

**GUIDE TO THE  
PROFESSIONAL CONDUCT  
OF ADVOCATES**

**FACULTY OF ADVOCATES**



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PROFESSIONAL CONDUCT  
OF ADVOCATES**

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## PREFACE

It is now 450 years since the inauguration of the College of Justice, of which advocates are members, and 400 years since the first record of the office of Dean of the Faculty of Advocates. Throughout those years, it has never been felt necessary to produce a code of written rules with which an advocate is expected to comply. Nor has such a code become necessary now. 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.

The Royal Commission on Legal Services in Scotland, which reported in 1980, recommended (paragraph 18.4) that "the Faculty of Advocates should promulgate an authoritative written guide to the professional conduct expected of advocates which should be supplied to advocates and be available to the public". In so recommending, the Royal Commission said: "We believe that professional rules for advocates could be stated ... succinctly in the form of general principles."

This Guide is, in part, a response to the recommendation of the Royal commission. But it goes beyond a statement of general principles most of which are, in any event, set out in "Declaration of Perugia" on the principles of professional conduct of the Bars and Law Societies of the European Community, which is printed as an Appendix to this Guide.

The Guide seeks, in the first place, to set the work of the advocate in its correct legal context. This is essential to a proper understanding of his status and of his professional duties. In the second place, the Guide is truly a "guide" for the advocate, particularly the young advocate starting on his career.

In places, 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.





## 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. Subject to the rights of individuals to plead on their own behalf and the limited rights of Scottish solicitors and of lawyers from other member states of the European Community, only 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 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 wider powers to make rulings on matters of professional conduct and 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 status of an advocate, and the legal and professional rights and obligations which flow from it, 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 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*. In essentials, although not perhaps in every detail, this remains, one hundred years later, the clearest and most reliable statement of the advocate's position -

"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. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes into court to take the retainer of the party who first applies to him. It follows,

also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives *honoraria* in consideration of these services. Another result is, that while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel

to get rid of his client. On the other hand, the 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 judgement 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 are 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

It follows from the fact that an advocate acts as such in performance of an office and has no contractual relationship with his client, 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. For the same reason, where the law requires that the client should be present in court or be "represented", the presence of an advocate is not sufficient. Again, it is the function of a solicitor to "represent" the client before the court. 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 solicitor. Equally, although it is said that the client or his solicitor "instructs an advocate" or "instructs counsel", this does not mean that he can give orders as to what the advocate must do or how he must conduct a case.

1.2.3 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.

1.2.4 Since the advocate "is not at liberty to decline, except in very special circumstances, to act for any litigant" and since "in the performance of his duty he must be entirely

independent" (see Lord President Inglis, paragraph 1.2.1), it follows that he cannot enter into partnership with another advocate or with any other person in connection with his practice as an advocate.

## 2. **THE CARDINAL PRINCIPLE OF PROFESSIONAL CONDUCT**

2.1 "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". (Declaration of Perugia, paragraph II) adopted by the Advocate-General in *Gulling v. Barreau de Colmar* 292/86, paragraph 14.

2.2 An advocate must, at all times, show himself to be worthy of the trust of those who deal with him: his client, his instructing solicitor, judges, other members of the legal profession (especially those who act for an opposing party) and the public generally. This is the cardinal principle of professional conduct and is almost always the surest guide in case of doubt.

2.3 The principle applies generally, not only in courts where advocates have exclusive right of audience, but also in other courts and tribunals, and in advisory work. It may also apply to an advocate's non-professional activities since his conduct there may affect the trust which others have in him in his professional capacity.

## 3. **THE DUTY TO SEEK ADVICE**

3.1 If an advocate is in any doubt as to the propriety of a particular course of conduct, he should consult the Dean. In explaining his position to the Dean, he must be absolutely frank and conceal nothing which might be relevant to the advice he seeks.

3.2 If he cannot consult the Dean, the advocate should consult the Vice-Dean.

3.3 If he cannot consult either the Dean or the Vice-Dean, then depending on the circumstances and the nature of the problem, the advocate should consult one of the other Faculty office-bearers, his devilmaster or the senior member of Faculty available.

3.4 If an advocate is told by the Dean or the Vice-Dean that it is his duty to adopt a particular

course, 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 the Vice-Dean.

#### 4. **INSTRUCTIONS**

##### 4.1 **GENERAL**

4.1.1 As explained by Lord President Inglis (see paragraph 1.2.1), an advocate does not enter into any contractual commitment. Nevertheless, by accepting instructions, he undertakes a professional commitment on which the courts and those instructing him are entitled to rely.

4.1.2 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.

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

4.2.1 An advocate may act in a professional capacity only on the instructions of a Scottish solicitor subject to the following exceptions and to paragraph 4.2.2 to 4.2.4 -

- (a) where he is instructed by the Chief Executive of a local authority;
- (b) where he is instructed by a Patent Agent on matters relating to Patents, Trade Marks or Designs or for the purposes of appearance before the Patents Appeal Tribunal, the Controller general of Patents or the Registrar of Trade Marks;
- (c) where he is instructed by a Parliamentary Agent; or
- (d) where he is instructed by a lawyer furth of Scotland in matters in which no litigation in Scotland is contemplated or in progress.

4.2.2 An advocate may accept instructions from an advocate or barrister who is employed as a legal adviser by any body corporate, local authority or government department or agency on the following matters -

- (a) to give advice, including the drafting and revising of documents, on matters affecting its affairs;



(b) to conduct proceedings on its behalf, other than proceedings in a Scottish court.

4.2.3 An advocate may accept instructions from a Scottish solicitor who is employed as a legal adviser by any body corporate, local authority or government department or agency on the following matters -

(a) to give advice, including the drafting and revising of documents, on matters affecting its affairs;

(b) to conduct proceedings on its behalf, other than proceedings in a Scottish court;

and

(c) to conduct proceedings on its behalf in a Scottish court, but only if the solicitor has fulfilled the requirements of the court for practice there as a solicitor.

4.2.4 An advocate may accept instructions from a Scottish solicitor who is employed as such by a firm of chartered accountants, on the following matters only -

(a) to give advice on accounting or tax matters affecting the firm's clients generally;

and

(b) to give advice, including the drafting and revising of documents, on particular accounting or tax problems affecting the individual clients of the firm.

But he is free to decline such instructions if he thinks fit, and he must not accept instructions from such a solicitor to conduct proceedings of any kind.

4.2.5 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.

4.2.6 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 1.2.2 above.

4.2.7 While there is no rule which prevents an advocate giving free 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.

4.3 **WHEN IS AN ADVOCATE BOUND TO ACCEPT INSTRUCTIONS?**

4.3.1 In the words of Lord President Inglis (see paragraph 1.2.1 above), an advocate "is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and ... is bound in any cause that comes into court to take the retainer from the party

who first applies to him". This rule is commonly known as the "cab-rank" rule.

- 4.3.2 The rule as stated by Lord president Inglis must be understood in the context of his time, when virtually all instructions to advocates were accompanied by payment of his fee in cash. The rule survives as a "rule" in the sense that an advocate must accept instructions which are accompanied by actual payment (in cash or by cheque) of a fee which is reasonable in all the circumstances including the seniority and experience of the advocate concerned and the nature of the work instructed. It is, however, only very rarely that a solicitor will seek to enforce the rule now, principally because it would not be in his client's interests to do so.
- 4.3.3 Nevertheless, the spirit of the rule is maintained: an advocates may not pick and choose between clients according to his personal preference, or refuse to act for a client for whom he is otherwise professionally at liberty to act. This is so for three reasons. First, it ensures that a litigant or accused person will not be deprived of professional help because he or his case is unpopular, unattractive or unwelcome to those in authority. Second, it plays a part in ensuring that the advocate does not allow his personal prejudices or predilections to influence his professional conduct or judgment. Third, it protects the advocate against improper pressure from those who would prefer that the case or defence should not be presented.
- 4.3.4 There are, however, circumstances in which an advocate is entitled, and indeed bound, to refuse instructions.
- 4.3.5 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 4.3.7 below).
- 4.3.6 An advocate may not under any circumstances agree to act on the basis of a *pactum de quota litis* - an agreement by which the advocate will receive a proportion of any sum recovered by the client or will receive a benefit in kind derived from the subject matter of the litigation.
- 4.3.7 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.
- 4.3.8 An advocate may not accept instructions on any basis which would deprive him of responsibility for the conduct of the case or fetter his discretion to act (in consultation with the solicitor and the client) in accordance with his professional judgement and public duty.
- 4.3.9 An advocate may not accept instructions to act in circumstances where, in his professional opinion, the case is unstatable in law or where the case is only statable if facts known to him are

misrepresented to, or concealed from, the court. If such circumstances arise after he has accepted instructions, he should decline 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 unstatable 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 unstatable.

4.3.10 An advocate should not accept instructions to act for, or advise, more than one party in the same proceedings if there is a conflict of interest between them. Where a conflict of interest emerges later, he cannot normally continue to act for any one of the parties concerned without the express consent of the other(s).

4.3.11 (1) A delicate situation may arise where counsel has acted for, or advised, party A in one matter (or is still doing so), and he is instructed to act for, or advise, party B in another matter where the interests of A and B are, or may be, in conflict. On the other hand, a client cannot, by instructing counsel in one matter, prevent him from acting against him in any other matter. (He can, if he wishes, seek to achieve this by payment of a retainer.) On the other hand, counsel cannot use, for the benefit of a new client, knowledge which he has obtained in confidence from another client with an opposing interest. (The knowledge may be directly relevant to the new matter; or it may be indirectly relevant in that counsel is better able to suggest profitable lines of enquiry, avoid unprofitable ones, or generally use the knowledge to gain a tactical advantage.) Also, it may prove difficult for counsel to act with full vigour in the interests of his new client if he feels inhibited by the fact that he has acted, or is acting, for an opposing party. This may only become apparent at a later stage in the proceedings. Thus, even if the conflict is not immediately apparent, it may be

in the best long-term interests of the new client that a different counsel should act for him from the beginning.

(2) In such a situation, counsel must always consider very carefully whether it is proper for him to accept the new instructions, weighing up all the considerations mentioned in the previous paragraph. This is particularly so where the clients concerned are individuals whose personal affairs are involved. If counsel is in doubt, this will probably be sufficient in itself to indicate that he should not accept the new instructions. Further, unless it is clear that no conflict can arise, counsel should tell the solicitor tendering the new instructions that he (counsel) has previously acted for the opposing party since the solicitor may wish to withdraw his instructions. It is not appropriate to *discuss* the matter with either of the solicitors concerned since, *ex hypothesi*, each of them is bound only to consider the interests of his own client. Still less it is appropriate to discuss the matter with the clients who cannot be expected to appreciate the implications, and ought not to be placed in the position of taking a decision which is essentially one of professional ethics. If necessary, counsel should consult the Dean.

4.3.12 Similar difficulties may arise where counsel is instructed to act against someone whom he knows personally, or with whose personal affairs he is familiar for other reasons. In such circumstances, the same considerations apply.

- 4.3.13 An advocate should not accept instructions where it is clear that instructions already accepted make it impossible for him to comply with the new instructions.
- 4.3.14 An advocate is entitled, but not bound, to act on a "speculative" basis. The nature of "speculative actions" and the special rules applying to them are explained in paragraphs 5.10 and 9.6 below.
- 4.3.15 While not refusing to accept instructions, an advocate may ask his clerk to suggest to the instructing solicitor that another advocate should be instructed. This may be appropriate in the following circumstances -
- (a) in the case of instructions to appear in court, where the advocate foresees a potential clash of commitments which might make it necessary to return the instructions later;
  - (b) in the case of instructions for written work, where the advocate is not in a position to do the work within an acceptable period of time; or
  - (c) where, because of the specialised nature of the subject matter, the advocate feels that the client needs the services of an advocate with greater specialist knowledge or experience than himself.

#### 4.4 WHAT CONSTITUTES ACCEPTANCE OF INSTRUCTIONS?

4.4.1 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.

4.4.2 The making of entries in the diaries kept by the advocates' clerk does not constitute the giving or acceptance of instructions. (See also paragraph 4.5.3 below.)

4.4.3 Except in circumstances of great urgency, 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 solicitor or which are the subject of oral arrangements between a solicitor and his clerk. (See also paragraph 4.5.2 below.)

4.4.4 The retainer does not constitute instructions. The only function and effect of a retainer is to give the client, whose retainer has been accepted, priority in instructing counsel in certain specific respects. (See paragraph 5.11 below.)

#### 4.5 PRIORITY OF INSTRUCTIONS

4.5.1 The general rule is that instructions take priority according to the precedence of the court

concerned. The order of precedence for this purpose is -

Court of Justice of the European Communities  
House of Lords  
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

- 4.5.2 Subject to paragraph 4.6.1, the general rule is that instructions take priority according to the date, or if on the same date the time, when they are delivered or, if oral when they have been accepted by the advocate. Thus instructions to appear in the Inner House for the Single Bills take precedence over instructions to appear for any kind of business in the Outer House: see also paragraph 9.4.3.
- 4.5.3 Entries in the diaries kept by the advocates' clerks confer no priority whatsoever.
- 4.5.4 Notwithstanding the general rules stated in paragraph 4.5.1 and 4.5.2, the following considerations are relevant in determining which instructions should be accepted -
- (a) in the case of an appeal, that counsel has appeared for the client in the court below;
  - (b) in the case of an adjourned diet or continued hearing, that counsel appeared at the previous diet or hearing;
  - (c) 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;
  - (d) 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;
  - (e) that the client and/or the instructing solicitor has come to rely to an unusual extent on counsel's advice and guidance;
  - (f) 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;
  - (g) that the instructing solicitor has taken steps beforehand to check the availability of counsel with counsel's clerk; and
  - (h) 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.
- 4.5.5 The extent to which any of the foregoing considerations outweigh the others or justify a

departure from the general rules 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 consult the Dean.

#### 4.6 RETURN OF INSTRUCTIONS

4.6.1 As explained in paragraph 4.1.1, acceptance of instructions involves a professional commitment on which the client, the instructing solicitor and the court are entitled to rely. An advocate is not entitled without good cause to return instructions once accepted so as to relieve himself of that professional commitment.

4.6.2 On the other hand, an advocate cannot be in two places at once and it is unavoidable that in some circumstances instructions will have to be returned. (This is particularly liable to happen in cases before the High Court of Justiciary on circuit.)

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

4.6.4 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) except as provided in paragraph 9.4.2 below, an advocate owes a duty to the client and the court 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 cases 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 4.5.4 above.

4.6.5 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.

- 4.6.6 Where a clash of commitments is foreseeable although not yet certain, an advocate must take steps to ensure 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.
- 4.6.7 In the case of proceedings before the High Court of Justiciary on appeal, there is a particular obligation on counsel who represented the appellant at the trial and has recommended an appeal to present that appeal.
- 4.6.8 In all cases 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.
- 4.7 PASSING ON INSTRUCTIONS TO ANOTHER ADVOCATE
- 4.7.1 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.
- 4.7.2 There are a few well-recognised situations in which counsel may pass on instructions without the express concurrence of the instructing solicitor. These are where the work to be done is of a routine character (such as *some* motions in the Motion Roll of the Court of Session) and/or where instructions are delivered at short notice, counsel is already engaged elsewhere and there is no reasonable opportunity to consult the instructing solicitor.
- 4.7.3 In passing on instructions, counsel must bear in mind the considerations mentioned in paragraph 4.6.4 (b) and (e) above. In particular, he should wherever possible (e.g. by noting relevant points on the instructing letter), put his substitute in a position to deal with the matter as well as he could have dealt with it himself.
- 4.8 SENIOR COUNSEL
- 4.8.1 "Senior Counsel" are those who have received her Majesty's commission as Queen's Counsel (or "silk"). The rules governing the instruction of senior counsel are derived in part from the practice of the Bar before the introduction of a Roll of Queen's Counsel in Scotland (in 1897) and in part from a Resolution of Faculty on 4th February 1977 following upon the report of the Monopolies and Mergers Commission in 1976.
- 4.8.2 In applying for silk, an advocate indicates his wish to "give up writing" - i.e. to be relieved of the task of drafting pleadings and other papers - and to have the assistance of junior counsel when appearing in court.
- 4.8.3 Senior counsel is entitled, but not bound, to accept instructions to appear in court without a junior. He is entitled to be given the opportunity to consider whether he is prepared to accept

such instructions. In deciding whether to accept such instructions, he is entitled to take into account his own personal circumstances and commitments as well as all the other circumstances of the case.

4.8.4 Senior counsel may draft pleadings incidental to a court appearance where he has agreed to accept instructions to appear without a junior.

## 5. FEES

5.1 Fees in this section mean fees for work instructed by a solicitor and retainers.

5.2 It is thought that, as the law stands, an advocate is not entitled to sue for his fees unless the solicitor has claimed payment of them from the client and the client has paid them to the solicitor - *Cullen v. Buchanan* (1862) 24 D. 1132; *Keay v. A.B.* (1837) 15 S. 748 (note). See also *Drummond v. The Law Society of Scotland* 1980 S.C. 175.

5.3 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.

5.4 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.

5.5 Fees are normally charged after the work is done. Faculty Services Limited, 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 within the time agreed between the Faculty and the Law Society. Failing such challenge, the solicitor is presumed to agree that the fee proposed is reasonable and comes under a professional obligation to pay it.

5.6 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.

5.7 Except in Legal Aid cases, where fees are regulated 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. 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.

5.8 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.



- 5.9 It is not appropriate for counsel to negotiate fees with his instructing solicitor. This is the function of counsel's clerk. All fees should be paid to Faculty Services Limited. If any fee happens to be paid direct to counsel, counsel must account for it forthwith to Faculty Services Limited. Counsel should not under any circumstances whatever discuss or negotiate fees with or receive fees directly from the lay client.
- 5.10 *Speculative actions.* It is permissible for counsel to accept instructions "on the footing that the [client is] unable to meet the expenses of the litigation and that there [will] be no remuneration for [his] services except in the event of success... It has long been recognised by our courts that this is a perfectly legitimate basis on which to carry on litigation and a reasonable indulgence to people who, while they are not qualified for admission to [Legal Aid], are nevertheless unable to finance a costly litigation", per Lord President Normand in *X Insurance Co. v. A. & B.* 1936 S.C. 225, 238-9. The rules governing the conduct of speculative actions are set out in paragraph 9.6 below. So far as fees are concerned, counsel is only entitled to the fees recovered on taxation from the party found liable in expenses. (The instructing solicitor may include fees to counsel, although not paid, in his account of expenses - see *Sim v. Scottish National Heritable Property Co. Ltd.* (1889) 16 R. 583 and earlier cases there cited.) Counsel may not agree to act on the basis that additional fees will be paid by the client out of the principal sum recovered in the action - see paragraph 4.3.6 above.
- 5.11 *Retainers* (see also Rules by the Dean of Faculty as to Retaining Fees, Parliament House Book, page A553). The purpose of a general retainer is to ensure that, during the currency of the retainer, counsel will not accept instructions to advise or appear for any other party in any proceedings involving the client giving the retainer. A special retainer has the same purpose but is restricted to the specific subject matter of the retainer.
- A general retainer endures for the lifetime of the client and counsel, unless otherwise specified.
- A special retainer falls after one year if not renewed or, in the case of a depending process, on completion of the case or matter to which the retainer relates.
- A general retainer falls if the client fails to instruct the advocate retained in any case or matter whatever. A special retainer falls if the client fails to instruct the advocate retained in the case or matter to which the retainer relates.
- There is no rule as to the amount of the fee payable for a retainer, other than that it must be reasonable in the circumstances.
- 5.12 *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 the full 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 under paragraphs 4.6.1-8 above, has kept himself free from other commitments, a fee appropriate to the circumstances may be charged. 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.

5.13 Paragraph 5.12 applies equally, *mutatis mutandis*, where a case is settled after the hearing has begun.

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

6.1 An advocate owes a duty of loyalty to the Faculty, to his fellow members and, in particular, to the Dean.

6.2 The efficient conduct of litigation under the adversarial system depends on mutual trust between counsel acting for different parties. Discussion and negotiation between counsel may achieve settlement of a case, or at least dispose of incidental points which would otherwise take up time and cause unnecessary expense. It is therefore essential that counsel should be able to discuss cases with each other on the basis that confidences will be respected and that agreements and undertakings will be honoured.

6.3 It must, however, also be remembered that counsel has a duty to act, together with the instructing solicitor, in the best interests of the client. Counsel cannot assume that everything said to opposing counsel will be treated as confidential and not disclosed to the solicitor or the client. It is therefore desirable, at the outset of a discussion between counsel, for them to make clear to each other the basis of the discussion. If it is intended to disclose information on a basis of confidence, this should be stated. Correspondingly, if one party to the discussion is not prepared to treat information as confidential he should say so before the information is disclosed.

6.4 Where an agreement is reached between counsel, or an undertaking is given by one counsel to another, it is binding in honour between them and should be reported as soon as possible to their respective instructing solicitors so that it can, if necessary, be incorporated in a formal exchange of letters. Alternatively, a joint minute should be drafted and initialled by counsel before being sent to the instructing solicitors. Counsel should bear in mind that, once recorded in writing, the written agreement supersedes the verbal agreement between counsel.

## 7. **DUTIES IN RELATION TO THE INSTRUCTING SOLICITOR**

7.1 A corollary of the advocate's independence from the solicitor (see paragraph 1.2.4) is the solicitor's independence from the advocate. An advocate must respect the solicitor'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 a solicitor 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 solicitor should be given several names from which to make his own choice after consultation with counsel's clerks.)

7.2 An advocate must also respect the fact that the solicitor'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 solicitor-client relationship or destroy the trust which the client has in the solicitor.

- 7.3 When an advocate has reason to believe that a solicitor has been guilty of professional misconduct (as opposed to professional negligence, as to which see paragraph 8.1.3), 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.
- 7.4 If an advocate feels compelled to criticise the conduct of a solicitor 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 solicitor to explain what he has done and why before criticising his conduct.
- 7.5 An advocate should not attend a consultation without his instructing solicitor or a representative of his firm being present. This protects 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.
- 7.6 In exceptional circumstances, it may be unavoidable that counsel has to speak to the client without the solicitor being present. Such an occasion will however be rare, and when it arises the solicitor should be told as soon as possible what transpired.
- 7.7 There is no rule against an advocate going to a solicitor's office to collect papers or to attend a consultation. Nor is there any rule which prevents an advocate accepting a social invitation from a solicitor or giving such invitation to a solicitor. In doing so, however, the advocate should bear in mind the considerations mentioned in preceding paragraphs and in chapter 10 below.

## 8. DUTIES IN RELATION TO THE CLIENT

### 8.1 GENERAL

- 8.1.1 *Confidentiality.* It is a fundamental duty of an advocate not to disclose or use any information communicated to him in his professional capacity other than for the purpose for which it was communicated to him, so long as it remains in confidence and has not otherwise been made public. Any conversations relating to a case which take place between an advocate and counsel on the other side, including Crown Counsel, are confidential and should not be revealed to anyone other than the client or those who are professionally concerned in the case. If he wishes to discuss a case with a colleague - for example for the purpose of seeking his advice about the law - he should do so only in terms which do not disclose, or risk disclosure of, the identity of the client or other parties involved.

This applies equally where counsel is asked to give a written opinion or to advise in consultation. Counsel should remember that there may be good reasons, unknown to him, why

the client or the instructing solicitor would not even wish it to be known that his advice has been sought. Idle gossip about cases and clients, even if the facts are publicly known, is damaging to the reputation of counsel and of the profession.

8.1.2 *Duty to uphold the interests of the client.* An advocate should remember that the client relies on him to exercise his professional skill and judgment in his (the client's) best interests. He must at all times do, and be seen to do, his best for the client and he must be fearless in defending his client's interests, regardless of the consequences to himself (including, if necessary, incurring the displeasure on the bench). But he must also remember that his client's best interests require him to give honest advice however unwelcome that advice may be to the client or his solicitor, and that the advocate's duty to the client is only one of several duties which he must strive to reconcile.

8.1.3 *Conflict between client and instructing solicitor* (e.g. where the client may have a claim form professional negligence against his solicitor). Where it appears to counsel that a conflict of interest has arisen or may arise between the client and the instructing solicitor, 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 solicitor. It will depend on the circumstances how this should be done. The great majority of solicitors can be relied upon, when the conflict has been pointed out, 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 solicitor 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 solicitor concerned.

8.1.4 *Withdrawing from acting.* In any case 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 the advice of the Dean, and if necessary obtain an adjournment to do so.

## 8.2 SPECIAL DUTIES IN CRIMINAL CASES

8.2.1 *Pleas.* 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.

8.2.2 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.

8.2.3 *Confessions.* Where an accused person makes a confession to counsel and counsel is satisfied that in law such confessions amount 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 9.2.2.5 and 9.2.2.6 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.

8.2.4 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.

8.2.5 *Acting for co-accused.* Save in the most exceptional circumstances, counsel should not accept instructions to act for more than one accused or appellant.

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

*Note:* The rules stated in this Chapter apply, in principle, to proceedings before any court or tribunal dealing with issues of law or fact, except insofar as it is established, by general ruling or by a ruling of the judge or chairman, that a rule does not apply.

### 9.1 DUTIES IN RELATION TO MATTERS OF LAW

9.1.1 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.

- 9.1.2 Where there is no contradicter, an advocate should inform the court of authorities relevant to that case, even where such authority may be against his interest.
- 9.1.3 In proceedings before the House of Lords, counsel should have in mind the observations of Lord Chancellor Birkenhead in *Glebe Sugar Refining Co. v. Greenock Harbour Trustees* 1921 S.C. (H.L.) 72, 73-74.
- 9.2 DUTIES IN RELATION TO MATTERS OF FACT
- 9.2.1 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, directly or indirectly, deceive or mislead the court.
- 9.2.2 *In Court.*
- 9.2.2.1 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 after evidence has been led, upon the evidence.
- 9.2.2.2 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 of the accused.
- 9.2.2.3 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.
- 9.2.2.4 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 which could, if necessary, be led in support of the suggestion.
- 9.2.2.5 *Confessions to counsel by accused persons.* It follows from the rules stated in paragraphs 9.2.2.3 and 9.2.2.4 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.
- 9.2.2.6 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;
- (e) make submissions as to the sufficiency in law of the evidence to support a verdict of guilty.

9.2.2.7 *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.

9.2.3 *Pleadings.* An advocate must have a proper basis on precognition or in the light of consultation with the client for stating a fact in any pleadings.

9.2.4 *Interviewing witnesses*

9.2.4.1 The general rule is that an advocate should not interview, or discuss a case with, or in the presence of, a potential witness.

9.2.4.2 There are two principle exceptions to this rule: an advocate may discuss the case with (a) the client and (b) skilled witnesses whose assistance is necessary for the proper understanding and preparation of the case. Even in these cases, counsel must avoid doing or saying anything which could have the effect of, or could be construed as, inducing the client or skilled witness to "tailor" his evidence to suit the case.

9.2.4.3 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.

9.2.4.4 Some cases cannot be properly prepared or conducted if the foregoing rules against interviewing potential witnesses are followed strictly according to the letter. The client may be accompanied at consultation 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.

9.2.4.5 An advocate may not, except with the consent of his opponent and of the court, communicate with *any* witness, including his client, once that witness has begun to give evidence until that evidence is concluded.

9.2.4.6 As to interviewing the client or witnesses in the absence of the instructing solicitor, see paragraphs 7.5 and 7.6 above.

### 9.3 THE DUTY OF COURTESY

9.3.1 Discourtesy is as offensive in court as it is outside, and is equally detrimental to the reputation of counsel and of the Bench, to the interests of the client and to public confidence in the administration of justice.

9.3.2 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.

9.3.3 There is a long-standing tradition of mutual trust and courtesy between the bench and bar which must be respected.

9.3.4 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 always be made in open court to the bench. It is not sufficient to offer an apology through the macer or the clerk of court.

### 9.4 THE DUTY TO ATTEND COURT

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

9.4.2 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 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.

9.4.3 Since instructions to appear in the High Court of Justiciary and the Inner House take precedence over instructions to appear in the Outer House, it follows that 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.

9.4.4 If counsel engaged in a proof or other hearing in the Outer House expects to be in difficulty because he is required 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.

9.4.5 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.

9.4.6 For the reasons mentioned in paragraph 1.2.2 above, only the solicitor 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 solicitor (see paragraphs 7.5 and 7.6 above). The advocate is not responsible for ensuring the attendance of his instructing solicitor and is entitled, but never bound, to proceed with the case in the solicitor's absence if the court permits him to do so. He must, however, be satisfied (a) that the absence of the solicitor 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 solicitor.

## 9.5 RESPONSIBILITY FOR PLEADINGS IN CIVIL ACTIONS

9.5.1 Subject to certain exceptions (e.g. summonses and some petitions), pleadings in the Court of Session and other courts where advocates have sole right of audience must be signed by an advocate. An advocate who signs such pleadings accepts personal responsibility to the court for their contents. He has a professional responsibility for any other pleadings drafted by him, whether or not he has sole right of audience in the court concerned, except where his draft has been altered without his knowledge and consent. Where counsel finds that pleadings drafted by him have been altered without his knowledge and consent, it is his professional duty to consider whether he can support the case on the basis of the pleadings so altered. If he cannot, he must insist that the offending alterations are removed and, if not, refuse to act further.

9.5.2 Since an advocate accepts responsibility for pleadings or other documents he has signed, he should not sign in his own name pleadings drafted by someone else save in exceptional circumstances. Certain papers may be signed by an advocate "for Mr. X [another advocate]". Papers may be signed in that way provided the advocate concerned is satisfied that the advocate for whom he signs cannot reasonably be found and is also satisfied that the papers is in proper form for submission to the court.

9.6 SPECULATIVE ACTIONS (See paragraph 5.10 above)

In speculative actions, counsel has a particular responsibility to the court both with regard to his own assessment of the merits of the case and with regard to the advice which he gives to the instructing solicitor. The nature of the responsibility undertaken by counsel and solicitor was stated thus by Lord President Normand (*X Insurance Co. v. A. & B.* 1936 S.C. 225, 239) -

"It has long been recognised by our Courts that this is a perfectly legitimate basis on which to carry on litigation and a reasonable indulgence to people who while they are not qualified for admission to [Legal Aid] are nevertheless unable to finance a costly litigation. But it has equally been recognised that there is involved in such business a grave risk of abuse unless it is carried on with strict regard to honour by all who are professionally concerned in it. Before acting in business of this kind it is the imperative duty of the solicitors and of the counsel to consider whether the party for whom they are to act has a reasonable prospect of success. The reasons for this are obvious, and need no discussion. If a solicitor, when asked to conduct the case on a speculative footing, is, after consideration, unable to advise that there is a reasonable prospect of success, he should refuse to conduct the case. But, if he has reasonable doubts about the prospect of success, he is justified in consulting counsel. If counsel advises that the action may properly be raised, the solicitor is entitled to follow his advice, and in the future conduct of the action he is bound to act in accordance with counsel's instructions. If he does this after having fairly disclosed to counsel all the information at his disposal, he will not be exposed to a charge of professional misconduct. In order that the prospects of success may be fairly estimated by the solicitor and by counsel in their turn, it is in most cases, where questions of fact are involved, a necessary precaution that fair and honest precognitions of the chief witnesses who will be relied on should be taken at the outset."

(See also the opinion of Lord Fleming, 250-251.)

## 9.7 CRIMINAL APPEALS

9.7.1 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: *Scott v. HMA* 1946 J.C. 68 per Lord President Normand at 69. (See also paragraph 4.6.7 above.)

9.7.2 Having advised that an appeal is statable, counsel may later come to the view that it is not. If so, he must promptly inform his instructing solicitor that he (counsel) can no longer act in the case.

## 9.8 OPPOSING A PARTY LITIGANT

9.8.1 Where an advocate appears against a party litigant, he must avoid taking unfair advantage of the party litigant and must, consistently 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. But he must not sacrifice the interests of his client to those of the party litigant.

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

10.1 The basic rule is that an advocate may not, in any way or any form, tout for professional work or do anything to draw attention to himself in his professional capacity which would be liable to impair public trust in himself or his profession.

10.2 An advocate must also bear in mind at all times his duty to maintain the trust of the client and to preserve the confidential character of information disclosed to him in confidence -see paragraph 8.1.1 above.

10.3 For these reasons, an advocate should not write, broadcast or give interviews to the media about matters in which he is engaged as counsel, or talk about his general practice. He should not make "statements to the press" or give press conferences in relation to such matters. Even when a case is over, or a matter completed, he should confine himself to matters of public record.

10.4 An advocate may not appear robed on television or act the part of counsel in film, on television or radio.

10.5 Subject to the foregoing rules, which must be carefully observed in the spirit as well as the letter, there is no rule which prevents an advocate from describing himself, or being described as "Advocate" and/or "Queen's Counsel", or from writing or speaking on a subject connected with the law.

10.6 In practice, it is sometimes difficult to determine the point at which use of the titles "Advocate" or "Queen's Counsel" is, or may be interpreted as being, a form of touting. In deciding where to draw the line (for example, in the printing or use of notepaper, personal cards, cheques, etc), an advocate should ask himself three questions -

- (a) is it useful or relevant to the recipient or hearer to know that I am an advocate or Queen's Counsel;
- (b) is the use of those titles liable to be interpreted as a form of touting, even if I do not intend it to be so; and
- (c) would members of other professions use equivalent titles in similar circumstances?

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.

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, the advocate concerned must obey any summons to appear and must co-operate with the reasonable requirements of the Committee or Tribunal, 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

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House of Lords  
Judicial Committee of the Privy Council  
Parliamentary Committee appointed to consider a Provisional Order or Private Bill

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Court of Session and other courts of which judges are Senators of the College of Justice  
High Court of Justiciary

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Land Court (if Chairman robed)  
Lyon Court  
Sheriff Court  
District Court  
General Assembly of the Church of Scotland  
Courts Martial  
Transport Tribunal

- 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, tailcoat 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. Stockings 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 either a black jacket and waistcoat with striped trousers or a dark business suit. A lady advocate should wear a suit or dress appropriate for business.

13. **DUTIES OF DEVILMASTER**

- 13.1 An advocate may not take a "devil" (pupil) without the consent of the Dean.
- 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. **NON-PROFESSIONAL ACTIVITIES OF PRACTISING ADVOCATES**

- 14.1 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.
- 14.2 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 principle stated in chapter 2 above;
  - (b) the fact that an advocate's exclusive right of audience in certain courts places an obligation upon him to be available to be instructed in proceedings before those courts; and
  - (c) 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 any doubt, he should consult the Dean.

- 14.3 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.

15. **ADVOCATES HOLDING A PUBLIC OFFICE AND NON-PRACTISING ADVOCATES**

15.1 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.

15.2 *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.

15.3 *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.

15.4 *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 a practising advocate insofar as they are relevant to the performance of that work. He may not appear in court on his employer's behalf, nor may he do any act as "representative" or agent of his employer in the sense explained in paragraph 1.2.2 above. He may however instruct another advocate in the circumstances and on the matters specified in paragraph 4.2.2 above.

16. **WORK OUTSIDE SCOTLAND**

16.1 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. If he is in any doubt as to the propriety of a particular course of conduct, he should consult the Dean.

16.2 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.

16.3 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.

16.4 An advocate practising in another country is, in relation to work or in emanating from Scotland, subject to all the rules governing the professional conduct of advocates in Scotland.

17. **E.E.C. LAWYERS APPEARING IN SCOTLAND**

- 17.1 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 (S.I. 1978/1910) as amended by the European Communities (Services of Lawyers) (Amendment) Order 1980 (S.I. 1980/1964). The expression "E.E.C. lawyer " has the same meaning as it has in those Orders.
- 17.2 These rules only apply to an E.E.C. lawyer who provides services in Scotland, or in relation to Scottish proceedings, which, apart from the said Directive and Orders, are reserved exclusively to advocates or to advocates and barristers; and references to "services" in these rules mean services so reserved.
- 17.3 No E.E.C. 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.
- 17.4 An E.E.C. 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 paragraphs 4.3.5 and 15.4.
- 17.5 Without prejudice to such other requirements for verification of his status as may arise, an E.E.C. 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 an E.E.C. 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.
- 17.6 An E.E.C. 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 an E.E.C. lawyer and the advocate with whom he is instructed and acting.
- 17.7 The advocate with whom an E.E.C. 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 E.E.C. lawyer in relation to the duties owed by that lawyer to the client.
- 17.8 An advocate accepting instructions to act with an E.E.C. 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 an E.E.C. 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.

- 17.9 The signature of the E.E.C. lawyer on any documents in the process must be accompanied by the signature of the advocate with whom he is instructed.
- 17.10 Where an advocate is required to wear court dress, an E.E.C. lawyer should wear the normal court dress of his own Bar.
- 17.11 The seat to be occupied by an E.E.C. lawyer in court should be determined by considerations of courtesy and circumstances with the approval of the court. (See also Section 18 below.)

18. **PRECEDENCE OF COUNSEL OF OTHER BARS**

- 18.1 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.
- 18.2 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.



## APPENDIX

### 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.

#### 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 designed, 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.