

CHAPTER 13

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13.01 Fair dealing

A solicitor must not act, whether in his professional capacity or otherwise, towards anyone in a way which is fraudulent, deceitful or otherwise contrary to his position as a solicitor, nor must he use his position as a solicitor to take unfair advantage either for himself or another person.

Commentary

1. A solicitor must take particular care when dealing and corresponding with an unrepresented third party to ensure that no solicitor-client relationship arises by implication between the solicitor and the third party.
2. Problems can arise, particularly in conveyancing transactions, where a solicitor is instructed by a client and is aware of the name and address of the other party, but not of his solicitor. The normal practice is for him to write to the other party asking to be put in touch with his solicitor.
3. Where a solicitor is dealing with an unrepresented third party, he should amend any draft document sent to him if it contains errors which could be put right by a reasonable amount of correction, provided that it is in his own client's interests to do so. If it is so badly drawn as to be inappropriate, there is no objection to his returning it to the unrepresented third party and advising him to consult a solicitor on its preparation.
4. When giving a reference as to character and financial standing, a solicitor must take care to give one that is true. A solicitor may be guilty of professional misconduct and may incur a potential liability where a false or misleading reference is given. The same Principle applies where a solicitor makes or corroborates a statement on an application by another person for a passport or on other documents.
5. A solicitor should not behave offensively or communicate in an offensive manner (with regard to offensive letters written to other solicitors see Principle 11.01 Commentary 4).
6. A solicitor should bear in mind the obligation to report to the Law Society any serious criminal charges against him (see Principle 11.03 Commentary 3).
7. With regard to a solicitor's duty to pay professional, non-lawyer or other agents' fees or witness expenses, see Principles 4.14, 10.20 Commentary 2, 11.01 Commentary 6 and Principles 12.04 & 12.05.

13.02 Dishonoured cheques

A client account cheque must never be dishonoured. A solicitor must take care to ensure that any cheque for use in connection with his practice will be honoured upon presentation.

Commentary

1. Dishonour of a client account cheque will other than in exceptional circumstances indicate a breach of the *Solicitors' Accounts Rules* (Cap. 159 sub. leg. F).
2. Dishonour of an office account cheque may amount to misconduct depending on the circumstances and on whether it will impair or is likely to impair the independence and integrity of the solicitor or the reputation of the profession (see Principle 1.01).

13.03 Stopping client account cheques

A client account cheque must not be stopped except for good reason and with prompt and effective notice to the payee or his agent.

Commentary

1. For the purpose of this Principle, notice will be prompt and effective if it is received before the recipient has committed himself to an action which was reasonably foreseeable by the giver as likely to follow the receipt of a cheque, e.g. effecting exchange of contracts.
2. Where the recipient of the cheque is another solicitor who has paid it into his client account, it is open to the giver to place a stop even where the receiving solicitor has not awaited clearance before accounting to the client.
3. This Principle does not affect any action in law the recipient may have if a cheque is stopped.
4. A solicitor who has good reason for stopping a cheque would not be considered to be in breach of this Principle if he uses his best endeavours to give prompt and effective notice but is nevertheless unable to contact the payee or his agent.

13.04 A solicitor must not assist an unqualified person to act as a solicitor

Section 49 of the *Legal Practitioners Ordinance* (Cap. 159) provides:

‘(1) No solicitor shall wilfully and knowingly:

- (a) act as agent in any action or in any matter in bankruptcy for any unqualified person; or
 - (b) permit his name to be made use of in any such action or matter upon the account or for the profit of any unqualified person; or
 - (c) (repealed)
 - (d) do any other act enabling any unqualified person to appear, act or practise in any respect as a solicitor in any such action or matter.
- (2) Where it appears to a Solicitors Disciplinary Tribunal or to the Court that a solicitor has acted in contravention of this section, the Solicitors Disciplinary Tribunal or the Court shall order his name to be struck off the roll of solicitors.
- (3) Where the Court orders the name of a solicitor to be struck off the roll in respect of an offence under this section, it may further order that the unqualified person who was enabled by the conduct of the offender to act or practise as a solicitor shall be imprisoned for any period not exceeding one year.’

Commentary

1. This section prohibits a solicitor from allowing an unqualified person or a body corporate to act as his principal or use his name in any action or in any bankruptcy matter.
2. This section underlines the importance of the rules for the supervision of staff and offices prescribed by rule 4A of the *Solicitors’ Practice Rules* (Cap. 159 sub. leg. H): see Principle 2.04.

13.05 Other person represented by an unqualified person

If a solicitor discovers that another person is represented by an unqualified person who is carrying out acts prohibited to unqualified persons, then, subject to the interests of his own client, his proper course is to decline to communicate with the unqualified person.

Commentary

1. For a definition of 'unqualified person' see sections 2 & 51 and for details of the acts prohibited to them, see sections 45–51 of the *Legal Practitioners Ordinance* (Cap. 159).
2. A solicitor is under a duty to report to the Law Society any cases that come to his notice where it appears that an unqualified person has acted in breach of the law.

13.06 Conveyancing contract: give time to purchaser to obtain legal advice

A solicitor acting for the vendor of property must not require an unrepresented purchaser to sign a contract unless that purchaser has obtained or has had a proper opportunity to obtain legal advice.

Commentary

Even if a contract allows the purchaser to terminate without penalty during a stated period, this Principle will still apply. This is because although the purchaser may consult a solicitor during that period, it could then be too late for him to negotiate amendments to the contract and, in practice, it may be impossible to make the necessary searches and enquiries within that period.

13.07 Letters before action

When writing a letter before action, a solicitor must not demand or threaten anything other than that recoverable under the due process of the law.

Commentary

1. Where a solicitor is instructed by a creditor to collect a debt, there is nothing improper in his communicating with the employer of the debtor in order to obtain information as to his status or means. He should not, however, use the threat of reporting to the employer or the media as a means of obtaining payment. (As to a solicitor instructing an enquiry

agent to enquire into the means of the debtor, see Principle 11.02 Commentary 5.)

2. See also Principle 13.01 Commentary 5.
3. A solicitor must never make a demand by or accompanied by a threat to report the matter to any authority for criminal prosecution unless the demand is met.

13.08 Oaths, affirmations and declarations

When administering oaths and affirmations or taking declarations, a solicitor is under a duty to ascertain:

- (a) that the person in his presence is the deponent, if necessary by checking the identity card or other document of identity and, if the document has already been signed, to include in the oath or affirmation or declaration a statement that the signature is that of the deponent;**
- (b) that the deponent is apparently competent to depose to the affidavit or declaration;**
- (c) that the deponent knows he is about to swear, affirm or declare to the truth of the statement; and**
- (d) that the exhibits, if any, are the documents referred to.**

Commentary

1. The *Legal Practitioners Ordinance* (Cap. 159), section 7A authorises a solicitor who is in practice holding a practising certificate to exercise the powers of a Commissioner for Oaths.
2. Solicitors in a group practice may administer oaths and affirmations or take declarations in respect of a solicitor or a client of a different firm in the same group practice but not of a solicitor or a client of the same firm.
3. The responsibility for the contents of the affidavit or declaration rests with the deponent and the solicitor who prepared it. However, if it comes to a solicitor's notice that the affidavit and declaration is incomplete, for example, because it contains blanks, he should refuse to administer it.
4. Although a solicitor is under no duty to read through the affidavit or declaration, if a solicitor has good reason to believe that the affidavit or declaration is false (even if that is unknown to the deponent), he must refuse to administer it.

13.09 When an oath must not be administered

A solicitor must not administer oaths and affirmations nor take declarations in proceedings or matters in which he or his firm is acting for any of the parties, or is otherwise interested. This Principle does not apply where a solicitor is taking declarations in his capacity also as a China-Appointed Attesting Officers ('CAAO') for the purpose of such declarations being used in Mainland China or pursuant to the applicable laws regulations or administrative directions of any competent authority for purpose(s) connected with Mainland China, provided that a note stating such purpose of the declarations should be endorsed thereon.

Commentary

1. This Principle applies to both contentious and non-contentious matters.
2. Because the administering of oaths and affirmations and the taking of declarations involve the discharge of a public office, this Principle would, for example, prevent a solicitor from administering oaths and affirmations or taking declarations in the following circumstances:
 - (a) a solicitor must not take affidavits regarding proofs in bankruptcy when acting for a proving creditor or regarding the winding-up of an estate when acting for the personal representative of the testator;
 - (b) a solicitor who is employed part-time by another solicitor must not administer oaths for a client of such other solicitor;
 - (c) a solicitor who is in the full or part-time employment of a company must not administer oaths in matters in which the company is concerned.
3. The exception to this Principle applies only to statutory declarations taken by a CAAO and not to oaths or affirmations.

13.10 Attestation, Certification and Notarization of Documents outside Hong Kong

A solicitor is not allowed to administer oaths and affirmations or take declarations under the *Oaths and Declarations Ordinance* (Cap. 11) outside Hong Kong, but a solicitor who holds a current practising certificate may attest the execution of documents and certify copy documents outside Hong Kong for use in Hong Kong.

Commentary

1. The power given to a solicitor to administer oaths and declarations under the *Oaths and Declarations Ordinance* (Cap. 11) is confined to the jurisdiction of Hong Kong.

2. An attesting solicitor should identify a signatory to a document executed outside Hong Kong in the same manner as if the document were executed in Hong Kong.
3. A solicitor appointed as a Notary Public in Hong Kong may not notarize or otherwise exercise his office as Notary outside Hong Kong (see Circular 00-127).

APPENDIX

PRINCIPLE 13.10 COMMENTARY 3

**CIRCULAR 00-127 'ATTESTATION, CERTIFICATION AND
NOTARIZATION OF DOCUMENTS BY HONG KONG SOLICITORS AND
NOTARIES OUTSIDE HONG KONG' SEE CHAPTER 1**