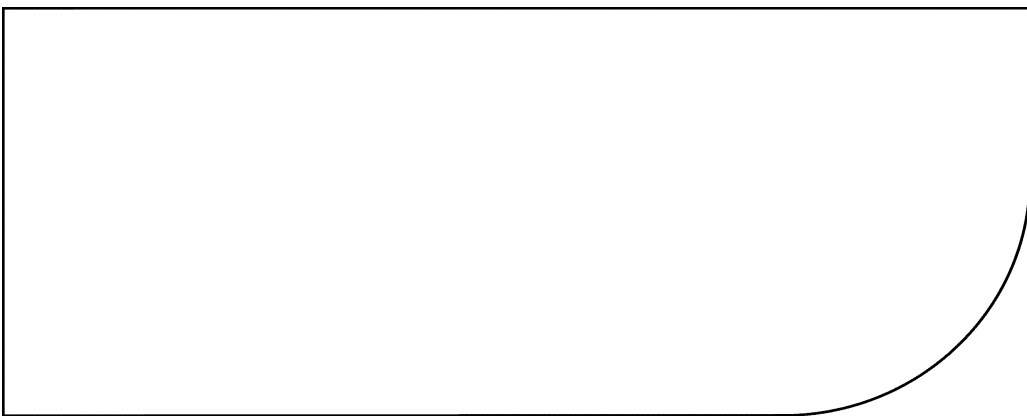


**'Rules of Professional Conduct for Barristers and Solicitors of
Samoa'**



Introduction

- 1 The Law Practitioners Act 1976, section 14(3) empowers the Samoa Law Society to make rules for the purposes of regulating the conduct of its members.
- 2 These rules have been made by the Samoa Law Society and under section 14(4) these rules shall bind all members.
- 3 All practitioners should make themselves familiar with the contents of these rules and observe them not only in the letter, but also in spirit.
- 4 The rules are not an exhaustive code. For example, a practitioner can be disciplined for professional misconduct or conduct unbecoming within the meaning of section 35 of the Law Practitioners Act 1976 as a result of misconduct or an incident not explicitly captured by these rules, such as by committing a criminal offence that is more than minor. However, the existence of these rules, and in particular any potential breach of them, may well provide the initiative for disciplinary proceedings if the breach is considered sufficiently serious.
- 5 It is far more desirable, however, that these rules provide an instructive and educational dimension for the profession in Samoa, rather than a disciplinary threshold. The standards established in these rules are designed to underscore the fact that practitioners belong to a profession and that the ethical standards of that profession are ultimately for the benefit of the public in general and the client in particular, together with the maintenance of fair and honourable conduct and respect between practitioners and towards the Courts, and yet without unreasonably restricting the flow of commerce and individual flair or style.
- 6 Whilst the preservation of the integrity and reputation of the profession is in the hands of individual members and their own sense of professional responsibility in the first instance, the enhancement or tarnishing of that reputation by individuals ultimately affects the entire profession.

Definitions

- 7 In these rules (and in any commentary):
 - 7.1 'The Act' means the Law Practitioners Act 1976 or any subsequent enactment that is in substitution for it.
 - 7.2 'barrister' means a barrister of the Supreme Court as defined in the Act.
 - 7.3 'the Law Society' means the Samoa Law Society.
 - 7.4 'Practitioner' means a practitioner within the meaning of the Act, namely:

a barrister or solicitor of the Supreme Court.

Chapter 1 - Independence of practitioners and conflicts of interest

1.01 The relationship between practitioner and client is one of confidence and trust, which must never be abused.

Commentary

A practitioner should never seek to advance his/her personal interests or position at the expense of a client. The relationship of confidence and trust is put at issue by the existence of compromising influences and loyalties. Once these occur, or become apparent, the practitioner must seriously review whether the practitioner/client relationship can properly continue.

1.02 A practitioner must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.

Commentary

The objective of this rule is that a practitioner should be available at a client's choice and should not turn a client away for other than good cause. Such good cause could include instructions that lie outside the practitioner's competence or regular fields of practice, or other commitments or pressure of work that will mean that the practitioner would be unable to devote adequate time and attention to the instructions. Whilst a practitioner should never decline instructions on the grounds of a client's means, it is acceptable for a practitioner to decline to carry out instructions (or to continue working on them) until arrangements have been put in place for payment of fees. A client should, however, always receive the same high standard of service regardless of the fee arrangement.

1.03 A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner and his/her own interests on the one hand, and an existing or prospective client and his/her/its interests on the other hand.

Commentary

This rule is based on the fundamental principle that a person who occupies a position of trust should never permit his/her personal interests to conflict with the interests of the client whom it is that person's duty to protect. Even where the practitioner strives otherwise, there is always a perception that a practitioner who continues to act in a situation where a conflict of interest with a client has become apparent, will be less responsive to the interests of the client. Factors that could lead to a conflict of interest (even if the practitioner does not consider them to be an actual conflict of interest) should, as a matter of good practice, be disclosed to the client. Where a conflict of interest is evident, whether direct or indirect, the practitioner should decline to act or continue to act. Situations that create fertile ground for such conflicts of interest are any financial, business, or property transactions a practitioner might enter or consider entering with a client. Borrowing money from a client would be one situation that almost always would create the need for independent advice. Both the words 'practitioner' and 'client' within this rule should be read broadly to include interest or dealings through families or relatives, or

companies, trusts, partnerships or any other entity in which either has an interest or exerts a measure of control or influence.

1.04 A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.

Commentary

A conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them. But care is needed when the interests of the two parties have the potential to become antagonistic to one another. To take a simple example, it could be acceptable to act for both buyer and seller in one transaction. But as soon as any suggestion of a dispute arises, that practitioner should cease to act for either party. Each such potential conflict of interest could well lead a practitioner into a breach of fiduciary duty quite apart from breaching this rule. Such conflicts or potential conflicts are not resolved simply by the fact that each client is represented by different practitioners from the same firm.

1.05 A practitioner must not act for a client against a former client of the practitioner when, through prior knowledge of the former client or his/her/its affairs which may be relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client.

Commentary

There may be many circumstances when acting against a former client is unobjectionable. But whenever the former relationship has given the practitioner an advantage that he/she might not otherwise have (as for example, knowledge of the former client's vulnerabilities) an actual or potential conflict of interest arises. It is not resolved by attempting to limit knowledge received from the former relationship: knowledge acquired by reason of acting for the former client is confidential and privileged (see rule 1.07) and yet information received relating to the present client's affairs must be disclosed to the present client (see rule 1.08). Careful consideration is required therefore, whenever a practitioner is asked to act against a former client.

1.06 In the event of a conflict or a potential conflict of interest among clients, a practitioner shall forthwith take the following steps:

- 1.06.1 Advise all clients involved of the areas of conflict or potential conflict.**
- 1.06.2 Advise the clients involved that they should take independent advice, and arrange such advice if required.**
- 10.6.3 Decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved.**

Commentary

Notional barriers within a firm such as 'chinese walls' or other such strategies do not overcome a conflict situation enabling a practitioner or his/her firm affected by such a conflict or potential conflict to continue to act.

- 1.07 A practitioner has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information except where:**
- 1.07.1 The client expressly or impliedly authorises the disclosure.**
 - 1.07.2 The practitioner is reasonably seeking to establish or collect his or her fee.**
 - 1.07.3 The practitioner is defending himself/herself or his/her associates or employees against an allegation by the client of malpractice or misconduct or against a criminal charge or a civil proceeding brought by the client against the practitioner.**
 - 1.07.4 The information relates to the anticipated or proposed commission of a crime.**
 - 1.07.5 The information is or has become public knowledge.**
 - 1.07.6 Disclosure is required by law (including Court order).**
 - 1.07.7 Disclosure to the practitioner's professional indemnity insurer is required in order to maintain or secure the practitioner's cover.**
 - 1.07.8 The practitioner forms the view that there is a serious and imminent risk to the health or safety of the client.**
 - 1.07.9 The practitioner has an overriding duty to a Court or Tribunal.**

Commentary

Outside of the named exceptions, requests for information held by a practitioner on a client file should be referred to the client or refused. Where disclosure is sought via a search warrant and the practitioner is of the opinion that the information in question is subject to legal privilege or for some other reason an order or warrant requiring disclosure ought not to have been made or issued, he/she should discuss with the client the possibility of making an application to have the order or warrant set aside without unlawfully obstructing its execution. Otherwise, a practitioner should comply with such warrants or orders. When confronted with a situation fitting one of the exceptions, a practitioner should disclose no more information than that which falls within the exception. Where a practitioner anticipates a crime involving the possibility of physical injury to another person, disclosure under rule 1.07.4 above should be mandatory. Unless the client otherwise directs, 'practitioner' within the meaning of this rule extends beyond the definition of that word in the definitions section of these rules to the practitioner's partners, employer and employees (if any). Thus, it is not a breach of the rule for a practitioner to share client information with his/her other partners or employees, but it is a breach of this rule for those

other persons to disclose information other than in compliance with the rule. The obligation to keep information confidential continues even after the client has ceased to be the practitioner's client. Following the death of the client or former client, the rights to confidentiality pass to the client's personal representatives. Upon the liquidation or receivership of a company client, the right to confidentiality passes to the liquidator or receiver who becomes entitled to the information (including documents). When a client is adjudicated bankrupt the right to confidentiality passes to the Official Assignee (but not in relation to professional advice to the client in relation to the bankruptcy proceedings themselves). Information not to be divulged by the practitioner under this rule will include the address of the client and even the fact of having been consulted or retained by the client unless the nature of the matter requires such disclosure.

1.08 In most circumstances a practitioner is bound to disclose to the client all information received by the practitioner which relates to the client's affairs.

Commentary

A practitioner should take care to prevent a situation arising where he/she receives confidential information on the basis that it is not to be disclosed to a client. If such a situation occurs then a conflict of interest may have been created (the conflict being between the obligation to disclose all information received relating to a client's affairs to the client under this rule and the obligation entered with the third party to keep information confidential. Unless the position can be otherwise resolved, the only solution may be for the practitioner to decline to continue to act in the particular matter. The fact that the information the practitioner receives may be unpalatable to the client is never an acceptable reason for withholding it: lawyers, as well as other professional people, as part of their practice, have to convey not infrequently to clients unwelcome, bad, and even at times, devastating information. The greatest care should always be taken on the occasion of such communication, but nevertheless, it must be done. The fact that fees are outstanding does not provide a good reason to refuse a request for access to information by a client even if the practitioner continues to claim a lien over original documents.

1.09 A practitioner who is a director or member of a body corporate (including a public board or authority) must not, without the consent of the body corporate, make use of information received in that capacity to the extent that advantage would result to a client or the practitioner personally and disadvantage to the body corporate.

Commentary

If a practitioner comes into possession of information in his/her capacity as a director or member of a body corporate, then the practitioner should not subsequently act for a client in connection with any relevant matter affecting the body corporate if that information could be detrimental to the body corporate in that matter. Indeed, a practitioner should be careful not to give the impression that the practitioner's membership or directorship could be used for the advantage of any client.

1.10 A practitioner must accept legal responsibility for his or her actions. A practitioner must be prepared to meet any liability arising out of any act, error

or omission in the course of the practitioner's professional duties or business. A practitioner shall not exclude by contract his/her liability to a client except:

- 1.10.1 Where it can be demonstrated that any limitation is fair and conscionable having regard to the parties involved, the nature of the transactions and any other relevant circumstances which were or ought reasonably to have been known or in contemplation when the contract was made; and**
- 1.10.2 Where the practitioner can demonstrate that he/she took all reasonable steps to ensure that the client understood and accepted such limitation.**

Commentary

A fundamental aspect of professionalism is a willingness to take responsibility for one's conduct. It is expected, for example, that a practitioner who has given an undertaking would honour that undertaking even if the practitioner's own client has made honouring the undertaking difficult, or triggered possible dishonour, unless there are very good reasons otherwise. Situations where a practitioner would seek to exclude or limit his/her potential liability are likely to be rare. Possible examples would be instructions involving the creation of securities for very significant amounts. Where an exclusion or limitation is considered appropriate, it is preferable for the practitioner to record that in writing and to seek acceptance or confirmation from the client similarly in writing. This is quite different from and does not affect a practitioner's normal ability to qualify any advice or opinion given on a particular matter, such that it is made clear that the practitioner is not unreservedly accepting or cannot accept responsibility for the advice or opinion. That stance may be entirely appropriate, for example, where the law is uncertain or complex or where there may be unknown material facts.

Chapter 2 - Conduct of practice generally

2.01 The name of a practitioner's firm must be one which is not likely to:

2.01.1 Be misleading as to the nature or structure of the firm.

2.01.2 Bring the profession into disrepute.

2.01.3 Be unfair to other practitioners or the public.

Commentary

A name of a firm must not be misleading, nor should it unfairly describe the firm. For example, it should not give an impression to the public that it is multi-partnered when in fact the practice is that of a sole practitioner. Similarly, the inclusion of place names requires considerable care in order to avoid the confusion that all the practitioners practising in that area are involved or that the office is some form of public legal aid agency. In cases of doubt whether a name or proposed name comes within the terms of this rule, the practitioner should refer the matter for decision to the Law Society.

2.02 On a practitioner's letterhead or any other publication or literature issued by a practitioner or his/her firm, or in an advertisement of legal services, the practitioner must see that neither the public nor other practitioners are misled about the structure of the practice or the status of any person named in any such letterhead or publicity.

Commentary

If the names of partners, consultants or associates or any of them are shown, their status should be indicated. If a person whose name is included is not a partner, this should be made clear by the use of appropriate expressions such as 'consultant', 'associate', 'solicitor', 'legal executive', or 'practice manager'.

2.03 A practitioner shall not, while the holder of a practising certificate, engage in a business or professional activity other than the practice of law unless the business or professional activity:

2.03.1 Will not detract or have the potential to detract from the standards of independence and professionalism a client is entitled to expect from a practitioner.

2.03.2 Does not have, or has the potential to have a harmful effect on the privilege or confidentiality attaching to communications between a practitioner and a client.

2.03.3 Would not of itself have the potential to create a conflict of interest on the part of a practitioner.

Commentary

The objective of this rule is to maintain the integrity of the profession and its standards by ensuring that other business activities undertaken by a practitioner will not cause conflicts of interest from such situations as differing or mismatching obligations, advantages or vulnerabilities from information received, confusion by clients of either business as to the role of the practitioner, or dereliction of his/her practice and clients. The rule is not intended to restrict practitioners from undertaking normal investment activities outside of their practice. If a practitioner intends to engage in a business or activity and there is some doubt in his/her mind as to whether any of the conditions in this rule can be met, the practitioner must refer the matter to the Law Society for a decision as to whether he or she may engage in such business or activity while retaining a practising certificate. Mixing of professions is not permitted because it is recognised as very susceptible to conflicts of interest (refer Chapter 1) and also creates difficulties of control under the Act and regulations. It would therefore be a breach of the rule, for example, to engage in an accountancy business. The rule does provide for the possibility that a practitioner or firm might wish to create such entities as service companies (to own office equipment, or to conduct process serving, etc) which provide services under contract to the practitioner or client. In conformity with this rule any such services must be confined to activity that is solely in connection with and concurrent to the provision of legal services and the practitioner or firm has a controlling interest in the entity, such that the provision of such services and the entity will remain subject to the provisions of the Act, the regulations made under the Act, and these rules.

2.04 A practitioner who is a solicitor (including a solicitor temporarily admitted under section 22 of the Act) shall ensure that he/she has a place of business within Samoa at all times under effective and competent management by a practitioner who is qualified to practice on his or her own account as a solicitor, whether in partnership or otherwise. If a practitioner who is a solicitor has two or more separate places of business within Samoa, he/she must ensure that each such separate place of business is at all times under effective and competent management as required by this rule.

Commentary

A practitioner who intends to practice as a solicitor within the jurisdiction of Samoa and its laws must have a place of business where he/she can be contacted or served with documents, or where records, files, trust accounts and other information can be obtained and inspected. Where a solicitor operates any place of business, that office must at all times be under the management and supervision of that solicitor or under the management of someone otherwise qualified to practice on his/her own account as a solicitor. Where, by reason of illness or some other emergency, this rule cannot be complied with, the circumstance should be reported immediately to the Law Society to ensure that appropriate arrangements can be made during the emergency.

2.05 A practitioner who is employed (other than a practitioner employed by another practitioner practising on his/her own account) should not offer or

provide legal services for reward to clients or persons other than his/her employer

Commentary

Practitioners who attempt to muddle practising on their own account for reward with regular employment for an employer in commerce or government create potentially difficult and conflicting issues arising from their obligations of fidelity and loyalty owed to their employers in the context of the employer/employee relationship vis a vis their obligations of trust and confidence owed to their clients in the context of the practitioner/client relationship. The difficulties are not resolved by providing for the reward to be paid to or accounted to the employer because the corporate or government employer is incapable of being able to practice on its own account in terms of section 6 of the Act. Thus, a practitioner intending to act for clients for reward while employed by a government department or institution or corporate, should cease that employment and either seek employment with another practitioner already practising on his/her own account or commence practice as a solicitor on his/her own account. However, nothing in this rule is intended to prohibit situations such as practitioners employed by government departments or institutions or corporates doing small amounts of pro bono work for relatives or friends.

Chapter 3 - Relationships with clients

3.01 A practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner.

Commentary

English, Australian and New Zealand jurisdictions have identified the following factors as relevant to the calculation of a fair and reasonable return for the services rendered, having regard to the interests of both client and lawyer. Those factors include:

- (a) The skill, specialised knowledge and responsibility required.
- (b) The importance of the matter to the client and the results achieved.
- (c) The urgency and circumstances in which the business is transacted.
- (d) The value or amount of any property or money involved.
- (e) The complexity of the matter and the difficulty or novelty of the questions involved.
- (f) The number and importance of the documents prepared or perused.
- (g) The time and labour expended.
- (h) The reasonable costs of running a practice.

The relative importance of the factors above will vary according to the particular circumstances of each transaction. It can be seen from these factors that time is simply one measure by which a fee can be calculated. A standard or unremarkable transaction may not of itself justify a premium fee. Yet a client who insists upon the engagement of a senior practitioner for his/her skill or specialised knowledge may justifiably be charged a higher fee. Many difficulties over fees can be avoided if practitioners communicate to the client early in the engagement the likely ambit of the fee (as far as that can be anticipated) and/or the basis of charging. It should also be noted that the rule contemplates contingency fees. Whilst extreme arrangements could still attract the common law rules against maintenance and champerty, and while the overall reasonableness of any contingency fee arrangement could still be in issue notwithstanding an otherwise perfectly valid agreement, there is no reason why practitioners cannot enter such arrangements with clients if the circumstances appear appropriate. Whatever the fee arrangement, any client who expresses dissatisfaction about the amount of a fee and who continues to do so after having the matter explained by the practitioner, should be advised of the ability to refer the matter to the Law Society.

3.02 A practitioner must not receive a reward, whether financial or otherwise, of which a client is unaware, in respect of services rendered to the client.

Commentary

It a practitioner is to receive a payment or other benefit from someone other than the client for legal services to that client, and the client is thus far unaware of that payment or benefit, the practitioner must make appropriate disclosure to a client. To do otherwise is to be in breach of the obligations of trust and confidence owed to every client. Where disbursements are included in an account sent to a client, the disbursements should reflect only actual payments by the practitioner and must not include any undisclosed fee charged by the practitioner. Practitioners should also be conscious of the rule regarding inducements from third parties (see rule 4.03).

3.03 A practitioner must take reasonable steps to ensure that any statutory certificate given by that practitioner is correct and complies with the statutory requirements.

Commentary

Various statutes require that particular documents or certificates are certified or signed correct by a practitioner. Consonant with the importance attributed by law to those documents and with the integrity of the profession which is relied on by the legislature in insisting that such documents must be signed by a practitioner, it is imperative that every practitioner so signing be satisfied as to the identity, capacity and bona fides of any person on whose behalf the practitioner signs such documents and that representations in such documents are by all accounts true and accurate. Practitioners asked to sign such documents when they have not been actively involved in a matter may need to make further inquiries to satisfy themselves under this rule (see also rule 3.04).

3.04 If a practitioner has reasonable grounds to doubt the bona fides of a client, then the practitioner is entitled to make inquiries, the form and extent of which would be a matter for the professional judgement of the practitioner in the circumstances of each case.

Commentary

Involvement (even unwitting) in the facilitation of a crime or fraud is a well known exception to the rules relating to privilege and the obligation to keep client information confidential. Those otherwise impenetrable barriers to law enforcement agencies (including the operation of a trust account) can provide an opportunity for misuse for the purposes of crime or fraud. There may be circumstances from time to time when a practitioner should be put on inquiry: for example, if a convicted drug dealer presents a practitioner with a large amount of cash for deposit into his/her trust account, a practitioner might well be put on inquiry as to the legitimate source of the funds before accepting them.

Chapter 4 - Distributing information about legal services

4.01 Advertisements to, or any other communications with, any person relating to the services of a practitioner or of a firm of practitioners must be consistent with the maintenance of proper professional standards.

Commentary

It is permissible for an advertisement or communication to indicate a field or fields of practice in which the practitioner is prepared to accept instructions. But an advertisement in the media should not contain or refer to testimonials or endorsements or the like about the practitioner or services offered. It is acceptable, however, for a practitioner submitting a proposal for legal services to a particular potential client to include a testimonial or endorsement from another client. A practitioner must not consent to nor permit being mentioned (whether by name or in any other identifiable way) in an advertisement or promotion by any person. This would not prevent non-advertising material such as company reports simply recording the identity of the company solicitors.

4.02 In offering services direct to members of the public other than by normal advertising channels, a practitioner must ensure that approaches to persons who are not existing clients are made in a manner that does not bring the profession into disrepute. Approaches must be made in accordance with proper professional standards and not in a way that is intrusive, offensive or inappropriate.

Commentary

A direct approach should not misrepresent the standard of services provided by other practitioners or firms or by the practitioner. The manner of such approaches, their frequency and the surrounding circumstances, may be taken into account in assessing the propriety of the practitioner's actions.

4.03 A practitioner must not directly or indirectly offer to, or receive from, a third party, a reward or inducement, whether financial or otherwise, in respect of services rendered or to be rendered to the client.

Commentary

The objective of this rule is to prohibit such arrangements as ones involving payments or commissions passing between a practitioner and a third party whereby either that third party refers work to the practitioner or the third party is recommended by the practitioner to the client. Such arrangements are likely to involve conflicts of interest with the practitioner having loyalties to both the client and the third party. The rule is not intended to prohibit professional associations that might develop between practitioners and third parties which may involve social exchanges, mutual referrals of work or small gifts, such as calendars and pens. Practitioners should, however, be wary of more substantial gifts or significant indirect benefits which might create a conflict of interest. In any event, practitioners must at all times observe rule 3.02 and make appropriate disclosures to a client.

4.04 A practitioner may not, without the specific consent of the client, give any interview or make any public statement relating to the client or the affairs of the client, whether or not the client is involved in a matter of public knowledge.

Commentary

The solicitor/client privilege and the obligations of confidence may not be broken without the consent of the client.

Chapter 5 - Relations between practitioners

5.01 A practitioner must promote and maintain proper standards of professionalism in relations with other practitioners.

Commentary

A practitioner shall treat professional colleagues with courtesy and fairness at all times, but consistent with the overriding duty to the client. For example, such courtesy would ordinarily require the practitioner to acknowledge or answer telephone messages from other practitioners promptly (even if only to explain that more time is required for a substantive answer) unless the exigency of the practitioner's present circumstances require otherwise. There are many occasions when a practitioner needs to rely on information given by another practitioner. Professionalism demands that such reliance should not be misplaced. It is preferable, however, that oral undertakings should be avoided in favour of written undertakings. Notwithstanding the nature of antagonistic relationships between their respective clients, practitioners should endeavour to avoid communicating with one another in an atmosphere of acrimony or discourtesy. It is a professional discourtesy to tape a conversation with another practitioner or his/her employee without that person's consent.

5.02 It is only in very exceptional circumstances that a practitioner should communicate either directly or in writing with the client of another practitioner in relation to a matter in which the practitioner is, or has previously been dealing, with the other practitioner.

Commentary

The kind of exceptional case where a direct approach might be acceptable is either where the shortness of time has created a genuine emergency, or where the practitioner can point to having tried unsuccessfully for a reasonable period on multiple occasions to obtain a response from the other practitioner in the matter. Even before doing so, however, the practitioner should advise the other practitioner of the intention to bypass him/her and to go directly to his/her client.

5.03 Subject always to the rights and duties pertaining to every practitioner and client privilege, there is generally an obligation on every practitioner who has grounds to suspect defalcations or other improper acts by another practitioner to make a confidential report at the earliest possible time to the President of the Law Society.

Commentary

It is impossible to itemise all the indications that there might be of improper conduct on the part of a practitioner, but warning signs such as the dishonour of cheques or delay in effecting settlements might be sufficient to indicate that all is not well with the practitioner's practice.

5.04 Unless there are exceptional circumstances, a practitioner shall not:

5.04.1 Stop a trust account cheque drawn on a solicitor's trust account payable to another practitioner; or

5.04.2 Stop a bank cheque payable to another practitioner; or

5.04.3 Cancel or reverse or amend an order for payment made to another practitioner by means of electronic transfer from a solicitor's trust account;

once the cheque or printed verification of the electronic transfer instructions has been handed or dispatched to the other practitioner.

Commentary

The circumstances that would justify stopping such a cheque, or cancelling or reversing or amending such an order for payment, would need to be truly exceptional. Such a step is not likely to be justified in the absence of clearly proper and legal grounds for doing so.

5.05 A client has an unequivocal right to change from one practitioner to another.

Commentary

A practitioner has no ownership in clients. Whilst it is permissible to enquire why a client intends to change, it is not permissible to exert any persuasion or influence or pressure on the client. Subject only to any lien over documents, on a change of practitioner an authority to uplift documents should be acted upon without undue delay. Even when a practitioner does have a lien over documents, efforts should be made to ensure that the urgency of a situation can be addressed such as by appropriate undertakings as to the payment of fees. Where there is, or may be a challenge over the quantum of fees, files can be copied or the solicitor to whom the files are to be transferred should reserve access for the transferring client's former practitioner to be able to address reasonableness issues surrounding fees or otherwise to defend himself/herself on issues regarding that practitioner's conduct.

5.06 Where a practitioner becomes aware of a potential claim for negligence, the practitioner must advise the client to seek independent advice in connection with the matter, and must inform the client that the practitioner can no longer act in the matter unless the client, having been independently advised, requests it.

Commentary

The obligation in this rule is not merely triggered when a practitioner realises there has been actual negligence: it is triggered whenever the practitioner realises there is a potential claim. For a practitioner to continue to act following such realisation in breach of the rule, leaves the practitioner vulnerable to a subsequent allegation that his/her stewardship of the matter has been affected by an anxiety to remove or diminish the possibility of a negligence claim by the client.

- 5.07 Every practitioner has a professional duty to honour an undertaking, written or oral, given in the course of legal proceedings or in the course of practice; and this rule applies whether the undertaking is given by the practitioner personally or by a partner or employee in the course of the practice.**

Commentary

The honouring of an undertaking involves the joint and several responsibility and liability of all the partners of a firm. It is obviously prudent for practitioners to express an undertaking in writing if at all practicable. An oral undertaking, while having the same effect, may present evidential problems. An undertaking should be given expressly and not merely by implication. It should be precise and unambiguous. An ambiguous undertaking will generally be construed in favour of the recipient. If a practitioner gives an undertaking 'on behalf of my client X', the practitioner may in some circumstances be held liable personally on the undertaking and not the client X. Practitioners should therefore be very careful about giving or accepting undertakings worded in that way. Practitioners should be aware that as a separate matter, the Court has the power to compel the performance of an undertaking as part of its jurisdiction over the practice of solicitors.

- 5.08 A practitioner who instructs another practitioner in the role of counsel or in any other capacity in any matter shall, unless agreement to the contrary is reached, become responsible personally for the prompt and full payment of the fee of the instructed practitioner.**

Commentary

Unless otherwise agreed, a practitioner may not delay payment because the client has not paid the amount of the fee to the practitioner. The relationship of the practitioner to the instructed practitioner is that of a professional client, who may be looked to for the fee accordingly.

- 5.09 A practitioner (practitioner A) closely related to another practitioner (practitioner B) shall not act for a client in a matter directly adverse to a person who practitioner A knows is represented by practitioner B, except upon consent by the client after consultation regarding the relationship.**

Commentary

Two practitioners are closely related if one is to the other, the parent or sibling, or if they are married or living as partners on a domestic basis. But a practitioner is not to be regarded as 'acting for a client' solely because a partner in his/her firm or an employee reporting to another partner in his/her firm is acting for that client. This rule only applies where the practitioner with the close relationship is himself/herself engaged in the matter, whether directly or as supervisor or adviser. With the client's consent, the practitioner may hand the instruction to another partner in his/her firm (if any) provided that the practitioner so handling the matter does not thereafter in any way act for the client. The purpose of the rule is to preserve the integrity and professional independence of practitioners.

Chapter 6 - Relations with third parties

6.01 A practitioner, when acting for a client in a matter where the other party is acting in person, should treat the other party with courtesy and fairness.

Commentary

A practitioner should not request an unrepresented party to execute a contract or other document under circumstances known to the practitioner that will place that unrepresented party in an unfair position through being unsure or unclear as to the entitlement to take legal advice, or having had no opportunity to seek legal advice.

6.02 A practitioner has a duty, subject to availability, to administer oaths or take declarations, but must not do so in respect of a contentious matter or proceeding in which the practitioner is involved.

Commentary

A practitioner who is merely administering an oath or taking a declaration is not responsible for the contents of the document and need not read it. But if the practitioner has reason to suspect an affidavit or declaration is false, then the practitioner should decline to administer the oath or take the declaration. When a practitioner is administering an oath or taking a declaration, he/she should be aware of the requirements for taking oaths and declarations and fulfil them. For example, it is not acceptable for a practitioner to take an oath or declaration in the absence of the deponent, nor is it acceptable to request another practitioner to do so.

6.03 A practitioner who:

6.03.1 Instructs another person, for example an accountant, valuer or engineer, to prepare an assessment valuation or report or to provide other services; or

6.03.2 Engages an expert witness;

shall, in the absence of any agreement to the contrary, be liable for the prompt payment of the proper fee of the person so instructed, or the witness, as the case may be.

Commentary

Unless special arrangements are made, the practitioner has personal responsibility for payment of such experts. Practitioners who wish to make other arrangements should ensure that the expert bills the client directly and that both the client and the expert are aware prior to the engagement that the responsibility for the expert's fees will be direct between the client and the expert and will not involve the practitioner. It is preferable that all such fee arrangements should be in writing.

6.04 A practitioner must make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not

likely to cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation.

Commentary

Examples of the operation of this rule are:

- (a) A practitioner should not issue a statutory demand knowing that the debt is bona fide disputed.
- (b) A practitioner should not arrange service of a document on a person deliberately in such a manner in such a place as to optimise embarrassment to that person.

These are simply examples, and there are many other legal processes which could be subject to misuse under this rule.

6.05 A practitioner must not make demands coupled with threats so as to commit the offence of extortion. A practitioner must not, with an intent to gain, threaten, even if only by implication, criminal proceedings in the context of civil disputes.

Commentary

This rule is self-explanatory.

Chapter 7 - Court proceedings and practice

- 7.01 In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the Court or the Tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client.**

Commentary

A practitioner must never deceive or mislead the Court or Tribunal. The practitioner must at all times be courteous to the Court, even where the practitioner considers the Court or Tribunal has wronged the practitioner or his/her client or his/her cause. Yet the practitioner, whilst acting in accordance with these duties, must fearlessly uphold the client's interests, without regard for personal interests or concerns. The practitioner has an obligation, when conducting a case, to put all relevant authorities known to the practitioner, whether decided cases or statutory provisions, before the Court and whether they support the practitioner's case or not. If a point of law which affects the case is discovered by the practitioner some time after the hearing, but before the decision has been given, the practitioner has a duty to bring it to the attention of the Court and to provide a copy of the reference to the practitioner acting for the other party or parties in the matter. A practitioner should not make any statement to the news media relating to proceedings which have not been concluded which may have the effect or may be seen to have the effect of interfering with a fair trial. In this area, practitioners should be aware of the law relating to contempt.

- 7.02 A practitioner shall not knowingly fail to discover a relevant document or, having discovered a document shall not claim privilege on behalf of a client in the absence of proper grounds for doing so.**

Commentary

The objective of this rule is to uphold the proper operation of discovery obligations which rely to a considerable extent on the integrity and professionalism of practitioners. Practitioners are reminded that the duty to discover relevant documents is a continuing one up to and including the time of judgment.

- 7.03 A practitioner must exercise care in Court about naming persons not involved in the proceeding, and must refrain particularly from making scandalous or unnecessary allegations against such persons.**

Commentary

The absolute privilege against claims for defamation for statements made in Court proceedings must not be abused. If it is necessary to name a person in a way which, if published, might damage that person's reputation or character, the practitioner should not shrink from doing so in furtherance of the client's cause, but should bear in mind the ability of the Court to receive the name and information in ways that will diminish or avoid such damage, such as orders prohibiting publication, etc.

7.04 A practitioner must not attack a person's reputation without good cause.

Commentary

This rule applies equally, both in Court during the course of proceedings, and out of Court by inclusion of statements in documents which are to be filed in the Court. A practitioner should not be party to the filing of a pleading or other Court document containing an allegation of fraud, dishonesty, undue influence, duress or other reprehensible conduct, unless the practitioner has first satisfied himself/herself that such allegation can be properly justified on the facts of the case. This means that if necessary, a practitioner must test the instructions which have been given, by independent inquiry, before making such allegations.

7.05 No practitioner engaged in a proceeding, criminal or civil, has the sole right to call or discuss the case with a witness.

Commentary

If an expert witness has, to the practitioner's knowledge, been retained by the other party, the practitioner should not, without the consent of the practitioner acting for the other party, approach the expert witness. To do so could possibly lead the expert witness into a breach of fiduciary duty. Subject to that restriction relating only to expert witnesses, it is permissible for a practitioner acting for one party to interview a witness or prospective witness as to fact at any stage prior to the hearing whether or not that witness has been interviewed by the practitioner acting for the other party or called as a witness. Of course any witness can elect not to be interviewed.

7.06 A practitioner must not act as both counsel and witness in the same matter.

Commentary

If there is any reason for a practitioner to think that he or she may be required as a witness in a matter, the practitioner should decline to act as counsel. The same principle applies to making an affidavit in a contentious matter where the practitioner is acting as counsel. If it becomes necessary for a practitioner already acting as counsel to make an affidavit, he/she should immediately retire as counsel unless the Court otherwise directs. This rule applies to the same extent where a practitioner acts as both solicitor and counsel.

7.07 Subject to any question of privilege which may arise in a particular case, a practitioner must disclose to all interested parties such information regarding the execution of a will and the circumstances surrounding it, as he or she would be obliged to give if subpoenaed as a witness.

Commentary

For example, solicitors acting for an estate in claims brought against that estate should be conscious of their obligations under this rule.

7.08 A practitioner appearing for a party shall not seek or agree to a consent order without the client's authority, preferably to be obtained in writing.

Commentary

Because the Court is heavily reliant on the ostensible authority of counsel to the effect that all that is said before the Court has the authority of the client or is within the instructions of the client, and because orders of the Court are by definition solemn and binding legal facts, it is imperative that practitioners ensure that their consent is clearly within the client's instructions.

Guidance: complaints against the judiciary

Where a practitioner feels that he/she has been unjustly censured by a Judge, the practitioner should report the matter to the President of the Law Society who shall pass on the complaint to the head of the Court of which the Judge is a member.

Chapter 8 - Advocate for prosecution

8.01 A practitioner prosecuting a criminal case must do so dispassionately and with scrupulous fairness.

Commentary

Prosecuting counsel should be firm, but scrupulously fair. They should use every known fact to support the prosecution, but on becoming aware of any fact or matter otherwise unknown to defence counsel that might be of relevant assistance to the defence, they should ensure that those facts or matters are drawn to the attention of defence counsel. Prosecuting counsel should avoid the use of inflammatory language in Court and expressions of opinion should be strictly confined to those required for the fair presentation of the case for the prosecution.

Chapter 9 - Advocate for defence

9.01 On a plea of not guilty, counsel for the defence has a duty to see that the prosecution discharges the appropriate onus to prove the guilt of the accused, and to put before the Court any proper defence in accordance with the client's instructions.

Commentary

It is not for counsel to assess the guilt or innocence of the client. That is a matter for the Court. There could well be cases where counsel feels reasonably sure of the client's guilt, but is still under a duty to put the prosecution to the proof and is free to submit, if justified, that there is insufficient evidence for a conviction. But if a client tries to put before the Court evidence, which to the knowledge of counsel is false, counsel should cease to act. In such instance, counsel should be fastidious to avoid disclosing to the Court or to any other person the precise reason for withdrawal. It should be sufficient to simply state that counsel is unable to carry out the client's instructions.

If the client's decision is to plead not guilty, notwithstanding counsel's advice otherwise after a perusal of the likely facts the prosecution will prove, defence counsel must nonetheless act conscientiously in presenting the case for the accused. If an accused admits to defence counsel the truth of some or all of the facts to be averred by the prosecution, but still wishes to plead not guilty, counsel may present any technical defence available to the client (including a failure to prove such facts to the requisite standard) but counsel must not invent or participate in the invention of facts or assert facts that will be different from or inconsistent with those that have been accepted by the accused. Whatever the view of counsel about the guilt or innocence of the client or of some third person, the clear duty of counsel is not to mislead the Court by allegations not supported by evidence. If a client tries to put before the Court evidence which to the knowledge of counsel is false, counsel should cease to act. If part way through a trial an accused makes a confession of guilt to defence counsel, the same principles apply. Counsel must not put forward a case inconsistent with the particular confession. But if the plea is to remain one of not guilty, counsel may conduct the defence by putting the prosecution to proof, and if appropriate, asserting that the prosecution evidence is inadequate to justify a verdict of guilty. But defence counsel must not raise any matter which suggests that the client has an affirmative defence which is inconsistent with the particular confession: for example, an alibi defence when the accused has confessed to having been present. Counsel may, however, proceed with a defence based on, say, insanity, if such a plea appears to be available.

9.02 Counsel must not in the course of making submissions or cross-examining a witness say or lead a witness to say anything that might mislead the Court. In particular, counsel must not make any statement to the Court or put any proposition to a witness that is not supported by reasonable instructions, or that lacks factual foundation by reference to the information available to the Court.

Commentary

Counsel has a particular responsibility to the Court when cross-examining a witness, not to put to the witness allegations in the form of questions which counsel knows that the witness does not have the necessary information or knowledge to answer, or where there is no justifiable foundation for the question.

9.03 Counsel must, in advising the client on a plea, or as to whether or not to give evidence, traverse all relevant aspects of the case and seek to ensure that the client makes an informed decision.

Commentary

Although counsel has a clear duty under this rule to advise on a plea, the client has the sole right to make the decision whether to plead guilty or not guilty. In giving advice on a plea, counsel's clear duty is to the client and the Court. The interest of the practitioner or any potential benefit to the practitioner by way of fee or otherwise, is quite irrelevant to the nature of the plea.

9.04 Where counsel is told by the accused that he or she did not commit the offence, or where counsel believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, counsel may continue to represent the client, but only after warning the client of the consequences and advising the client that counsel can act after the entry of the plea only on the basis that the offence has been admitted, and to put forward factors in mitigation.

Commentary

It should ordinarily be made evident to the client that, once the plea is entered, counsel cannot conduct the case in any way on the basis that the offence has not been committed.

9.05 Defence counsel must not disclose a client's previous convictions without the client's authority.

Commentary

Should the Court raise the question of previous convictions with counsel, counsel should inform the Court that it is not entitled to ask such a question and that counsel will not answer it.

Chapter 10 - The practice of barristers

Note: Many of these rules apply to practitioners generally in whatever capacity they might be acting. The rules in this chapter apply particularly:

- (a) *To practitioners who have a practising certificate as a barrister only (barristers sole), including admission as such on a temporary basis under section 22 of the Act.*
- (b) *To practitioners who have a certificate as a barrister and solicitor, but have been briefed to act as a barrister by a practitioner not in his or her own firm or employment.*

10.01 A barrister sole may not practice in partnership.

Commentary

A barrister sole may employ another practitioner who holds a practising certificate as a barrister only. Barristers sole may practice from sets of rooms or chambers, and join with other barristers sole in sharing secretarial and support services for their practices.

10.2 No person holding a practising certificate as a barrister and solicitor shall hold himself/herself out as practising as a barrister sole.

Commentary

The intervention rule enables the public to rely on the fact that, except in particular circumstances, every barrister sole has been instructed by a solicitor who controls the retainer.

10.3 Except in the circumstances prescribed below, a barrister sole must accept instructions only from a solicitor and may not accept instructions direct from a lay client. The exceptions are:

- 10.3.1 Instructions to act in a judicial or quasi judicial capacity or instructions by a person or body acting in such capacity.**
- 10.3.2 Instructions by the Law Society.**
- 10.3.3 Instructions by an Official Assignee, Official Liquidator, Public Trustee, Ombudsman, or the Attorney-General.**
- 10.3.4 Instructions as a revising barrister pursuant to any enactment.**
- 10.3.5 Instructions by way of assignment to a legally aided person.**
- 10.3.6 Instructions to move a candidate's admission.**
- 10.3.7 Any other instance where the Law Society has determined an instructing solicitor is not required.**

Commentary

Because the nature of the practice of a barrister sole may not be readily understood by the public, it is in order in the event of a potential client approaching the barrister sole direct, for the

potential client to be told that the barrister sole would be prepared to accept instructions, but that they must come through the medium of a solicitor. It follows that it is acceptable for a barrister sole to recommend or suggest an instructing solicitor or solicitors to the potential client if the client does not already have a solicitor available or that he/she wishes to consult about the matter. However, barristers sole should be careful to observe rules 10.05 and 10.06.

10.04 A practitioner, having made the decision to practice as a barrister sole, must be in a position of complete professional independence and be available to accept instructions within his/her fields of practice and subject to other professional obligations, from any solicitor wishing to brief the barrister sole for a client.

Commentary

A barrister sole must not have any arrangement which restricts the complete freedom of a solicitor to instruct any counsel the solicitor or the client selects.

10.05 A barrister sole must not do anything to induce persons to suppose the barrister sole retains a connection with any law firm of which he or she was previously a partner or employee or to suppose that there is any connection between the barrister sole and that firm or any other practitioner.

Commentary

The degree of objectivity and independence required of a barrister sole negates the notion of any implication that there is a connection with the former firm or any other firm or practitioner. That does not prevent, however, a barrister sole receiving briefs from a firm of which he or she had previously been a partner.

10.06 A barrister should keep his/her instructing solicitor reasonably informed of the progress of the brief. Normal relations between an instructing solicitor and a barrister require the barrister to seek the consent of the solicitor before interviewing the client or witnesses.

Commentary

The consent of the solicitor could be either a specific consent obtained for each occasion or a general consent given at any stage.

10.07 Correspondence between parties on matters relating to litigation should normally be carried out between the instructing solicitors.

Commentary

Whilst there may be occasions when counsel need to correspond with other counsel, generally speaking, it is preferable for inter-parties correspondence to be between the solicitors because otherwise there is a risk that the correspondence may become relevant to the litigation, thus placing counsel in an embarrassing position.

10.08 A barrister should not normally file documents in Court, or in the course of proceedings, which show his/her rooms or chambers as the address for service.

Commentary

The normal practice requires an address for service in accordance with the rules of Court and these rules require solicitors practising on their own account to maintain and supervise a place of business (see rule 2.04). However, there may be exceptional circumstances where it is practicable and necessary for a barrister to show his/her rooms or chambers as the address for service. One exception would be those instances where the barrister is not instructed by a solicitor recognised in rule 10.03 above.