

FACULTY OF ADVOCATES



**GUIDE TO THE PROFESSIONAL CONDUCT OF ADVOCATES**

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## INTRODUCTION

The work of an Advocate is essentially the work of an individual practitioner whose conscience, guided by the advice of his seniors, is more likely to tell him how to behave than any book of rules.

In places in this Guide, it has been found convenient to state "the rule" or "the general rule". Although convenient, use of the word "rule" would be misleading if it were thought to imply that the rule is absolute and subject to no exceptions whatever the circumstances. The Guide must be read as a whole and interpreted according to its spirit rather than its letter. For the same reasons, it must not be assumed that it is enough for an Advocate to keep within the letter of a "rule" as stated in the Guide.

It cannot be stressed too strongly that the ultimate test of an Advocate's conduct is whether it is such as to impair the trust and the confidence which others place in him and his profession.

## NOTE

In this Guide, unless a contrary intention appears, the word "Advocate" or "Counsel" is used to refer to a practising Member of the Faculty of Advocates - i.e. a Member who currently holds himself out as available to be instructed as an Advocate in Scotland. For convenience, the male gender has been used for the most part when referring to Members of the Bar, but except where the context otherwise requires such references apply equally to female Members.

# 1. THE STATUS, RIGHTS AND OBLIGATIONS OF AN ADVOCATE

## 1.1 The status of an Advocate

1.1.1 In law, an Advocate owes his status to the fact that he has been admitted to the office of Advocate in the Court of Session, the supreme civil Court in Scotland. Advocates so admitted have right of audience in the Court of Session and the High Court of Justiciary (the supreme criminal Courts of Scotland), and in the other Courts (such as the Lands Valuation Appeal Court) whose judges are Senators of the College of Justice.

1.1.2 The Faculty of Advocates is a self-governing body consisting of those admitted to the office of Advocate in the Court of Session. The formal act of admission to that office is an act of the Court and an Advocate can ultimately be deprived of his office only by the Court. But, by long tradition, the Court has left it to the Faculty of Advocates (a) to lay down the qualifications for admission, (b) to determine whether an applicant for admission satisfies those qualifications, (c) to lay down the rules of professional conduct, and (d) to exercise disciplinary authority.

1.1.3 The Dean of Faculty is the elected leader of the Faculty of Advocates and, again by long tradition, the Faculty entrusts him with wide powers to make rulings on matters of professional conduct and, subject to the Disciplinary Rules of Faculty, to exercise disciplinary authority. The Dean's Council is a consultative body whose function is to advise the Dean on these and other matters.

1.1.4 In practice therefore, the legal and professional rights and obligations of an Advocate depend:-

- (i) upon the fact that he holds the office of Advocate in the supreme Courts of Scotland; and
- (ii) upon the fact that he is a Member of the Faculty of Advocates and is subject to the disciplinary authority of the Faculty and its Dean.

## 1.2 The legal rights and obligations of an Advocate

1.2.1 The historical rights and obligations of an Advocate as the holder of an office were explained by John Inglis, Lord President of the Court of Session and a former Dean of Faculty, in *Batchelor v. Pattison & Mackersy* (1876) 3 R. 914, 918.

"An Advocate in undertaking the conduct of a cause in this Court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the Members of his own profession, and to the public. .... [T]he nature of the Advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does *bona fide* according to his own judgement will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of Counsel are seldom, if ever, exercised to the full extent, because Counsel is restrained by consideration of propriety and expediency from doing so. But in such a case as this it is necessary to have in view what is the full extent of their legal powers.

The position of an agent [*i.e. law agent or solicitor*] is somewhat different. There is a contract of employment between him and his client, by virtue of which the client, for certain settled rates of remuneration, is entitled to require from the agent the exercise of care and diligence, and professional skill and experience. The general rule may fairly be stated to be that the agent must follow the instructions of his client.

But the general rule is subject to several qualifications. The agent, of course, cannot be asked to follow the client's instructions beyond what is lawful and proper. For the agent, as well as the Counsel, owes a duty to the Court, and must conform himself to the rules and practice of the Court in the conduct of every suit. He is also bound by that unwritten law of his profession which embodies the honourable understanding

**of the individual Members as to their bearing and conduct towards each other. But above all in importance, as affecting the present question, is the undoubted special rule that when the conduct of a cause is in the hands of Counsel, the agent is bound to act according to his directions, and will not be answerable to his client for what he does *bona fide* in obedience to such directions."**

1.2.2 That traditional view of the powers and liabilities of an Advocate has been considerably altered by practice and case law in succeeding generations. It is now not possible to rely on many parts of Lord President Ingles' *dictum* with any degree of confidence. Some parts of the dictum still offer a sound analysis of the position of an Advocate.

1.2.3 An Advocate acts as such in performance of an office and has no contractual relationship with his client. It follows that he cannot perform any act which must, in law, be performed by the client or by someone empowered to act as an agent on his behalf. The acts of an Advocate are acts done upon his own responsibility in performance of an office and he does not, and cannot, in any sense, act as agent of his client; that is the function of a solicitor or other professional. Although it is commonly said that an accused person or litigant is "represented by an Advocate" or "represented by Counsel", the use of these expressions should not be allowed to obscure the difference in law between the status and function of the Advocate and those of the agent. Thus, it is not appropriate for an Advocate to appear without an instructing agent if the client is not present. Equally, although it is said that the client or his agent "instructs an Advocate" or "instructs Counsel", this does not mean that he can give orders. An Advocate is however obliged to follow instructions as to basic matters such as the line of defence in criminal cases. If he is unable to do so in a manner which allows him to fulfil his duties to the Court he should withdraw from acting. It should be noted however that whilst Counsel is not an agent of his client he may legally bind his client in matters falling within the Advocate's particular mandate. Only in exceptional circumstances would an Advocate seek to bind his client on any matter central to a case without instructions to do so from the

instructing solicitor (or other professional enjoying direct access) or the client.

1.2.4 It also follows from the fact that an Advocate acts as such in performance of an office that he cannot act in his professional capacity as an Advocate on his own behalf. He is, of course, free to plead his own cause in civil, criminal or other proceedings in exercise of his rights as an ordinary citizen, but he has no special rights or privileges by reason of the fact that he is an Advocate, nor may he wear wig or gown when doing so.

1.2.5 In order to preserve a Bar of independent Advocates it is necessary that an Advocate cannot enter into partnership with another Advocate or with any other person, or any employment or similar relationship, in connection with his practice as an Advocate.

1.2.6 An Advocate owes a variety of legal and moral obligations to his client, the Court, his professional colleagues and the legal profession generally. He does not directly owe any duty to his client's opponents.

## 2. **THE GENERAL PRINCIPLES OF PROFESSIONAL CONDUCT**

The general principles which should guide the professional conduct of an Advocate at all times are:—

### 2.1 **Independence**

2.1.1 The many duties to which an Advocate is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as is the impartiality of the judge. An Advocate must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the Court or third parties.



2.1.2 This independence is necessary in non-contentious matters as well as in litigation. Advice given by an Advocate to his client has no value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure.

## 2.2 **Trust and personal integrity**

Relationships of trust can only exist if an Advocate's personal honour, honesty and integrity are beyond doubt. For the Advocate, these traditional virtues are professional obligations.

## 2.3 **Confidentiality**

2.3.1 It is of the essence of an Advocate's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the Advocate.

2.3.2 An Advocate shall respect the confidentiality of all information that becomes known to him in the course of his professional activity.

2.3.3 The obligation of confidentiality is not limited in time.

## 3. **DUTIES IN RELATION TO THE FACULTY AND OTHER ADVOCATES**

3.1 An Advocate owes a duty of loyalty to the Faculty, to his fellow Members and, in particular, to the Dean.

3.2 An Advocate owes a duty not to bring the Faculty into disrepute.

3.3 It is essential that Counsel be able to discuss, negotiate and resolve cases on the basis that confidences will be respected and that agreements and undertakings will be honoured.

## 4. **DUTIES IN RELATION TO THE INSTRUCTING AGENT**

4.1 A corollary of the Advocate's independence from the agent is the agent's

independence from the Advocate. An Advocate must respect the agent's independence - in particular, his freedom to instruct Counsel of his choice and to change Counsel at any time without explanation or apology. (An Advocate may be asked by an agent to recommend the name of another Advocate to act as his junior, or as his senior, or to replace him if he is unable to act. There is no rule against doing so, but it is preferable that the agent should be given several names from which to make his own choice after consultation with Counsel's clerk.)

4.2 An Advocate must also respect the fact that the agent's relationship with the client is different from, and likely to be more continuing than, his own. He should do nothing, beyond what his professional duty requires, to upset the agent/client relationship or destroy the trust which the client has in the agent.

4.3 When an Advocate has reason to believe that an agent has been guilty of professional misconduct (as opposed to professional negligence, as to which see paragraph 5.1.3), he has a duty to the client, the Court and the profession to take appropriate action. If the matter comes to his knowledge in the course of proceedings in Court, it may be necessary to take immediate action, and if an adjournment is necessary for this purpose, it should be asked for. If the matter does not call for immediate action, Counsel should consult the Dean before making any formal complaint or report.

4.4 If an Advocate feels compelled to criticise the conduct of an agent in respect of something falling short of professional misconduct, he should avoid doing so in the presence of the client and should in any event ask the agent to explain what he has done and why before criticising his conduct.

4.5 An Advocate should carefully consider whether he should attend a consultation without his instructing solicitor or a representative of his firm being present. The presence of the solicitor or representative will protect both Counsel and the solicitor should a dispute arise later as to what advice Counsel gave or what instructions he was given by the client. In cases where difficult advice is given but not accepted, it

may be wise to record the advice in writing.

4.6 If Counsel has to speak to the client without the solicitor being present, the solicitor should be told as soon as possible what transpired.

4.7 There is no rule against an Advocate going to an agent's office to collect papers or to attend a consultation. Nor is there any rule which prevents an Advocate accepting a social invitation from an agent or giving such invitation to an agent. In doing so, however, the Advocate should bear in mind the considerations mentioned in preceding paragraphs.

## 5. DUTIES IN RELATION TO THE CLIENT

### 5.1 **General**

#### 5.1.1 **Confidentiality**

As described in paragraph 2.3, an Advocate owes his client a duty of confidentiality.

#### 5.1.2 **The client's interest**

Subject to due observance of all rules of law and professional conduct, an Advocate must always act in what he perceives in his professional judgement to be the best interests of his client and must put those interests before his own interests or those of fellow Members of the legal profession.

##### 5.1.2.1 **Conflict between client and instructing agent (e.g. where the client may have a claim for professional negligence against his agent)**

Where it appears to Counsel that a conflict of interest has arisen or may arise between the client and the instructing agent, it is his duty to take steps to ensure that the client is so advised in order that he can get the advice of another agent. It will depend on the circumstances how this should be done. The great majority of solicitors and other professional agents can be relied upon, when the conflict has been pointed out (orally or, if appropriate, in writing), to take the necessary steps themselves. It will therefore

normally be inappropriate to mention the matter in the presence of the client. But it may be necessary to record Counsel's advice as to the existence of a conflict in a formal note and to ask the agent to send it to the client, or to deal with the matter at consultation with the client. In extreme cases, it may be the duty of Counsel to refuse to act further on the instructions of the agent concerned.

### 5.1.3 **Withdrawing from acting.**

Generally, it is desirable for Counsel to continue to act in criminal cases to assist the Court, but there are cases where it may be appropriate to withdraw from acting. In any case (criminal or civil) where Counsel feels obliged to withdraw from acting, he must do so without delay and take such steps as are necessary to ensure that the instructing solicitor and the client know why he has withdrawn. Where he feels obliged to withdraw in the course of a trial or other hearing, he must formally move the judge (or chairman) for leave to withdraw from acting and protect the interests of the client by moving for an adjournment so that the client can get other advice. He is under no obligation to explain in detail to the Court or tribunal his reasons for withdrawing, since to do so may prejudice the client, and he should not yield to pressure to do so. If Counsel is in doubt as to whether he is entitled or bound to withdraw he should seek advice (as set out in Section 7), and if necessary obtain an adjournment to do so. The consequences of withdrawing from acting when a trial is imminent or in progress may be particularly disruptive. In these circumstances care must be taken regarding the decision to withdraw from acting. Junior Counsel should seek advice (as is set out in section 7).

### 5.1.4 **Adequate insurance.**

An Advocate is obliged to maintain a reasonable level of PII cover having regard to the nature of that Advocate's practice and the extent of potential liabilities to clients in the event of a negligent error.

### 5.1.5 **Client money**

An Advocate is not permitted to receive, control, handle or manage clients' money

apart from what a client pays for his services. This applies whether acting on the instructions of a solicitor or in terms of the Direct Access Rules. The prohibition extends to holding client money or other assets in person or through any agent, third party or nominee.

## 5.2 **Special Duties in Criminal Cases**

### 5.2.1 **Pleas.**

5.2.2 Where the Crown offers to accept a reduced or restricted plea, the defending Advocate has a duty to advise the accused of that offer and to obtain his instructions about it. Likewise, where any limited offer to plead is made by an accused, it should (if considered in law to be appropriate) be conveyed to the Crown for consideration, without delay. For the avoidance of doubt, it is prudent to obtain written instructions from the accused, through the instructing solicitor, for the tendering of any plea. In no circumstances should Counsel tender any plea on behalf of an accused unless instructions to do so have been obtained either through, or in the presence of, the instructing solicitor.

5.2.3 In advising as to the possible consequences of a plea of guilty, Counsel should refrain from making any positive forecast of the possible sentence beyond drawing the attention of the accused to the normally anticipated range of sentences in the circumstances of that particular case, and to any current case law indicating that a discount in sentence may be expected when a plea of guilty is tendered at an appropriate stage.

### 5.2.4 **Confessions.**

Where an accused person makes a confession to Counsel and Counsel is satisfied that in law such confession amounts to guilt, Counsel must explain to the accused (if he is not pleading guilty) that the conduct of his defence will be limited by that confession as set out in paragraphs 6.3.5 and 6.3.6 below. Counsel must emphasise to the accused that no substantive defence involving an assertion or a suggestion of innocence will be put forward on his behalf and that, if he is not satisfied with this, he should seek

other advice. Counsel should consider whether it is advisable to obtain confirmation in writing from the accused that he has been so advised and that he accepts such an approach to the conduct of his defence.

5.2.5 So long as an accused maintains his innocence, Counsel's duty lies in advising him on the law appropriate to his case and the conduct thereof. Counsel may not put pressure on him to tender a plea of guilty, whether to a restricted charge or not, so long as he maintains his innocence. Nor should Counsel accept instructions to tender a plea in mitigation on a basis inconsistent with the plea of guilty. Counsel should always consider very carefully whether it is proper, in the interests of justice, to accept instructions to tender a plea of guilty. He should ensure that the accused is fully aware of all the consequences and should insist that the instructions to plead guilty are recorded in writing.

5.2.6 **Acting for co-accused.**

Save in the most exceptional circumstances, Counsel should not accept instructions to act for more than one accused or appellant.

## 6. DUTY TO THE COURT AND DUTIES CONNECTED WITH COURT AND SIMILAR PROCEEDINGS

6.1 **Duties in relation to matters of law**

6.1.1 Where an Advocate is aware of a previous decision binding on the Court, or of a statutory provision, relevant to a point of law in issue, it is his duty to draw that decision or provision to the attention of the Court whether or not it supports his argument and whether or not it has been referred to by his opponent.

6.1.2 Where there is no contradictor, an Advocate should inform the Court of authorities relevant to the material issues in the case, even where such authority may be against his interest.

## 6.2 **Duties in relation to matters of fact**

In relation to matters of fact, an Advocate should have two principles in mind -

- (a) it is for the Court, not for Counsel, to assess the credibility and reliability of witnesses;  
And
- (b) Counsel must not seek to persuade a Court to proceed on a factual basis which he with reasonable certainty knows to be untrue.

## 6.3 **In Court**

6.3.1 When conducting a case in Court, an Advocate should base his questions upon his instructions, the precognitions and the productions supplemented by information obtained at consultation, and on any evidence which has already been led.

6.3.2 An Advocate should not state his personal opinion on matters of fact. It is particularly important to observe this rule when addressing a jury. Counsel must not attempt to supplement the evidence by making observations on matters of fact which are not based on, or justified by, the evidence. In a criminal trial, he should not under any circumstances express either directly or indirectly a personal belief in the innocence or guilt of an accused or any of the accused.

6.3.3 An Advocate may not be a party to the giving of evidence which he knows to be perjured evidence, or to any other course that would enable a case to be put forward on behalf of a client which the client or his solicitor has informed him is unfounded in fact.

6.3.4 An Advocate may not put to a witness any question suggesting that the witness has been guilty of a crime, fraud or other illegal or improper conduct unless he has personally satisfied himself that there is evidence to support the suggestion.

### 6.3.5 **Confessions to Counsel by accused persons.**

It follows from the rules stated in paragraphs 5.2.4 and 6.2(b) that, where an accused person has admitted that he committed the act with which he is charged (whether or

not that admission is an explicit admission of guilt in law), an Advocate may not conduct the defence on a basis inconsistent with that admission. Thus, he may not put to a witness any question suggesting, or tending to suggest, that the accused did not commit the act. *A fortiori*, he may not seek to set up a special defence of alibi or incrimination.

6.3.6 Subject to the rule stated in the previous paragraph, Counsel may:

- (a) take proper objection to the jurisdiction of the Court, to the competency or relevancy of the indictment or complaint, or to the admissibility of evidence;
- (b) test the evidence for the prosecution by cross-examination;
- (c) cross-examine or lead evidence in support of a special defence of insanity or (depending on the tenor of the accused's admission) self defence;
- (d) cross-examine or lead evidence for the purpose of explaining the actings of the accused or supporting a plea in mitigation; and
- (e) make submissions as to the sufficiency in law of the evidence to support a verdict of guilty.

### 6.3.7 **Ex parte statements of fact by Counsel at the Bar**

The Court frequently must rely on statements as to matters of fact made by Counsel at the Bar - for example, in the Motion Roll and certain types of Petition procedure. Such statements are made on the responsibility of Counsel as the holder of a public office and a Member of the College of Justice. Counsel must therefore be scrupulously careful to ensure that anything stated as fact is justified by the information in his possession. If the Court asks a question which Counsel cannot answer on the information in his possession, he must say that he cannot answer it and, if necessary, ask leave to take instructions on the matter. This rule applies whether or not the opposing party is represented in Court.

### 6.3.8 **Pleadings**

An Advocate must have a proper basis for stating a fact in any pleadings.



### 6.3.9 **Interviewing witnesses**

6.3.9.1 There is no general rule that an advocate may not discuss the case with a potential witness, but an advocate, when instructed by a solicitor, is entitled to insist that he accepts instructions on the basis that he, the advocate, will not do so.

6.3.9.2 Once a proof or trial has begun, an advocate must not interview any potential witness in relation to what has been said in court in the absence of that witness.

6.3.9.3 Under no circumstances should Counsel do or say anything which suggests to a witness that he should give evidence other than in accordance with the honest recollection or opinion of the witness. An advocate must avoid doing or saying anything which could have the effect of, or could be construed as, inducing the client or a skilled witness to “tailor” his evidence to suit the case.

6.3.9.4 Some cases cannot be properly prepared or conducted if the rule stated in para. 6.3.9.2 is followed strictly according to the letter. The client may be accompanied by a relative or friend who is also a potential witness. Where the client is a corporate persona, those who can speak for the corporation may also be potential witnesses, although in that case it is usually better to discuss the case with someone who is not personally involved and can take a more objective view of it. Some witnesses may be witnesses to fact as to part of their evidence and expert witnesses giving opinion evidence as to another part. It may be essential in a case raising technical issues to discuss points arising from the evidence with a skilled witness who has not yet given evidence. In such cases, an Advocate must use his discretion. But he should always act according to the spirit of the rule - namely, that Counsel should not under any circumstances do or say anything which might suggest to the witness that he should give evidence otherwise than in accordance with his honest recollection or opinion.

6.3.9.5 An Advocate may not, except with the consent of his opponent or of the Court, communicate with *any* witness, including his client, once that witness has begun to give evidence until that evidence is concluded.

6.3.9.6 As to interviewing the client or witnesses in the absence of the instructing agent, see paragraphs 4.5 and 4.6 above.

#### 6.4 **The duty of Courtesy**

6.4.1 Discourtesy is as offensive in Court as it is outside, and is equally detrimental to the reputation of Counsel with the bench, to the interests of the client and to public confidence in the administration of justice.

6.4.2 In the examination of witnesses, and particularly in the cross-examination of hostile witnesses, an Advocate must remember that the law places him in a privileged position which he should not abuse - for example, by bullying or insulting behaviour or by making offensive or personal remarks.

6.4.3 There is a long-standing tradition of mutual trust and Courtesy between the bench and Bar which must be respected.

6.4.4 A failure to appear in Court on time should always, as a matter of courtesy, be the subject of an apology. If the Court is still sitting, and has not yet passed on to other business, the proper time to make the apology is at once on arrival in Court. The apology should be made in open Court to the bench.

#### 6.5 **The duty to attend Court**

6.5.1 It is the duty of an Advocate so to arrange his affairs as to avoid a foreseeable clash of commitments.

6.5.2 Having accepted instructions to appear, it is the Advocate's responsibility to ensure, unless (in a civil case only) other arrangements have been made with the instructing solicitor, that he is present in Court on the day and at the time appointed and thereafter during the period of time for which he has been properly instructed until the trial or hearing is concluded. Where unforeseen circumstances make it impossible for him to be present, he must ensure that someone else is present at or before the time appointed to explain his absence and, if necessary, to move for an adjournment.

- 6.5.3 If an Advocate has accepted instructions to appear in the High Court or the Inner House, including instructions for the Single Bills, it is his duty to ensure that he is present there at the appointed time, even although he also has instructions to appear in the Outer House. If a clash of commitments appears likely, he should ensure that someone else is present to appear in the Outer House in his place and, if necessary, to move for an adjournment until he is free to appear there. If a conflict arises due to unforeseen circumstances and he finds himself still detained in the Outer House when he must appear in the High Court or the Inner House, he should inform the Lord Ordinary that he requires to go to the High Court or the Inner House as the case may be and ask for an adjournment so that he can do so.
- 6.5.4 It is acceptable but not obligatory for Counsel to accept instruction for the Motion Roll on a day when he is engaged in a proof or other substantial hearing in the Outer House. If Counsel engaged in a proof or other hearing in the Outer House expects to be in difficulty because he has accepted instructions to attend elsewhere in the Outer House to deal with an important matter on the Motion Roll on the same day, he or his clerk should inform the Clerk of Court as soon as possible so that the judge concerned may be alerted to the problem and take such action as is appropriate. It has been accepted that in such circumstances the start of the proof might reasonably be delayed until Counsel's business in the other Court has been completed.
- 6.5.5 Senior Counsel appearing with junior should only be absent from the Court if he is satisfied that his junior will be present and will be able to deal properly with any matter which may arise.
- 6.5.6 For the reasons mentioned in paragraph 1.2.3 above, only the agent can "represent" the client in Court. Moreover, it may be necessary at any time for the Advocate to take instructions which he cannot properly do in the absence of the agent (see paragraphs 4.5 and 4.6 above). The Advocate is not responsible for ensuring the attendance of his instructing agent and is entitled, but never bound, to proceed with the case in the agent's absence if the Court permits him to do so. He must, however,

be satisfied (a) that the absence of the agent does not imply that his instructions have been withdrawn, and (b) that he can, consistently with his duty to the client and the Court, conduct the case properly in the absence of the agent.

## 6.6 **Responsibility for pleadings in civil actions**

An Advocate has a professional responsibility for any pleadings drafted by him. In the case of pleadings drafted by others it is his professional duty to consider whether he can support the pleadings on the basis of the available information. If he cannot, he must insist that the pleadings are revised and, if not, refuse to act further.

## 6.7 **Criminal appeals**

6.7.1 In advising on criminal appeals, Counsel has a duty, first, to consider whether there are grounds for an appeal which he is prepared to state to the Court and, second, if in his opinion there are none, to refuse to act further in the case.

6.7.2 Particular care must be exercised in coming to a view that an appeal which has passed a judicial sift is not stateable.

## 6.8 **Opposing a party litigant**

Where an Advocate appears against a party litigant, he should as far as consistent with his duty to his client, co-operate with the Court in enabling the party litigant's case to be fairly stated and justice to be done.

## 7 **THE DUTY TO SEEK ADVICE**

7.1 If an Advocate is in doubt about the proper course of conduct to adopt, he should consult the Dean or Vice-Dean. If the Dean or Vice-Dean is not available, then another office-bearer should be consulted. If no office-bearer is available, then the Advocate should consult his devilmaster or another senior Member of faculty.

7.2 In explaining his position he must be absolutely frank and conceal nothing which might be relevant to the advice he seeks.

7.3 If an Advocate is told by the Dean or Vice-Dean that it is his duty to adopt a particular course of conduct, then he must act accordingly. In other cases, if he feels unable to accept the advice given, then he must make every effort to obtain the advice of the Dean or Vice-Dean.

## 8. INSTRUCTIONS

### 8.1 General

8.1.1 By accepting instructions, an Advocate undertakes a professional commitment on which the Courts and those instructing him are entitled to rely.

8.1.2 In considering the nature of that professional commitment, two basic distinctions must be borne in mind -

(a) the distinction between (i) delivery of instructions to an Advocate, and (ii) acceptance of instructions by an Advocate; and

(b) the distinction between (i) refusal to accept instructions and (ii) the return of instructions once accepted.

### 8.2 From whom may an Advocate accept instructions?

8.2.1 An Advocate may not accept instructions direct from a client, except in cases detailed in Appendix D. Instructions must come from another professional person who represents the client. The persons from whom instructions may be accepted are listed in the Appendix. Instructions may only be accepted in relation to Court or tribunal appearances from professionals entitled to practise before the relevant Court or tribunal.

8.2.2 Where a Dean's Ruling is in force regulating the acceptance of instructions from a particular solicitor or firm of solicitors, an Advocate may only accept instructions from that solicitor or firm on the conditions laid down by the Dean's Ruling.

8.2.3 While there is no rule which prevents an Advocate giving free legal advice at a Legal

Advice Centre or similar institution, he should remember the limitations on his power to act explained in paragraph 1.2.3 above.

8.2.4 While there is no rule which prevents an Advocate giving legal advice to a relative or friend, he should remember that it is not always possible to advise a relative or friend with the degree of objectivity which the case requires.

### 8.3 **When is an Advocate bound to accept instructions?**

8.3.1 It is an important principle of practice that an Advocate should not, when available to accept instructions, refuse to accept instructions to act for any litigant before Scottish Courts which are accompanied by payment of a reasonable fee or the obligation of a Scottish solicitor to pay such a fee.

8.3.2 Advocates who are holders of the office of Advocate depute for the time being are not available to be instructed for the defence in criminal cases. They are available for instruction in civil matters, although their ability to accept instructions is constrained by the requirement that in general their duties in the Crown Office must take precedence over other work. The position of *ad hoc* Advocates depute has no implications for the availability of Counsel to be instructed otherwise.

8.3.3 The post of standing Counsel to a government department or agency may require that Counsel not be available to be instructed against that department or agency, but does not necessarily do so. The position of Standing Counsel has no implications for the availability of Counsel to be instructed otherwise, nor grants any priority of instruction for the purposes of rule 8.5 below

8.3.4 An Advocate should not refuse to accept instructions on :-

- (i) unacceptable discriminatory grounds such as race, religion, gender or sexual orientation; or
- (ii) grounds of mere personal preference or personal dislike of the potential client or his

views; or

(iii) grounds that do not have some other reasonable justification.

- 8.3.5 An Advocate would normally be expected to be available to accept instructions to appear before Scottish Courts at times when the Court of Session is not in recess or vacation. It is however accepted that there may be circumstances such as maternity, paternity, vacation, illness or other personal circumstances which mean that an Advocate may not be available to accept any or some instructions.
- 8.3.6 The Dean may in exceptional circumstances require an Advocate to accept instructions to appear in Scottish Courts.
- 8.3.7 It is permitted and indeed encouraged to agree fees in advance. If necessary the Dean may be asked by Counsel to rule on whether a particular fee is “reasonable” in the circumstances.
- 8.3.8 There are, however, circumstances in which an Advocate is entitled, and indeed bound, to refuse instructions.
- 8.3.9 An Advocate may not accept instructions to act on behalf of any person or body from whom or from which he receives any remuneration other than the professional fees or retainers paid to him as an Advocate. Thus, he may not act for a company of which he is a director, or for a firm of which he is a partner, and from which he derives director's fees, a salary or a share of the profits (see also paragraph 8.3.9 below).
- 8.3.10 An Advocate shall not be entitled to make a *‘pactum de quota litis’* – an agreement between the Advocate and his client entered into before final conclusion of a matter to which the client is a party by virtue of which the client undertakes to pay the Advocate a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon conclusion of the matter.

8.3.11 An Advocate may not allow his personal interests to affect the performance of his professional duty. Accordingly, he should not accept instructions to act in his professional capacity in circumstances where he has a direct personal interest in the outcome. Where he has, or may have, an indirect personal interest in the outcome (e.g. where he is asked to act for a company in which he is a major shareholder or for an organisation in which he holds office although unremunerated), he should consult the Dean before accepting instructions. Where a conflict of personal interest arises later, he should inform the instructing solicitor and decline to act further. Similar difficulties may arise whether Counsel is instructed to act for or against someone he knows personally or with whose personal affairs he is familiar for other reasons, or on the instructions of an agent with whom he has a close personal relationship. Thus he should exercise particular care if proposing to act on the instructions of or against a spouse, partner or other person with whom he has a close personal relationship.

8.3.12 An Advocate may not accept instructions to act in circumstances where, in his professional opinion, the case is unstateable in law or where the case is only stateable if facts known to him are misrepresented to, or concealed from, the Court. If such circumstances arise after he has accepted instructions, he must draw the matter to the client's attention as soon as possible and indicate he is unable to act further. If necessary he may require to explain to the Court that he is unable to act further. There may, however, be exceptional circumstances in which it is proper for an Advocate, in order to assist the Court, to present a case which he believes to be unstateable in law. In such circumstances, the Advocate must explain to the client that he cannot do more than explain the client's position to the Court, and that he will be bound to draw the Court's attention to such statutory provisions or binding precedents as have led him to the conclusion that the case is unstateable.

8.3.13 An Advocate may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of conflict, between or among the interests of those clients.



8.3.14 An Advocate must cease to act for both clients when a conflict of interests arises between those clients and also when there is a risk of a breach of confidence or where his independence may be impaired.

8.3.15 An Advocate must not accept instructions in a Legal Aid case for work for which sanction for the employment of Counsel has not been given by the Scottish Legal Aid Board. Acceptance of such instructions would almost certainly involve a breach of section 32 of the Legal Aid (Scotland) Act 1986 (as amended).

#### 8.4 **What constitutes instructions and acceptance of instructions?**

8.4.1 “Instructions” would normally be constituted by a letter of instruction instructing Counsel to undertake a piece of advising or drafting work or in the case of a Court or tribunal appearance instructing Counsel to appear at a set diet. In the event that Counsel does not have sufficient information properly to decide whether he should accept these instructions, he should ask for that information before accepting the instructions.

8.4.2 An Advocate does not accept instructions merely because they have been delivered to him with or without a fee. He is entitled to a reasonable time within which to consider whether it is proper for him to accept the instructions or whether he is bound to do so. What is a reasonable time will depend on the circumstances; but Counsel will be deemed to have accepted instructions if he has failed to take any action within a reasonable time.

8.4.3 The making of entries in the diaries kept by the Advocates' clerk does not constitute the giving or acceptance of instructions.

8.4.4 An Advocate is not bound to accept instructions unless they have been delivered to him in writing. But he is entitled to accept instructions which are given to him orally by a person entitled to instruct him or which are the subject of oral arrangements

between such a person and his clerk.

**8.5 Priority of instructions**

8.5.1 The general rule is that instructions take priority according to the date, or if on the same date the time, when they are delivered. Once accepted, instructions would generally take priority over all subsequent instructions.

8.5.2 Entries in the diaries kept by the Advocates' clerks confer no priority whatsoever.

8.5.3 Notwithstanding the general rule, the following considerations are relevant in determining which instructions should be accepted –

- (a) the precedence of the Court concerned. The order of precedence for this purpose is–
  - Court of Justice of European Communities
  - European Court of Human Rights
  - House of Lords and Judicial Committee of the Privy Council
  - High Court of Justiciary exercising its appellate jurisdiction
  - High Court of Justiciary
  - Inner House of the Court of Session
  - Outer House of the Court of Session
  - Other Courts and tribunals
- (b) in the case of an appeal, that Counsel has appeared for the client in the Court below;
- (c) in the case of an adjourned diet or continued hearing, that Counsel appeared at the previous diet or hearing;
- (d) in the case of a proof or trial, that Counsel has been involved to a substantial extent in drafting the pleadings, debating the pleadings at Procedure Roll, consulting with the client and/or advising on the pre-trial or pre-proof preparations;
- (e) in the case of a debate on pleadings, that Counsel was responsible for drafting or revising the pleadings, particularly where a difficult or delicate point of law is involved to which Counsel has already devoted a substantial amount of time and research;

- (f) that the client and/or the instructing person has come to rely to an unusual extent on Counsel's advice and guidance;
- (g) that because of the nature or circumstances of the case, or because of the limited time available, it would be unusually difficult for other Counsel adequately to prepare the case;
- (h) that the instructing solicitor has taken steps beforehand to check the availability of Counsel with Counsel's clerk; and
- (i) that a fee has been tendered with instructions or, conversely, that the instructions are given on the basis that no fee, or only a modified fee, will be paid.

8.5.4 The extent to which any of the foregoing considerations outweigh the others or justify a departure from the general rule is a matter of judgement and conscience in the light of all circumstances. Counsel may think it right, as a matter of Courtesy, to explain the reasons for his decision to the solicitor(s) concerned. But he should not allow himself to be drawn into an argument on the subject, and if that is likely to happen, he should explain his reasons to his clerk and leave him to deal with the matter. If in doubt as to what his decision should be, Counsel should act in accordance with Section 7 (duty to seek advice).

## 8.6 **Return of instructions**

8.6.1 An Advocate is not entitled without good cause to return instructions once accepted so as to relieve himself of that professional commitment.

8.6.2 On the other hand, an Advocate cannot be in two places at the same time and it is unavoidable that in some circumstances instructions will have to be returned.

8.6.3 In any event, as already stated, it may be the Advocate's professional duty to return instructions.

8.6.4 In considering whether, and if so when, to return instructions, an Advocate should have in mind the following considerations –

- (a) so long as instructions to do so have been accepted and not returned, an Advocate owes a duty to the client and the Court to attend in Court when the case is called;

- (b) an Advocate also owes a duty to the client and the Court to ensure, as far as he can, that the case is properly prepared and properly presented;
- (c) an Advocate owes a duty to the client and the Court within the period of time for which he has accepted instructions to remain in attendance until the trial or hearing has been completed;
- (d) an Advocate owes a duty to his instructing solicitor not to place him unnecessarily in a position where he has to instruct alternative Counsel at short notice and explain the situation to a dissatisfied client; and
- (e) an Advocate owes a duty to his fellow Advocates not to place them unnecessarily in a position where they have to take over his case at short notice and face the client and the Court without adequate time for preparation.

It may also be appropriate to take into account the considerations mentioned in paragraph 8.5.3 above.

8.6.5 As soon as it is clear that a clash of commitments is inevitable, Counsel must return without delay all instructions with which he cannot comply.

8.6.6 Where a clash of commitments is likely although not yet certain, an Advocate should take steps to see to it that his clerk and the instructing solicitor are aware of the situation. If the instructing solicitor asks that the papers be returned so that other Counsel can be instructed, the papers must be returned without delay.

8.6.7 In the case of proceedings before the High Court of Justiciary on appeal, there is an obligation on Counsel who represented the appellant at the trial and has recommended an appeal to present that appeal.

8.6.8 In certain cases the operation of the Proceeds of Crime Act 2002 may require the return of instructions.

8.6.9 In all cases, except under the Proceeds of Crime Act 2002, the paramount consideration is the interests of the client. The fact that the instructing solicitor says

he is "willing to take a risk" does not absolve Counsel from his duty to the client and the Court. Counsel should not under any circumstances be influenced in his decision by the consideration that, if he returns instructions, he himself may suffer financially.

#### 8.7 **Passing on instructions to another Advocate**

In principle, an Advocate is not entitled, without the prior concurrence of the instructing solicitor, to pass on instructions to another Advocate. It is for the solicitor, acting on behalf of the client, to choose whom he wishes to instruct. Counsel is not entitled to fetter that choice.

### 9. **FEES**

9.1 Fees in this section mean fees for work instructed by a solicitor. This section does not cover fees chargeable to other professionals exercising their right of direct access to the Bar. Guidance is published separately in that regard.

9.2 It has traditionally been understood that, as the law stands, an Advocate's fees are *honoraria*, and he is not entitled to sue for his fees, at least unless the solicitor has claimed payment of them from the client and the client has paid them to the solicitor.

9.3 Although he may not be entitled to sue for his fees, it is recognised that an Advocate is entitled to payment of a *reasonable* fee for his services. In the absence of express prior arrangement to the contrary, the instructing solicitor impliedly undertakes a professional commitment to pay a reasonable fee. The arrangements between the Faculty of Advocates and the Law Society of Scotland for payment of fees to Counsel are published separately, as are the arrangements for payment of fees in Legal Aid cases.

9.4 What is a "reasonable fee" depends on the whole circumstances of the particular case. Unless otherwise stipulated, Counsel's fees cover all expenses incurred by Counsel in the conduct of the case, such as travelling expenses.

- 9.5 Fees are normally charged after the work is done. Counsel's clerk, acting on Counsel's behalf, issues a Note of Proposed Fee to the solicitor. The solicitor is entitled to challenge the amount of the fee proposed. Failing such challenge, the solicitor is presumed to agree that the fee proposed is reasonable and comes under a professional obligation to pay it.
- 9.6 If the solicitor challenges the fee proposed, the matter will normally be resolved by negotiation between the solicitor and Counsel's clerk. If they cannot agree, the solicitor and/or Counsel is entitled to require that the matter be determined by the Auditor of the Court of Session. The Auditor is entitled to have regard to all the circumstances and is, in particular, entitled to allow a higher fee than would be allowed on party-and-party taxation.
- 9.7 Except in Legal Aid cases, where scale fees are specified more or less closely by Statutory Instrument, there is no scale of fees nor does the Faculty offer any indication as to the fees which it is appropriate for Counsel to charge, although the Dean may be asked by Counsel whether any particular fee is "reasonable". Some guidance may be obtained from consideration of previous decisions of Auditors in the Court of Session or Sheriff Courts. Counsel is entitled to charge his fee on any basis appropriate to the work involved - for example, a composite or "block" fee for all work done, a daily rate, an hourly rate, etc. The solicitor is entitled to challenge the basis of the charge as well as the amount. As a matter of prudent practice, Counsel may wish, in appropriate cases, to keep a record of time spent and work done in dealing with particular instructions.
- 9.8 The amount of the fee and/or the basis of charging may be agreed in advance between the solicitor and Counsel's clerk. Provided that an unequivocal agreement has been reached, the solicitor is not entitled to challenge it later.
- 9.9 Normally Counsel's fees are negotiated between the clerk and the solicitor. All fees

should be paid to Counsel's clerk. If any fee happens to be paid direct to Counsel, Counsel must account for it forthwith to his or her clerk. Counsel should not under any circumstances whatever discuss or negotiate fees with or receive fees directly from the lay client.

9.10 A fixed fee paid in advance is not client money for the purposes of paragraph 5.1.5, nor is a retainer.

9.11 If an Advocate requires an upfront payment to account of fees afterwards to be rendered relative to work subsequently to be carried out he must ensure it is a reasonable payment for the work to be done, that the client understands and has been informed in writing that once paid it will not be the client's money and he will not be beneficially entitled to it, but that any difference between the sum paid to account and the Advocate's fees will be repaid.

9.12 If an Advocate makes use of an escrow service for receiving payments of fees he must ensure it will not result in a breach of the prohibition in paragraph 5.1.5

9.13 **Speculative actions.**

It is permissible for Counsel to accept instructions on the footing that there will be no remuneration for his services except in the event of success.

9.14 **Fees for Settled or Discharged Cases.**

Normally, a fee is only chargeable when instructions have been given and accepted. Where instructions have been given and accepted, an Advocate is entitled to charge an appropriate fee for the work instructed even if the case is subsequently settled or the diet is discharged. In addition, where the solicitor knows, or ought in the circumstances reasonably to be aware, that Counsel, in order to comply with his obligations, has kept himself free from other commitments, a fee appropriate to the circumstances may be charged (see Practice Note No 5 of 1996, reproduced at Parliament House Book page C2040, and City of Aberdeen Council v W A Fairhurst

2000 SCLR 392). Relevant circumstances will include time spent in preparation and the extent to which Counsel has been unable to accept other instructions. Counsel may also charge a fee for negotiating a settlement.

9.15 **Referral Fees.**

Counsel may not enter into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work, or for recommending or introducing counsel to the client or an instructing agent.

10. **ADVERTISING, PUBLICITY, TOUTING AND RELATIONS WITH THE MEDIA**

10.1 Subject to the provisions of paragraph 10.2 an Advocate may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion and such advertising or promotion may include:

- (a) photographs or other illustrations of the Advocate;
- (b) statements of rates and methods of charging;
- (c) statements about the nature and extent of the Advocate's services;
- (d) information about any case in which the Advocate has appeared (including the name of any client for whom the Advocate acted) where such information has already become publicly available or, where it has not already become publicly available, with the express prior written consent of the lay client.

10.2 Advertising or promotion must not:

- (a) be inaccurate or likely to mislead;
- (b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
- (c) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be Advocates or Members of any other profession);
- (d) include statements about the Advocate's success rate;
- (e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted otherwise than in accordance



with this Code;

- (f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed.

## 11. **DISCIPLINE**

11.1 Matters of discipline in respect of the conduct of Advocates are governed by the Faculty of Advocates Disciplinary Rules, which are published separately. Advocates must adhere to any statutory obligations enacted in legislation in relation to regulation of the legal profession.

11.2 Any complaint in respect of the conduct of an Advocate should be addressed to the Dean.

11.3 The Dean may summon an Advocate to explain his conduct. The Advocate must obey that summons forthwith and explain his conduct as fully as the Dean may require. Where the complaint is remitted by the Dean to the Investigating Committee or the Disciplinary Tribunal in terms of the Disciplinary Rules or is such as requires to be investigated and determined by the Scottish Legal Complaints Commission, the Advocate concerned must obey any summons to appear and must co-operate with the reasonable requirements of the Committee or Tribunal or of the Scottish Legal Complaints Commission, as the case may be.

11.4 An Advocate may, if it is necessary to his defence, disclose information communicated to him in confidence by the client or any other person, insofar as it is relevant to a proper investigation of the complaint. All those involved in the inquiry are bound by their professional duty not to disclose confidential information so disclosed.

## 12. **DRESS**

12.1 An Advocate should wear Court dress when appearing before the following Courts and tribunals:

Court of Justice of the European Communities  
 European Court of Human Rights  
 House of Lords  
 Judicial Committee of the Privy Council  
 Parliamentary Committee appointed to consider a Provisional Order or Private Bill  
 Court of Session and other Courts of which judges are Senators of the College of Justice (other than during vacation and in the Commercial Court when paragraph 12.4 below should be followed)  
 High Court of Justiciary  
 Land Court (if Chairman robed)  
 Lyon Court  
 Sheriff Court  
 District Court  
 General Assembly of the Church of Scotland  
 Courts Martial  
 Transport Commissioners

12.2 Court dress for a male junior consists of a wig and black stuff gown, white shirt with wing collar and white bow tie, black waistcoat and tailcoat (or lightweight sleeved waistcoat) and striped or dark grey morning trousers. Court dress for male Queen's Counsel consists of a wig, black "silk" gown, wing collar and white fall, Court coat and waistcoat (or lightweight sleeved waistcoat with high collar and ornamental cuffs and pockets) and striped or dark grey trousers. Shoes should be black.

12.3 Court dress for a lady Advocate consists of a wig and the gown appropriate to her status. She should wear a black or dark grey suit or dress with a white shirt or blouse. A lady junior need not wear a white bow tie, but a lady Queen's Counsel should wear a Q.C.'s fall with a suitable shirt or blouse. Hosiery should be black or a neutral colour, and shoes black.

12.4 *Dress out of Court.* Within the precincts of Parliament House during business hours

for any substantial part of the day, and when carrying on his profession in any other place of business away from Parliament House, an Advocate should wear clothing appropriate for business.

### 13. **DUTIES OF DEVILMASTER**

13.1 An Advocate may not take a "devil" (pupil) without the consent of the Dean. He should, in normal circumstances, be at least seven years called before he will be eligible to take a devil.

13.2 It is the duty of a devilmaster, so far as he is able, to ensure that, on completion of his devilling period, the devil is fit to exercise the office of Advocate.

13.3 The duties of a devilmaster include the duty of teaching the devil the rules and customs of the Bar, and ensuring that he has read and understands this Guide.

13.4 If a devilmaster is in doubt as to whether his devil is fit to exercise the office of Advocate he should consult the Dean.

13.5 A devilmaster may not accept or request a fee for acting as a devilmaster.

### 14. **CONTINUING PROFESSIONAL DEVELOPMENT**

The Faculty has a programme for Continuing Professional Development. It is the duty of an Advocate to comply with the requirements of that programme as the Faculty may specify in regulations made from time to time. Failure to do so may amount to professional misconduct.

### 15. **DISCRIMINATION**

Advocates should have due regard to

- (a) the need to eliminate unlawful discrimination
- (b) the need to promote equality of opportunity and
- (c) the need to promote good relations between persons of different groups; And
- (d) any Faculty Code on Equality and Diversity.

### 16. **NON-PROFESSIONAL ACTIVITIES OF PRACTISING ADVOCATES**

16.1 There are no fixed rules prescribing the activities in which a practising Advocate may

or may not engage outside his practice as an Advocate, except that he cannot be a solicitor or be in partnership with or employed by a solicitor or other professional person entitled to instruct Counsel directly on behalf of clients in Scotland or elsewhere.

16.2 In considering whether it is proper for him to engage in any particular activity outside his practice, an Advocate should have in mind:-

- (a) the cardinal principles stated in Section 2 above; And
- (b) the extent to which any duties which may be inherent in, or flow from, the activity in question are compatible with the rights and duties of an Advocate.

If he is in any doubt, he should follow the procedure set out in section 7.

16.3 The Dean may, at any time, require an Advocate to cease to engage in a particular activity which in his opinion is incompatible with the rights or duties of an Advocate or, alternatively, to cease to hold himself out as a practising Advocate.

## 17. **ADVOCATES HOLDING A PUBLIC OFFICE AND NON-PRACTISING ADVOCATES**

17.1 Every Member of Faculty, whether practising or not, must bear in mind that his conduct may reflect upon public confidence in the Faculty and the legal profession.

### 17.2 **Crown Counsel.**

Although appointed to act as deputies of the Lord Advocate, Crown Counsel are, in their relations with the Courts, with Counsel for the defence, and with others, subject to the professional obligations of a practising Advocate.

### 17.3 **Other public offices**

Where an Advocate is the holder of a public office, for appointment to which he is

qualified by reason of his status as Advocate, he is bound by all the professional obligations of a practising Advocate insofar as they are relevant to the performance of his duties.

17.4 **Advocates in salaried employment.**

An Advocate in salaried employment engaged in legal work of any kind on his employer's behalf is subject to all the professional obligations of an Advocate insofar as they are relevant to the performance of that work. He may not appear in a Court or tribunal on his employer's behalf in reliance on his status as an Advocate, although he may so appear if he would have that right without that status. He may instruct another Advocate in the circumstances and on the matters specified in the Appendix, but not otherwise.

18. **WORK OUTSIDE SCOTLAND**

18.1 An Advocate who acts in his professional capacity in another country is subject to the rules of professional conduct of the faculty as well as the rules of the host Bar. An Advocate is, therefore, under a responsibility to take reasonable steps to familiarise himself with the relevant rules of the host Bar. If he is in any doubt as to the propriety of a particular course of conduct, he should consult the Dean.

18.2 In considering a complaint against an Advocate, the Dean will have regard to the rules governing practitioners in the country concerned as well as those of the Faculty. Where there is a conflict of rules, the Dean will determine the matter, so far as the discipline of the Faculty is concerned, in the light of the circumstances and the rules of both countries.

18.3 Where an Advocate does something in another country which would be a breach of professional rules if done by a practitioner of that country but which is not a breach of professional rules of the faculty, the breach may nonetheless in an appropriate case be justiciable by the Dean.

18.4 An Advocate practising in another country is, in relation to work in or emanating from Scotland, subject to all the rules governing the professional conduct of Advocates in Scotland.

19. **EUROPEAN LAWYERS APPEARING IN SCOTLAND**

19.1 These rules are consequential upon the Council Directive (No. 77/249/E.E.C.) to facilitate the effective exercise by lawyers of freedom to provide services and the European Communities (Services of Lawyers) Order 1978 (SI 1978/1910) as amended by the European Communities (Services of Lawyers) (Amendment) Order 1980 (SI 1980/1964) and the European Communities (Services of Lawyers) Amendment (Scotland) Order 2004 (SSI 2004/186). The expression "European lawyer" has the same meaning as it has in SI 1978/1910 as so amended.

19.2 These rules only apply to a European lawyer who provides services in Scotland, or in relation to Scottish proceedings, which apart from the said Directive and Orders and those referred to in Section 20 hereof are reserved exclusively to Advocates and/or solicitor Advocates, and who does not act along with a solicitor Advocate; and references to "services" in these rules mean services so reserved.

19.3 No European lawyer may provide any services in relation to any proceedings whether civil or criminal before any Court, tribunal or public authority unless he is instructed with and acts in conjunction with a practising Member of faculty.

19.4 A European lawyer in salaried employment who is instructed with and acts in conjunction with a Member of Faculty in any proceedings may provide services on behalf of his employer in those proceedings only insofar as a Member of faculty in such employment could properly do so - see paragraph 17.4.

19.5 Without prejudice to such other requirements for verification of his status as may arise, a European lawyer, before appearing in the Court of Session or the High Court of Justiciary, must be introduced to the Dean of Faculty or to such Faculty Officer as

may be nominated by the Dean and furnish proof of his status, preferably by production of a European Professional Identity Card. If and so long as a European lawyer fails to satisfy the Dean of Faculty with regard to verification of his status, he shall be entitled to provide services to such extent only, if at all, as the Dean of Faculty may allow.

- 19.6 A European lawyer providing services shall be under the disciplinary authority of the Dean of Faculty. The Dean of Faculty shall determine any matters of dispute or difficulty arising between a European lawyer and the Advocate with whom he is instructed and acting.
- 19.7 The Advocate with whom a European lawyer is instructed will be answerable to any Court, tribunal or other body before which they appear for the conduct of the case and for compliance with professional practice and standards. He will not be answerable, in a question with the client, for the actings of the European lawyer in relation to the duties owed by that lawyer to the client.
- 19.8 An Advocate accepting instructions to act with a European lawyer should recognise the responsibility which he undertakes. It would be inappropriate for any Advocate to be instructed so to act unless he has the seniority necessary to enable him to carry that responsibility. An Advocate with whom a European lawyer is instructed is entitled to withdraw from the case at any stage if he considers that such a course is expedient in the interests of the preservation of proper professional standards.
- 19.9 The signature of the European lawyer on any documents in the process must be accompanied by the signature of the Advocate with whom he is instructed.
- 19.10 Where an Advocate is required to wear Court dress, a European lawyer should wear the normal Court dress of his home Bar, or, if he belongs to more than one such Bar, the normal Court dress of one of those Bars.

19.11 The seat to be occupied by a European lawyer in Court should be determined by considerations of Courtesy and circumstances with the approval of the Court. (See also Section 21 below.)

## 20. REGISTERED EUROPEAN LAWYERS

20.1 These rules are consequential upon the Council Directive (No. 98/5/EC) to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, and the European Communities (Lawyer's Practice) (Scotland) Regulations 2000 (SSI 2000/121). The expression "European lawyer" has the same meaning as it has in those Regulations. These rules are established by the Faculty of Advocates as the competent authority for those wishing to provide the services hereinafter referred to.

20.2 These rules apply only to a European lawyer who seeks to provide services in Scotland, or in relation to Scottish proceedings, having registered in terms of these Regulations with the faculty ("a registered European lawyer"); and references to "services" in these rules mean services so sought to be provided.

20.3 A registered European lawyer is subject to the same rules of professional conduct as a Member of faculty in relation to all activities he pursues in the United Kingdom, and is subject to the same rules of procedure, penalties and remedies as a Member of faculty in relation to failure to comply with the faculty's rules of professional conduct.

20.4 A registered European lawyer engaged in offering to provide services must use his home professional title. His home title must be expressed in an intelligible manner in an official language of his home state in such a way as to avoid confusion with the titles of "Advocate" or "solicitor" or both.

20.5 In representing a client in any proceedings before any Court, tribunal or public authority, (including addressing the Court, tribunal or public authority), the



registered European lawyer shall act in conjunction with an Advocate who is entitled to practise before the Court, tribunal or public authority concerned who could lawfully provide those services. A registered European lawyer shall not have a right of audience before the High Court of Justiciary sitting as an appeal Court or the House of Lords or Privy Council unless he has passed the faculty's examinations for devils in evidence, pleading and practice.

- 20.6 A registered European lawyer in salaried employment may provide services on behalf of his employer only insofar as a Member of faculty in such employment could properly do so - see paragraph 17.4.
- 20.7 The Advocate referred to in paragraph 20.5 shall be answerable to the Court, tribunal or public authority concerned in relation to the proceedings. He will also be answerable to the Dean for the proper conduct of the case and for his own compliance with professional practice and standards. He will not be answerable, in a question with the client, for the actings of the registered European lawyer in relation to the duties owed by that lawyer to the client.
- 20.8 The signature of the registered European lawyer on any document in a process must be accompanied by the signature of the Advocate with whom he is so instructed.
- 20.9 An Advocate accepting instructions to act with a registered European lawyer is advised to recognise the responsibility which he undertakes referred to in the advice given in paragraph 19.8 to Advocates accepting instructions to appear with a European lawyer.
- 20.10 Where an Advocate is required to wear Court dress, a registered European lawyer should wear the normal Court dress of his home Bar, or, if he belongs to more than one such Bar, the normal Court dress of one of those Bars.
- 20.11 The seat to be occupied by a registered European lawyer in Court should be

determined by considerations of Courtesy and circumstances with the approval of the Court (see also Section 21 below).

21. **PRECEDENCE OF COUNSEL OF OTHER BARS**

21.1 As between the Scottish, English and Irish Bars, the tradition is that juniors take precedence *inter se* in accordance with the date of their admission or call, and silks in accordance with the date of their patents.

21.2 As between the Scottish Bar and other Bars which do not make any distinction between senior and junior Counsel, the normal rule would be that Counsel take precedence according to their respective seniority in their own Bars.

22. **PROCEEDS OF CRIME, MONEY LAUNDERING AND TERRORIST FINANCING**

22.1 Counsel are required to acquaint themselves with the legislation in force in relation to proceeds of crime, money laundering and terrorist financing and to take appropriate steps to comply with it.

22.2 Counsel who carry out work that falls within the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 must comply with the requirements of those Regulations. They must be authorised by the Faculty to undertake such work. They must not accept such instructions without having complied with their obligations in relation to customer due diligence.

22.3 Counsel who do not undertake work that is covered by the Regulations are still under obligations not to commit an offence under the Proceeds of Crime Act 2002 and the Terrorism Act 2000.

22.4 In certain circumstances Counsel have a legal requirement to report to the Office of Financial Sanctions Implementation (OFSI) information that could undermine UK Financial Sanctions. Counsel are referred to OFSI's Financial Sanctions Guidance and to its website for further information.

- 22.5 Counsel are required to have regard to the Anti-Money Laundering Guidance for the Legal Sector published by the Legal Sector Affinity Group in March 2018 and which has been approved by the Treasury. In accordance with sections 330(8) and 331(7) of the Proceeds of Crime Act 2002, section 21A(6) of the Terrorism Act 2000, and Regulation 86(2)(b) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, a court is required to consider compliance with that guidance in assessing whether a person committed an offence or took reasonable steps and exercised due diligence to avoid committing the offence.
- 22.6 Counsel must also have regard to the Guidance contained at Appendix E and to paragraph 7 hereof (the duty to take advice).

## APPENDIX A

THE DECLARATION OF PERUGIA ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY. (16.IX. 1977)

*Note:* This Declaration has served as the basis for the preparation by the CCBE of a code of professional conduct for cross-border transactions within the E.E.C. and Advocates should have regard to the CCBE Code of Conduct as it may be revised and adopted by the Faculty from time to time.

### I **The nature of Rules of Professional Conduct**

Rules of professional conduct are not designed simply to define obligations, a breach of which may involve a disciplinary sanction. A disciplinary sanction is imposed only as a remedy of last resort. It can indeed be regarded as an indication that the self-discipline of the Members of the profession has been unsuccessful.

Rules of professional conduct are designs, through their willing acceptance by the lawyers concerned, to ensure the proper performance by lawyers of a function which is recognised as essential in all civilised societies.

The particular rules of each Bar or Law Society are linked to its own traditions and are adapted to the organisation and sphere of activity of the profession in the country concerned, to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application.

In seeking a common basis for a code of professional conduct for the Community one must start from the common principles which are the source of specific rules in each Member country.

### II **The Function of the Lawyer in Society**

A lawyer's function in society does not begin and end with the faithful performance of what he is

instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as of those who seek it and it is his duty, not only to plead his client's cause, but to be his adviser. A lawyer's function therefore lays on him a variety of duties and obligations (sometimes appearing to be in conflict with each other) towards -

- ❖ the client;
- ❖ the client's family and other people towards whom the client is under a legal or moral obligation;
- ❖ the Courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- ❖ the legal profession in general and each fellow Member of it in particular; and
- ❖ the public, for whom the existence of a free and independent but regulated profession is an essential guarantee that the rights of man will be respected.

Where there are so many duties to be reconciled, the proper performance of the lawyer's function cannot be achieved without the complete trust of everyone concerned. All professional rules are based from the outset upon the need to be worthy of that trust.

### III **Personal Integrity**

Relationships of trust cannot exist if a lawyer's personal honour, honesty and integrity are open to doubt. For the lawyer these traditional virtues are professional obligations.

### IV **Confidentially**

1. It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. The obligation of confidentiality is therefore recognised as the primary and fundamental right and duty of the profession.

2. While there can be no doubt as to the essential principle of the duty of confidentiality, the Consultative Committee has found that there are significant differences between the Member countries as to the precise extent of the lawyer's rights and duties. These differences which are sometimes very subtle in character especially concern the rights and duties of a lawyer vis-à-vis his

client, the Courts in criminal cases and administrative authorities in fiscal cases.

3. Where there is any doubt the Consultative Committee is of opinion that the strictest rule should be observed - that is, the rule which offers the best protection against breach of confidence.

4. The Consultative Committee most strongly urges the Bars and Law Societies of the Community to give their help and assistance to Members of the profession from other countries in guaranteeing protection of professional confidentiality.

## V **Independence**

1. The multiplicity of duties to which a lawyer is subject requires his absolute independence, free from all other influence, especially such as may arise from his personal interests. The disinterestedness of the lawyer is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore show himself to be as independent of his client as of the Court and be careful not to curry favour with one or the other.

2. This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to his client has no real value if it is given only to ingratiate himself, to serve his personal interests or in response to outside pressure.

3. The rule against representation of conflicting interests, and the rules which prohibit a lawyer carrying on certain other forms of activity are designed to guarantee the lawyer's independence in accordance with the traditions and customs of each country.

## VI **The Corporate Spirit of the Profession**

1. The corporate spirit of the profession ensures a relationship of trust between lawyers for the benefit of their clients and in order to avoid litigation. It can never justify setting the interests of the profession against those of justice or of those who seek it.

2. In some Community countries, all communications between lawyers (written or by word of mouth) are regarded as being confidential. This principle is recognised in Belgium, France, Italy, Luxembourg and the Netherlands. The law of the other countries does not accept this as a general principle: even the express statement that a letter is confidential (or "without prejudice") is not always sufficient to make it so. In order to avoid any possibility of misunderstanding which might arise from the disclosure of something said in confidence, the Consultative Committee considers it

prudent that a lawyer who wishes to communicate something in confidence to a colleague the rules of whose country are different from his own, should ask beforehand whether and to what extent his colleague is able to treat it as such.

3. A lawyer who seeks the assistance of a colleague in another country must be sure that he is properly qualified to deal with the problem. Nothing is more damaging to trust between colleagues than a casual undertaking to do something which the person giving it cannot do because he is not competent to do it. It is therefore the duty of a lawyer who is approached by a colleague from another country not to accept instructions in a matter which he is not competent to undertake. He should give his colleague all the information necessary to enable him to instruct a lawyer who is truly capable of providing the service asked for.

4. As regards the financial obligations of a lawyer who instructs a lawyer of another country, the Council for Advice and Arbitration of the Consultative Committee issued the following opinion on 29th January 1977:

In professional relations between Members of Bars of different countries, where a lawyer does not confine himself to recommending another lawyer or introducing him to the client but himself entrusts a correspondent with a particular matter or seeks his advice, he is personally bound, even if the client is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of his disclaimer of responsibility for the future.

## VII **Professional Publicity**

1. In all Member countries of the Community lawyers are forbidden to seek personal publicity for themselves or to tout for business. This prohibition is designed for the protection of the public and of the high standing of the profession. The extent of the prohibition is not the same in every country. In some countries, it is laid down in national legislation which provides for a criminal penalty in case of breach. It is therefore possible that a lawyer from another country who engages in a prohibited form of publicity may mislead the public and run the risk of criminal proceedings. In general, there is nothing to prevent a lawyer using cards and writing paper in the form authorised by

his own professional body. Beyond that, he would be wise to ask the professional organisation of the host country for guidance in advance.

2. In some countries, publicity which is designed to provide information for the public or for lawyers in other countries is permitted if it is approved by or under the auspices of the professional organisations. Lawyers from other countries may use such means of publicity insofar as the rules of their own Bar or Law Society permit them to do so.

#### VIII **Respect for the Rules of other Bars and Law Societies**

The Directive of 22nd March 1977 specifies the circumstances in which a lawyer from another Community country is bound to comply with the rules at the Bar or Law Society of the host country. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity. The Bar or Law Society of the host country has a duty to reply to their questions as to the content and effect of its own rules, always having regard to their purpose which is to protect those who require the professional services of a lawyer. Lawyers should always have in mind that the manner in which they behave will reflect on the professional organisation to which they belong, on their colleagues and on all their clients.



## APPENDIX B

### **CODE OF CONDUCT FOR EUROPEAN LAWYERS**

This Code of Conduct for European Lawyers was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 December 2002 and 19 May 2006. The Code includes an Explanatory Memorandum which was updated during the CCBE Plenary Session on 19 May 2006.

Editor : CCBE

Avenue de la Joyeuse Entrée, 1-5 – B-1040 Brussels

Tél. : +32 (0)2 234 65 10 - Fax : +32 (0)2 234 65 11/12

E-mail : [ccbe@ccbe.org](mailto:ccbe@ccbe.org) - <http://www.ccbe.org>

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##### **1. PREAMBLE**

###### **1.1. The Function of the Lawyer in Society**

In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights

and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society.

A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the Courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
- the legal profession in general and each fellow Member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

## **1.2. The Nature of Rules of Professional Conduct**

1.2.1. Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilised societies. The failure of the lawyer to observe these rules may result in disciplinary sanctions.

1.2.2. The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application.

## **1.3. The Purpose of the Code**

1.3.1. The continued integration of the European Union and European Economic Area and the increasing frequency of the cross-border activities of lawyers within the European Economic Area have made necessary in the public interest the statement of common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of "double deontology", notably as set out in Articles 4 and 7.2 of Directive 77/249/EEC and Articles 6 and 7 of Directive 98/5/EC.

1.3.2. The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

- be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Union and European Economic Area;
- be adopted as enforceable rules as soon as possible in accordance with national or EEA procedures in relation to the crossborder activities of the lawyer in the European Union and European Economic Area;
- be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

They further express the wish that the national rules of deontology or professional practice be interpreted and applied whenever possible in a way consistent with the rules in this Code.

After the rules in this Code have been adopted as enforceable rules in relation to a lawyer's cross-border activities the lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs to the extent that they are consistent with the rules in this Code.

#### **1.4. Field of Application *Ratione Personae***

This Code shall apply to lawyers as they are defined by Directive 77/249/EEC and by Directive 98/5/EC and to lawyers of the Observer Members of the CCBE.

#### **1.5. Field of Application *Ratione Materiae***

Without prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Union and the European Economic Area. Cross-border activities shall mean:

- (a) all professional contacts with lawyers of Member States other than the lawyer's own;
- (b) the professional activities of the lawyer in a Member State

other than his or her own, whether or not the lawyer is physically present in that Member State.

#### **1.6. Definitions**

In this Code:

"Member State" means a Member state of the European Union or any other state whose legal profession is included in Article 1.4.

"Home Member State" means the Member State where the lawyer acquired the right to bear his or her professional title.

“Host Member State” means any other Member State where the lawyer carries on cross-border activities.

“Competent Authority” means the professional organisation(s) or authority(ies) of the Member State concerned responsible for the laying down of rules of professional conduct and the administration

of discipline of lawyers.

“Directive 77/249/EEC” means Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

“Directive 98/5/EC” means Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.

## **2. GENERAL PRINCIPLES**

### **2.1. Independence**

2.1.1. The many duties to which a lawyer is subject require the lawyer’s absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the Court or third parties.

2.1.2. This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure.

### **2.2. Trust and Personal Integrity**

Relationships of trust can only exist if a lawyer’s personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.

### **2.3. Confidentiality**

2.3.1. It is of the essence of a lawyer’s function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of

other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

## **2.4. Respect for the Rules of Other Bars and Law Societies**

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

Member organisations of the CCBE are obliged to deposit their codes of conduct at the Secretariat of the CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

## **2.5. Incompatible Occupations**

2.5.1. In order to perform his or her functions with due independence and in a manner which is consistent with his or her duty to participate in the administration of justice a lawyer may be prohibited from undertaking certain occupations.

2.5.2. A lawyer who acts in the representation or the defence of a client in legal proceedings or before any public authorities in a Host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the Host Member State.

2.5.3. A lawyer established in a Host Member State in which he or she wishes to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.

## **2.6. Personal Publicity**

2.6.1. A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.

2.6.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by

electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.

## **2.7. The Client's Interest**

Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow Members of the legal profession.

## **2.8. Limitation of Lawyer's Liability towards the Client**

To the extent permitted by the law of the Home Member State and the Host Member State, the lawyer may limit his or her liabilities towards the client in accordance with the professional rules to which the lawyer is subject.

# **3. RELATIONS WITH CLIENTS**

## **3.1. Acceptance and Termination of Instructions**

3.1.1. A lawyer shall not handle a case for a party except on that party's instructions. The lawyer may, however, act in a case in which he or she has been instructed by another lawyer acting for the party or where the case has been assigned to him or her by a competent body. The lawyer should make reasonable efforts to ascertain the identity, competence and authority of the person or body who instructs him or her when the specific circumstances show that the identity, competence and authority are uncertain.

3.1.2. A lawyer shall advise and represent the client promptly, conscientiously and diligently. The lawyer shall undertake personal responsibility for the discharge of the client's instructions and shall keep the client informed as to the progress of the matter with which the lawyer has been entrusted.

3.1.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

A lawyer shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work.

3.1.4. A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client. Failing such payment, a lawyer may withdraw from the case or refuse to handle it, but subject always to paragraph 3.1.4 above.

### **3.2. Conflict of Interest**

3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs

of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its Members.

### **3.3. *Pactum de Quota Litis***

3.3.1. A lawyer shall not be entitled to make a *pactum de quota litis*.

3.3.2. By "*pactum de quota litis*" is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.

3.3.3. "*Pactum de quota litis*" does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

### **3.4. Regulation of Fees**

A fee charged by a lawyer shall be fully disclosed to the client, shall be fair and reasonable, and shall comply with the law and professional rules to which the lawyer is subject.

### **3.5. Payment on Account**

If a lawyer requires a payment on account of his or her fees and/or disbursements such payment should not exceed a reasonable estimate of the fees and probable disbursements involved.

### **3.6. Fee Sharing with Non-Lawyers**

3.6.1. A lawyer may not share his or her fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws and the professional



rules to which the lawyer is subject.

3.6.2. The provisions of 3.6.1 above shall not preclude a lawyer from paying a fee, commission or other compensation to a deceased lawyer's heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer's practice.

### **3.7. Cost of Litigation and Availability of Legal Aid**

3.7.1. The lawyer should at all times strive to achieve the most cost effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.

3.7.2. A lawyer shall inform the client of the availability of legal aid where applicable.

### **3.8. Client Funds**

3.8.1. Lawyers who come into possession of funds on behalf of their clients or third parties (hereinafter called "client funds") have to deposit such money into an account of a bank or similar institution subject to supervision by a public authority (hereinafter called a "client account"). A client account shall be separate from any other account of the lawyer. All client funds received by a lawyer should be deposited into such an account unless the owner of such funds agrees that the funds should be dealt with otherwise.

3.8.2. The lawyer shall maintain full and accurate records showing all the lawyer's dealings with client funds and distinguishing client funds from other funds held by the lawyer. Records may have to be kept for a certain period of time according to national rules.

3.8.3. A client account cannot be in debit except in exceptional circumstances as expressly permitted in national rules or due to bank charges, which cannot be influenced by the lawyer. Such an account cannot be given as a guarantee or be used as a security for any reason. There shall not be any set-off or merger between a client account and any other bank account, nor shall the client funds in a client account be available to defray money owed by the lawyer to the bank.

3.8.4. Client funds shall be transferred to the owners of such funds in the shortest period of time or under such conditions as are authorized by them.

3.8.5. The lawyer cannot transfer funds from a client account into the lawyer's own account for payment of fees without informing the client in writing.

3.8.6. The Competent Authorities in Member States shall have the power to verify and examine any document regarding client funds, whilst respecting the confidentiality or legal professional privilege to which it may be subject.

### **3.9. Professional Indemnity Insurance**

3.9.1. Lawyers shall be insured against civil legal liability arising out of their legal practice to an extent which is reasonable having regard to the nature and extent of the risks incurred by their professional activities.

3.9.2. Should this prove impossible, the lawyer must inform the client of this situation and its consequences.

## **4. RELATIONS WITH THE COURTS**

### **4.1. Rules of Conduct in Court**

A lawyer who appears, or takes part in a case, before a Court or tribunal must comply with the rules of conduct applied before that Court or tribunal.

### **4.2. Fair Conduct of Proceedings**

A lawyer must always have due regard for the fair conduct of proceedings.

### **4.3. Demeanour in Court**

A lawyer shall while maintaining due respect and Courtesy towards the Court defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person.<sup>15</sup>

### **4.4. False or Misleading Information**

A lawyer shall never knowingly give false or misleading information to the Court.

### **4.5. Extension to Arbitrators etc.**

The rules governing a lawyer's relations with the Courts apply also to the lawyer's relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.

## **5. RELATIONS BETWEEN LAWYERS**

### **5.1. Corporate Spirit of the Profession**

5.1.1. The corporate spirit of the profession requires a relationship of trust and co-operation between lawyers for the benefit of their clients and in order to avoid unnecessary litigation and other behaviour harmful to the reputation of the profession. It can, however, never justify setting the interests of the profession against those of the client.

5.1.2. A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and Courteously towards them.

## **5.2. Co-operation among Lawyers of Different Member States**

5.2.1. It is the duty of a lawyer who is approached by a colleague from another Member State not to accept instructions in a matter which the lawyer is not competent to undertake. The lawyer should in such case be prepared to help that colleague to obtain the information necessary to enable him or her to instruct a lawyer who is capable of providing the service asked for.

5.2.2. Where a lawyer of a Member State co-operates with a lawyer from another Member State, both have a general duty to take into account the differences which may exist between their respective legal systems and the professional organisations, competences and obligations of lawyers in the Member States concerned.

## **5.3. Correspondence between Lawyers**

5.3.1. If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she should clearly express this intention prior to communicating the documents 5.3.2. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay.

## **5.4. Referral Fees**

5.4.1. A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending the lawyer to a client.

5.4.2. A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to him- or herself.

## **5.5. Communication with Opposing Parties**

A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

## **5.6. (Deleted by decision of the Plenary Session in Dublin on 6 December 2002)**

## **5.7. Responsibility for Fees**

In professional relations between Members of Bars of different Member States, where a lawyer does not confine him- or herself to recommending another lawyer or introducing that other lawyer to the client but instead him- or herself entrusts a correspondent with a particular matter or seeks the correspondent's advice, the instructing lawyer is personally bound, even if the client

is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his or her personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of the instructing lawyer's disclaimer of responsibility for the future.

### **5.8. Continuing Professional Development**

Lawyers should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession.

### **5.9. Disputes amongst Lawyers in Different Member States**

5.9.1. If a lawyer considers that a colleague in another Member State has acted in breach of a rule of professional conduct the lawyer shall draw the matter to the attention of that colleague.

5.9.2. If any personal dispute of a professional nature arises amongst lawyers in different Member States they should if possible first try to settle it in a friendly way.

5.9.3. A lawyer shall not commence any form of proceedings against a colleague in another Member State on matters referred to in 5.9.1 or 5.9.2 above without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.

## **EXPLANATORY MEMORANDUM**

This Explanatory Memorandum was prepared at the request of the CCBE Standing Committee by the CCBE's deontology working party, who were responsible for drafting the first version of the Code of Conduct itself. It seeks to explain the origin of the provisions of the Code, to illustrate the problems which they are designed to resolve, particularly in relation to cross-border activities, and to provide assistance to the Competent Authorities in the Member States in the application of the Code. It is not intended to have any binding force in the interpretation of the Code. The Explanatory Memorandum was updated on the occasion of the CCBE Plenary Session on 19 May 2006. The original versions of the Code are in the French and English languages. Translations into other Community languages are prepared under the authority of the national delegations.

### ***Commentary on Article 1.1 – The Function of the Lawyer in Society***

The Declaration of Perugia, adopted by the CCBE in 1977, laid down the fundamental principles of professional conduct applicable to lawyers throughout the EC. The provisions of Article 1.1

reaffirm the statement in the Declaration of Perugia of the function of the lawyer in society which forms the basis for the rules governing the performance of that function.

***Commentary on Article 1.2 – The Nature of Rules of Professional Conduct***

These provisions substantially restate the explanation in the Declaration of Perugia of the nature of rules of professional conduct and how particular rules depend on particular local circumstances but are nevertheless based on common values.

***Commentary on Article 1.3 – The Purpose of the Code***

These provisions introduce the development of the principles in the Declaration of Perugia into a specific Code of Conduct for lawyers throughout the EU and the EEA, and lawyers of the Observer Members of

the CCBE, with particular reference to their cross-border activities (defined in Article 1.5). The provisions of Article 1.3.2 lay down the specific intentions of the CCBE with regard to the substantive provisions in the Code.

***Commentary on Article 1.4 – Field of Application Ratione Personae***

The rules are stated to apply to all lawyers as defined in the Lawyers Services Directive of 1977 and the Lawyers Establishment Directive of 1998, and lawyers of the Observer Members of the CCBE. This includes lawyers of the states which subsequently acceded to the Directives, whose names have been added by amendment to the Directives. The Code accordingly applies to all the lawyers represented on the CCBE, whether as full Members or as Observer Members, namely:

*Austria Rechtsanwalt; Belgium avocat / advocaat / Rechtsanwalt; Bulgaria advokat; Croatia odvjetnik; Cyprus dikegóros; Czech Republic advokát; Denmark advokat; Estonia vandeadvokaat; Finland asianajaja / advokat; FYROMacedonia advokat; France avocat; Germany Rechtsanwalt; Greece dikegóros; Hungary ügyvéd; Iceland lögmaður; Ireland Barrister, solicitor; Italy avvocato; Latvia zvērīnāts advokāts; Liechtenstein Rechtsanwalt; Lithuania advokatas; Luxembourg avocat / Rechtsanwalt; Malta avukat, prokuratur legali; Netherlands advocaat; Norway advokat; Poland adwokat, radca prawny; Portugal advogado; Romania avocat; Slovakia advokát / advokátka; Slovenia odvetnik / odvetnica; Spain abogado / advocat / abokatu / avogado; Sweden advokat; Switzerland Rechtsanwalt / Anwalt / Fürsprech / Fürsprecher / avocat / avvocato /advokat; Turkey avukat; Ukraine Advocate; United Kingdom Advocate, Barrister, solicitor.*

It is also hoped that the Code will be acceptable to the legal professions of other non-Member states in Europe and elsewhere so that it could also be applied by appropriate conventions between them and the Member States.

### ***Commentary on Article 1.5 – Field of Application Ratione Materiae***

The rules are here given direct application only to “cross-border activities”, as defined, of lawyers within the EU and the EEA and lawyers of the Observer Members of the CCBE - see above on Article 1.4, and the definition of “Member State” in Article 1.6. (See also above as to possible extensions in the future to lawyers of other states.) The definition of crossborder activities would, for example, include contacts in state A even on a matter of law internal to state A between a lawyer of state A and a lawyer of state B; it would exclude contacts between lawyers of state A in state A of a matter arising in state B, provided that none of their professional activities takes place in state B; it would include any activities of lawyers of state A in state B, even if only in the form of communications sent from state A to state B.

### ***Commentary on Article 1.6 – Definitions***

This provision defines a number of terms used in the Code, “Member State”, “Home Member State”, “Host Member State”, “Competent Authority”, “Directive 77/249/EEC” and “Directive 98/5/EC”.

The reference to “where the lawyer carries on cross-border activities” should be interpreted in the light of the definition of “cross-border activities” in Article 1.5.

### ***Commentary on Article 2.1 – Independence***

This provision substantially reaffirms the general statement of principle in the Declaration of Perugia.

### ***Commentary on Article 2.2 – Trust and Personal Integrity***

This provision also restates a general principle contained in the Declaration of Perugia.

### ***Commentary on Article 2.3 – Confidentiality***

This provision first restates, in Article 2.3.1, general principles laid down in the Declaration of Perugia and recognised by the ECJ in the *AM&S* case (157/79). It then, in Articles 2.3.2 to 4, develops them into a specific rule relating to the protection of confidentiality. Article 2.3.2 contains the basic rule requiring respect for confidentiality. Article 2.3.3 confirms that the obligation remains binding on the lawyer even if he or she ceases to act for the client in question.

Article 2.3.4 confirms that the lawyer must not only respect the obligation of confidentiality him- or herself but must require all Members and employees of his or her firm to do likewise.

***Commentary on Article 2.4 – Respect for the Rules of Other Bars and Law Societies***

Article 4 of the Lawyers Services Directive contains the provisions with regard to the rules to be observed by a lawyer from one Member State providing services on an occasional or temporary basis in another Member State by virtue of Article 49 of the consolidated EC treaty, as follows:

(a) activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each Host Member State under the conditions laid down for lawyers established in that state, with the exception of any conditions requiring residence, or registration with a professional organisation, in that state;

(b) a lawyer pursuing these activities shall observe the rules of professional conduct of the Host Member State, without prejudice to the lawyer's obligations in the Member State from which he or she comes;

(c) when these activities are pursued in the UK, "rules of professional conduct of the Host Member State" means the rules of professional conduct applicable to solicitors, where such activities are not reserved for Barristers and Advocates. Otherwise the rules of professional conduct applicable to the latter shall apply. However, Barristers from Ireland shall always be subject to the rules of professional conduct applicable in the UK to Barristers and Advocates. When these activities are pursued in Ireland "rules of professional conduct of the Host Member State" means, in so far as they govern the oral presentation of a case in Court, the rules of professional conduct applicable to Barristers. In all other cases the rules of professional conduct applicable to solicitors shall apply. However, Barristers and Advocates from the UK shall always be subject to the rules of professional conduct applicable in Ireland to Barristers; and

(d) a lawyer pursuing activities other than those referred to in (a) above shall remain subject to the conditions and rules of professional conduct of the Member State from which he or she comes without prejudice to respect for the rules, whatever their source, which govern the profession in the Host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that state, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the Host Member State and to the extent to which

their observance is objectively justified to ensure, in that state, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

The Lawyers Establishment Directive contains the provisions with regard to the rules to be observed by a lawyer from one Member State practicing on a permanent basis in another Member State by virtue of Article 43 of the consolidated EC treaty, as follows:

(a) irrespective of the rules of professional conduct to which he or she is subject in his or her Home Member State, a lawyer practicing under his home-country professional title shall be subject to the relevant professional title of the Host Member State in respect of all the activities the lawyer pursues in its territory (Article 6.1);

(b) the Host Member State may require a lawyer practising under his or her home-country professional title either to take out professional indemnity insurance or to become a Member of a professional guarantee fund in accordance with the rules which that state lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his or her home-country professional title shall be exempted from that requirement if the lawyer can prove that he or she is covered by insurance taken out or a guarantee provided in accordance with the rules of the Home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the Competent Authority in the Host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the Home Member State (Article 6.3); and

(c) a lawyer registered in a Host Member State under his or her home country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the Host Member State so permits for lawyers registered under the professional title used in that state (Article 8).

In cases not covered by either of these Directives, or over and above the requirements of these Directives, the obligations of a lawyer under Community law to observe the rules of other Bars and Law Societies are a matter of interpretation of any relevant provision, such as the Directive on Electronic Commerce (2000/31/EC). A major purpose of the Code is to minimise, and if possible eliminate altogether, the problems which may arise from "double deontology", that is the



application of more than one set of potentially conflicting national rules to a particular situation (see Article 1.3.1).

### ***Commentary on Article 2.5 – Incompatible Occupations***

There are differences both between and within Member States on the extent to which lawyers are permitted to engage in other occupations, for example in commercial activities. The general purpose of rules excluding a lawyer from other occupations is to protect the lawyer from influences which might impair the lawyer's independence or his or her role in the administration of justice. The variations in these rules reflect different local conditions, different perceptions of the proper function of lawyers and different techniques of rule-making. For instance in some cases there is a complete prohibition of engagement in certain named occupations, whereas in other cases engagement in other occupations is generally permitted, subject to observance of specific safeguards for the lawyer's independence. Articles 2.5.2 and 3 make provision for different circumstances in which a lawyer of one Member State is engaging in cross-border activities (as defined in Article 1.5) in a Host Member State when he or she is not a Member of the Host State legal profession. Article 2.5.2 imposes full observation of Host State rules regarding incompatible occupations on the lawyer acting in national legal proceedings or before national public authorities in the Host State. This applies whether the lawyer is established in the Host State or not.

Article 2.5.3, on the other hand, imposes "respect" for the rules of the Host State regarding forbidden or incompatible occupations in other cases, but only where the lawyer who is established in the Host Member State wishes to participate directly in commercial or other activities not connected with the practice of the law.

### ***Commentary on Article 2.6 – Personal Publicity***

The term "personal publicity" covers publicity by firms of lawyers, as well as individual lawyers, as opposed to corporate publicity organised by Bars and Law Societies for their Members as a whole. The rules governing personal publicity by lawyers vary considerably in the Member States. Article 2.6 makes it clear that there is no overriding objection to personal publicity in cross-border practice. However, lawyers are nevertheless subject to prohibitions or restrictions laid down by their home professional rules, and a lawyer will still be subject to prohibitions or restrictions laid down by Host State rules when these are binding on the lawyer by virtue of the Lawyers Services Directive or the Lawyers Establishment Directive.

### ***Commentary on Article 2.7 – The Client’s Interest***

This provision emphasises the general principle that the lawyer must always place the client’s interests before the lawyer’s own interests or those of fellow Members of the legal profession.

### ***Commentary on Article 2.8 – Limitation of Lawyer’s Liability towards the Client***

This provision makes clear that there is no overriding objection to limiting a lawyer’s liability towards his or her client in cross-border practice, whether by contract or by use of a limited company, limited partnership or limited liability partnership. However it points out that this can only be contemplated where the relevant law and the relevant rules of conduct permit - and in a number of jurisdictions the law or the professional rules prohibit or restrict such limitation of liability.

### ***Commentary on Article 3.1 – Acceptance and Termination of Instructions***

The provisions of Article 3.1.1 are designed to ensure that a relationship is maintained between lawyer and client and that the lawyer in fact receives instructions from the client, even though these may be transmitted through a duly authorised intermediary. It is the responsibility of the lawyer to satisfy him- or herself as to the authority of the intermediary and the wishes of the client.

Article 3.1.2 deals with the manner in which the lawyer should carry out his or her duties. The provision that the lawyer shall undertake personal responsibility for the discharge of the instructions given to him or her means that the lawyer cannot avoid responsibility by delegation to others. It does not prevent the lawyer from seeking to limit his or her legal liability to the extent that this is permitted by the relevant law or professional rules - see Article 2.8.

Article 3.1.3 states a principle which is of particular relevance in cross-border activities, for example when a lawyer is asked to handle a matter on behalf of a lawyer or client from another state who may be unfamiliar with the relevant law and practice, or when a lawyer is asked to handle a matter relating to the law of another state with which he or she is unfamiliar. A lawyer generally has the right to refuse to accept instructions in the first place, but Article 3.1.4 states that, having once accepted them, the lawyer has an obligation not to withdraw without ensuring that the client’s interests are safeguarded.

### ***Commentary on Article 3.2 – Conflict of Interest***

The provisions of Article 3.2.1 do not prevent a lawyer acting for two or more clients in the same matter provided that their interests are not in fact in conflict and that there is no significant risk of

such a conflict arising. Where a lawyer is already acting for two or more clients in this way and subsequently there arises a conflict of interests between those clients or a risk of a breach of confidence or other circumstances where the lawyer's independence may be impaired, then the lawyer must cease to act for both or all of them.

There may, however, be circumstances in which differences arise between two or more clients for whom the same lawyer is acting where it may be appropriate for the lawyer to attempt to act as a mediator. It is for the lawyer in such cases to use his or her own judgement on whether or not there is such a conflict of interest between them as to require the lawyer to cease to act. If not, the lawyer may consider whether it would be appropriate to explain the position to the clients, obtain their agreement and attempt to act as mediator to resolve the difference between them, and only if this attempt to mediate should fail, to cease to act for them.

Article 3.2.4 applies the foregoing provisions of Article 3 to lawyers practicing in association. For example a firm of lawyers should cease to act when there is a conflict of interest between two clients of the firm, even if different lawyers in the firm are acting for each client. On the other hand, exceptionally, in the "chambers" form of association used by English Barristers, where each lawyer acts for clients individually, it is possible for different lawyers in the association to act for clients with opposing interests.

### ***Commentary on Article 3.3 – Pactum de Quota Litis***

These provisions reflect the common position in all Member States that an unregulated agreement for contingency fees (*pactum de quota litis*) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. The provisions are not, however, intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful, provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice.

### ***Commentary on Article 3.4 – Regulation of Fees***

Article 3.4 lays down three requirements: a general standard of disclosure of a lawyer's fees to the client, a requirement that they should be fair and reasonable in amount, and a requirement to comply with the applicable law and professional rules. In many Member States machinery exists for regulating lawyers' fees under national law or rules of conduct, whether by reference to a power of adjudication by the Bar authorities or otherwise. In situations governed by the Lawyers

Establishment Directive, where the lawyer is subject to Host State rules as well as the rules of the Home State, the basis of charging may have to comply with both sets of rules.

#### ***Commentary on Article 3.5 – Payment on Account***

Article 3.5 assumes that a lawyer may require a payment on account of the lawyer's fees and/or disbursements, but sets a limit by reference to a reasonable estimate of them. See also on Article 3.1.4 regarding the right to withdraw.

#### ***Commentary on Article 3.6 – Fee Sharing with Non-Lawyers***

In some Member States lawyers are permitted to practise in association with Members of certain other approved professions, whether legal professions or not. The provisions of Article 3.6.1 are not designed to prevent fee sharing within such an approved form of association. Nor are the provisions designed to prevent fee sharing by the lawyers to whom the Code applies (see on Article 1.4 above) with other "lawyers", for example lawyers from non-Member States or Members of other legal professions in the Member States such as notaries.

#### ***Commentary on Article 3.7 – Cost of Litigation and Availability of Legal Aid***

Article 3.7.1 stresses the importance of attempting to resolve disputes in a way which is cost-effective for the client, including advising on whether to attempt to negotiate a settlement, and whether to propose referring the dispute to some form of alternative dispute resolution. Article 3.7.2 requires a lawyer to inform the client of the availability of legal aid where applicable. There are widely differing provisions in the Member States on the availability of legal aid. In cross-border activities a lawyer should have in mind the possibility that the legal aid provisions of a national law with which the lawyer is unfamiliar may be applicable.

#### ***Commentary on Article 3.8 – Client Funds***

The provisions of Article 3.8 reflect the recommendation adopted by the CCBE in Brussels in November 1985 on the need for minimum regulations to be made and enforced governing the proper control and disposal of clients' funds held by lawyers within the Community. Article 3.8 lays down minimum standards to be observed, while not interfering with the details of national systems which provide fuller or more stringent protection for clients' funds. The lawyer who holds clients' funds, even in the course of a cross-border activity, has to observe the rules of his or her home Bar. The lawyer needs to be aware of questions which arise where the rules of more than one Member State may be applicable, especially where the lawyer is established in a Host State under the Lawyers Establishment Directive.

### ***Commentary on Article 3.9 – Professional Indemnity Insurance***

Article 3.9.1 reflects a recommendation, also adopted by the CCBE in Brussels in November 1985, on the need for all lawyers in the Community to be insured against the risks arising from professional negligence claims against them.

Article 3.9.2 deals with the situation where insurance cannot be obtained on the basis set out in Article 3.9.1.

### ***Commentary on Article 4.1 – Rules of Conduct in Court***

This provision applies the principle that a lawyer is bound to comply with the rules of the Court or tribunal before which the lawyer practises or appears.

### ***Commentary on Article 4.2 – Fair Conduct of Proceedings***

This provision applies the general principle that in adversarial proceedings a lawyer must not attempt to take unfair advantage of his or her opponent. The lawyer must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure. To the extent not prohibited by law a lawyer must not divulge or submit to the Court any proposals for settlement of the case made by the other party or its lawyer without the express consent of the other party's lawyer. See also on Article 4.5 below.

### ***Commentary on Article 4.3 – Demeanour in Court***

This provision reflects the necessary balance between respect for the Court and for the law on the one hand and the pursuit of the client's best interest on the other.

### ***Commentary on Article 4.4 – False or Misleading Information***

This provision applies the principle that the lawyer must never knowingly mislead the Court. This is necessary if there is to be trust between the Courts and the legal profession.

### ***Commentary on Article 4.5 – Extension to Arbitrators etc.***

This provision extends the preceding provisions relating to Courts and other bodies exercising judicial or quasi-judicial functions.

### ***Commentary on Article 5.1 – Corporate Spirit of the Profession***

These provisions, which are based on statements in the Declaration of Perugia, emphasise that it is in the public interest for the legal profession to maintain a relationship of trust and cooperation between its Members. However, this cannot be used to justify setting the interests of the

profession against those of justice or of clients (see also on Article 2.7).

***Commentary on Article 5.2 – Co-operation among Lawyers of Different Member States***

This provision also develops a principle stated in the Declaration of Perugia with a view to avoiding misunderstandings in dealings between lawyers of different Member States.

***Commentary on Article 5.3 – Correspondence between Lawyers***

In certain Member States communications between lawyers (written or by word of mouth) are normally regarded as to be kept confidential as between the lawyers. This means that the content of these communications cannot be disclosed to others, cannot normally be passed to the lawyers' clients, and at any event cannot be produced in Court. In other Member States, such consequences will not follow unless the correspondence is marked as "confidential". In yet other Member States, the lawyer has to keep the client fully informed of all relevant communications from a professional colleague acting for another party, and marking a letter as "confidential" only means that it is a legal matter intended for the recipient lawyer and his or her client, and not to be misused by third parties. In some states, if a lawyer wishes to indicate that a letter is sent in an attempt to settle a dispute, and is not to be produced in a Court, the lawyer should mark the letter as "without prejudice". These important national differences give rise to many misunderstandings. That is why lawyers must be very careful in conducting cross-border correspondence.

Whenever a lawyer wants to send a letter to a professional colleague in another Member State on the basis that it is to be kept confidential as between the lawyers, or that it is "without prejudice", the lawyer should ask in advance whether the letter can be accepted on that basis. A lawyer wishing that a communication should be accepted on such a basis must express that clearly at the head of the communication or in a covering letter. A lawyer who is the intended recipient of such a communication, but who is not in a position to respect, or to ensure respect for, the basis on which it is to be sent, must inform the sender immediately so that the communication is not sent. If the communication has already been received, the recipient must return it to the sender without revealing its contents or referring to it in any way; if the recipient's national law or rules prevent the recipient from complying with this requirement, he or she must inform the sender immediately.

***Commentary on Article 5.4 – Referral Fees***

This provision reflects the principle that a lawyer should not pay or receive payment purely for the reference of a client, which would risk impairing the client's free choice of lawyer or the client's interest in being referred to the best available service. It does not prevent fee-sharing arrangements between lawyers on a proper basis (see also on Article 3.6 above). In some Member States lawyers are permitted to accept and retain commissions in certain cases provided the client's best interests are served, there is full disclosure to the client and the client has consented to the retention of the commission. In such cases the retention of the commission by the lawyer represents part of the lawyer's remuneration for the service provided to the client and is not within the scope of the prohibition on referral fees which is designed to prevent lawyers making a secret profit.

#### ***Commentary on Article 5.5 – Communication with Opposing Parties***

This provision reflects a generally accepted principle, and is designed both to promote the smooth conduct of business between lawyers and to prevent any attempt to take advantage of the client of another lawyer.

#### ***Commentary on Article 5.6 – Change of Lawyer***

Article 5.6 dealt with change of lawyer. It was deleted from the Code on 6 December 2002.

#### ***Commentary on Article 5.7 – Responsibility for Fees***

These provisions substantially reaffirm provisions contained in the Declaration of Perugia. Since misunderstandings about responsibility for unpaid fees are a common cause of difference between lawyers of different Member States, it is important that a lawyer who wishes to exclude or limit his or her personal obligation to be responsible for the fees of a foreign colleague should reach a clear agreement on this at the outset of the transaction.

#### ***Commentary on Article 5.8 – Continuing Professional Development***

Keeping abreast of developments in the law is a professional obligation. In particular it is essential that lawyers are aware of the growing impact of European law on their field of practice.

#### ***Commentary on Article 5.9 – Disputes amongst Lawyers in Different Member States***

A lawyer has the right to pursue any legal or other remedy to which he or she is entitled against a colleague in another Member State. Nevertheless it is desirable that, where a breach of a rule of professional conduct or a dispute of a professional nature is involved, the possibilities of friendly settlement should be exhausted, if necessary with the assistance of the Bars or Law Societies concerned, before such remedies are exercised.

## APPENDIX C

### **THE CONTINUING PROFESSIONAL DEVELOPMENT REGULATIONS**

(Approved by Faculty Council 2016.)

#### **Application**

1. (1) These Regulations apply to all practising advocates;
- (2) These Regulations shall apply from 10 September 2016

#### **The Continuing Professional Development Requirements**

2. (1) For the purpose of these Regulations the “CPD Requirements” shall comprise:
  - (a) a specified number of hours of continuing professional development to be completed within each calendar year; and
  - (b) successful fulfilment of the requirements of the Quality Assurance Programme (in the calendar year when called upon to do so)
- (2) Subject to sub-paragraph (3), any advocate to whom these Regulations apply must comply with the CPD Requirements in force as approved from time to time by the Faculty Council.
- (3) An advocate who (i) commences or returns to practice in the course of a year or (ii) has a period of exempted absence in the course of a year, shall undertake the CPD Requirements for that year pro rata.
- (4) For the purpose of these Regulations, a failure to comply with any of the CPD Requirements shall be a breach of the Regulations.
3. The Faculty Council, on the advice of the Training Committee, may if it thinks fit specify the nature, content and format of particular courses and other activities which may be undertaken by advocates in order to satisfy the CPD Requirements.
4. Every advocate to whom these regulations apply shall:
  - (1) keep a record of his or her performance of the CPD Requirements and,
  - (2) exhibit that record to the Faculty at the end of each calendar year or when required to do so.



5. The Faculty Council, on the advice of the Training Committee, may alter the minimum number of hours of continuing professional development, or the content of the continuing professional development which must be completed in order to satisfy any of the CPD Requirements

### **Waivers/Extension of time**

6. (1) An advocate may apply to the Director of Training and Education for an extension of time or waiver in relation to:
  - (a) the CPD Requirements; and/or
  - (b) the time limit for forwarding a record of CPD performance and/or
  - (c) any extension of time previously granted.(2) The Director of Training and Education may in exceptional circumstances grant an extension of time in respect of any application under sub paragraph (1) of this regulation.  
(3) The Director of Training and Education may in exceptional circumstances grant a waiver in respect of any application under sub paragraph (1) of this regulation.
7. Any application under regulation 6 shall be made to the Director of Training and Education on the form prescribed by him from time to time and must be accompanied by an administration fee of £125 or such other sum as the Faculty Council may from time to time determine. The Director of Training and Education shall have discretion to waive the administration fee.
8. In the event of the Director of Training and Education refusing to grant an extension of time or waiver in terms of Regulation 6 or to waive the administration fee in terms of Regulation 7 an advocate may request in writing, within seven days of the receipt of written intimation of said refusal, that said refusal be reviewed by the Training Committee at its next meeting. The Training and Admissions Committee shall have the power to direct that the Director of Training and Education grant an extension of time or waiver in terms of Regulation 6 or to waive the administration fee in terms of Regulation 7 as it may think fit.

### **Failure to comply**

9. (1) If it appears to the Director of Training and Education by 15 March in any year that an advocate has not complied with the requirements of paragraph 2(1) of these regulations the Director of Training and Education will report to the Dean of Faculty that the advocate is in breach of these regulations.

(2) On receipt of a report under Regulation 9 (1), the Dean shall, within 7 days of receipt of the report invite the advocate to make written or oral representations within 14 days or such other period that the Dean may on cause shown allow, on the matter of his or her breach of the regulations.

(3) Once the Dean has considered the written and/or oral representations of the member the Dean may:

(a) suspend the advocate from practice; and

(b) initiate disciplinary proceedings against the member in terms of the Faculty of Advocates Disciplinary Rules

### **Citation and commencement**

14. (1) These regulations may be cited as the Faculty of Advocates Continuing Professional Development Regulations 2016

(2) These regulations shall come into force on 10 September 2016

## APPENDIX D

### **FROM WHOM MAY AN ADVOCATE ACCEPT INSTRUCTIONS?**

An Advocate may accept instructions from any person or body detailed in the appendix hereto and in terms of the Direct Access Rules and Standard Terms of Instruction as they may be updated by the faculty from time to time.

### **DIRECT ACCESS RULES (October 2006)**

1. An Advocate may accept instructions from any person or body detailed in the Appendix hereto, whether on their own behalf or on behalf of a client. Instructions under these rules will be referred to as “Direct Access Instructions”.

2. Advocates may not, however, accept instructions to act from, or on behalf of, any person or body from which they receive any remuneration other than the professional fees or retainers paid to them as Advocate. Thus they may not act for, or accept instructions from, a company of which they are a director, or any person or body by which they are employed, or a firm of which they are a partner, and from which they derive director's fees, a salary, or a share of the profits either in name or in reality.

3. Advocates may not accept instructions to receive or handle clients' money; nor to do administrative work which would normally be carried out by an instructing solicitor; nor to carry out investigative work which would normally be carried out by an instructing solicitor, any more than they might do so when instructed by a solicitor. An Advocate acting under these rules may, however, meet and discuss matters with a client or a potential witness without a representative of the instructing body or person being present, so long as both the Advocate and the instructing person or body consider this appropriate in terms of the code of conduct.

4. An Advocate who is instructed by any person or body detailed in the Appendix other than a Scottish solicitor must satisfy himself or herself so far as appears necessary of

(i) their competence to give the instructions in question;

(ii) if those instructions are given on behalf of a client, their authority to do so; and

(iii) their understanding of the terms of engagement and their effect, and in particular the limitations on the work which an Advocate may do and also any disadvantage which may, as a real possibility, be suffered by the client if the client does not act through a Scottish solicitor. If an Advocate cannot be satisfied of these matters, they may not accept those instructions. If an Advocate at any time concludes that they are no longer satisfied of any of these matters, or that it is not in the interest of the client or the interests of justice that such instructions be given other than through the medium of a Scottish solicitor, they must so inform the person instructing and may refuse to act further except through that medium.

5. For the avoidance of doubt, the “cab rank” rule does not apply to instructions provided under these rules.

6. It is expected that an Advocate who accepts instructions under Direct Access Rules shall follow any guidance issued by the Direct Access Guidance Committee from time to time.

## **APPENDIX TO DIRECT ACCESS RULES**

### **1. Legal professionals:**

- (i) Members of the Law Societies of England and Wales, and Northern Ireland;
- (ii) Non-practising Members of Faculty;
- (iii) European lawyers registered under the European Communities (Lawyers Practice)(Scotland) Regulations;
- (iv) Persons on the register of foreign lawyers held by the Law Society of Scotland;
- (v) Qualified conveyancing and executry practitioners in Scotland;
- (vi) Persons or bodies qualified to practise law in a jurisdiction other than Scotland who actually do so practise law;

### **2) Other professionals:**

- (i) Members of any professional body recognised for this purpose by the Faculty, and any such body itself;
- (ii) Parliamentary agents;
- (iii) Any person or body on the register maintained by the Office of the Immigration Services Commissioner.

### **3) Public authorities:**

- (i) Any person or body subject to complaint to the Scottish Public Services Ombudsman;
- (ii) Any public authority in terms of the Freedom of Information (Scotland) Act 2002 or the Freedom of Information Act 2000;
- (iii) Any person or body subject to complaint to the European Ombudsman;
- (iv) Any public authority under the law of the European Union;
- (v) Any person or body acting under law in a governmental, judicial or legislative capacity;
- (vi) Members of the British and Irish Ombudsman Association or the International Ombudsman Institute.

### **4) Other persons and bodies:**

- (i) Any person or body on the Financial Services Authority Register;
- (ii) Any voluntary organisation in Membership of the Scottish Council for Voluntary Organisations, the National Council for Voluntary Organisations, the Northern Ireland Council for Voluntary Action, or the Wales Council for Voluntary Action;
- (iii) Any body on the register maintained by the office of the Scottish Charity Regulator or the Central Register of Charities maintained by the Charity Commission for England and Wales;
- (iv) Any public limited company regulated by the London Stock Exchange;
- (v) Any community interest company registered as such;
- (vi) Any trade union or employers association on the list maintained by the Certification Officer (see [www.certoffice.org](http://www.certoffice.org));
- (vii) Any body incorporated by statute which is so established to represent or regulate any trade, business or profession;
- (viii) The Medical and Dental Defence Union of Scotland, The Medical and Dental Defence Union, and the Medical Protection Society.
- (ix) Any person or body, or Member of a class, recognised for this purpose by the Faculty.

**Initial list of bodies recognised under part 2 (i):**

1. *All professional bodies in the United Kingdom which have been awarded a Royal Charter*
2. *All Designated Professional Bodies under the Financial Services and Markets Act 2000*
3. *Architects Registration Board of the United Kingdom*
4. *Army Legal Service*
5. *Directorate of Legal Services of the Royal Navy*
6. *Naval Prosecuting Authority*
7. *Directorate of Legal Services of the Royal Air Force*
8. *Association of Average Adjusters*
9. *Association of Taxation Technicians*
10. *Insolvency Practitioners Association*
11. *Institute of Indirect Taxation*
12. *Institute of Chartered Accountants in Ireland*
13. *Officers of Arms in Ordinary (The Heralds and Pursuivants of the Lyon Court)*
14. *Incorporated Society of Valuers and Auctioneers*
15. *Pensions Management Institute*
16. *Institute of Trade Mark Attorneys*
17. *The Chartered Insurance Institute or any Member thereof*
18. *Property Factors Registered on the Scottish Property Factors Register*
19. *Electrical Contractors' Association of Scotland (SELECT)*

**6. Further list of bodies subsequently recognised under parts 2 (i) or 4 (ix)\*:**

1. The Society of Messengers-at-Arms and Sheriff Officers and members thereof
2. British Branch of the Society of Trust and Executry Practitioners
3. Faculty Services Ltd
4. The Association of Commercial Attorneys
5. MR Associates
6. Chamberlain McBain
7. Whealing Project Consultancy Limited
8. The Scottish Trades Union Congress

9. NAB Customer Support Group
10. Dundee Employment Law
11. Federation for Industry Sector Skills & Standards
12. Families Need Fathers Scotland
13. Scottish Care

**\*It is likely that this list will continue to be updated and you should consult the Faculty's Website for a fully updated list at: [www.Advocates.org.uk](http://www.Advocates.org.uk)**

### **Direct Access to Advocates: Standard Terms of Instruction**

#### **Revised: 13 July 2018**

These Standard Terms of Instruction apply whenever the person instructing is neither qualified to practise as a solicitor in Scotland, nor by law authorised to act as a solicitor to a public department in Scotland. The person or body instructing is here referred to as the instructing person, although they may be instructing on their own behalf.

#### **1. Introduction**

1.1 Except as otherwise provided hereafter, Advocates will conduct themselves in accordance with the '*Guide to the Professional Conduct of Advocates*' of the Faculty of Advocates and with the Faculty's Direct Access rules, here together referred to as '*the Guide*', and these terms of instruction should be read together with the Guide. If instructions are given by a registered European lawyer, or by a lawyer in a country of the European Union other than Scotland, these terms should also be read with Part 5 of the '*Code of Conduct for Lawyers in the European Union*' issued by the Council of the Bars and Law Societies of the European Union.

1.2 Advocates are holders of a public office, who owe duties to the Court and the public as well as to those who instruct them. They cannot in law, and do not, enter into any contractual relationship with those who instruct them or with their clients, and nothing in these terms should be taken to suggest otherwise.

#### **2. Instructions**

## 2.1 General

2.1.1 Subject to the Guide and the provisions below, an Advocate may accept instructions from any person under the Direct Access rules, without the need for instruction through a Scottish solicitor, in relation to any matter.

2.1.2 Such instructions should be in writing (which includes e-mail). They may be sent directly to Counsel, or to his or her clerk. If formal acknowledgement is required, the instructions should be sent to the Advocate's clerk with a request for such acknowledgement. As an Advocate cannot be responsible for the general conduct of any matter (see paragraph 2.3 below), the instructions should specify the particular services which are required from the Advocate. It is important to specify these services as accurately as possible. An Advocate would not normally be expected to provide services beyond those specified in any particular instructions.

2.1.3 It is the responsibility of the Advocate to satisfy himself or herself that any instruction received may properly be accepted in accordance with rule 4 of the Direct Access rules. Whether or not that is the case, an Advocate may decline to accept instructions under these arrangements.

2.1.4 An Advocate is entitled at any stage to require, as a condition of continuing to act in the matter, that a person qualified to practise as a solicitor in Scotland shall take over the instruction of the work concerned or that the services of such a solicitor shall otherwise be retained to assist in the future conduct of the matter, if he or she considers that this is necessary in the interests of the client or the interests of justice.

2.1.5 As Advocates carry out all their work personally and cannot always predict with certainty their other professional responsibilities, instructions under these arrangements are accepted on the basis that the Advocate may be unavoidably prevented, sometimes at short notice, from attending at any hearing or other engagement in connection with the matter on which he or she is instructed on account of the precedence accorded to instructions for Court appearances, in terms of 8.5 and 8.6 of the Guide. However, an Advocate will not discriminate in this respect between instructions which have been accepted under the Direct Access rules and otherwise.



2.1.6 If an Advocate identifies a clash of commitments which is likely to prevent attendance at any hearing, either the Advocate or the Advocate's clerk will warn the instructing person as soon as possible and will, if desired, suggest the names of other Advocates who are willing and able to take over the instructions. The Advocate will co-operate so far as possible with any other Advocate who takes over. In no circumstances, however, will instructions be passed to any other Advocate without the express agreement of the instructing person.

2.1.7 In any case in which an Advocate accepts instructions from a person in his or her capacity as a director, partner, associate, Member or employee of a company, firm or other body, the obligations of the instructing person under these terms of instruction (and in particular obligations to make payment of fees) shall be the joint and several obligations of him or her and that company, firm or other body.

## **2.2 Categories of work to which these arrangements apply.**

2.2.1 An Advocate may accept instructions under these arrangements in relation to any kind of work except as excluded below. There are, however, circumstances in which it will not practically be possible for this to be done, in particular where the work is in a Scottish Court, where it may be necessary for a Scottish solicitor to be involved.

## **2.3 Excluded Work**

2.3.1 However, an Advocate shall not accept instructions:

- a) To receive or handle clients money; or
- b) To do administrative work normally performed by a solicitor, such as entering into correspondence on the client's behalf (as distinct from assistance in drafting correspondence), or ensuring the attendance of witnesses at a hearing; or
- c) To undertake investigative work normally performed by a solicitor, such as the collection of evidence or the instruction of expert witnesses; or
- d) To take responsibility for the management or general conduct of a client's affairs or litigation; or
- e) Which are inconsistent with guidance given by or on behalf of the Faculty of Advocates.

## **2.4 Documents**

2.4.1 All papers will be returned to the instructing person on the completion of the work instructed.

2.4.2 However, unless agreed otherwise, the Advocate is entitled to keep copies of any documents sent for the Advocate's own professional purposes.

2.4.3 Copyright in any work produced remains with the Advocate who is its author, but the instructing person may publish it to any third party to whom publication was contemplated by the instructions in question.

2.4.4 All documents and other information sent to an Advocate under the Direct Access rules are received in confidence and are subject to legal professional privilege. They will not accordingly be disclosed to any third party except in terms of a statutory or legal requirement on the Advocate to do so; with the express consent of the instructing person to the disclosure; or in terms of the disciplinary rules of the Faculty of Advocates.

### **3. Payment of Fees**

3.1 It shall be the professional obligation of the instructing person to make payment of the Advocate's fees. That is so whether or not the identity of the client is stated. No agreement to the contrary will be of any effect.

3.2 Upon acceptance of instructions, the Advocate will be entitled to payment of a reasonable fee. What is a reasonable fee depends on the whole circumstances of the particular matter on which the Advocate is instructed. Unless otherwise agreed, an Advocate's fees cover all expenses incurred in relation to the matter instructed, such as travelling expenses. All fees are stated as exclusive of, and are subject to, Value Added Tax at the appropriate rate, if applicable.

3.3 Unless otherwise agreed between the instructing person and the Advocate's clerk, a fee note will normally be submitted at the conclusion of each item of work for which the Advocate is instructed.

3.4 It is often helpful to all concerned to agree the amount of a fee and/or the basis of charging in advance. Discussion about such an agreement must take place with the Advocate's clerk or deputy

clerks, because professional rules prohibit discussion or negotiation of fees or associated matters directly with the Advocate. Where such an agreement has been reached, neither the instructing person nor the Advocate is entitled to challenge it later.

3.5 A fixed fee paid in advance is not client money.

3.6 If an Advocate requires an upfront payment to account of fees he must ensure it is a reasonable payment for the work to be done, that the client understands and has been informed in writing that once paid it will not be the client's money and he will not be beneficially entitled to it, and that any difference between the sum paid to account and the Advocate's fees will be repaid.

3.7 If an Advocate makes use of an escrow service for receiving payments of fees he must ensure it will not result in a breach of the prohibition on handling client money.

3.8 Unless otherwise agreed between the instructing person and the Advocate's clerk, an Advocate's fee shall be paid by the instructing person within twenty-one days of submission of each fee note.

3.9 Subject to paragraph 3.4, the instructing person is entitled to challenge the fee proposed or the basis of the charge. In the event of such a challenge, the instructing person should inform the Advocates clerk concerned (or, in the case of fee notes issued by Faculty Services Limited, Faculty Services Limited) in writing as soon as possible and in any event within twenty-one days of the issue of the fee note; and failing such challenge, the instructing person is presumed to agree that the fee proposed is reasonable and becomes responsible to make payment of it.

3.10 If an instructing person challenges the fee proposed, the matter will normally be resolved by negotiation between them and the Advocate's clerk. If they cannot agree, either the instructing person or the Advocate is entitled to require that the matter be determined by a mutually agreed third party, whom failing by the Auditor of the Court of Session, who shall then adjudicate as to what is a reasonable fee in the circumstances on an agent and client, client paying, basis.

3.11 In the case of fee notes issued by Faculty Services Limited, all fees should be paid to Faculty Services Limited, and not directly to the Advocate.

3.12 An Advocate may not accept a general retainer from the instructing person.

## APPENDIX E

### Guidance as regards the Proceeds of Crime, Money Laundering and Terrorist Financing

#### 1. Proceeds of Crime, Money Laundering and Terrorist Financing

Members are required to acquaint themselves with the relevant law and associated duties relating to Proceeds of Crime and Money Laundering, and in particular:

- The Proceeds of Crime Act 2002, as amended;
- The Terrorism Act 2000, as amended;
- The scope of common law legal professional privilege as it relates to the disclosure requirements contained in sections 327 – 329 of the Proceeds of Crime of Act 2002 and the corresponding provisions of the Terrorism Act;
- The judgment of the Court of Appeal in *Bowman v Fels [2005] EWCA Civ 226*, and;
- The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

Broadly speaking, section 330 of the Proceeds of Crime Act 2002 provides that a person may commit an offence if he knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering and he does not make a required disclosure. However, the person does not commit an offence by failing to disclose where he is a professional legal adviser and the information on which his knowledge or suspicion is based came to him in privileged circumstances. For these purposes information comes to a professional legal adviser in privileged circumstances *inter alia* where it is communicated or given to him by a client in connection with the giving by the adviser of legal advice, by a person seeking legal advice, or by a person in connection with legal proceedings or contemplated legal proceedings. The exceptions to the requirements to disclose do not apply to information or matters communicated or given to a legal adviser with the intention of furthering a criminal purpose.

#### 2. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017: Application

It is thought unlikely that the Regulations apply to an Advocate's practice in so far as he provides

legal advice on contentious matters, on matters subject to contemplated or on-going litigation and other contemplated or on-going civil or criminal proceedings or any form of alternative dispute resolution procedure.

#### *Financial or heritable property transactions (Regulation 12)*

The Regulations apply to independent legal professionals who by way of business provide legal services to others when participating in specified financial or heritable property transactions, namely:

- the buying or selling of heritable property or business entities,
- managing client money, securities or other assets,
- opening or management of bank, savings or securities accounts
- organisation of contributions necessary for the creation, operation or management of companies, or
- the creation, operation or management of trusts, companies, foundations or similar structures.

Participating in a transaction in this context includes assisting in its planning or execution, or otherwise acting for a client in it. However, as the provision of legal advice will not generally be viewed as participating in a transaction for these purposes it is thought that Regulation 12 does not apply to Advocates **when** advising on such transactions.

#### *Tax advice (Regulation 11)*

The Regulations apply, separately, to tax advisers. “Tax adviser” in this context means a practitioner who by way of business provides advice about the tax affairs of others. An Advocate providing advice about the non-contentious tax affairs of a client must consider whether he is subject to the Regulations when providing such services. If he is uncertain about the extent to which the Regulations apply to his work he should seek legal advice or **simply assume that they apply.**”

### 3. Obligations of Advocates carrying on work subjecting them to the Regulations

An Advocate carrying on work subjecting him to the Regulations is under various obligations. These apply only to the extent he carries on such work and not otherwise.) Particular attention is

drawn to the following.

#### 4. Authorisation (Regulation 26)

The Faculty is the supervisory authority for Advocates subject to the Regulations. An Advocate may not carry out work subjecting him to the Regulations unless he has been authorised to do so by the Faculty. The Faculty will maintain a register of Advocates permitted to carry out such work to be known as the Anti-Money Laundering Register. Applications for inclusion on the Register shall be in such form as the Faculty shall reasonably require. Applications must be accompanied by an up to date criminal records check. Applications will be granted unless the applicant has committed a relevant offence. Should a registered Advocate be convicted of a relevant offence his authorisation will cease to be valid. Relevant offences for these purposes are those specified in Schedule 3 to the Regulations. Any registered Advocate who is convicted of such an offence must inform the Faculty immediately. Registration confers authority to carry on regulated work until the end of the calendar year of the date of registration. Applications for inclusion on the Register shall be renewed annually. It is a condition of registration that a registered Advocate must complete 1 hour of CPD on money laundering in each year.

#### 5. Risk Assessment (Regulation 18)

A registered Advocate must take appropriate steps to identify and assess the risks of money laundering and terrorist financing to which the part of his business which subjects him to the Regulations is exposed. In carrying out the required risk assessment he must take into account relevant information provided by the Faculty. He must also take into account risk factors including those relating to his clients, the countries or areas in which he practices, the nature of the services he offers, the type of transactions he advises on, and the source of his instructions. He must keep an up-to-date record of the steps he has taken in this regard.

#### 6. Risk Management (Regulation 19)

A registered Advocate must establish and maintain a written record of policies, controls and procedures to mitigate and manage the risks of money laundering and terrorist financing identified in any such risk assessment. These must include risk management practices, customer due diligence, reliance and record keeping. They must provide for scrutiny of any case where a

transaction is complex and unusually large or there is an unusual pattern of transactions, or a transaction that has no apparent economic or legal purpose. They should also provide for scrutiny of cases where the clients are secretive or which involve higher risk countries which do not have effective anti-money laundering/counter terrorist financing systems. A registered Advocate must also have in place procedures to determine whether a client or the beneficial owner of a client is a politically exposed person and to manage the enhanced risks associated with dealing with such a person (Regulation 35).

### 7. Customer Due Diligence (Regulations 27, 28, 30)

A registered Advocate must apply customer due diligence when he establishes a business relationship with a client to provide advice on matters covered by the Regulations, or if he later suspects money laundering or terrorist financing, or doubts the veracity or adequacy of documents or information previously obtained for the purposes of identification or verification (Regulation 28). Exceptionally, a registered Advocate may verify a client, any person acting on the client's behalf, and the client's beneficial owner during the establishment of a business relationship where that is necessary not to interrupt the normal flow of business and there is a low risk of money laundering and terrorist financing, as long as this is completed as soon as practicable after contact is first established. Otherwise verification must be completed before the establishment of a business relationship (Regulation 30).

By means of customer due diligence a registered Advocate:

- must identify his client and verify the client's identity on the basis of documents or information from a source independent of the client
- assess the purpose and intended nature of the transaction.
- where the client is a corporate body, he must identify and verify its name, its company number, the address of its registered office and its principal place of business. Except where it is listed on a regulated market he must take reasonable measures to determine and verify the law to which it is subject, its constitution, the names of its board of directors and the senior persons responsible for its operations.
- where the client is beneficially owned by another person he must identify the beneficial owner and take reasonable measures to verify the identity of the beneficial owner. If the



beneficial owner is a legal person (including trust or a company) he must take reasonable measures to understand its ownership and control structure. If the client is a company listed on a registered exchange these requirements do not apply.

- where a person such as a solicitor or other instructing agent purports to act on behalf of a client, he must verify that person is authorised to act on the client's behalf, identify the person so acting, and verify that person's identity on the basis of documents or information obtained from a reliable independent source.

A registered Advocate does not satisfy his obligation to identify a beneficial owner merely by relying solely on the register of people with significant control kept by a company or limited liability partnership, or partnership or delivered to the registrar of companies. In the case of a body corporate he may treat the senior person responsible for managing it as its beneficial owner. But he must have exhausted all possible means of identifying the beneficial owner and must keep a written record of the steps he has taken to do so.

The ways in which a registered Advocate complies with the requirements in relation to customer due diligence must reflect his risk assessment and his assessment of the particular risks presented by the transaction. He may not be required to continue to apply customer due diligence where it would result in the offence of tipping off under section 21D of the Terrorism Act 2000 or section 333A of the Proceeds of Crime Act 2002.

The essence of customer due diligence is that a registered Advocate, as the relevant person for the purposes of the Regulations, must know who he is really acting for, and obtain information as to his client's intention and purpose for instructing him. Customer due diligence requires him to carry out both identification and verification, i.e. he must obtain details of the client's identity, and evidence that supports that identity. While he may derive assistance from his clerk in carrying out customer due diligence, the responsibility under the Regulations for doing so remains entirely his.

#### 8. Inability to Apply Customer Due Diligence (Regulation 31)

Where a registered Advocate is obliged to carry out customer due diligence and is unable to apply

such measures he must:

- Not establish a business relationship with the client,
- Terminate any existing business relationship, and
- Consider whether he is required to make a disclosure by Part 3 of the Terrorism Act 2000 or Part 7 of the Proceeds of Crime Act 2002.

These obligations do not apply where an Advocate acting as an independent legal professional or a tax adviser is in the course of ascertaining the legal position for a client or performing the task of defending or representing that client in, or concerning legal proceedings, including giving advice on the institution or avoidance of proceedings.

### 9. Enhanced Customer Due Diligence (Regulation 33)

A registered Advocate providing advice on matters covered by the Regulations must perform enhanced customer due diligence where:

- There is a high risk of money laundering or terrorist financing;
- The client is established in a high risk third country;
- The client is a politically exposed person or a family member or close associate of a politically exposed person;
- The client has provided false or stolen identity documentation, or;
- A transaction is complex or unusually large or there is an unusual pattern of transactions or there is no apparent economic or legal purpose.

Depending on the circumstances, enhanced customer due diligence may involve examining the background and purpose of a transaction, determining whether the transaction appears to be suspicious, seeking additional independent, reliable sources to verify information made available, and taking additional measures to understand better the background, ownership and financial situation of the client and other parties to the transaction.

### 10. Politically Exposed Persons (Regulation 35)

In addition, a registered Advocate must have in place risk-management systems and procedures to determine whether a client or the beneficial owner of a client to whom advice on matters subject to the Regulations is to be given is a politically exposed person or a family member or known close associate of a politically exposed person and to manage the enhanced risks arising from his

business relationship with such a person. He must take adequate measures to establish the source of wealth and source of funds which are involved in the proposed business relationship.

#### 11. Simplified Customer Due Diligence (Regulation 37)

A registered Advocate may apply simplified customer due diligence measures in relation to a particular business relationship or transaction if it presents a low risk of money laundering or terrorist financing. Where he does so he must continue to comply with the requirements of Regulation 28 but may adjust the extent, timing or type of measures he takes to reflect his assessment of the risk of money laundering or terrorist financing.

#### 12. Reliance (Regulation 39)

A registered Advocate obliged to carry out customer due diligence may, in certain circumstances, rely on a third party to apply such measures. Notwithstanding any such reliance he remains liable for any failure to apply such measures. The third party must be subject to the Regulations (such as solicitors, auditors, insolvency practitioners, accountants and tax advisers) or otherwise fall within the categories in Regulation 39(3). It is a condition of such reliance that the registered Advocate immediately obtain from the third party all the information needed to satisfy his obligations in relation to the doing of customer due diligence under Regulation 28(2) to (6) and (10); he must also enter into arrangements with the third party which enable him to obtain immediately on request copies of any relevant identification and verification data, and the arrangement must oblige the third party to retain copies of relevant data and documents for at least five years.

#### 13. Record Keeping (Regulation 40)

A registered Advocate must keep records of customer due diligence documents and supporting records and information for a period of five years beginning on the date which he knew or had reasonable grounds to believe the transaction was complete or the business relationship had come to an end. On the expiry of this period he must delete any personal data unless he is otherwise obliged or permitted to retain it.