

CHAPTER 10

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10.01 Litigation solicitor

In addition to the obligations and responsibilities set out elsewhere in the Guide and the Law Society's Code of Advocacy for Solicitor Advocates, a litigation solicitor must meet even higher standards of conduct.

Commentary

1. In this Chapter, a litigation solicitor refers to a solicitor who has been granted higher rights of audience under the *Legal Practitioners Ordinance* (Cap. 159) (solicitor advocate), a solicitor acting in the role of an advocate or a solicitor acting as an instructing solicitor.
2. The Principles relating to a solicitor acting in the role of an advocate or a solicitor advocate extend to appearances and proceedings not only before the court, but also before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.
3. For the purposes of this Chapter, the references to a solicitor, unless the context otherwise requires, means a litigation solicitor.

10.02 The duty of a solicitor

A solicitor must treat the court with courtesy and respect and must represent his client resolutely, honourably and within the limits of the law.

Commentary

1. A solicitor has a duty to his client 'fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case' and to endeavour 'to obtain for his client the benefit of any and every remedy and defence which is authorised by law' (per Lord Reid in *Rondel v Worsley* [1969] AC 191 at 227). This duty must always be discharged by fair and honourable means, without illegality and in a manner consistent with his client's instructions and his duty to treat the court with candour, fairness, courtesy and respect.
2. Except in the course of an application to the court, a solicitor must not discuss the merits of the case with a judge, magistrate or other adjudicator before whom a case is pending or may be heard, unless invited to do so in the presence of the solicitor or barrister for the other side or party.

3. If a written communication is made to a judge, magistrate or other adjudicator at any time, a solicitor shall at the same time deliver a copy of it to his professional adversary or to the opposing party if he is not legally represented. Where there is to be oral communication, prior notice to the other party or his solicitor or barrister should be given.
4. Where, after a hearing, judgment is reserved and a relevant point of law is subsequently discovered, a solicitor who intends to bring it to the judge's attention must inform the advocate on the other side.

10.03 Duty to court

A solicitor must never knowingly attempt to deceive or participate in the deception of a court.

Commentary

1. Breaches of this Principle include:
 - (a) knowingly misstating the contents of a document, the testimony of a witness, the substance of an argument or the provisions of an Ordinance or like authority;
 - (b) knowingly asserting something as a fact for which there is no reasonable basis in evidence, or the admissibility of which must first be established;
 - (c) dissuading or seeking to dissuade a material witness from giving evidence, or persuading such a witness to be absent;
 - (d) knowingly permitting a witness to be present in a false or misleading way, or to impersonate another.
2. In general, there is no duty upon a solicitor to enquire in every case where he is instructed as to whether his client is telling the truth and it will be for the court, and not the solicitor, to assess the truth or otherwise of the client's statement.
3. When it has come to the knowledge of a solicitor that a client intends to mislead the court by making false statements or producing false evidence, the solicitor has a duty to advise the client not to do so and explain the legal consequences of misleading the court, which may amount to a grave criminal offence such as perjury or perverting the course of justice. If the client refuses to accept the advice, the solicitor must cease to act (see also Principle 10.05).
4. If, either before or during the course of proceedings, a client makes statements to his solicitor which are inconsistent, this is not of itself a ground for the solicitor to refuse to act further on behalf of the client.

5. Where a client, in the course of litigation, admits to his solicitor that he has committed perjury or misled the court in any material matter in those proceedings, it is the duty of his solicitor to decline to act further in the proceedings, unless the client agrees fully to disclose his conduct to the court.
6. A solicitor knowing facts which, or of a witness who, would assist his adversary is not under any duty to inform his adversary or the court of this to the prejudice of his own client, unless the proceedings are ex-parte (see Principle 10.04), or he is acting for the prosecution (see Principle 10.14). He must not, however, himself knowingly put forward or let his client put forward false information with intent to mislead the court. Similarly, he must not indicate his agreement with information that the prosecution puts forward which he knows to be false.
7. Although a solicitor is entitled both before and during a trial to take every point, technical or otherwise, that is fairly arguable on behalf of his client, the court must be advised of relevant cases and statutory provisions by the advocates on both sides. If one of them omits a case or provision or makes an incorrect reference to a case or provision, it is the duty of the other to draw attention to it even if it assists his opponent's case.

10.04 Ex-parte proceedings

In adversarial proceedings a solicitor's function is inevitably partisan. Accordingly, a solicitor is not obliged (save as required by law or under any relevant rules) to assist an adversary or advance matters detrimental to his client's case. However in ex parte proceedings, a solicitor must take particular care in presenting his client's case to ensure that the court is not misled.

Commentary

1. A party seeking relief ex-parte must make full and frank disclosure to the court of all material matters within his knowledge. Failure to do so may result in the discharge of any order obtained with consequent loss to a client. If a solicitor has not fully advised his client of his obligations or he himself has not adequately reviewed the material to be disclosed, the solicitor may be in contempt and be exposed to legal action and complaint to the Solicitors Disciplinary Tribunal.
2. If an ex-parte order has been granted and there is subsequently a material change in circumstances, that change must be disclosed to the court by the solicitor for the party in whose favour the order was granted.

10.05 Duty to withdraw

If during litigation a client desires or intends to take a course of action which will involve a breach of the duties owed to the court and the opponent, his solicitor must refuse to take or support that course of action. The solicitor must do all he can reasonably to prevent it. If that course cannot be prevented then the solicitor should cease to act or seek leave to do so, subject however to the rules concerning ceasing to act.

Commentary

1. A solicitor should never terminate a retainer without good cause and without reasonable notice.
2. If a solicitor is acting in the defence of a client in criminal proceedings and the trial is imminent or has commenced, he should be especially concerned about the effect on the client's defence were he to cease to act at such a late stage and should do so only in the clearest circumstances.
3. A client's failure to pay costs on account is not a good reason for ceasing to act unless there has been a breach of a pre-existing agreement to pay them: see Principle 5.22 Commentary 5. Even if there is a breach of such an agreement and the solicitor is on the legal aid panel he should continue to act at legal aid rates if he is assigned to act by the Director of Legal Aid.
4. In any case, reasonable notice of ceasing to act must be given to the client in writing with an explanation. After commencement of civil proceedings or a criminal trial, a solicitor, as instructing solicitor or as advocate, can only cease to act with leave from the court and the court will consider whether good reason exists and reasonable notice has been given. If reasonable notice has not been given the solicitor may be required by the court to continue to act for such period as would constitute reasonable notice (see Circular 02-209).
5. Where a solicitor acting for an assisted person within the meaning of the *Legal Aid Ordinance* (Cap. 91) receives notification of revocation or discharge of his client's Legal Aid Certificate, he must notify the opposite party of the same and, if he has been instructed to continue to act privately for the same client, he must file a notice to act.

10.06 Limited instructions for appearance in court

A solicitor may accept instructions limited to a particular matter or issue in the proceedings, such as an application to adjourn the proceedings. Where a solicitor accepts limited instructions, he shall inform the court before which he has been instructed to appear of the limited nature of his instructions at the first available opportunity after his acceptance of such instructions, and preferably before the solicitor's appearance.

Commentary

1. Before he accepts limited instructions, the solicitor should fully advise the client of the possible legal and cost consequences.
2. The client should be made aware and the solicitor should appreciate that once he is on the court record he cannot withdraw from representation without the leave of the court.
3. If counsel is also making a limited appearance on the instruction of the solicitor, the solicitor should ensure that counsel appreciates that the court's consent will be required for withdrawal and it is desirable that he and counsel plan for the contingency of refusal by the court.

10.07 Courtesy

A solicitor should at all times be courteous to the court, to all witnesses and to those engaged on the other side.

Commentary

1. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a solicitor, even though unpunished as contempt, might well merit disciplinary action.
2. A solicitor should serve a witness summons in time for a witness to have adequate notice and arrange his affairs accordingly.
3. A solicitor must not make or instruct a barrister to make an allegation which is intended only to insult, degrade or annoy the other side, a witness or any other person.
4. This Principle also prohibits a solicitor from making or instructing a barrister to make an allegation which is scandalous.
5. In any litigation, a solicitor should, if possible, avoid naming in open court persons who are neither parties nor witnesses if their characters would thereby be impugned. The court should be invited to receive in writing the names, addresses and other details of such third parties.

6. A solicitor should not, in a plea in mitigation, make or instruct a barrister to make an allegation which is likely to vilify or insult any person, without having first satisfied himself that there are reasonable grounds for making the statement.
7. A solicitor must observe the correct etiquette in court at all times and must refrain from inappropriate conduct or discourteous behaviour during the course of a hearing before the court.

10.08 Court dress

A solicitor appearing in court as an advocate should appear duly robed where this is customary and must always wear suitable clothing (see also Circular 11-195).

10.09 Solicitor as litigant in person

Whilst it is not improper for a solicitor to engage in litigation on his own behalf, he must, when engaged in such litigation, sue or appear as a litigant in person.

Commentary

1. If a solicitor appears before a court as a litigant, he should not be robed so that it is clear that he is not acting as a professional advocate.
2. Where a solicitor, an employee or the firm is one of a number of plaintiffs or defendants, the firm is permitted to go on the record as the solicitors, but a solicitor or employee who is a party to the litigation should not appear as a professional advocate on behalf of the parties either in chambers or in open court. If he does appear in any other capacity he must not be robed.
3. A solicitor acting on his own behalf in a litigation matter may instruct counsel direct. It is not necessary for the solicitor to instruct another firm of solicitors to instruct counsel.

10.10 Undertakings

An undertaking given by a solicitor to a tribunal, court or to another solicitor in the course of litigation must be strictly and scrupulously carried out.

Commentary

1. Such an undertaking is the personal promise and responsibility of the solicitor as an Officer of the Court. Breach of such an undertaking may amount to contempt of court.
2. If, for example, an undertaking has been given by a solicitor and he fails to comply with the undertaking, he may be committed for contempt, his assets were sequestered and he may be required by the court to pay the costs of the hearing and may well be reported to the Solicitors Disciplinary Tribunal (see Chapter 14 for full discussion of solicitors' undertakings.)

10.11 Court orders

A solicitor must comply with any order of the court requiring the solicitor or the firm to take or refrain from taking some particular course of action.

Commentary

1. Failure to comply with such a court order may amount to contempt of court.
2. A solicitor must not aid and abet his client to disobey a court order (see also Principle 8.01 Commentary 6.)

10.12 Interviewing a witness or prospective witness

It is permissible for a solicitor acting for any party to interview and take statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party.

Commentary

1. This Principle stems from the fact that there is no property in a witness and applies both before and after the witness has given evidence at the hearing.

2. A solicitor must not tamper with the evidence of a witness or attempt to suborn the witness into changing his evidence.
3. A solicitor should be aware that in seeking to exercise his right to interview a witness who has already been called by the other side or who to his knowledge is likely to be called by them, he may be exposed to the suggestion that he has tampered with the evidence. This may be so particularly where the witness subsequently changes his evidence. It may be wise in these circumstances for the solicitor to offer to interview the witness in the presence of a representative of the other side.
4. When interviewing an expert witness or professional agent instructed by the other side there should be no attempt to induce the witness to disclose privileged information. In these circumstances it would be wise to offer to interview the witness in the presence of the other side's representative.
5. As a general principle, it is not improper for a solicitor to advise a witness from whom a statement is being sought by the opposing party that he need not make such a statement but the solicitor must not try to prevent him from making a statement.
6. A solicitor must obtain leave of the court with notice to the barrister or solicitor for the other party, to discuss the case with a witness, whether his client or not, whilst the witness is in the course of giving evidence. This prohibition covers the whole of the relevant time including adjournments and weekends.

10.13 Advocate should not be a witness

A solicitor should not accept instructions to act for a client as an advocate if it is clear that he or a member of his firm will be called as a witness, unless the evidence is purely formal.

Commentary

1. A solicitor must exercise his judgment whether to cease acting where he has already accepted instructions to act as an advocate and then becomes aware that he or a member of his firm will be called as a witness.
2. The circumstances in which a solicitor should continue to act as advocate must be extremely rare where it is likely that he will be called to give evidence other than that which is purely formal.
3. In exercising judgment, the solicitor should consider the nature of the evidence to be given, its importance to the case overall and the difficulties faced by the client if the solicitor were to cease to act as an

advocate. The decision should then be taken in the interests of justice as a whole and not solely in the interests of the client.

10.14 The solicitor as advocate for the prosecution

Whilst a solicitor prosecuting a criminal case must ensure that every material point is made which supports the prosecution, in presenting the evidence he must do so dispassionately and with scrupulous fairness.

Commentary

1. The prosecutor should state all relevant facts and should limit his expressions of opinion to those fairly required to present his case. He should reveal any mitigating circumstances; he should inform the court of its sentencing powers only if invited to do so and whenever it appears to be under a misapprehension about those powers.
2. It should be normal practice for the prosecutor to provide the accused with the witnesses' statements of all the witnesses that he intends to call. If a prosecutor obtains evidence which he does not intend to use but which may assist the defence, he must supply particulars of witnesses to the defence, and must consider whether it would be appropriate to supply copies of the statements made by those witnesses to the defence. If, however, he knows of a credible witness who can speak to material facts which tend to cast doubt on the prosecution's evidence or to show the accused to be innocent, he must either call that witness himself or make his statement available to the defence. Further, if he knows, not of a credible witness, but of a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. A prosecutor must reveal to the defence factual evidence of which he has knowledge and which is inconsistent with that which he, as prosecutor, has presented or proposes to present to the court. In any case a prosecutor must reveal any convictions of a witness that he intends to call.
3. A prosecutor must reveal all relevant cases and legislative provisions known to him whether it be for or against his case. This is so whether or not he has been called upon to argue the point in question (see Principle 10.03 Commentary 7).
4. A solicitor who prosecutes must ensure that he has not previously appeared in the same or related matter for the defence.

10.15 The solicitor as advocate for the accused

A solicitor who appears in court for the defence in a criminal case is under a duty to say on behalf of his client what the client could properly say for himself if he possessed the requisite skill and knowledge.

Commentary

1. For the defence advocate's duty regarding facts and law, see Principle 10.03 and Commentaries.
2. Subject to the fundamental rights of an accused client on trial (described in Principle 10.16) it is an implied term of an advocate's retainer that he is free to present his client's case at the trial or hearing in such a way as he considers appropriate. If a client's express instructions do not permit an advocate to present the case in a manner which he considers to be the most appropriate, then unless his instructions are varied, he may withdraw from the case after seeking the approval of the court to that course, but without disclosing matters which are protected by his client's privilege.
3. Whilst a solicitor may present a technical defence which is available to his client, he must never fabricate a defence.
4. Where, prior to the commencement or during the course of proceedings, a client admits to his solicitor that he is guilty of the charge, the solicitor must decline to act in the proceedings if his client insists on giving evidence in the witness box in denial of his guilt or requires the making of a statement asserting his innocence. The advocate who acts for a client who has admitted his guilt but has pleaded not guilty (as he is so entitled), is under a duty to put the prosecution to proof of its case and may submit that there is insufficient evidence to justify a conviction. Although the advocate may advance any defence open to his client, he must not assert his client's innocence or suggest, expressly or by implication, that someone other than his client committed the offence.
5. If a client wishes to plead guilty, but at the same time asserts the truth of facts which, if true, would or could lead to an acquittal, his solicitor should use his best endeavours to persuade his client to plead not guilty. However, if the client insists on pleading guilty, despite being advised that such a plea may or will restrict the ambit of any plea in mitigation or appeal, then his solicitor is not prevented from continuing to act in accordance with the client's instructions which it would be advisable to have in writing. The solicitor will not, in mitigation, be entitled to suggest that the facts are such that the ingredients of the offence have not been established.

10.16 Fundamental rights of an accused

An accused has the right to choose whether to plead guilty or not guilty. An accused has the right to choose whether or not to give evidence. A solicitor must advise his client of these rights.

Commentary

1. These are fundamental rights. If a solicitor undermines them, or permits a barrister to undermine them, by threatening to withdraw if the client does not comply with the lawyer's advice or by other means of duress, that will amount to a serious act of misconduct.
2. Advice may be given in a strong and persuasive manner but the client must be left with the clear understanding that he has the right to choose how to plead and whether to give evidence.
3. In the situation where a solicitor is acting for an accused in criminal proceedings on the instructions and at the expense of an insurance company client, the accused is also the client of the solicitor, and has exactly the same freedom to choose whether to plead guilty or not guilty or whether to plead guilty to a lesser charge or whether to give evidence, even though this may be contrary to the interests of the insurer client. A solicitor must not intimidate an accused into maintaining a plea of not guilty against his will by threatening that the insurers will withdraw their support should he change his plea.

10.17 Encouraging settlements

A litigation solicitor needs to keep in mind that a settlement may be in his client's interests and to advise and act accordingly.

Commentary

1. Even if he has authority to settle, a solicitor should (unless it is not possible to communicate) inform his client of a settlement offer made by the opposing party and give his opinion of its merits before agreeing to settle (see also Principle 5.12 Commentary 6).
2. At the commencement and throughout the retainer, a solicitor should consider with his client whether the likely outcome will justify the expense or risk involved: see Principle 4.01 Commentaries 5 and 8.
3. A litigation solicitor should consider and if appropriate advise his client on alternative dispute resolution procedures such as mediation, conciliation and the like.

10.18 Hopeless proceedings

A solicitor must inform his client if a proposed or continuing action has no prospect of success as a matter of law.

10.19 Bail

It is unlawful for any person, including a solicitor, to be a party to a bargain to indemnify a surety for bail.

No solicitor or his employee may act as surety for bail for a client of the firm without the prior written consent of the Council, which consent would be forthcoming only in the most exceptional circumstances (see Practice Direction I.1).

10.20 Payment of witnesses

A solicitor must not make or offer to make payments to a witness contingent upon the nature of the evidence given or upon the outcome of a case.

Commentary

1. There is no objection to the payment of reasonable expenses to witnesses and reasonable compensation for loss of time attending court. In the case of an expert witness, there is an implied obligation to pay a reasonable fee.
2. A solicitor is professionally responsible for payment of the reasonable agreed fees and expenses of expert, professional and other witnesses whom he calls to give evidence on behalf of his client, unless a specific disclaimer is first conveyed to the witness. Therefore, a solicitor who does not wish to accept such responsibility should make this clear to the witness in advance. In criminal cases, all witnesses who give evidence in the court, other than expert witnesses, can obtain payment of their fees and expenses, within the limits of the statutory scale, from the court. It is good practice for a solicitor to inform such witnesses of this and to agree in advance whether he will accept responsibility for any sum in excess of the scale. (See Principle 4.14)
3. In legal aid cases, whether civil or criminal, a solicitor should draw the attention of the witnesses to the fact that their fees and disbursements will have to be taxed or assessed and that only such amounts can be paid to the witness. A solicitor should expressly disclaim personal responsibility for payment of fees beyond those allowed on taxation or assessment.

4. A solicitor, on his client's instructions, may insert advertisements for witnesses to come forward as to a particular occurrence. However, care must be taken to draft the advertisement so that, so far as practicable, it does not suggest the detailed testimony sought.

10.21 Interviewing the opposing party

No interview should be conducted or communication made with an opposite party who is represented by another solicitor save with the prior consent of the other solicitor (see Principle 11.02.)

10.22 Attendance in support of counsel during the hearing

Where a barrister has been instructed, his instructing solicitor is under a duty to attend or arrange for the attendance of a responsible representative throughout the proceedings, unless the solicitor has agreed with the barrister that such attendance is not required. A solicitor should not reach such agreement with the barrister unless he has the client's consent and he is satisfied that it is reasonable in the circumstances of the case that counsel be unattended and, in particular, that the interests of the client and the interests of justice will not be prejudiced.

Commentary

1. 'Responsible' in this Principle means that the representative should have a reasonable familiarity with the matter so as to be able properly to assist counsel during the conduct of the hearing and to answer counsel's or the court's queries upon the matter. The solicitor in charge of the matter if he is not himself attending court should ensure so far as practicable that he remains contactable so that his representative may make contact with him should that be necessary.
2. Solicitors should exercise careful judgment in considering whether non-attendance is reasonable in a particular case. A solicitor should normally attend or send a representative where:
 - (a) the client is a person at risk, which includes, for example, juveniles, persons with inadequate knowledge of Chinese or English, persons subject to mental illness or mental handicap, or with sight, speech or hearing impediments; this list is not exhaustive, and whether someone is a person at risk is a matter as to which a solicitor must exercise judgment; or

- (b) the client is of such a difficult character that it is desirable that counsel be attended; or
 - (c) there is a probability that the client will receive a substantial sentence of imprisonment or will receive an immediate sentence of imprisonment for the first time; or
 - (d) witnesses as to fact or opinion (i.e. not character witnesses) are required to be present, whether or not they are actually called; or
 - (e) counsel actually appearing in the particular case is not the counsel instructed, unless the solicitor is satisfied that the change of counsel is unlikely to be prejudicial to the interests of the client; or
 - (f) where there is a likelihood that instructions from a lay client may have to be given during the course of proceedings; or
 - (g) there are any other circumstances in which the solicitor considers attendance on counsel is desirable.
3. In any case where a solicitor proposes that counsel should appear unattended he must:
- (a) so inform counsel and deliver a full and detailed brief sufficiently early before the hearing to enable counsel to consider the papers and to decide whether it would be appropriate for counsel to attend alone (see paragraphs 142 & 142A of the *Code of Conduct for the Bar of Hong Kong*); and
 - (b) confirm to the client that counsel will be unattended and tell the client the name of the counsel instructed; and
 - (c) attend on counsel or send a representative where the counsel originally instructed or subsequently substituted informs the solicitor that he believes that it is appropriate for counsel to be attended.

10.23 Statement to the press

A solicitor must not give a public statement without his client's consent. A solicitor who on his client's instructions gives a statement to the press must ensure that he does not become in contempt of court by publishing any statement which is calculated to interfere with the fair trial of a case which has not been concluded.

10.24 Post-trial responsibilities: legal aid and criminal appeals

When a legally aided client has been convicted, his legal representatives have a duty to consider and advise the Director of Legal Aid whether there are grounds for appeal, and, if so, to settle the same (regulation 9 of the *Legal Aid in Criminal Cases Rules* (Cap. 221 sub. leg. D)), and to act in the appeal if requested (regulation 17 of *Legal Aid Regulations* (Cap. 91 sub. leg. A)).

10.25 Video evidence of children in criminal matters

When a solicitor acting for the prosecution or defence has in his possession a video recording of a child witness, he must comply with Practice Direction C.4.

10.26 Legal Visits

A solicitor representing a client who is detained in custody must ensure that he complies with the appropriate standing procedures for legal visits by himself and authorized clerks, trainee solicitors, interpreters and counsel (see Circular 12-857).

Commentary

1. For supervision of authorized clerks, see Practice Direction D.6.

10.27 Unqualified intermediaries

Solicitors should exercise caution when accepting instructions to act for a client through unqualified intermediaries (see Circular 12-176 and Principle 5.06).

Commentary

1. This Principle does not apply to instructions received by a solicitor from insurers acting under the terms of an insurance policy.
2. For the prohibition of solicitors from acting as agents of unqualified persons, see section 49 of the *Legal Practitioners Ordinance* (Cap. 159).

10.28 Witness training (coaching)

Training or coaching of witnesses in criminal proceedings (whether for prosecution or defence) is not permitted.

Commentary

It would be prudent to proceed on the basis that the general principles set out in *R v Momodou and others* [2005] EWCA Crim 177 also apply to civil proceedings.

APPENDICES

PRINCIPLE 10.05 COMMENTARY 4

CIRCULAR 02-209

5 July 2002

CRIMINAL

Withdrawal of Solicitors During a Criminal Trial (Revised on 15 July 2002)

1. The Council wishes to remind members that a solicitor should only withdraw from a case during the course of a criminal trial for good reasons and on reasonable notice. Council considers it appropriate to issue the following guidance in relation to withdrawal due to lack of funds:
 - (a) Legal Aid

A solicitor is under a duty to consider and advise a client of his entitlement to legal aid. If such advice is given but the client chooses not to apply for legal aid, either a written note of the advice given should be made and put on the file or, preferably the advice given should be recorded in a letter to the client. Failure to give such advice promptly where the client's means are within the legal aid scheme can amount to unbecoming conduct and may result in disciplinary proceedings. It may also lead to a claim in negligence against a solicitor for breach of duty owed to the client.
 - (b) Arrange for adequate Funds

If a client is not entitled to legal aid or chooses not to apply for legal aid, members are encouraged to obtain sufficient funds for their fees and disbursements at the beginning of the case to cover the whole trial if relatively short, or to reach a clear agreement with client, to be recorded in writing, on fees and disbursements e.g. the amount to be charged, the basis on which they are calculated, when and the stages at which they will be payable, etc. Members must, therefore, ensure that if Counsel is engaged, Counsel's fees are agreed on a proper basis before the commencement of trial.
 - (c) Termination of retainer
 - (i) A solicitor will have good reason to terminate the retainer if he has requested funds for disbursements which the client has failed to provide. Further, a solicitor may terminate the retainer where he has requested funds on account of profit costs which the client has failed to provide if the requirement for a payment on account of profit costs was an express condition of accepting instructions. Without this condition (or the client's

subsequent agreement), a solicitor cannot justifiably terminate his retainer if a client refuses to make a payment on account of profit costs. It is emphasized that in either case, reasonable notice to terminate the retainer must be given and should be in writing giving the reasons.

(ii) Withdrawal before date of trial

Where a solicitor, having appeared in Court on behalf of the defendant, withdraws before the date of trial, which withdrawal would not require leave of the Court, it would be good practice for the solicitor:-

- to notify the Court of his withdrawal; and
- to explain to the defendant his right to apply for legal aid.

(iii) During the course of a trial

During the course of a trial, a solicitor cannot come off the record without leave of the Court. It is a matter for the Court in each case to determine whether good reason exists and reasonable notice has been given when deciding whether or not to grant leave to come off the record. The Court may have regard to all the circumstances when determining these issues. In the Council's opinion, a solicitor who, knowing that his client is likely to be unable to pay the costs and disbursements for the entire pre-estimated length of trial, nevertheless fails to advise him at the outset of his rights to apply for legal aid or to advise him of the possibility that he could be left unrepresented in the course of the trial may well be unable to show good reason. The necessity of recording such advice in writing (preferably by letter addressed to the client) is obvious. If reasonable notice has not been given to terminate the retainer, a solicitor may have to continue acting for the period which in the opinion of the Court would constitute reasonable notice, depending on the facts of each case.

(d) Inadequate funds during the trial

Where funds run out during a trial, every assistance should be given to the client to make an immediate application for legal aid. The Council considers that unless there are exceptional circumstances, solicitors should continue to act at legal aid rates if they are on the Legal Aid Panel and if they are assigned to act by the Director of Legal Aid.

2. The attention of members is also drawn to:

- (a) Rule 5D of the *Solicitors' Practice Rules* (Cap. 159 sub. leg. H); and

(b) Principles 10.05 and 10.06, *The Hong Kong Solicitors' Guide to Professional Conduct*, Vol. 1.

3. Circular 90-30 is superseded.

PRINCIPLE 10.08

CIRCULAR 11-195

21 March 2011

LAW SOCIETY GUIDANCE NOTE

**1. Solicitors' Rights of Audience
2. Trainee Solicitors' Rights of Audience
Updated March 2011**

This Circular offers guidance to Solicitors and Trainee Solicitors on their rights of audience before the Courts and Tribunals and has been approved by the Civil Courts Users' Committee.

A. SOLICITORS

General Rights of Audience

A solicitor does not have a general right of audience in the courts but only such rights which have been acquired by statute, rule or usage of particular courts.

1. Tribunals

a. Solicitors have rights of audience in the

- Lands Tribunal

Rule 26 *Lands Tribunal Rules* (Cap. 17 sub. leg. A)

b. Solicitors do not have any rights of audience in the following Tribunals

- Labour

Section 23(2) *Labour Tribunal Ordinance* (Cap. 25)

- Small Claims Tribunal

Section 19(2) *Small Claims Tribunal Ordinance* (Cap. 338)

2. Arbitration Proceedings

Solicitors have rights of audience in arbitration proceedings.

Section 2F *Arbitration Ordinance*

3. Administrative Appeals

Solicitors have rights of audience before the Administrative Appeals Board

Section 18 *Administrative Appeals Board Ordinance* (Cap. 442)

4. Magistracies

Solicitors have a general right of audience in the Magistrates Courts

Section 2 *Magistrates Ordinance* (Cap. 227)

5. Coroner's Court

Solicitors have rights of audience in the Coroner's Court

Section 31 *Coroners Ordinance* (Cap. 504)

6. District Court *

Solicitors have rights of audience in the District Court

Section 15 *District Court Ordinance* (Cap. 336)

7. Bankruptcy Proceedings in Open Court – Contested Hearings

Solicitors have rights of audience in contested hearings in open court. See the Decision of Yuen J. in *Lai Yin Shan Ex parte the Hong Kong and Shanghai Banking Corporation Ltd.* HCB 992 of 2000.

Click [here](#) for a copy of the Decision in HCB992 of 2000

8. Bankruptcy and Winding-Up Proceedings and Rule 6(a) of the *Companies Ordinance* (Cap. 32) and *Companies (Winding-Up) Rules* (Cap. 32 sub. leg. H)

Solicitors have the right to appear the applications listed in the Judiciary's Practice Direction 3.1:

- (a) for leave to continue or commence proceedings against a debtor under Section 12 of the [*Bankruptcy Ordinance* (Cap. 6)];
- (b) to dispense with a statement of affairs or to extend the time for submitting such statement under Section 18 of the Ordinance;
- (c) for arrest of a debtor under Section 27(1) of the Ordinance and for an order for release;
- (d) for the re-direction of debtors' mail under Section 28 of the Ordinance;
- (e) for a certificate of automatic discharge from bankruptcy where the application is unopposed under Section 30A of the Ordinance and Rule 92;
- (f) for production of documents by the Commissioner of Inland Revenue under Section 30D(1) of the Ordinance;

- (g) to extend the time for trustee to make a decision relating to a proof of debt under Section 34(7A) of the Ordinance;
- (h) to approve the disposition of bankrupt's property under Section 42(1) of the Ordinance;
- (i) to extend the time limit for notice under Section 43C(1) of the Ordinance;
- (j) to include or exclude items from the bankrupt's estate under Section 43D(2) of the Ordinance;
- (k) for income payments order under Section 43E of the Ordinance and to vary and review such order under Rules 128B, 128D and 129;
- (l) for an order to extend the bankrupt's occupation of family home under Section 43F(1) of the Ordinance;
- (m) for disclaimer and extension of time for disclaimer of onerous property under Section 59(1) of the Ordinance;
- (n) for the appointment of a solicitor under Sections 61(c) and 61A of the Ordinance;
- (o) to reduce the allowance to a bankrupt under Section 63 of the Ordinance;
- (p) to approve the dealings relating to copyright work of a bankrupt's estate under Section 65 of the Ordinance;
- (q) for the release of a trustee under Section 94 of the Ordinance and Rule 169;
- (r) for the appointment of a creditors' committee under Section 100E of the Ordinance;
- (s) for leave to commence and prosecute any action in the names of the trustee and of the bankrupt's partners under Section 107 of the Ordinance;
- (t) for leave to disclose the names of the partners in proceedings in partnership name under Section 109 of the Ordinance;
- (u) for summary administration and rescission of a summary administration order under Section 112A of the Ordinance;
- (v) for service of the petition, order or summons on a debtor who cannot be found or is outside the jurisdiction under Rule 31;
- (w) for leave to file a petition under Rule 49(9);
- (x) for security for costs under Rule 55;
- (y) for substituted service of a petition under Rule 59(2);
- (z) to vary the dates relating to the submission of nominee's abstracts and reports under Rule 122Z(6);

- (aa) to extend time for the nominee's notice of final completion of the voluntary arrangement and report under Rule 122ZC(4);
- (bb) to dispense with the production of bills and notes under Rule 124;
- (cc) for leave to disclaim a lease under Rule 130;
- (dd) to give directions to the Official Receiver where there are no available assets under Rule 158A;
- (ee) for disposal of books and papers under Rule 202;
- (ff) for abridgement or enlargement of time under Rule 204;
- (gg) to dispense with a public examination under Section 19A of the Ordinance for cases in which bankruptcy proceedings were commenced before 1 April 1998;
- (hh) for adjudication under Section 22 of the Ordinance for cases in which bankruptcy proceedings were commenced before 1 April 1998.

Click [here](#) for Judiciary's Practice Direction 3.1

9. High Court

I. Open Court

a. Masters *

Solicitors have rights of audience before a Master in Open Court in the following applications:

- trials pursuant to O.14 r.6(2), RHC
- trials pursuant to O.17 r.11, RHC
- trials pursuant to O.36 r.1, RHC
- assessment of damages pursuant to O.37 r.1, RHC
- examinations under O.48 and O.49B, RHC
- unopposed bankruptcy petitions referred to in section 99(3) of the *Bankruptcy Ordinance* (Cap. 6)
- unopposed winding-up petitions referred to in section 180A of the *Companies Ordinance* (Cap. 32)
- the making of an order for imprisonment of a judgment debtor under O.49B r.1B(1), RHC

Click [here](#) for Judiciary's Practice Direction 14.2

b. Magistracy Appeals to the High Court *

- A solicitor has rights of audience before the High Court on the hearing of Magistracy appeals.

Section 2, section 18 and section 118 (2) *Magistrates Ordinance* (Cap. 227)

c. Judiciary's Practice Direction 21.1 *

Practice Direction 21.1 states as follows:

- '1. In addition to the cases in which solicitors already have rights of audience in the Court of First Instance, and without prejudice to the discretion of a judge to allow a solicitor to represent his client in open court in an emergency, a solicitor may appear in the Court of First Instance in formal or unopposed proceedings, that is to say those proceedings where –
 - (a) by reason of agreement between the parties there is unlikely to be any argument; and
 - (b) the court will not be called upon to exercise a discretion.
2. A solicitor may also represent his client in the Court of First Instance where judgment is delivered in open court following a hearing in chambers at which that solicitor conducted the case for his client.'

II. Chambers Hearings

A solicitor has rights of audience in Chambers before:

- Masters
- A Judge of the Court of First Instance
- An Appeal Court Judge

10. Court Dress* (March 2011)

Members are reminded to wear appropriate attire when exercising their rights of audience:

Open Court

- gown
- wing collar and bands or collarette
- dark clothes

Chambers/Court generally (March)

Solicitors and Trainee Solicitors should dress in appropriate attire when attending court.

'Appropriate' means suits of a solemn or dark colour, such as navy blue, dark grey or black with shirts of white or other unobtrusive colour.

Male solicitors and Trainee solicitors should also wear ties when they attend court.

Click [here](#) for Judiciary's Practice Direction 21.1

B. TRAINEE SOLICITORS (March 2011)

Trainee Solicitors have limited rights of audience:

11. District Court (March 2011)

A Trainee Solicitor may appear: before a District Court Judge in Chambers in

- an uncontested application in civil matters
- Trainee solicitors during the last 12 months of the trainee solicitor contract may appear in the following:
 - In taxations listed for not more than 3.5 hours subject to the qualifications outlined in paragraph 4 in PD14.1 and paragraph 8A in PD27.
 - Hearings listed for no longer than 15 minutes:
 - Order 14
 - Order 88
 - Order 83A

Click [here](#) for Judiciary's Practice Direction 27

12. High Court Chambers (March 2011)

(a) A Trainee Solicitor has limited rights of audience in Chambers before a Master and can only appear in the following:

- an uncontested application
- an application listed for a 3-minute hearing

(b) During the last 12 months of the Trainee Solicitor contract, a Trainee can appear on:

- In taxations listed for not more than 3.5 hours subject to the qualifications outlined in paragraph 4 in PD14.1 and paragraph 8A in PD27.
- Hearings listed for no longer than 15 minutes:
 - Order 14
 - Order 88
 - Order 83A

Click [here](#) for Judiciary's Practice Direction 14.1

13. Expiration of a Trainee Solicitor contract – Period before date of Admission: No right of audience

At the expiration of the Trainee Solicitor contract and before the date of admission as a solicitor, the former Trainee Solicitor becomes a paralegal and as such has no rights of audience.

14. Circular 09-165 has been superseded.

PRINCIPLE 10.26

CIRCULAR 12-857 'LEGAL VISITS' SEE CHAPTER 3

PRINCIPLE 10.27

CIRCULAR 12-176 'RECOVERY AGENTS' SEE CHAPTER 3