

CODE OF CONDUCT

FOR

CAYMAN ISLANDS

ATTORNEYS-AT-LAW

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Introduction

The purpose of this publication is to provide guidance for attorneys-at-law in the Cayman Islands and those who provide Cayman Islands legal advice outside the Cayman Islands (both for the purposes of this publication called "**attorneys**"). It is not exhaustive, but instead seeks to define the bounds within which an attorney can practice the profession. Observance of those bounds, and managing all aspects of practice within them involves the acceptance of the basic principle of professional responsibility.

The Commentary does not add obligations to the 'Rules' (as set out below) but provides guidance for practicing in compliance with the Rules. In this publication words importing the masculine gender include the feminine gender.

Chapter 1 – Attorneys' Rights, Duties and Responsibilities Generally: Independence of Attorneys: Conflicts of Interests

Rule 1.01

An attorney must not conduct himself:

- (1) dishonestly or otherwise discreditably;**
- (2) so as to prejudice or undermine confidence in the administration of justice or otherwise bring it or the profession into disrepute;**
- (3) in a manner which is unbecoming to the profession or otherwise may be deemed unprofessional; or**
- (4) inconsistently with the proper interests of his client.**

Commentary:

It is not possible to define the circumstances in which an attorney may be held to have acted unprofessionally or otherwise improperly or so as to bring the profession into disrepute, although there are a large number of disciplinary offences that can occur at common law or on breach of statutory laws. Examples could include the solicitation of business from clients of an erstwhile employer; or being found guilty of a criminal offence of whatever nature, including, say, crimes of violence or serious traffic offences where the safety of others is jeopardised.

Rule 1.02

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

Rule 1.03

An attorney shall at all times observe and comply with the Legal Practitioners Law (2010 Revision) (the "LPL") as the same may be revised, amended or replaced from time to time.

Commentary:

An example of this is that an attorney may not aid any person or entity in the practice of Cayman Islands law contrary to the LPL.

Rule 1.04

An attorney's primary duty is to his client, to whom he must act in good faith. He must at all times and by all proper and lawful means advance and protect his clients' best interests without fear or regard for self-interest.

Commentary

- (1) *The professional judgment of an attorney should at all times be exercised within the bounds of the law solely for the benefit of the client and free from compromising influences and loyalties.*
- (2) *The attorney should never seek an advancement of personal interest or position at the expense of a client.*

Rule 1.05

Where an attorney acts as a director or officer of a company, the fact that he may also be that company's external legal representative in no way diminishes his liability as a director or officer arising under law. Attorneys should beware of conflicts of interests arising from their simultaneously acting as such and in the event of any such conflicts arising either immediately notify their fellow directors and officers and resign from office or resign as the company's external legal representative.

Rule 1.06

Except in the specific circumstances contemplated by statute, an attorney 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 may not divulge such information except where:

- (1) **the attorney is reasonably seeking to establish or collect his or her fee; or**
- (2) **the attorney is defending himself or his partners or employees against an allegation by the client of malpractice or misconduct or against a criminal charge; or**
- (3) **the information is or has become public knowledge; or**
- (4) **disclosure is required by law; or**
- (5) **disclosure to the attorney's professional indemnity insurer is required in order to maintain or secure the attorney's cover; or**
- (6) **the attorney forms the view that there is a serious and imminent risk to the health or safety of the client; or**
- (7) **the attorney has an overriding duty to a court or tribunal.**

Commentary

- (1) *Save as set out in statute, confidentiality and privilege of client information are among the prime principles of professional practice. Such information belongs to the client and not to the attorney. Generally any request by a third party for client information held by an attorney should be referred to the client or refused.*
- (2) *Where an attorney is in possession of information received from joint clients, the consent of both or all the clients is required to waive the duty of confidentiality.*
- (3) *In the event that an attorney is obliged to provide information, documents or other disclosure of his clients affairs by reason of any court order or warrant, the attorney shall assert legal privilege if relevant on behalf of his client and should, unless the order otherwise specifically provides, inform his client of the service of the order or warrant.*
- (4) *In any circumstances where disclosure is justified, an attorney should nonetheless be concerned not to divulge more information than is required of him or her for the purpose.*

- (5) *An attorney practising on his own account or as a partner in a firm may disclose the client's affairs to partners (if any) and employed attorneys and, to the extent necessary, to employed law clerks, legal executives, non legal staff such as secretaries and filing clerks, and to others whose services are utilised by the attorney.*
- (6) *An employed practitioner may always disclose the client's affairs to his or her employer. He should not agree to accept instructions or directions from the client on any other basis.*
- (7) *An attorney's duty continues even after the client has ceased to be the attorney's client. Following the death of the client or former client, the right to confidentiality passes to the client's personal representatives and can be waived only by them.*
- (8) *Difficulties often arise in relation to an attorney's duties when a client becomes insolvent. Upon the liquidation or receivership of the company client, authority is vested in the liquidator or receiver, who is entitled to information and documents relating to the company. Authority to permit disclosure to others thereafter vests in the liquidator or receiver. If an attorney has also acted in the past for directors or shareholders in their personal matters, care must be taken to ensure that confidentiality in respect of such personal matters is maintained.*
- (9) *Information not to be divulged by the attorney in terms of this rule will include the fact of having been consulted or retained by a person, unless the nature of the matter requires such disclosure.*

Rule 1.07

An attorney must not undertake to provide a service that he knows or ought to know he is not competent to undertake or for which he does not have the time or opportunity to fulfill.

Rule 1.08

No attorney shall discriminate against or treat unfairly any other attorney by reason of the colour, race, ethnic or national origin, sex or sexual orientation, marital status or religious or ethical belief of that other attorney.

Rule 1.09

No attorney shall permit any disqualified or unqualified person in his employ to hold themselves out as an attorney in contravention of the Law.

Commentary

A person employed by an attorney as a paralegal, corporate assistant, secretary or employee of the attorney shall not be regarded as a person falling within this Rule if in correspondence it is made clear that such person is not an attorney.

Rule 1.10

Attorneys should have regard to the provisions of the International Principles on Conduct for the Legal Profession promoted by the International Bar Association set out in APPENDIX I and act in the spirit in which it calls upon all lawyers to act. Where, however, there is a conflict between these Rules and those Principles on Conduct for the Legal Profession, these Rules prevail.

Rule 1.11

An attorney must not without the informed consent of such person act or continue to act for any person where there is a conflict of interest between the attorney on the one hand and an existing or prospective client on the other hand; nor similarly may the attorney

agree to act for any such person when, at the time he takes instructions, it is reasonably foreseeable that such a conflict may arise during the course of his doing so.

Commentary

- (1) *The rule is based on the principle that a person who occupies a position of trust must not permit his personal interests to conflict with the interests of those whom it is that person's duty to protect.*
- (2) *The rule is intended to protect a client in situations where the interest or position of the attorney would or could make the attorney's professional judgement less responsive to the interests of the client.*
- (3) *The existence of a personal interest of an attorney should be disclosed to the client or prospective client irrespective of a perceived lack of conflict and as soon as the attorney becomes aware of it. The attorney should consider carefully whether a personal interest is in any way in conflict with the interests of the client, and refuse to act, or to act further, if there is any such conflict.*
- (4) *An attorney may not enter any financial, business or property transaction with a client if there is a possibility of the fiduciary relationship between practitioner and client being open to abuse by the attorney. This applies even if the attorney does not propose to act for the client in the particular transaction.*
- (5) *The rule will usually apply to any interest or dealing through the attorney's family or relatives or any company, trust, partnership, or other body in which the attorney has or exerts a material measure of control or influence. It will also include interests which are not personal in the strict sense but representative in character such as directorships and trusteeships.*
- (6) *"Informed consent" in this and subsequent Rules means that the person in question understands all the facts and his rights in relation to the issue. Attorneys should carefully consider recommending that the person takes independent advice so that his consent may be fully informed.*
- (7) *It is difficult to guard against conflicts of interest when clients are represented by different attorneys in the same firm. There is a danger that information may be imparted by one client to an attorney in the firm to which the firm should not have access, having regard to the interest of another client who is represented by a different practitioner in that firm. Firms must establish workable systems to prevent such events occurring.*
- (8) *A potential conflict of interest is a situation which, without care, could well lead an attorney into a breach of fiduciary duty.*

Rule 1.12

An attorney 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

- (1) *A conflict of interest does not arise between parties simply because the attorney is acting for more than one of them.*
- (2) *An attorney should exercise careful professional judgement to ensure that a conflict of interest does not exist and is not likely to arise.*

Rule 1.13

- (1) As soon as he becomes aware of a conflict or likely conflict of interest among clients, an attorney shall forthwith take the following steps:**
 - (i) advise all clients involved of the areas of conflict or potential conflict;**
 - (ii) advise the clients involved that they should take independent advice as may be appropriate;**
 - (iii) 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 unless the parties have given their prior informed consent to the attorney continuing to act.**
- (2) Unless the relevant parties have given their prior informed consent, it is not acceptable for attorneys in the same firm to continue to act for more than one client in a transaction. The use of an information barrier such as a "Chinese wall" should be considered carefully and appropriate safeguards adopted with respect to segregating confidential information. Such a device does not overcome a conflict of interest that has already arisen.**
- (3) Save as hereinafter set out, an attorney must disclose to his client all information received by the attorney in the course of his business which relates to the client's affairs. The exception to this rule is that an attorney should not disclose to a client details of any enquiry or request to such practitioner from a third party to act against or otherwise in connection with that client's interests and the attorney has advised such third party that he cannot assist or act for it or where such disclosure is otherwise prohibited by any law or regulation or by the order of any governmental, judicial authority or agency.**

Commentary

- (1) An attorney should take all reasonable steps to prevent a situation arising where confidential information is received on the basis that it is not to be disclosed to a client.*
- (2) As regards the exception to this rule set out above, the attorney may agree with the third party that information relayed to him by it, for the purpose of enabling the attorney to establish whether a conflict of interest may arise in acting for the third party, will not be disclosed to anyone, including any existing client.*

Chapter 2 - Conduct of Practice Generally

Rule 2.01

The name of an attorney's firm must be one which is not likely to:

- (1) be misleading as to the nature or structure of the firm;**
- (2) bring the profession into disrepute; or**
- (3) be unfair to other attorneys or the public.**

Commentary

- (1) The reference to firm where appropriate includes references to the business of a sole practitioner.*

- (2) *Unless it is already well-established when these Rules come into effect:*
- (a) *the name of a firm must be consistent with the requirements of professional standing; and*
 - (b) *the name of a firm must not be misleading nor should it unfairly describe the firm. It should not, for instance, give an impression to the public that the firm is multi-partnered and broadly based when it is not. Nor should it falsely suggest patronage of or connection with some person or authority that has no connection with the firm.*

Rule 2.02

On a firm's letterhead or email any other publication or literature issued by a firm, or in an advertisement of a firm's services, a firm must ensure that neither the public nor other attorneys are misled about the structure of the firm or the status of any person named in such letterhead or publicity.

Commentary

- (1) *If the names of partners, consultants or associates, or any of them, are shown, their status should be indicated.*
- (2) *If a person whose name is included is not a partner, consultant or associate, this should be made clear by the use of appropriate expressions such as "legal executive", "office accountant", "paralegal", "corporate assistant", "financial controller", "practice manager", etc.*
- (3) *A firm must ensure that the public, and other attorneys dealing with a principal or an employee of the firm, know the name and status of the person with whom they are dealing.*

Chapter 3 - Relations: Attorneys and Clients

Rule 3.01

An attorney may charge a client for his services no more than that charged on a prior agreed basis or which otherwise is fair and reasonable for the work done, having regard to the interests of both client and practitioner.

Commentary

- (1) *There is no objection in principle to fees calculated on a percentage of the value of the transaction provided that is agreed in advance by the client.*
- (2) *If not on a prior agreed basis, charges must be fair and reasonable in all the circumstances. Charges by a lawyer for professional work shall be calculated to give a fair and reasonable return for the services rendered, having regard to the interests of both client and lawyer. Charges may take account of all relevant factors, including:*
 - (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 set out above will vary according to the particular circumstances of each transaction.

Rule 3.02

An attorney must not receive a reward, whether financial or otherwise, of which a client is unaware, in respect of services rendered to the client, and if he does so without the consent of the client such reward will be treated as held by the attorney on trust for the client.

Commentary

- (1) *Attorneys must at all times make appropriate disclosure to a client of any personal gain by them from a transaction or otherwise from representing that client.*
- (2) *Where an attorney sends an account to a client and that account includes a payment which has been or is to be made to an agency company or other body in which the relevant practitioner, his partner(s) or members of their family has or have an interest, then that interest must be disclosed on the account.*

Rule 3.03

An attorney shall keep accounts which clearly and accurately distinguish the financial position between himself and his client.

Commentary

- (1) *Attorneys must at all times ensure that any monies that are held by the attorney on behalf of the client are kept in separate accounts from those accounts which contain monies belonging to the attorney.*
- (2) *The attorney shall, unless otherwise instructed by his client, keep any money held by him on behalf of a client in the account of a bank regulated by a legally constituted regulatory authority in the Cayman Islands or some other legally constituted regulatory authority located in the country in which the attorney is practicing.*
- (3) *An attorney shall indicate in the title or designation of an account that the funds belong to a client of the attorney if the account is one in which the client's money is held in the name of the attorney out of expediency.*
- (4) *An attorney shall at all times maintain clear records to-*
 - (a) *show all the transactions in relation to a client's account;*
 - (b) *show separately in respect of each client, all money received, held or paid by the attorney for or on account of that client and to distinguish the same from any other money received, held or paid by the attorney; and*
 - (c) *to ensure that the attorney is at all times able, without delay, to account to clients for all money received, held or paid by the attorney on behalf of the client.*
- (5) *An attorney shall preserve for at least six years from the date of the last entry therein all accounts, books, ledgers and records maintained in relation to the client's affairs.*
- (6) *An attorney shall not make any payment or withdrawal from money held on behalf of any client except where the money paid or withdrawn is-*
 - (a) *properly required for a payment to or on behalf of the client;*

- (bi) *properly required for or towards payment of a debt due to the attorney from the client or in reimbursement of money expended by the attorney on behalf of the client;*
 - (c) *paid or withdrawn on the client's authority; or*
 - (d) *properly required for or towards payment of the attorney's costs where a bill of costs has been delivered to the client or other written intimation of the amount of the costs incurred and it has been made clear to the client that the money so paid or withdrawn will be applied to satisfying the bill of costs.*
- (7) *An attorney shall not be deprived of any recourse or right whether by way of lien, set-off, counterclaim, charge or otherwise against moneys standing to the credit of a client's account maintained by that attorney.*

Chapter 4 - Information about Legal Services: Dissemination

Rule 4.01

Advertisements to or any other communications with any person relating to the services of an attorney or of a firm of attorneys must be consistent with the maintenance of proper professional standards.

Commentary

- (1) *The advertisement or communication must not be false, misleading or deceptive, or likely to be so.*
- (2) *The advertisement or communication may indicate a field or fields of practice in which the attorney is prepared to take instructions.*
- (3) *If any advertisement or communication contains or refers to testimonials, endorsements or the like about an attorney or the services offered, the attorney must be able to show on enquiry that such testimonials or endorsements were not provided for monetary or other reward. The genuineness and veracity of any testimonials or endorsements may be tested on enquiry.*
- (4) *The advertisement or communication must not disparage other attorneys, either individually or as a group. For further reference see Rule 4.03.*
- (5) *An attorney may not consent to, nor permit, being mentioned (whether by name or in any other identifiable way), in an advertisement or other promotion by a third party which is misleading in relation to the legal services offered.*

Rule 4.02

An attorney must not, in any advertisement to, or any other communication with, any person, claim to be a specialist or to have special expertise or experience in any field or fields of practice unless such claim is true.

Rule 4.03

In offering services other than by normal advertising channels, whether within or outside the Cayman Islands, an attorney must ensure that approaches to persons who are not existing clients, whether or not they are the clients of another attorney, are made in a manner which does not bring the profession or the jurisdiction into disrepute. Such approaches must accord with proper professional standards and must not be misleading or misrepresent the standard of services provided by other attorneys. Nor may they be

intrusive or offensive or disparage other attorneys (whether individually or as a firm or group).

Commentary

- (1) *A direct approach to a potential client should not misrepresent the standard of services provided by other attorneys or firms or by the attorney.*
- (2) *The manner of such approaches, their frequency and surrounding circumstances, may be taken into account in assessing the propriety of the attorney's actions.*

Rule 4.04

An attorney 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

- (1) *A financial arrangement between an attorney and a third party whereby that third party refers work to the attorney, or is recommended by the attorney, is likely to involve a conflict of interest, with an attorney having loyalties to both the client and the third party. That conflict of interest will often be irremediable under Chapter 1/ Rules 1.11 – 1.13.*
- (2) *Although the rule is cast in absolute terms, there is a line to be drawn between two situations. While the offering of direct payments or benefits for the advancing of work is proscribed, it is not intended that the rule should prohibit the usual professional associations that develop between attorneys and third parties, i.e. those associations which may involve social exchanges, the mutual referrals of work, or small gifts. There could, nevertheless, be instances where indirect benefits may create a conflict of interest, or involve a breach of Chapter 1/ Rules 1.11 – 1.13.*

Rule 4.05

An attorney may not, without the specific consent of a client, give any interview or make any public statement involving the confidential information of a client, whether or not the client's involvement is a matter of public knowledge.

Chapter 5 – Anti Money-Laundering and Countering the Financing of Terrorism

Rule 5.01

Each practitioner must observe and comply with regulations issued pursuant to Misuse of Drugs Law (2010 Revision), the Proceeds of Crime Law, 2008 and the Terrorism Law (2009 Revision) and follow any relevant supervisory or regulatory guidance, such as the Money Laundering Regulations (2010 Revision), issued by the Cayman Islands Monetary Authority or the Legal Advisory Council. Each firm of attorneys shall maintain appropriate procedures in accordance with such Regulations for the conduct of relevant financial business.

Commentary

Failure by an attorney to observe such Regulations in the conduct of relevant financial business may render him liable to civil or criminal sanctions.

Chapter 6 - Relations Between Attorneys

Rule 6.01

An attorney must promote and maintain proper standards of professionalism in relations with other attorneys.

Commentary

- (1) *An attorney shall treat professional colleagues with courtesy and fairness at all times consistent with an overriding duty to the client.*
- (2) *There are many occasions when an attorney needs to rely on information given by another practitioner. Professionalism demands that such reliance should not be misplaced. Whether the information is given in writing, or orally, or is in the form of an oral or written undertaking, the attorney receiving the information or undertaking is entitled to be able to rely and act on it with impunity.*
- (3) *Wherever possible oral undertakings should be avoided in favour of written undertakings - see Commentary (2) in relation to Rule 6.06.*
- (4) *While it is not always possible to take telephone calls from another practitioner or to answer emails, text or instant messaging immediately, such calls, emails or messaging should be returned at the earliest opportunity.*
- (5) *It is an invasion of a person's privacy to tape a conversation without that person's consent. It is unprofessional and discourteous for one practitioner to do so in respect of another practitioner or an employee of another practitioner. If an attorney wishes a conversation by telephone or otherwise to be taped, then he or she should first notify the other practitioner or employee so as to give them the opportunity to decline to go ahead with the conversation if they wish.*

Rule 6.02

It is only in very exceptional cases that an attorney should communicate either directly or in writing with the client of another practitioner (without the knowledge of or without addressing a copy of such communication to that practitioner) in relation to a matter in which he has reason to believe the other practitioner is still instructed by that client.

Commentary

- (1) *An attorney may suggest to a client that an approach by that client to the other practitioner's client might be appropriate or useful.*
- (2) *If an attorney has tried unsuccessfully for a reasonable period to obtain a response from the other practitioner in a matter, then it may be appropriate for the client of that other attorney to be approached. This action should, however, be regarded as most unusual and be used only in extreme circumstances. In any event, the action should be taken only after advising the other practitioner of the attorney's intention to do so.*
- (3) *In circumstances where the client himself is acting in a professional capacity (e.g. a liquidator of a company), it may be appropriate for lawyers of other clients to communicate with him directly.*

Rule 6.03

Unless there are exceptional circumstances, an attorney shall not:

- (1) **Stop a cheque drawn on such practitioner's account payable to another practitioner; or**

- (2) Stop a bank cheque payable to another practitioner; or
- (3) Cancel or reverse or amend an order for payment made to another practitioner by means of electronic transfer from an attorney's 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.

Rule 6.04

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

Commentary

- (1) *An attorney has no proprietary interest in a client. It is permissible to inquire why a client is changing but it is not permissible to exert influence or pressure on the client to return to the attorney.*
- (2) *On a change of practitioner, an authority to transfer specific documents should be acted upon without undue delay subject only to any lien that the holding practitioner may lawfully claim. It is however recognised that documents may be required for a short time for costing purposes.*
- (3) *Even when an attorney does have a lien over documents, the urgency of a situation may demand that as a matter of courtesy, that practitioner will make the documents available to the client's new adviser on receipt of an appropriate undertaking as to the payment of the attorney's fee..*
- (4) *Efforts should be made in the interests of the former client and of the profession to facilitate the transfer of files on a change of practitioner. There could be circumstances, such as a revision of costs, where delays might occur which would be harmful to the client's interest unless the file was handed to the new practitioner against appropriate undertakings.*
- (5) *A circumstance might arise where the attorney, whose client wishes to change to another practitioner has given undertakings to settle and pay settlement moneys and hand over documents. In such a situation, an attorney should decline to hand over documents and moneys to the new practitioner until he or she receives from the new practitioner a personal written undertaking to honour the terms of the undertaking already made.*

Rule 6.05

Immediately upon an attorney becoming aware of a potential claim for negligence that a client may assert against himself or his firm, the attorney must advise the client to seek independent advice in connection with the matter and must inform the client that the attorney can no longer act in the matter, unless the client, either having been independently advised or having deliberately chosen not to take advice and to waive any claim, requests it.

Commentary

- (1) *An attorney is entitled to ensure, while informing the client of the client's rights, that he (the attorney) does not make any statement that may prejudice any insurance cover held by the attorney.*

- (2) *An attorney who is requested to hand the relevant papers to a new practitioner instructed by the client should, as a matter of prudence and at the expense of the client, take copies of relevant papers which may be material in the attorney's defence.*

Rule 6.06

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

Commentary

- (1) *An attorney's word is his bond. Further, the honouring of an undertaking involves the joint and several responsibility and liability of all the partners of that practitioner's firm.*
- (2) *While a professional undertaking may be given in writing or orally, it is prudent for attorneys to express an undertaking in writing if it is at all practicable. An oral undertaking has the same effect as one in writing but may raise evidential problems as to its content or existence.*
- (3) *If circumstances require an oral undertaking to be given, it may be that a contemporaneous note, transcript or written confirmation recorded by either practitioner may be necessary as conclusive proof of its existence. If the recipient confirms or accepts the terms of an oral undertaking and these are not promptly repudiated by the giver of the undertaking, this would be likely to constitute sufficient evidence of the existence and terms of the undertaking.*
- (4) *An undertaking should be given expressly and not merely by implication.*
- (5) *An attorney should try to ensure that an undertaking is precise and unambiguous in its terms. An ambiguous undertaking will generally be construed in favour of the recipient.*
- (6) *An attorney may not escape liability on an undertaking by pleading that to honour it would be a breach of a duty owed to the attorney's client.*
- (7) *If a client makes it impossible or impracticable for the undertaking to be honoured, the attorney shall investigate the circumstances and, if appropriate, consider resigning.*

Rule 6.07

An attorney 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, be responsible personally for the prompt and full payment of the fee of the instructed practitioner.

Commentary

- (1) *An attorney may not delay payment because the client has not paid the amount of the fee to the attorney.*
- (2) *The relationship of the attorney to the instructed practitioner is that of a professional client, who may be looked to for the fee accordingly.*

Rule 6.08

Subject always to the rights and duties pertaining to practitioner and client privilege, there is an obligation on every attorney who has grounds to suspect improper acts by another practitioner (including breaches of these Rules) to make a confidential report at the earliest possible time to the Hon. Chief Justice of the Cayman Islands.

Commentary

- (1) *An attorney may receive information in professional confidence from an attorney who is a client. In any such case the attorney/client privilege applies and there is a duty of silence imposed on the attorney. An attorney should where appropriate encourage a client to consent to disclosure to the Hon. Chief Justice of the Cayman Islands unless such encouragement is contrary to the attorney's professional duty to the client.*
- (2) *It is not possible to itemise all the indications there might be of improper conduct on the part of an attorney, but such circumstances as breach of law, the dishonour of cheques, or delay or procrastination in effecting settlements, might be sufficient to indicate that all is not well with the attorney's practice or with the attorney's firm.*

Chapter 7 - Relations with Third Parties

Rule 7.01

An attorney, 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.

Rule 7.02

An attorney who:

- (1) **instructs another person, for example an accountant, valuer or engineer to prepare an assessment valuation or report or to provide other services; or**
- (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

- (1) *Except where the matter is funded on legal aid, the attorney is not relieved from liability merely because the client or a third party has not paid the amount of the fee to the attorney. In the absence of agreement with the person so instructed or the witness ("the instructed person"), the attorney has personal responsibility for payment.*
- (2) *Attorneys should be precise as to fee arrangements at the time the instructed person is retained. Where a fee or formula for fixing a fee (e.g. an hourly rate) has been agreed in advance, then that agreed fee or a fee fixed in accordance with that formula will be the proper fee for which the attorney will be responsible under this rule. Otherwise the proper fee is the instructed person's reasonable fee. If there is a dispute about the reasonableness of the fee, the attorney should promptly pay the amount, which the attorney considers reasonable, and attempt to negotiate prompt settlement of any balance.*
- (3) *All fee arrangements with an instructed person should be in writing.*
- (4) *The provisions of this rule will also apply in circumstances where an attorney has made a personal commitment to be responsible for the fees and expenses of a non-expert witness.*

Rule 7.03

An attorney 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 the rule are:

- (1) *An attorney should not issue a statutory demand under Section 93 of the Companies Law (2010 Revision) knowing that or being reckless as to whether the debt is bona fide disputed, and should make reasonable inquiry from the client as to the existence of any such dispute.*
- (2) *Ex parte applications should be made by an attorney only if he is satisfied that to do so is both permitted by the Grand Court Rules and that it is impractical or inappropriate to give notice to the persons likely to be affected by the order being sought in the application.*
- (3) *An attorney should not register a caution under Section 127 of the Registered Land Law (2004 Revision) knowing that there is no "unregistrable interest" of the client to be protected pursuant to that Law, and should make reasonable inquiry from the client as to the existence of any such interest.*
- (4) *An attorney, in arranging service of a document on a person, has a clear duty to the client to make all reasonable efforts to effect service promptly or to seek substituted service, but the attorney should also take reasonable steps to avoid in the manner and place of service causing the person served unnecessary embarrassment or damage to his reputation, interests or occupation.*

Chapter 8 - Court Proceedings and Practice

Rule 8.01

The overriding duty of an attorney acting in litigation is to ensure in the public interest that the proper and efficient administration of justice is served. Subject to this, the attorney has a duty to act in the best interests of the client.

Commentary

- (1) *An attorney must never deceive or knowingly or recklessly mislead the court or the tribunal.*
- (2) *The attorney must at all times be courteous to the court or the tribunal.*
- (3) *The attorney, whilst acting in accordance with these duties, must uphold his client's interests without regard for personal interests or concerns.*
- (4) *The attorney has an obligation when conducting a case to put all relevant authorities known to the attorney, whether decided cases or statutory provisions, before the court, whether they support the attorney's case or not.*
- (5) *If a fact or an authority which may affect the judgment in the case is discovered by the attorney some time after the hearing but before the decision has been given, the attorney has a duty to bring it to the attention of the court and to inform or, as the case may be, provide a copy of the reference to the attorney acting for the other party or parties in the matter.*
- (6) *An attorney 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.*

The following points should be specifically noted:

- (i) *A publication will amount to contempt if it is likely to prejudice the trial or conduct of the action.*
 - (ii) *A publication may constitute a contempt if it is likely to interfere with the proper adducing of evidence, either by discouraging witnesses from coming forward or by influencing them in the evidence that they are prepared to give. An example would be a publication attacking or criticising a witness or disparaging a party in proceedings.*
 - (iii) *Contempt of court in a civil action extends also to conduct that is calculated to inhibit suitors from availing themselves of their right to have their legal rights determined by the courts. An example would be a publication which is likely to bring pressure to bear on one or other of the parties to an action so as to prevent that party from prosecuting or defending the action.*
- (7) *Whether or not civil or criminal proceedings are pending or imminent, an attorney must not discuss a client's affairs without his or her consent.*
 - (8) *Unless invited to do so by the court or tribunal, an attorney must not assert a personal opinion on fact or law.*
 - (9) *Attorneys must not allow their independence and freedom from external pressures to be compromised and they must not themselves compromise their professional standards to appease a client, the court or any third party.*

Rule 8.02

An attorney must exercise care in court about naming persons not involved in the proceeding, and must refrain particularly from making merely scandalous or unnecessary allegations against such persons. Further, he should not make statements or ask questions that are merely scandalous or calculated only to insult, vilify, harass, threaten or intimidate a witness or another.

Rule 8.03

Except in cases of urgency or where an ex parte application is justified, an attorney must not discuss the merits of a case or matter with a judge or other presiding officer, either formally or informally, without the consent of the other practitioner; and such discussion should be held only in the presence of the other practitioner unless he or she consents otherwise. In any event, natural justice demands that generally there should not be unilateral communications with a court or other tribunal.

Rule 8.04

An attorney must not attack a person's reputation without good cause nor make any allegation of fraud or dishonesty unless he has clear instructions to do so and has satisfied himself that there is reasonably credible material supporting a prima facie case.

Commentary

- (1) *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.*
- (2) *An attorney should not be a party to the filing of a pleading or other court document containing an allegation of fraud, dishonesty, undue influence, duress unless the attorney has first satisfied himself or herself that it is necessary relevant and material and that there is reasonably credible material to support the allegation. For an attorney to allow such an allegation to be made, without*

the fullest investigation, could be an abuse of the protection which the law affords to the attorney in the drawing and filing of pleadings and other court documents.

- (3) *An attorney should not permit to be filed or used in proceedings or in evidence an affidavit or witness statement including any statements of fact other than those which he reasonably believes on his instructions would be given in evidence by the witness in live testimony or which are included in the affidavit subject to confirmation by the client as to its accuracy.*
- (4) *An attorney shall not place a witness or prospective witness under any pressure to provide untruthful evidence.*

Rule 8.05

An attorney must not act as both advocate and witness in the same matter.

Commentary

- (1) *If there is any reason for an attorney to think that he or she may be required as a witness in a matter, the attorney should decline to act as advocate. This does not necessarily prevent his partners or other colleagues in his firm from doing so, however.*
- (2) *The same principle applies to making an affidavit in a contentious matter where the attorney is acting as advocate.*
- (3) *If, having started to act as advocate, the attorney finds it necessary to make an affidavit in respect of the matter concerned unless it is respectable formal or non contentious nature, then the attorney must immediately retire from the position of advocate, unless the court, in the particular circumstances, directs that it is still appropriate for the attorney to continue to act.*
- (4) *Even where an affidavit might appear to be in respect of a formal or non-contentious fact, it may be prudent for the attorney to have it made and sworn by some other person.*
- (5) *Where an attorney, having already accepted instructions as advocate, becomes aware that a partner or employee of the attorney might be called as a witness for the client, the attorney must exercise care and professional judgment in deciding whether or not to continue as advocate in the matter.*
- (6) *The constraints expressed above apply to the same extent where an attorney acts as both attorney and advocate.*

Rule 8.06

In litigation matters, as in the course of other aspects of practice, an attorney must avoid a conflict of interest.

Commentary

- (1) *In civil proceedings an attorney should ensure that parties with conflicting interests are not represented by the same practitioner, whether or not counsel is or are briefed.*
- (2) *If a remote possibility is identified of a conflict arising, it should generally be avoided by the attorney declining to act unless with the informed consent of both parties and upon clear agreement as to what should happen in the event of a conflict.*
- (3) *The provisions of this rule apply where two or more persons are charged jointly in a criminal matter.*

Rule 8.07

An attorney appearing for a party shall not seek or agree to a consent order without the client's authority. The attorney should obtain written instructions.

Commentary:

- (1) *Where an attorney appearing for a party informs the court that he or she consents to an order on behalf of the party, the court and the other counsel and client are entitled to rely on the authority of counsel.*
- (2) *The rule applies whether:*
 - (i) *the client is present and makes no demur; or*
 - (ii) *the client is absent.*
- (3) *Where, unknown to the other party's counsel, an attorney's usual authority has been expressly limited by instructions but the attorney has nevertheless entered into a compromise without authority, the court in its discretion may set aside the compromise and the orders based on it.*

Chapter 9 – Counsel for Defence

Rule 9.01

1. **On a plea of not guilty the 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.**
2. **An attorney may not wantonly or recklessly attribute to another person the crime or offence with which the client is charged. An attorney may so attribute if it goes to a matter or issue (including the creditability of a witness) which is material to the client's case and it is necessary to do so as part of the Client's case.**

Commentary

- (1) *Attorneys should examine the facts that the prosecution seek to prove before advising the client about an appropriate plea. If the client's decision is to plead not guilty, the attorney must act conscientiously in presenting the case for the accused.*
- (2) *Counsel for the defence has the same general duty to the court to disclose all cases and authorities bearing on the matter whether or not they support the defence.*
- (3) *Although an attorney may present a technical defence available to the client, he must not invent or participate in the invention of facts, which will assist in advancing the client's case.*

Rule 9.02

The attorney has, on receiving instructions, a duty to defend a person on a criminal charge, whether or not he has formed a belief or opinion about the guilt or innocence of that person.

Commentary

- (1) *It is not for the attorney to assess the guilt or innocence of the client. That is a matter for the Court or a properly instructed jury. There could well be cases where an attorney feels reasonably*

sure of the client's guilt, but is still under a duty to put the prosecution to proof and is free to submit, if justified, that there is insufficient evidence for a conviction.

- (2) *If a client tries to put before the court evidence which to the knowledge of his counsel is false the attorney should avail himself of any opportunity to persuade the client to withdraw the evidence failing which he should cease to act.*

Rule 9.03

1. **Where an attorney has been instructed to defend a criminal charge and before or after the proceedings have started the client makes a confession of guilt to him, the attorney must bear in mind:**
 - (i) **a trial is for the purpose of finding whether the accused person is guilty or not guilty, and not whether the accused is innocent;**
 - (ii) **it is for the prosecution to call evidence to justify a verdict of guilty;**
2. **In such circumstances, the attorney may continue to act only if the plea is changed to one of guilty or otherwise within strict limit. An attorney must not put forward a factual case inconsistent with the confession.**
3. **If the plea is to remain one of not guilty, the attorney may conduct the defence by putting the prosecution to proof, and if appropriate, assert that the prosecution evidence is inadequate to justify a verdict of guilty; but must not raise any matter which suggests that the client has an affirmative defence, for example an alibi. An attorney may, however, proceed with a defence based on a special plea such as insanity, if such a plea appears in his professional opinion to be available.**

Commentary:

- (1) *This rule applies to a case where there is a clear confession that the client committed the offence charged.*
- (2) *No rule can deal with doubts raised in advocate's mind after he or she has been instructed to act on a not guilty plea, by inconsistent statements by the client which might suggest to the attorney that the client is guilty. An attorney can deal with such a situation only in the light of all the circumstances and pursuant to his professional judgment and duty as an officer of the Court.*

Rule 9.04

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

Commentary

- (1) *Although an attorney has a clear duty to advise on a plea, the client has the sole right to make the decision whether to plead guilty or not guilty.*
- (2) *Where the client might have difficulty making a decision on a plea, where he asserts a position inconsistent with a decision to plead guilty or where the client changes his decision to one in which he pleads guilty, it is prudent for the attorney to take written instructions on the plea. To have the client's decision so recorded might well assist the attorney if in the course of the proceedings or on appeal, the client decides to change the plea. It may also be prudent for an attorney to take written instructions as to whether or not the client is to give evidence on his or her own behalf.*

- (3) *In giving advice on a plea, the attorney's clear duty is to the client and the court. The interest of the attorney or any potential benefit to the attorney by way of fee or otherwise, is quite irrelevant to the nature of the plea.*

Rule 9.05

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

APPENDIX I – IBA International Principles on Conduct for the Legal Profession

IBA

International
Principles on
Conduct for the
Legal Profession

Adopted on 28 May 2011
by the International Bar Association



the global voice of
the legal profession™

This Commentary is dedicated
to the memory of Steve Krane,
former President of the New York State Bar,
who assisted greatly with its earlier versions
and sadly died during its final drafting.

The IBA wishes to thank the following for their
contribution to the
International Principles on Conduct for the Legal Profession

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International Principles on Conduct for the Legal Profession

Lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the courts, and the legitimate aspiration to maintain a reasonable standard of living. Between these elements there is often tension. These principles aim at establishing a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world. In addition, the purpose of adopting these International Principles is to promote and foster the ideals of the legal profession. These International Principles are not intended to replace or limit a lawyer's obligation under applicable laws or rules of professional conduct. Nor are they to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind.

1. Independence

A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

2. Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

3. Conflicts of interest

A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

4. Confidentiality/professional secrecy

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

5. Clients' interest

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

6. Lawyers' undertaking

A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

7. Clients' freedom

A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

8. Property of clients and third parties

A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

9. Competence

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

10. Fees

Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.

Commentary on IBA International Principles on Conduct for the Legal Profession

Adopted by the International Bar Association
at the Warsaw Council Meeting
28 May 2011

Introduction

- 1 The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves a client's interests and protects the client's rights, also fulfils the functions of the lawyer in society – which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to negotiate and draft agreements and other transactional necessities, to further the development of the law, and to defend liberty, justice and the rule of law
- 2 The International Principles consist of ten principles common to the legal profession worldwide. Respect for these principles is the basis of the right to a legal defence, which is the cornerstone of all other fundamental rights in a democracy.
- 3 The International Principles express the common ground which underlies all the national and international rules which govern the conduct of lawyers, principally in relation to their clients. The General Principles do not cover in detail other areas of lawyer conduct, for instance regarding the courts, other lawyers or the lawyer's own bar.
- 4 The International Principles take into consideration:
 - national professional rules from states throughout the world;

- the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990;
- the Universal Declaration of Human Rights.

- 5 It is hoped that the Principles and this Commentary will be of help, for instance, to bars that are struggling to establish their independence and that of their members in emerging democracies, and to lawyers and bars to understand better the issues arising in cross-border situations as a consequence of conflicting national rules and regulations.
- 6 It is hoped that the Principles will increase understanding among lawyers, decision makers and the public of the importance of the lawyer's role in society, and of the way in which the principles by which the legal profession is regulated support that role.
- 7 The IBA urges judges, legislators, governments and international organisations to strive, along with lawyers and bars, to uphold the principles set out in the International Principles. However, no statement of principles or code of ethics can provide for every situation or circumstance that may arise. Consequently, lawyers must act not only in accordance with the professional rules and applicable laws in their own state (and maybe also the rules and laws of another state in which they are practising), but also in accordance with the dictates of their conscience, in keeping with the general sense and ethical culture that inspires these International Principles.
- 8 The Appendix to this Commentary contains definitions of some of the terms contained in it.

1. Independence

1.1 General principle

A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

1.2 Explanatory note

It is indispensable to the administration of justice and the operation of the Rule of Law that a lawyer act for the client in a professional capacity free from direction, control or interference. If a lawyer is not guaranteed independence and is subject to interference from others, especially those in power, it will be difficult for the lawyer fully to protect clients. Therefore, the guarantee of a lawyer's independence is an essential requirement for the protection of citizens' rights in a democratic society. The requirement of independence calls upon the individual practicing lawyer, government and civil society to give priority to the independence of the legal profession over personal aspirations and to respect the need for an independent legal profession. Clients are entitled to expect independent, unbiased and candid advice, irrespective of whether or not the advice is to the client's liking.

Independence requires that a lawyer act for a client in the absence of improper conflicting self-interest, undue external influences or any concern which may interfere with a client's best interest or the lawyer's professional judgment.

Circumstances in which a lawyer's independence will or may be at risk or impaired include:

- the involvement of the lawyer in a business transaction with a client absent proper disclosure and client consent;

- where the lawyer becomes involved in a business, occupation or activity whilst acting for a client and such an interest takes or is likely to take precedence over the client's interest;
- unless otherwise authorised by law, knowingly acquiring an ownership, possessory or security interest adverse to the client; and
- holding or acquiring a financial interest in the subject matter of a case which the lawyer is conducting, whether or not before a court or administrative body, except, where authorised by law, for contingent fee agreements and liens to secure fees.

The fact that lawyers are paid by a third party must not affect their independence and professional judgement in rendering their services to the client.

Independence of a lawyer requires also that the process for the lawyer's admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise.

1.3 International implications

While the principles of independence of the lawyer and of the legal profession are undisputed in all jurisdictions adhering to, and striving for, the improvement of the Rule of Law, the respective regulatory and organisational frameworks vary significantly from jurisdiction to jurisdiction. In certain jurisdictions, the bars enjoy specific regulatory autonomy on a statutory and sometimes constitutional basis. In others, legal practice is administered by the judicial branch of government and/or governmental bodies or regulatory agencies. Often the courts or statutory bodies are assisted by bar associations established on a private basis. The various systems for the organisation and regulation

of the legal profession should ensure not only the independence of practicing lawyers but also administration of the profession in a manner that is itself in line with the Rule of Law. Therefore, decisions of the Bars should be subject to an appropriate review mechanism. There is an ongoing debate as to the extent to which governmental and legislative interference with the administration and conduct of the legal profession may be warranted. Lawyers and bars should strive for and preserve the true independence of the legal profession and encourage governments to avoid and combat the challenges to the Rule of Law.

Some jurisdictions hold certain types of activities and the handling of certain matters by members of the bar as incompatible with their independent practice; others see no conflict at all. As regards employment of a lawyer admitted to the bar, it is allowed in some jurisdictions and prohibited in others for a lawyer to be employed by another lawyer or a third party (in-house or corporate counsel). Of those jurisdictions that allow a lawyer to be employed, some jurisdictions acknowledge the privileges of a lawyer (protection of independence and confidentiality) only in those cases where the lawyer works for a client other than the lawyer's employer, while other jurisdictions grant this protection also for work performed for the employer.

Differences in jurisdictional approach should be taken into account in cases of cross-border or multi-jurisdictional practice. Every lawyer is called upon to observe applicable rules of professional conduct in both home and host jurisdictions (Double Deontology) when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice. Every international law firm will have to examine whether its entire organisation is in conformity with such rules in every jurisdiction in which it is established or engaged in the provision of legal services. A universally accepted framework for determining proper conduct in the event of

conflicting or incompatible rules has yet to be developed, although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice.

2. Honesty, integrity and fairness

2.1 General principle

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

2.2 Explanatory note

Trust in the legal profession requires that every member of the legal profession exemplifies personal integrity, honesty and fairness.

A lawyer shall not knowingly make a false statement of fact or law in the course of representing a client or fail to correct a false statement of material fact or law previously made by the lawyer. Lawyers have an obligation to be professional with clients, other parties and counsel, the courts, court personnel, and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution. Lawyers should be mindful that while their duties are often carried out in an adversarial forum, lawyers should not treat the court, other lawyers, or the public in a hostile manner. Nevertheless, it is also true that there are different standards expected towards the client, the court or a professional colleague since the lawyer has different responsibilities towards each category. The expression of these responsibilities varies jurisdiction by jurisdiction.

2.3 International implications

A lawyer who appears before or becomes otherwise engaged with a court or tribunal must comply with the rules applied by such court or tribunal.

Cross-border cooperation between lawyers from different jurisdictions requires respect for the differences that may exist between their respective legal systems, and the relevant rules for the regulation of the legal profession.

A lawyer who undertakes professional work in a jurisdiction where the lawyer is not a full member of the local profession shall adhere to applicable law and the standards of professional ethics in the jurisdiction of which the lawyer is a full member, and the lawyer shall practice only to the extent this is permitted in the host jurisdiction and provided that all applicable law and ethical standards of the host jurisdiction are observed.

3. Conflicts of interest

3.1 General principle

A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

3.2 Explanatory note

Trust and confidence in the legal profession and the rule of law depends upon lawyers' loyalty to clients. Rules regarding conflicts of interest vary from jurisdiction to jurisdiction. The definition of what constitutes a conflict also differs from jurisdiction to jurisdiction, including (but not exhaustively) whether information barriers are permitted at all, and also whether conflict of interest prohibitions cover all the law firm or whether information barriers can help. Generally, a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if the representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, a third person or by a personal interest of the lawyer. Notwithstanding the existence of conflict of interest, in some jurisdictions a lawyer may represent the client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and each affected client gives informed consent, confirmed in

writing. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not use information relating to the representation to the disadvantage of the former client except when permitted by applicable law or ethics rules.

In some jurisdictions, certain potentially conflicting situations may be permitted subject to proper disclosure to and, to the extent permitted by applicable law or ethics rules, consent by all parties involved, provided always that disclosure may be made without breaching confidentiality obligations. Without prejudice to additional duties, if a conflict becomes apparent only after the lawyer's work has commenced, some jurisdictions require the conflicted lawyer to withdraw from the case in its entirety and in respect of all clients concerned; others require withdrawal from representing one client only, but not all of them.

In addition, legal and professional conduct conflict of interest must be clearly distinguished from commercial conflict of interest. A lawyer should be entitled to defend the interests of or represent a client in a case even if that client is a competitor or its interests conflict with the commercial interests of another present or former client, not involved or related in that particular case assigned to the lawyer. Also, a lawyer may defend the interests of or represent a client against another client in any circumstance where the latter, whether in negotiating an agreement, or in another legal action or arbitration, has chosen to place its interests for those cases with another lawyer; however, in such cases, the first-mentioned lawyer will have to comply with all other applicable rules of professional conduct, and in particular with rules of confidentiality, professional secrecy and independence.

In upholding the interests of clients, lawyers must not allow their own interests to conflict with or

displace those of their client. A lawyer must not exercise any undue influence intended to benefit the lawyer in preference to that of a client. A lawyer must not accept instructions or continue to act for a client, when the lawyer becomes aware that the client's interest in the proceedings would be in conflict with the lawyer's own interest.

3.3 International implications

The differences in national rules on conflicts of interest will have to be taken into account in any case of cross-border practice. Every lawyer is called upon to observe the relevant rules on conflicts of interest when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice. Every international law firm will have to examine whether its entire organisation complies with such rules in every jurisdiction in which it is established and engaged in the provision of legal services. A universally accepted framework for determining proper conduct in the event of conflicting or incompatible rules has yet to be developed, although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice.

4. Confidentiality/ professional secrecy

4.1 General principle

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

4.2 Explanatory note

The right and duty of a lawyer to keep confidential the information received from and advice given to clients is an indispensable feature of the rule of law and another element essential to public trust and confidence in the administration of justice and the independence of the legal profession.

The principles of confidentiality and professional secrecy have two main features. On the one hand there is the contractual, ethical and frequently statutory duty on the part of the lawyer to keep client secrets confidential. The statutory duty is sometimes in the form of an evidentiary attorney-client privilege; this differs from the lawyer's obligations under applicable rules of professional conduct. Such obligations extend beyond the termination of the attorney-client relationship. Most jurisdictions respect and protect such confidentiality obligations, for example, by exempting the lawyer from the duty to testify before courts and other public authorities as to the information the lawyer has gathered from clients, and/or by affording lawyer-client communications special protection.

On the other hand, there are manifest situations in which the principles of confidentiality and professional secrecy of lawyer-client communications no longer apply in full or in part. Lawyers can not claim the protection of confidentiality when assisting

and abetting the unlawful conduct of their clients. Some jurisdictions also allow or require a lawyer to reveal information relating to the representation of the client to the extent the lawyer reasonably believes it necessary to prevent reasonably certain crimes resulting, for example in death or substantial bodily harm, or to prevent the client from committing such a crime in furtherance of which the client has used or is using the lawyer's services. Recent legislation imposing special duties upon lawyers to assist in the prevention of criminal phenomena such as terrorism, money laundering or organised crime has led to further erosion of the protection of the lawyer's duty of confidentiality. Many bars are opposed in principle to the scope of this legislation. Any encroachment on the lawyer's duty should be limited to information that is absolutely indispensable to enable lawyers to comply with their legal obligations or to prevent lawyers from being unknowingly abused by criminals to assist their improper goals. If neither of the above is the case and a suspect of a past crime seeks advice from a lawyer, the duty of confidentiality should be fully protected. However, a lawyer cannot invoke confidentiality/professional secrecy in circumstances where the lawyer acts as an accomplice to a crime.

Jurisdictions differ on the scope of protection and its geographical extension. In some jurisdictions clients may waive the lawyer's obligation of confidentiality and professional secrecy, but in others clients may not. In some jurisdictions, the obligation can be broken for self-defence purposes in judicial proceedings. Apart from client waiver, such self-defence and any requirements imposed by law, the lawyer's obligation of confidentiality and professional secrecy is usually without time limit. The obligation also applies to assistants, interns and all employed within the law firm. In any event, lawyers shall be under a duty to ensure that those who work in the same law firm, in whatever capacity, maintain the obligation of confidentiality and professional secrecy.

Law firms or associations raise different aspects of the duty of confidentiality and professional secrecy. The basic and general rule must be that any information or fact known by a lawyer in a law firm is held to be known by the entire organisation, even if that organisation is present in different branches and countries. This means that extraordinary measures must be adopted within the organisation if a lawyer is involved in a case that should be considered as strictly confidential even beyond the general standards of the professional secrecy principle.

Lawyers should also take care to ensure that confidentiality and professional secrecy are maintained in respect of electronic communications, and data stored on computers. Standards are evolving in this sphere as technology itself evolves, and lawyers are under a duty to keep themselves informed of the required professional standards so as to maintain their professional obligations.

The extent to which clients may waive the right to confidentiality is subject to differing rules in different jurisdictions. Those rules limiting the ability to waive argue that clients frequently cannot properly assess the disadvantages of issuing such a waiver. Restrictions on waivers are of paramount importance to protect against a court or governmental authority putting inappropriate pressure on a client to waive his or her right to confidentiality.

Finally, lawyers should not benefit from the secrets confided to them by their clients.

4.3 International implications

Although there is a clear common goal behind the various regimes governing the duty of confidentiality and its protection, national rules differ substantially. While civil law countries entitle and oblige the lawyer not to testify, and protect the lawyer against search and seizure, common law countries protect the confidentiality of certain attorney-client

communications, even if, for example, privileged correspondence is found with a client suspected of having committed a criminal offence.

Lawyers engaged in cross-border practice and international law firms will have to investigate all rules that may be of relevance and will have to ensure that information to which they gain access and the communication in which they are engaged will in fact enjoy the protection of confidentiality.

Generally, the national rules of all relevant jurisdictions must be complied with (Double Deontology). But national rules sometimes do not address the issue of how to deal with conflicting rules. If the conflicting rules are broadly similar, then the stricter rule should be complied with. There is, however, no universally accepted solution for those cases where the rules contradict each other (for instance secrecy protection versus reporting obligation), although certain jurisdictions have adopted conflict of law principles to determine which rules of professional conduct apply in cross-border practice.

Likewise, national rules as to the ability of a client to waive confidentiality vary, and the applicable rule or rules will have to be determined individually in every case.

A special international consideration arises from the fact that some jurisdictions permit employment of a lawyer admitted to the Bar, while others do not permit employment of in-house counsel. Accordingly, the question arises how jurisdictions that do not recognise in whole or in part the duty of confidentiality on the part of in-house counsel deal with foreign in-house counsel who enjoy that protection in their home jurisdiction.

5. Clients' interests

5.1 General principle

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

5.2 Explanatory note

This means that lawyers in all of their dealings with the courts, by written or oral form, or by instructing an advocate on the client's behalf, should act with competence and honesty.

Lawyers should serve their clients competently, diligently, promptly and without any conflict to their duty to the court. They should deal with their clients free of the influence of any interest which may conflict with a client's best interests; and with commitment and dedication to the interest of the client. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures may be required to vindicate a client's cause or endeavour.

Lawyers should maintain confidentiality. They should also provide all relevant information to their clients, in order to protect their clients' interests and advise them competently, subject to any contrary law or ethics rule.

Lawyers must not engage in, or assist their client with, conduct that is intended to mislead or adversely affect the interest of justice, or wilfully breach the law.

Lawyers' duty to safeguard clients' interests commences from their retainer until their effective release from the case or the final disposition of the whole subject matter of the litigation. During that

period, they are expected to take such steps and such ordinary care as clients' interests may require.

Even if not required by the applicable law of a jurisdiction, it is considered good practice in many jurisdictions for lawyers to ensure that they secure in the interest of their clients adequate insurance cover against claims based on professional negligence or malpractice.

6. Lawyers' undertaking

6.1 General principle

A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

6.2 Explanatory note

A lawyer's undertaking is a personal promise, engagement, stipulation and responsibility, as well as a professional and legal obligation. A lawyer must therefore exercise extreme caution when giving and accepting undertakings. A lawyer may not give an undertaking on behalf of a client if they do not have a prior mandate, unless they are requested to do so by another lawyer representing that client. A lawyer should not give or request an undertaking that cannot be fulfilled, and must exercise due diligence in this regard. This therefore requires that a lawyer has full control over the ability to fulfil any undertaking given. Ideally, a lawyer should provide a written confirmation of an undertaking in clear and unambiguous terms, and in a timely manner – if the lawyer does not intend to accept personal responsibility this should be made clear in the undertaking. Breaches of undertakings adversely affect both the lawyer's own reputation as being honourable and trustworthy, as well as the reputation and trustworthiness of the legal profession as a whole.

In those jurisdictions in which undertakings are not recognised as described here, lawyers should nevertheless exercise the same extreme caution in engaging themselves in the way outlined.

7. Clients' freedom

7.1 General principle

A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

7.2 Explanatory note

The client may issue an instruction or mandate to the lawyer, instructing the transfer of all papers and files to another lawyer. The lawyer is under an obligation to comply with the instruction or mandate, subject to any lawful right of retention or lien. A lawyer should not withdraw from representation of a client except for good cause or upon reasonable notice to the client, and must minimize any potential harm to the client's interests, and (where appropriate or required) with the permission of the court. A lawyer should do everything reasonable to mitigate the consequences of the change of instructions.

8. Protection of property of clients and third parties

8.1 General principle

A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

8.2 Explanatory note

A lawyer shall hold property of clients or third parties that is in the lawyer's possession in connection with a representation separate from the lawyer's own business or personal property. Client or third-party funds should be held in a separate bank account and not commingled with the lawyer's own funds. Property other than funds should be identified as such and appropriately safeguarded. Complete records of such funds and other property shall be kept by the lawyer and shall be preserved after termination of a representation to the extent required by applicable law or professional regulations. The lawyer should ascertain the identity, competence and authority of the third person that is transferring the possession of the property or the funds.

Upon receiving funds or other property in which a client or third person has an interest, the lawyer shall promptly notify the client or third person. Except as permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. A lawyer cannot use a client's property or client's funds in order to set off or compensate any outstanding payment of the lawyers' professional fees or expenses unless so is authorised by law or in writing by the client.

9. Competence

9.1 General principle

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

9.2 Explanatory note

As a member of the legal profession, a lawyer is presumed to be knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf or to procure that somebody else either in or outside the law firm will do it.

Competence is founded upon both ethical and legal principles. It involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied, and includes competent and effective client, file and practice-management strategies.

A lawyer must consider the client's suggestion to obtain other opinions in a complex matter or from a specialist, without deeming such requests to be a lack of trust.

10. Fees

10.1 General principle

Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.

10.2 Explanatory note

The basis for the claim of a lawyer to fees for services performed may be contractual or statutory. The lawyer shall make a clear and transparent arrangement on fees with the client jointly with the giving and taking of instructions. If permitted by law or applicable rules of professional conduct, such arrangement may contain an agreement on the limitation of the lawyer's liability.

On whatever basis a fee arrangement is made, it shall be reasonable. Reasonableness is normally determined with a view to the nature of the assignment, its difficulty, the amount involved, the scope of work to be undertaken and other suitable criteria. The lawyer shall strive to achieve the most cost effective resolution of the client's dispute.

The lawyer's invoices shall be submitted in accordance with the agreement with the client and statutory rules, if any.

Where permitted, a lawyer may require the payment of reasonable deposits to cover the likely fees and expenses as a condition to commencing or continuing his or her work. As mentioned in Principle 7, the lawyer may have a lawful right of retention or lien if the client instructs the lawyer to transfer all the papers and files to another lawyer. A lawyer shall also hold separate from the lawyer's own business or personal property any legal fees and expenses that a client has paid in advance, to be withdrawn by the lawyer only as those fees are earned or expenses are incurred. If a dispute arises between the client and the lawyer as to the lawyer's entitlement to withdraw

funds for fees or expenses, then, subject to applicable law, the disputed portion of the funds must be held separate until the dispute is resolved. The undisputed portion of the funds shall be promptly distributed to the client.

If a lawyer engages or involves another lawyer to handle a matter, the responsibility for such other lawyer's fees and expenses shall be clarified among the client and the lawyers involved beforehand. In the absence of such clarification and depending on applicable law the lawyer so having involved another lawyer may be liable for the latter lawyer's fees and expenses.

10.3 International implications

When engaging in cross-border practice, the lawyer should investigate whether arrangements on fees, payments of deposits and limitations of liability are permitted under all applicable rules and, if relevant, the rules which govern the responsibility for fees of other lawyers who may become involved. In particular, a contingency fee or *pactum de quota litis* is permitted in certain jurisdictions provided certain requirements are met but prohibited as a matter of public policy in other jurisdictions.

In some jurisdictions, it is not appropriate for a lawyer to ask another lawyer or a third party for a fee, or to pay a fee to another lawyer or a third party for referring work.

Appendix

Definitions

Bar An officially recognised professional organisation consisting of members of the legal profession that is dedicated to serving its members in a representative capacity to maintain the practice of law as profession, and, in many countries possessing regulatory authority over the bar in its jurisdiction. Membership in the bar may be compulsory or voluntary.

Client-lawyer confidentiality Subject to specific exceptions, the lawyer's ethical duty of confidentiality prohibits a lawyer from disclosing information relating to the representation of or advice given to a client from any source, not just to communications between the lawyer and client, and also requires the lawyer to safeguard that information from disclosure. The principle of confidentiality is greater in scope than the legal professional privilege. Matters that are protected by the legal professional privilege are also protected by the principle of confidentiality; the converse, however, is not true.

Confirmed in writing Informed consent provided via a writing from the person from whom such consent is sought or a writing that a lawyer promptly transmits to that person confirming an oral informed consent. The written consent may take the form of a tangible or electronic record. It may consist of handwriting, typewriting, printing, photocopy, photograph, audio or video recording, and electronic communication such as an e-mail or Twitter message.

Court/tribunal An entity, whether part of the judicial, legislative or executive branch of government, including an arbitrator in a binding arbitration proceeding, administrative agency or other body,

acting in an adjudicative capacity. This entity acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Informed consent Agreement by a person to allow something to happen in response to a proposal by a lawyer after the lawyer has made full disclosure of the facts, material risks of, and reasonably available alternatives to the proposed course of action.

Knowingly Actual knowledge of the fact in question. Knowledge may be inferred from the circumstances.

Legal profession The body of lawyers qualified and licensed to practice law in a jurisdiction or before a tribunal, collectively, or any organised subset thereof, and who are subject to regulation by a legally constituted professional body or governmental authority.

Legal professional privilege An evidentiary privilege that protects a lawyer from being compelled to disclose certain communications between a lawyer and a client in a judicial or other proceeding where a lawyer may be called as a witness.

Professional secrecy The handling of information about a client received during the course of the representation from the client or other sources that the lawyer may not be able to disclose, regardless of client consent. This principle is effective in many civil law jurisdictions.

Reasonable or reasonably In reference to a lawyer's actions, the level of conduct of a prudent and competent lawyer.

Reasonably believes or reasonable belief A belief by a prudent and competent lawyer in a fact or set of facts that is appropriate under the circumstances in which that belief exists.

Secrets Information gained by the lawyer in the course of a representation that the client specifically requests that the lawyer not reveal or information the nature of which would be potentially embarrassing or detrimental to the client if revealed.



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