequently issued a statement¹⁸ to the effect that counsel may make such an attack, although such conduct should be exceptional and was likely to attract adverse comment from the Bench.

¹⁵ *Bulloch-MacIntosh v Browne* [2015] OJ No 1292, 2015 ONSC 1622.

¹⁶ Paragraph 10.41, Bar Code. See *Clyne v New South Wales Bar Association* (1966) 104 CLR 186 (HC, Aust) at 188.

¹⁷ *R v Callaghan* (1979) 69 Cr App R 88 (CA, Eng).

¹⁸ *Youngs v Thanet District Council* The Times, 20 February 1980.

4.4.2 Counsel drawing attention to an error in the summing-up

[2-16] Another matter of possible variance is that governing the duty of defence counsel to draw the attention of the trial judge to an error in the summing-up. The Bar Code provides that defence counsel is not under any duty to draw matters of fact or law to the attention of the court at the conclusion of the summing-up but he may do so if he believes it would be to the advantage of his client.¹⁹ In all cases, however, a practising barrister must bring any procedural irregularity of which he is or has become aware to the attention of the court during the hearing and not reserve such matter to be raised on appeal.²⁰ In *R v Edwards*,²¹ defence counsel had remained silent during the summing-up, although being aware that the judge had failed to direct the jury as to the standard of proof. Notwithstanding the fact that the supposed error was not a matter of procedure, the court expressed surprise when counsel took this point on appeal, saying that counsel, acting in the best interests of his client, should have drawn the trial judge's attention to the omission.

[2-17] The same issue came before the Court of Appeal in Hong Kong in *R v Leung Chi Yuen*.²² The trial judge had invited both prosecuting and defence counsel, before he summed-up to the jury, to address him on a point relating to corroboration. Crown counsel did so, but defence counsel said that he had been instructed not to assist the court on this matter. On appeal Penlington JA, referring to the provisions of the Bar Code, and noting that this was not a procedural matter, said that what would be wrong — and the learned judge made it clear that he was not suggesting that it had occurred here — was for counsel to refrain from making a submission on the grounds that it would be a good point to be taken later on appeal. It was counsel's duty to take all proper steps in his client's interest, which involved attempting to secure his acquittal at the trial. It could also be that failure to take a point at the trial could affect counsel's right to take the point subsequently and counsel should have replied that he did not wish to make a submission on the point.²³ In both *Edwards* and *Leung Chi Yuen*, the possible error was not procedural and the courts would appear to be requiring of defence counsel a more positive duty than that required by the Code of Conduct (ie, counsel 'should', not 'may', make a submission on the point).

4.4.3 The manner of making a statutory declaration

[2-18] The manner of making statutory declarations provides another example where the law and professional standards apparently conflict. Principle 13.09 of the Solicitors' Guide provides that a solicitor must not administer oaths and affirmations nor take statutory declarations in proceedings or matters in which

¹⁹ Paragraph 10.60, Bar Code.

²⁰ Paragraph 10.39, Bar Code.

²¹ *R v Edwards* (1983) 77 Cr App R 5 (CA, Eng).

²² *R v Leung Chi Yuen* [1989] 2 HKC 24 (CA).

²³ See also *R v Southgate* [1963] 2 All ER 833 (CA, Eng); *R v Ho Chun-Yuen* [1961] 3 HKLR 433, [1961] HKCU 51 (CA); *HKSAR v Shing Siu Ming* [1999] 2 HKC 818 (CA).

he or his firm is acting for any of the parties or is otherwise interested.²⁴ This is consistent with the rules of civil procedure in that Order 41 rule 8 of the Rules of the High Court (Cap 4A) provides that no affidavit shall be sufficient if sworn before the solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that solicitor. The courts and the profession appear, however, to have adopted differing stances in respect of statutory declarations made in non-contentious matters such as conveyancing transactions.

[2-19] In *Lee Yeung Chun v Ng Choi Chun*,²⁵ Godfrey J expressed the view obiter that, as a matter of policy, a statutory declaration made before a declarant's own solicitor was inadmissible. This decision, of course, accords with the ethical position. In *Hardy Kowara v Headwell Investments Ltd*,²⁶ however, Rogers J, after a detailed analysis of the relevant legislation and common law authorities, concluded that a statutory declaration was not rendered inadmissible simply because it had been made before a declarant's own solicitor or a solicitor acting for one of the parties in the transaction to which the declaration related. Other than in the case of declarations as to the non-revocation of powers of attorney (section 5(8) of the Powers of Attorney Ordinance (Cap 31)), there was no statutory prohibition on such a statutory declarations being inadmissible. The learned judge concluded that, although it was no doubt preferable in many instances that statutory declarations be made before an independent solicitor, there was no justification for preventing the use of a statutory declaration simply because the declarant had made it before his own solicitor.²⁷

²⁴ Principle 13.09 of the Solicitors' Guide also provides, however, that it does not apply where a solicitor is taking statutory declaration in his capacity as a China-Appointed attesting Officer, for Mainland China purposes.

²⁵ *Lee Yeung Chun v Ng Choi Chun* [1990] 1 HKC 222, [1990] 1 HKLR 468 (HC).

²⁶ *Hardy Kowara v Headwell Investments Ltd* [1995] 1 HKC 613, [1995] 2 HKLR 491 (HC).

²⁷ Notwithstanding this decision, the Law Society subsequently confirmed in Law Society Circular No 264 of 2000 that a solicitor must not, as a matter of professional conduct, take statutory declarations in proceedings or matters in which he or his firm is acting for any of the parties or is otherwise interested.

CHAPTER 3

ADMISSION TO PRACTICE — SOLICITORS

1. CONDITIONS GOVERNING ELIGIBILITY FOR ADMISSION

[3-1] The decision whether to admit any person as a solicitor of the High Court rests with the Court of First Instance,¹ but before the court is empowered to admit a person to be a solicitor certain pre-conditions to admission must be fulfilled. These conditions relate both to eligibility and suitability. The Legal Practitioners Ordinance (Cap 159) provides:

The Court may, in such manner as may be prescribed by the Chief Justice, admit as a solicitor of the High Court a person whom the Court considers is a fit and proper person to be a solicitor and who—

- (a) has complied with requirements prescribed by the Council with respect to employment as a trainee solicitor, the passing of examinations and the completion of courses; or
- (b) in the case of a person who seeks admission on the basis of qualifications acquired outside Hong Kong, qualifies for admission under requirements prescribed by the Council.²

[3-2] The rules governing eligibility for admission were substantially revised in 1994 and the present provisions simplify admission by removing any distinctions based upon citizenship. No longer is admission conditional upon Commonwealth citizenship or seven years' residence in Hong Kong, but admission is now open to anyone who can comply with the professional requirements stipulated by the Law Society. Different conditions for admission apply depending upon whether the application is based upon local or foreign qualifications.

1.1 Admission based upon local qualifications

[3-3] The basic local admission qualification is now residency together with compliance with rules made by the Council of the Law Society with respect to examinations, together with the prescribed period of employment as a trainee solicitor and compliance with mandatory continuing professional development requirements.

¹ Section 4(1), Legal Practitioners Ordinance (Cap 159).

² Section 4(1)(a), (b), Legal Practitioners Ordinance (Cap 159).

1.1.1 Requirements as to residency

[3-4] The first requirement is that the court may not admit a person unless it has received from the Law Society a certificate to the effect that the Society is satisfied that the person:

- (1) has resided in Hong Kong for at least three months immediately before his admission;
- (2) intends to reside in Hong Kong for at least three months immediately after his admission;³
- (3) has been ordinarily resident in Hong Kong for at least seven years; or
- (4) has been present in Hong Kong for at least 180 days of each of at least seven years.⁴

1.1.2 Compliance with examination and course requirements

[3-5] The second requirement is that the applicant has complied with the requirements prescribed by the Council with respect to the passing of examinations and the completion of courses.⁵

[3-6] These requirements are laid down in the Trainee Solicitors Rules (Cap 159J):

A person may only enter into a trainee solicitor contract if he:

- (a) has passed or received a certificate of completion or a certificate of satisfactory completion as the case may be in:
 - (i) the Postgraduate Certificate in Laws (PCLL) and such other examination or course as the Law Society may require and set or approve; or
 - (ii) such other examination or course as the Law Society may require and set or approve; or
- (b) has been granted total exemption by the Law Society from the requirements in paragraph (a).⁶

[3-7] At present, no other examination in addition to the PCLL has been required by the Law Society.⁷

³ Section 4(3), Legal Practitioners Ordinance (Cap 159) provides that, where such a person was admitted on the basis of an intention to reside in Hong Kong for at least three months immediately after his admission but fails to reside in Hong Kong for that period, the court may, on the application of the Society, order that the person's name be removed from or struck off the Roll of solicitors.

⁴ Section 4(1A), Legal Practitioners Ordinance (Cap 159).

⁵ Section 4(1)(a), Legal Practitioners Ordinance (Cap 159).

⁶ Rule 7, Trainee Solicitors Rules (Cap 159J).

⁷ The Hong Kong Law Society has been considering the introduction of an alternative to the PCLL for a number of years. This was initially called a Common Entrance Examination (CEE) but is now referred to as the Law Society Examination (LSE). At the time of writing, the Law Society had not implemented the LSE nor finalised its provisions.

1.1.3 Compliance with required period of employment as trainee solicitor

[3-8] The third requirement is that the applicant has complied with the obligation prescribed by the Law Society with respect to employment as a trainee solicitor.⁸ Subject to certain exceptions,⁹ no person may be admitted as a solicitor by the local qualifications route unless he has duly completed two years' period of employment as a trainee solicitor under one or more trainee solicitor contracts.¹⁰ If the period of two years is not a continuous period of two years, it is nevertheless an effective employment as a trainee solicitor if the trainee solicitor has been employed under one or more trainee solicitor contracts equal in total to two years during the three years, or such further period as the Council may allow, immediately preceding his application for admission as a solicitor.¹¹ The Law Society recently issued guidance on different aspects of trainee solicitor training, such as the terms and conditions of the trainee solicitor contract; training experience; the conduct of principals or trainees; and problems and difficulties that may arise during training.¹²

1.1.4 Persons who may employ trainee solicitors and restrictions upon the number of trainee solicitors

[3-9] Save with the special written leave of the Law Society, only solicitors who have been in continuous practice as solicitors in Hong Kong for a period of five years or more may employ a trainee solicitor or act as his principal¹³ and no solicitor is permitted to employ or act as principal for more than two trainee solicitors at the same time.¹⁴ Further, unless special written leave is given by the Law Society, the principal must be practising on his own account or in partnership.¹⁵ The Law Society has published a 'Code of Good Practice in the Recruitment of Trainee Solicitors' to achieve an effective, open and fair recruitment process.¹⁶ The Code sets out the responsibilities of the principals and trainees in the recruitment process. A failure to comply with the Code will not amount to professional misconduct. It may, however, be referred to the Council for it to consider whether an applicant is suitable for registration as a trainee solicitor and/or is a fit and proper person for admission as a solicitor.

[3-10] There is also provision for 'in-house' solicitors employing trainees upon their securing special leave to do so. Also, solicitors who have been admitted via the Overseas Lawyers Qualification Examination may be granted conditional

⁸ Section 4(1)(a), Legal Practitioners Ordinance (Cap 159).

⁹ See rules 9, 9A and 20, Trainee Solicitors Rules (Cap 159J).

¹⁰ Rule 6(1), Trainee Solicitors Rules (Cap 159J).

¹¹ Rule 6(2), Trainee Solicitors Rules (Cap 159J).

¹² See Law Society Circular No 509 of 2021.

¹³ Section 20(1), Legal Practitioners Ordinance (Cap 159).

¹⁴ Section 20(2), Legal Practitioners Ordinance (Cap 159).

¹⁵ Section 20(3), Legal Practitioners Ordinance (Cap 159).

¹⁶ See Law Society Circular No 396 of 2020.