

RULES OF PROFESSIONAL CONDUCT

THE GUERNSEY BAR COUNCIL in exercise of the powers conferred by The Royal Court (Bar Administration) Order, 1993, with the sanction of the Bailiff and the approval of Her Majesty's Procureur, hereby make the following Rules:-

A GENERAL

Rule 1

An Advocate shall not do anything in the course of practising as an Advocate, or permit another person to do anything on his or her behalf, which breaches, compromises or impairs or is likely to breach, compromise or impair any of the following:-

- (a) the Advocate's Oath and Articles;**
- (b) the Advocate's independence or integrity;**
- (c) the Advocate's duty to the Court;**
- (d) a person's freedom to instruct an Advocate of his or her choice;**
- (e) the Advocate's duty to act in the best interests of the client;**
- (f) the good repute of the Advocate or of the Guernsey Bar;**
- (g) the Advocate's proper standards.**

Commentary

Rule 1, apart from the Oath and Articles, comprises those ethical duties imposed on solicitors by the common law. The words should be given a common sense interpretation. Advocates should always refer to Rule 1 if they have an ethical problem.

Rule 2

An Advocate is an officer of the Court, and should conduct himself or herself appropriately, both in his profession and private life.

Commentary

An Advocate, whether practising or not, is an officer of the Court. Certain standards of behaviour are required of an Advocate, as an officer of the Court and as a member of the Guernsey Bar, in his or her activities outside

legal practice. Disciplinary sanctions may be imposed if an Advocate's behaviour tends to bring the Guernsey Bar into disrepute.

B PRIVATE PRACTICE

Rule 3

An Advocate is responsible for exercising proper supervision over both admitted and unadmitted staff.

Commentary

1. The duty to supervise and be responsible for staff covers not only employees but also employees of in-house companies and also independent contractors engaged to carry out work on behalf of the firm e.g. consultants.
2. An Advocate cannot evade responsibility for work carried out by the firm by leaving it entirely to his or her staff, however well qualified.

Rule 4

An Advocate shall not enter into professional partnership with any person other than an Advocate.

Rule 5

As a matter of conduct a partner is *prima facie* responsible for the acts or omissions of the firm, and this extends to the acts or omissions of staff.

Commentary

This Rule extends to cover the acts or omissions of staff of an in-house company.

Rule 6

Where there has been an alteration to the composition of the firm, all clients of the firm who may be affected must be informed promptly.

Commentary

1. All clients for whom the firm is acting are likely to be affected by a material change of its composition. Whether a change is material depends on the circumstances. The departure of a partner would affect all the clients for whom that partner was acting as fee-earner, and all the clients whose matters he or she was responsible for supervising.
2. Contractual obligations between partners will not absolve them from their obligation to fulfil the duties they owe to clients as a matter of professional conduct. Care should be taken to ensure that partnership agreements do not put obstacles in the way of the proper discharge of duties to clients.
3. Firms must ensure that clients know the name and status of the person responsible for the day to day conduct of the matter in which they have instructed the firm, and the principal responsible for its overall supervision.

Rule 7

It is not in itself misconduct for an Advocate, whether partner or employee, to write to clients of a firm after leaving that firm, inviting their instructions. However, nothing in this Rule can absolve the Advocate from any legal obligations arising out of his or her former contract of employment or partnership agreement.

C. EMPLOYED ADVOCATES

Rule 8

An Advocate employed by a non-Advocate ("employed Advocate") is subject to the same principles of professional conduct as an Advocate in private practice.

Rule 9

An employed Advocate may not act for private clients, including fellow employees, outside the course of employment.

D. OBTAINING INSTRUCTIONS

Rule 10

An Advocate must be able to give impartial and frank advice to the client, free from any external or adverse pressures or interests which would destroy or weaken the Advocate's professional independence or the fiduciary relationship with the client.

Commentary

1. A potential client who has been improperly influenced in his or her choice of Advocate cannot be said to have had a free choice. Improper influence can come from the Advocate or from a third party. Where an Advocate has reason to suspect that there may have been improper influence, the Advocate must satisfy himself or herself that the client's freedom of choice has not been restricted.
2. An Advocate must avoid being placed in a position where the Advocate's interests, or the interests of a third party to whom the Advocate may owe a duty, conflict with the interests of the client.
3. An Advocate must not allow clients to override the Advocate's professional judgement, for example by insisting on the Advocate acting in a way which is contrary to law or to a rule or a principle of professional conduct.

E. ADVERTISING

Rule 11¹

The provisions of the Advocates' Publicity Code 2000, as approved by a meeting of the Bar Council held on 28 February 2000 and initialled by the Bâtonnier by way of identification, shall have effect.

Rule 12

Advocates may accept introductions and referrals of business from other persons and may make introductions and refer business to other persons, provided there is no breach of these Rules.

Rule 13

An Advocate must not accept instructions knowing that a third party has stipulated that the Advocate must act.

Commentary

A breach of this Rule would have the effect of denying the prospective client freedom of choice. Consequently, an Advocate must not act for a purchaser or borrower where the Advocate knows or ought to know that a condition of the sale or loan is that the Advocate should act for the purchaser or borrower. Such

¹ Amended in 2000, at the time of adoption of the Advocates' Publicity Code 2000

conditions may be imposed without the knowledge of the Advocate. An Advocate who has any doubts should satisfy himself or herself that third party introductions are not tainted by such objectionable conditions, by making enquiries of the prospective client.

F. RETAINER

Rule 14

An Advocate is generally free to decide whether to accept instructions from any particular client. However, an Advocate should not accept instructions in circumstances in which that client owes costs to another Advocate for work undertaken in connection with the same matter, unless there is a genuine dispute over those costs.

Commentary

1. An Advocate who is instructed to bring an action against his or her client's former Advocate should, provided he or she is able, accept those instructions.
2. Every Advocate who is or becomes aware that another Advocate was formerly retained in a particular matter must ascertain from that Advocate whether any fees and disbursements remain outstanding, and whether any dispute as to their payment subsists, and whether such dispute is genuine.

Rule 15

An Advocate must not act or, where relevant, must cease acting further where the instructions would involve the Advocate in a breach of the law or a breach of the principle of professional conduct, unless the client is prepared to change his or her instructions appropriately.

Commentary

An Advocate who has accepted instructions to act is under a duty to observe these Rules and a client must accept the limitations imposed by these Rules.

Rule 16

An Advocate must not accept instructions to act in a matter where another Advocate is acting for the client in respect of the same matter until the first retainer has been determined.

Commentary

1. Where the first retainer has been determined, there is no duty on the second Advocate to inform the first Advocate that he or she has been instructed, except in litigation where the first Advocate is on the record.

2. This Rule does not preclude an Advocate from giving a second opinion without the first Advocate's knowledge. However, the Advocate from whom a second opinion is sought must carefully consider whether he or she is in possession of sufficient facts to give such an opinion. In no circumstances should the second Advocate improperly seek to influence the client to determine the first Advocate's retainer.
3. An Advocate is not precluded from advising another party on the subject matter of the first Advocate's advice if the other party has a separate or distinct interest.

Rule 17

An Advocate must not act or continue to act in circumstances where the client cannot be represented with competence or diligence.

Commentary

This would apply where an Advocate has insufficient time to devote to the matter, or insufficient experience or skill to deal with the instructions.

Rule 18

An Advocate must not accept instructions where he or she suspects that those instructions have been given by a client under duress or undue influence.

Commentary

If an Advocate suspects that the client's instructions infringe this Rule, either the client must be seen alone in order that the Advocate can be satisfied that the instructions were freely given, or the Advocate must refuse to act. Particular care may need to be taken where clients are elderly or otherwise vulnerable to pressure from others.

Rule 19

Where instructions are received not from a client but from a third party purporting to represent that client, an Advocate should obtain written instructions from the client that he or she wishes the Advocates to act. In any case of doubt the Advocate should see the client or take other appropriate steps to confirm instructions.

Commentary

In such circumstances an Advocate must advise the client without regard to the interests of the source from which he or she was introduced.

Rule 20

An Advocate must refuse to take action which he or she believes is solely intended to gratify a client's malice or vindictiveness.

Rule 21

An Advocate who has accepted instructions on behalf of a client is bound to carry out those instructions with diligence and must exercise reasonable care and skill.

Commentary

An Advocate must act within his or her client's express or implied authority. It is therefore essential at the outset for an Advocate to agree clearly with the client the scope of the retainer and subsequently to refer any matter of doubt to the client. If an Advocate limits the scope of the retainer it is good practice for the limits of the retainer to be precisely defined and communicated in writing to the client.

Rule 22

Except as required by law, an Advocate must keep his or her client's business and affairs confidential.²

Commentary

This duty extends to the Advocate's staff, whether admitted or unadmitted, and staff in-house companies, and it is the responsibility of the Advocate to ensure compliance.

Rule 23

It is an implied term of the retainer that an Advocate is under a duty at all times to observe the Rules of professional conduct.

² Amendment approved at AGM 23.10.09

Commentary

1. This means that there will be limitations upon the freedom of an Advocate to do what the client wants him or her to do. An Advocate must not breach these Rules in order to benefit the client.
2. An Advocate owes a duty to the Court which must be reconciled with the duty owed to the client.

Rule 23A

It is an implied term of the retainer that an Advocate is under a duty at all times to observe the provisions of all Guernsey laws and Guernsey codes of conduct in respect of the services rendered to the client.

Commentary

1. This means that Advocates not only have to comply in their dealings with their clients with the provisions of the common law and with all Orders in Council and Ordinances but with all Guernsey codes of conduct and guidelines – for example in respect of money laundering.

Rule 24

An Advocate must not take advantage of the age, inexperience, want of education or business experience, or ill health of the client.

Rule 25

An Advocate is under a duty to keep the client properly informed and to comply with reasonable requests from the client for information concerning his or her affairs.

Commentary

1. The information referred to in this Rule includes recent changes of law where those changes affect the subject matter of the retainer.
2. The extent and frequency of the information supplied and the degree of consultation will depend on the circumstances and upon the type and urgency of the matter and upon the extent of the experience of the client in that type of matter.
3. There may be exceptional circumstances in which an Advocate would be justified in withholding information from a client: for example where an Advocate is acting for both vendor and purchaser: see Rule 49.

Rule 26

An Advocate must not terminate his or her retainer with the client except for good reason and upon reasonable notice.

Commentary

1. Whilst it is open to a client to terminate an Advocate's retainer for whatever reason, an Advocate must complete the retainer unless he or she has a good reason for terminating it. Examples of good reasons include where an Advocate cannot continue to act without being in breach of these Rules, or where an Advocate is unable to obtain clear instructions for a client, or where there is a serious breakdown in the mutual trust and confidence between them.
2. The retainer may be determined by operation of law, e.g. the client's or Advocate's incapacity. Where the client suffers mental incapacity the Advocate should take reasonable steps to ensure that the client's interests are protected.

Rule 27

On termination an Advocate should, subject to any lien, then deliver to the client all papers and property to which the client is entitled or hold them to his or her order and account for all funds of the client then held by the Advocate.

Commentary

A client is not entitled to his or her Advocates' notes. Where a lien arises over a client's papers and documents delivered to an Advocate in his or her professional capacity for costs due and work done, they can be retained until those costs are paid. The lien is passive in nature and does not entitle the Advocate to sell or dispose of the client's property. Whilst the lien operates until satisfaction of the claim for costs, where a genuine dispute over costs arises, and the retainer is determined in favour of another Advocate, the Advocate formerly instructed should not insist on his or her lien if it is necessary for the proper continuing conduct of the matter that the successor Advocate has the clients' papers and documents e.g. in a claim being currently litigated. There is no lien over papers and documents for costs that are excessive or unreasonable.

G. **CLIENT CARE**

Rule 28

Every Advocate in private practice shall, so far as is practicable, ensure that clients know the same and status of the person responsible for the day to day conduct of the matter and the principal responsible for its overall supervision.

Commentary

1. The Rule requires that the client be informed not only of the name, but also of the status of the person responsible for conduct of the matter. Status refers to qualification as well as partnership status, e.g. whether the person is an Advocate or a clerk.
2. If the conduct or the overall supervision of the whole or part of the client's matter is transferred to another person in the firm, the client should be informed and the reasons must be explained.

Rule 29

Every Advocate in private practice shall, unless it is inappropriate in the circumstances, ensure that clients are at all relevant times given any appropriate information as to the issues raised and the progress of the matter.

Commentary

1. One of the objects of this Rule is to ensure that clients who are unfamiliar with the law and lawyers receive the information they need to make the legal process more comprehensible. This will reduce areas of potential conflict and complaint. Different levels of information may be appropriate for different clients.
2. Clients should normally be told in appropriate language at the outset of a matter or as soon as possible thereafter the issues in the case and how they will be dealt with. In particular, the immediate steps to be taken must be clearly explained.
3. Advocates should keep clients informed both of the progress of matters and of the reason for any serious delay which occurs. This may often be assisted by sending to clients copies of letters. Requests for information should be answered properly.

4. Advocates should normally explain to clients the effect of any important and relevant documents. At the end of the matter, Advocates should normally write to clients confirming that it has been completed and summarising any future action to be taken by the client or the Advocate.
5. Advocates should consider whether it is appropriate to confirm in writing the advice given and instructions received: it is usually desirable.

Rule 30

On taking instructions the Advocate should give clients the best information possible about the likely cost of the matter, unless the circumstances do not allow such information to be given.

Commentary

1. It is an implied term in law that Advocates when instructed in their professional capacity will be paid reasonable remuneration for their services.
2. An Advocate should not rely solely upon this implied term, but should explain to the client, so far as is possible, the work which is likely to be involved in carrying out the instructions and the time which may be taken, both of which will have direct relevance to the likely amount of fees.
3. Wherever possible, an Advocate should give an estimate of the likely cost of acting in a particular matter. If, because of the nature of the work, an Advocate cannot give even an approximate estimate of the fees and disbursements, the client should be informed accordingly, and in that case, must be told of the basis of charge, and be kept informed about the costs as the matter proceeds.
3. When giving estimates, Advocates should take care to ensure that they are not binding themselves to an agreed fee unless this is their intention. To give an estimate which has been pitched at an unrealistically low level solely to attract the work, and subsequently to charge a higher fee for that work, is improper because it misleads the client as to the true or likely cost.

Rule 31

If no fee has been agreed or estimate given, the Advocate should tell clients how the fee will be calculated.

Commentary

A client should be informed of the charging rate of the person doing the work, or alternatively, if charges are based on an expense rate, the expense rate of the person doing the work and the range of any possible mark-up: likewise for tariff rates or charges based on the value of the transaction. A client should also be informed if such rates are to be subject to periodic review. Where applicable, the client should be told that factors other than time will be taken into account when settling the actual fee.

When confirming the clients' instructions in writing the Advocate should record whether a fee has been agreed and, if so, what it is and what it covers and whether it includes disbursements. If no fee has been agreed, the Advocate should confirm an oral estimate in writing. Advocates should also tell clients what other reasonably foreseeable payments they may have to make either to the Advocate or to a third party and the stages at which they are likely to be required.

If there is an agreement between an Advocate and client that the Advocate is to be remunerated by an agreed fee, the Advocate is bound to do the work covered by the agreement for that fee, even though circumstances arise which make the work unremunerative for the Advocate. Advocates should inform clients immediately it appears that an estimate will be or is likely to be exceeded. They should not wait until submitting the bill of costs.

Rule 32

Where clients are personally liable for the costs, in appropriate cases the Advocate should inform them that they may set a limit on the costs which may be incurred without further reference.

Commentary

1. Before instructions are accepted by an Advocate in these circumstances, the client should be warned of the consequences. An Advocate must not exceed any limit without the authority of the client. Further, an Advocate must, as soon as possible, inform the client where the limit imposed on the expenditure is insufficient and obtain the client's instructions as to whether the Advocates should continue with the matter.
2. Where an Advocate continues to act in such circumstances regardless of the limit with the client has fixed and then presents a bill for a sum which exceeds that limit, he or she may be guilty of professional misconduct.

Rule 33

Where clients are personally liable for the costs, in appropriate cases the Advocate should inform clients every six months of the approximate amount of the costs to date, whether or not they have set a limit, and in appropriate cases an interim bill should be delivered.

Commentary

1. The Advocate should monitor the position regularly regarding costs which have accrued to date.
2. Failure to keep the client informed, so far as possible, regarding the costs incurred, could prejudice an Advocate's ability to recover a fair and reasonable fee for the work done.
3. In non-contentious matters, an Advocate may render an interim bill if the client has agreed or acquiesced, or if the transaction or proceedings have reached a natural break.

Rule 34

Where the matter is contentious clients should be informed at the outset of the case and at appropriate stages thereafter:

- (i) the types of recoverable costs;
- (ii) that in any event they will be personally responsible for payment of their own Advocate's bill of costs in full regardless of any order for costs made against opponents;
- (iii) of the probability that if they lose they will have to pay their opponent's recoverable costs as well as all their own;
- (iv) that even if they win their opponent may not be capable of paying what they have been ordered to pay;
- (v) that recoverable costs are unlikely to cover all the actual costs, even if successful.

Rule 35

In all matters an Advocate should consider with clients whether the likely outcome will justify the expense or risk involved.

Commentary

It is in the interests of both the Advocate and the client that this advice should be in writing.

H. PROFESSIONAL FEES

Rule 36

An Advocate may, at the outset of and during the retainer, require the client to make a payment or payments on account of costs and disbursements to be incurred.

Commentary

1. In non-contentious matters, an Advocate should make any requirement for payments on account of charges, as distinct from disbursements, to be incurred a condition of accepting instructions. Without this condition, or the client's subsequent agreement, an Advocate cannot justifiably terminate the retainer if a client refuses to make such a payment.
2. In contentious matters, where an Advocate who has been retained by a client requests the client to make a payment of a sum of money, being a reasonable sum on account of the costs incurred or to be incurred, and the client refuses or fails within a reasonable time to make that payment, then refusal or failure will be good cause for the Advocate to terminate the retainer upon giving reasonable notice.
3. In either case, where an Advocate receives such a payment on account of costs or disbursement to be incurred, it should be made clear to the client that the costs may be greater than the sum paid in advance, since such sums may not represent the fee for the whole work. Any sum requested must be reasonable.
4. Where no bill or written intimation of the amount of costs has been delivered, monies paid on account of costs (as opposed to an agreed fee) must be paid into clients account pending delivery of the bill or interim bill or written intimation of the amount of costs incurred.
5. Where in a trial on indictment before the Royal Court an Advocate has sought, but has not received, a payment in advance on account of costs or disbursements, that can never be a reason for refusing to represent the client at the trial.

Rule 37

An Advocate shall not share or agree to share his or her professional fees with any person except:

- (a) a practising Advocate;
- (b) the Advocate's in-house company, or *bona fide* employee or consultant, which provision shall not permit a partnership with a person not an Advocate disguised as employment or consultancy;
- (c) a retired partner or predecessor of the Advocate or the dependants or personal representatives of a deceased partner or predecessor.

Rule 38

An Advocate who is retained or employed to prosecute any action, or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding.

Commentary

1. This Rule restates the prohibition in the Articles against contingency fees.
2. A contingency fee is any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action or other contentious proceeding. The fact that an agreement stipulates a minimum fee in any case, win or lose, will not prevent it from being an arrangement for a contingency fee.
3. It would not be unlawful for an Advocate to enter into an agreement on a commission basis to recover debt due to a client, provided that the agreement is limited strictly to debts which are recovered without the institution of legal proceedings, or which are recovered on the issue of a summons.

Rule 39

An Advocate is under duty to render a bill of costs to a client within a reasonable time of concluding the matter to which the bill relates.

Commentary

It is good practice to submit a bill of costs as soon as possible. This is particularly important where an Advocate is holding sums of money on behalf of a client and awaits approval of the costs before accounting to the client or where the client has asked for the papers and the Advocate claims a lien.

Rule 40

An Advocate's bill of costs should contain sufficient information to identify the matter to which it relates and the period covered.

Commentary

1. The bill should show disbursements separately from professional fees.
2. If a contentious bill is disputed, the client has the right to require the Advocate to deliver, in lieu of a gross sum bill, a bill containing detailed items, providing the client makes the request before being served with any summons for the recovery of costs included in the bill.

Rule 41

An Advocate may charge interest on an unpaid bill provided that notice has been given to the client on commencement of the retainer. An Advocate may also charge interest

- (a) if a client has later agreed to pay it, or**
- (b) where the Advocate sues the client and claims interest under a relevant statutory provision.**

Rule 42

An Advocate must not take unfair advantage of the client by overcharging for work done or to be done.

Commentary

1. If an agreement has been made between an Advocate and client which is found to be wholly unreasonable as to the amount of the fees charged or to be charged, disciplinary action may be taken against the Advocate on the grounds that he or she had taken unfair advantage of the client.
2. If an Advocate requires the client to pay a sum on account of costs to be incurred, that sum must be a reasonable amount by reference to the subject matter of the retainer.

I. TARIFFS

Rule 43³

A member shall not make or agree to make any payment to a third party in anticipation of, or in consideration of, that party introducing or referring clients to that member or to that member's firm. For the purposes of this Rule, the term "payment" shall be deemed to include any form of consideration or benefit but shall not include reasonable hospitality.

J. CONFLICTS OF INTEREST

Rule 44

An Advocate must not act where his or her own interests conflict with the interests of a client or a potential client.

³ Amendment approved at AGM 31.10.12

Commentary

1. Because of the fiduciary relationship which exists between Advocate and client, an Advocate must not take advantage of the client, nor act where there is conflict of interest or potential conflict of interest between the client and the Advocate, where an Advocate in his or her personal capacity transacts with his or her own clients. The Advocate in these cases must ensure that the client takes independent legal advice.
2. An Advocate must at all times disclose with complete frankness whenever the Advocate has or might obtain any personal interest or benefit in a transaction in which he or she is acting for the client. In such circumstances, it is incumbent upon an Advocate to insist that the client receives independent advice.
3. This Rule applies not only where an Advocate is personally interested in a transaction, but equally where a partner or member of the Advocate's staff is so interested.
4. An Advocate must also consider whether any personal relationship, family relationship, office or appointment inhibits his or her ability to advise the client properly and impartially.
5. The Rule precludes an Advocate, or a member of his or her family or firm, from making or being a party to an arrangement for making a secret profit out of a relationship with the client and ensures that, where such a conflict exists, the client is independently represented. Disclosure of the conflicting interest to the client or potential client does not permit the instructions to be accepted by the Advocate, even where the clients consent.

Rule 45

An Advocate must decline to act where either he or she, his or her partner, employer or relative, hold some office or appointment which may lead to a conflict of interests or which might give the impression to the public that the Advocate is able to make use of such appointment for the advantage of the client.

Rule 46

Subject to Rule 49 and Advocate or firm of Advocates should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients.

Commentary

Where an Advocate already acts for one client and is asked to act for another client whose interests conflict or appear likely to conflict with those of the first client, the Advocate should generally refuse to act for the second client.

Rule 47

If an Advocate of firm of Advocates has acquired relevant knowledge concerning a former client during the course of acting for that client, the Advocate or the firm must not accept instructions to act against that client.

Commentary

1. Any knowledge acquired by an Advocate whilst acting for the former client is confidential and cannot be disclosed without the client's consent. However, an Advocate is under a duty to the present client to inform the client of all matters which are material to the retainer. Consequently, an Advocate in possession of knowledge concerning a former client which is or might be relevant, is put in an impossible position and cannot act against that client. Moreover, if an Advocate would feel embarrassed in acting against a former client, the Advocate should not act.
2. As a result of this Rule, an Advocate who has acted jointly for both husband and wife in matters of common interest, must not act for one of them in matrimonial or other proceedings where he or she is in possession of confidential relevant information concerning the other, which was received in the course of the joint retainer and which information is not known by the party for whom he or she now proposes to act.
3. Another example of the operation of this Rule is where an Advocate has acted for both the lender and borrower in the making of a loan. The Advocate should not subsequently act for the lender against the borrower to enforce repayment if the Advocate has obtained confidential relevant knowledge, e.g. of the borrower's financial position, when acting for the borrower in connection with the original loan.

Rule 48

An Advocate of firm of Advocates must not continue to act for two or more clients where a conflict of interest arises between those clients.

Commentary

1. If an Advocate has already accepted instructions from two clients in a matter or related matters and a conflict subsequently arises between the interests of those clients, the Advocate must cease to act for both clients, unless he or she can without embarrassment and with propriety, continue to represent one client with the other's consent. An Advocate may only continue to represent one client if not in possession of relevant confidential knowledge concerning the other obtained whilst acting for the other. Even in such a case the consent must be sought of the other client (usually through his or her new Advocates) and the Advocate should proceed in the absence of such consent only if there is no good cause for refusal.
2. Where an Advocate acts for two or more co-defendants in criminal proceedings, and one or more of them changes his or her plea, and /or gives evidence for the prosecution, the Advocate must consider carefully

whether it is proper to continue to represent any of them. In reaching a decision, the Advocate must bear in mind that if his or her duty of disclosure to the retained client or clients conflicts with his or her duty of confidentiality to the other client or clients, the Advocate must cease to act for all of them, in a Royal Court trial with the approval of the Royal Court. Before agreeing to continue to represent one client the Advocate must, therefore, examine carefully whether there is any information in his or her possession relating to the other clients which may be relevant to the retained client.

Rule 49

An Advocate may act for both seller and buyer on a transfer of land, or for both lessor and lessee, or for both lender and borrower, provided the Advocate obtains the informed consent of both parties to his or her acting.

Commentary

"Informed consent" means consent given in the knowledge that there is a potential conflict between the parties and that, as a result, the Advocate might be disabled from acting if a conflict arises, or from disclosing to each party the full knowledge which he or she possesses about the transaction, or might be disabled from giving advice to one party which conflicted with the interests of the other, and if all parties are content to proceed on that basis, the Advocate can properly act for both: see *Clark Boyce v. Mouat* (1993) 4 All ER (Privy Council).

Rule 50

Where a client intends to make a gift *inter vivos* or by will to his or her Advocate, or to that Advocate's partner, or a member of staff or to the families of any of them, and the gift is of a significant amount, either in itself or having regard to the size of the client's estate and the reasonable expectations of prospective beneficiaries, the Advocate must advise the client to be independently advised as to that gift and if the client declines, must refuse to act.

Commentary

1. If the client declines to be independently advised, the Advocate must refuse to act for the client in drawing the will or any document by which the gift is to be made. It is not sufficient merely to have the will or other document witnessed by an independent Advocate.
2. An Advocate must also ensure that members of staff do not embody in any will or document a gift to themselves without the approval of the Advocate. If the member of staff seeks the Advocate's approval, the same principle as to independent advice applies.

3. Where a client wishes to leave a legacy to the Advocate which is not of a significant amount, there is no need for independent advice. However, the Advocate should be satisfied that the client does not feel obliged to make such a gift.
4. Occasionally, a testator may wish to leave all or a substantial part of his or her estate to an Advocate to be dealt with in accordance with the testator's wishes as communication to the Advocate either orally or in a document, or as a secret trust. Where an Advocate in such circumstances will not benefit personally and financially, there is no need to ensure the testator receives independent advice. However, Advocates should preserve the instructions from which the will was drawn and should also see that the terms of such secret trust are embodied in a written document signed or initialled by the testator.

K. CONFIDENTIALITY

Rule 51

Except as required by law, an Advocate is under a duty to keep confidential to his or her firm the affairs of clients and to ensure that the staff do the same.⁴

Commentary

1. It is important to bear in mind the distinction between such duty in conduct and the client's legal privilege. It is also important to bear in mind that the privilege belongs to the client, not the Advocate. The duty in conduct extends to all matters communicated to an Advocate by the client, save the exceptions below. Legal privilege protects communication between a client and Advocate from being disclosed, even in a court of law. Non-privileged communications remain subject to the Advocate's duty to keep the client's affairs confidential, until a court orders disclosure.
2. Unauthorised disclosure of a client's confidences could lead to disciplinary proceedings against an Advocate.
3. The duty extends to the disclosure of the contents of a will after the death of the testator. Where an Advocate has acted in drawing up the will, information about its contents should not, before probate is granted, be disclosed except to, or with the consent of, the executors.
4. When acting for two or more clients jointly, information communicated to an Advocate in the capacity of Advocate acting for only one of the clients in a separate matter must not be disclosed to the other clients without the consent of that one client.
5. An Advocate may reveal confidential information to the extent he believes it is necessary to prevent a client or a third party committing a criminal act which the Advocate reasonably believes is likely to result in serious bodily harm.⁵

⁴ Amendment approved at AGM 23.10.09

⁵ Amendment approved at AGM 23.10.09

6. There may be exceptional circumstances involving children where an Advocate should consider revealing confidential information to an appropriate authority. This may be where the child is the client or the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another person against a child but refuses to allow any disclosure. An Advocate must consider whether the effect on the child's life or health, both mental and physical, is sufficiently serious to justify a breach on the duty of confidentiality.⁶

Rule 52

The duty to keep confidential information about a client and his or her affairs applies irrespective of the source of the information.

Rule 53

The duty to keep confidential a client's business continues until the client permits disclosure or waives the confidentiality.

Commentary

1. The duty is not determined by the end of the retainer, nor by the conclusion of the particular matter on which the Advocate or the firm were engaged, nor by the death of the client.
2. Following the death of the client the right to confidentiality passes to the personal representatives of the client and can only be waived by them.
3. Where an Advocate is in possession of information received from joint clients, the consent of both clients is required to waive the duty of confidentiality.
4. Communications made by a client to the Advocate before the commission of a crime for the purpose of being guided or helped in the commission of it are not confidential since such communications do not come within the ordinary scope of the professional retainer.
5. Express consent by a client to disclosure of information relating to his or her affairs overrides any duty of confidentiality, as does consent by the personal representatives of a deceased client.

Rule 54

An Advocate must not make any profit by the use of confidential information for his or her own purposes.

L. PROPER STANDARDS

⁶ Amendment approved at AGM 23.10.09

Rule 55

An Advocate is under a duty to carry out the terms of a retainer with care and skill, proper diligence and promptness and to keep the client properly informed.

Commentary

1. An Advocate should not accept instructions if he or she has insufficient time to devote to a matter, or insufficient experience or skill to deal with it competently.
2. Similarly an Advocate's duties in conduct cannot be excluded or limited by contract. An Advocate cannot exclude or restrict the right of the client or of any other person to make a complaint in respect of professional misconduct.

Rule 56

An Advocate should deal promptly with correspondence relating to the matter of a client or a former client.

Commentary

1. An Advocate who fails to answer and deal with the issues raised in letters from a client or former client on that client's business may be subject to disciplinary action.
2. Where an Advocate receives letters from third parties relating to the business of a client or former client, instructions should be sought from the client. Unless instructed to provide a substantive reply, failure to do so would not normally amount to professional misconduct.

M. RELATIONS WITH THIRD PARTIES

Rule 57

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

Commentary

1. When dealing and corresponding with an unrepresented third party an Advocate must take particular care to ensure that no retainer arises by implication between the Advocate and the third party.

2. In non-contentious matters, an Advocate may be instructed by a client and be aware of the name and address of the other party, but not of the other party's Advocates. The normal practice is for the Advocate to write to the other party asking to be put in touch with his or her Advocate.
3. Where an Advocate is dealing with an unrepresented third party, any draft document sent to the Advocate should be amended if it contains errors which could be put right by a reasonable amount of correction, provided that it is in his or her own client's interests to do so. If it is so badly drawn as to be inappropriate, there is no objection to returning it to the lay party and advising that an Advocate should be consulted on its preparation.
4. It is unbefitting conduct for an Advocate to write offensive letters to third parties. The same principle applies to offensive behaviour, and advocating breaking the law.
5. Where an Advocate receives a letter which asks for a reply from persons who are not clients and to whom no professional duty is owed or a letter which does not relate to the business of a client or former client, failure to reply does not amount to professional misconduct.

Rule 58

To stop a client account cheque is not inevitably professional misconduct, but may be if notice of intention to stop the cheque is not given promptly and effectively to the recipient.

Commentary

1. For the purpose of this Rule notice will be prompt and effective if it is received before the recipient has committed himself or herself to an action which was reasonably foreseeable by the giver as likely to follow the receipt of the cheque e.g. effecting exchange of contracts.
2. Where the recipient of the cheque is another Advocate who has paid it into his or her client account it is open to the giver to place a stop even where the Advocate has not awaited clearance before accounting to the client.

Rule 59

When writing a letter before action, an Advocate must not demand anything other than that recoverable under due process of law.

Commentary

1. For example, where an Advocate is retained to collect a simple debt, he or she must not demand from the debtor the cost of the letter before action, since it cannot be said at the stage when the first letter is written, that such costs are legally recoverable.

2. Where an Advocate is instructed by a creditor to collect a debt, there is nothing improper in the Advocate communicating with the employer of the debtor in order to obtain information as to the debtor's status or means. An Advocate should not, however, use the threat of contacting the employer or the media as a means of obtaining payment.

N. UNDERTAKINGS

Rule 60

An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by:

- (a) an Advocate or a member of staff in the course of practice; or**
- (b) an Advocate as Advocate but not in the course of practice whereby the Advocate becomes personally bound.**

Commentary

1. A professional undertaking may be given orally or in writing and need not necessarily include the word undertake.
2. Although an oral undertaking has the same effect as a written one, there may be evidential problems as to its existence unless there is available a contemporaneous note, transcript or written confirmation of its terms. If the recipient confirms the terms of the oral undertaking and the giver does not promptly repudiate those terms, this may be accepted as sufficient evidence of the existence and terms of the undertaking.

Rule 61

There is no obligation on an Advocate either to give or accept an undertaking.

Rule 62

An undertaking is still binding even if it is to do something outside the Advocate's control.

Commentary

1. Advocates must consider carefully whether they will be able to implement an undertaking before they give it. If there is a complaint of professional misconduct, it is no defence that the undertaking was to do something

outside the Advocate's control (e.g. that it was dependent upon action being taken by a third party and that the action has not been taken) unless the undertaking was suitably qualified.

2. If an undertaking involves the payment of money, Advocates must decide whether they are able to give such an undertaking, since they can be required to discharge this out of their own resources. If asked to give such an undertaking, an Advocate must consider all eventualities including the possibility of the client terminating the retainer or becoming insolvent, which will not discharge such an undertaking.

Rule 63

An Advocate who fails to honour a professional undertaking is prima facie guilty of professional misconduct.

Rule 64

Normally only the giver of an undertaking will be expected to honour it and only the recipient of an undertaking may complain of a breach.

Commentary

1. Where an Advocate has received an undertaking for the benefit of a client and that client instructs another Advocate in his or her place then, unless for good reason the former Advocate objects, the benefit of the undertaking will remain vested in the client any complaint can be made at the client's request by the new Advocate.
2. An Advocate cannot assign the burden of an undertaking (and thus claim to be released from its terms) without the express approval of the recipient.

Rule 65

An Advocate will be held personally liable to honour an undertaking given on behalf of anyone unless liability is expressly and clearly disclaimed in the undertaking itself.

Commentary

1. This is an example of the professional conduct obligation being more onerous than the legal requirement.
2. It is, however, necessary to distinguish between a professional undertaking (including one given 'on behalf of' a client) and a mere statement of a client's intentions or an agreement between Advocates as agents for their clients which is manifestly without the assumption of any personal liability.

Rule 66

An Advocate employer is responsible for honouring an undertaking given by any member of staff, including unadmitted staff.

Rule 67

An Advocate in employment will be personally liable as a matter of conduct on a professional undertaking, whether or not given in the course of employment.

Rule 68

Where an Advocate in partnership gives an undertaking in the course of his or her practice, all partners are responsible for its performance.

Rule 69

An Advocate cannot avoid liability on an undertaking by pleading that to honour it would be a breach of the duty owed to a client.

Rule 70

An Advocate who gives an undertaking which is dependent upon the happening of a future event must notify the recipient immediately if it becomes clear that the event will not occur.

O. RELATIONS WITH OTHER ADVOCATES

Rule 71

An Advocate must act towards other Advocates with frankness and good faith consistent with his or her overriding duty to the client.

Commentary

1. Any fraudulent or deceitful conduct by one Advocate towards another will render the offending Advocate liable to disciplinary action.

2. This Rule also requires that an Advocate must honour his or her word given either personally, or by partners or by any other member of the Advocate's firm, and whether or not in writing.
3. An Advocate must at all times maintain his or her personal integrity and observe the requirements of good manners and courtesy towards other members of the profession or their staff, no matter how bitter the feelings between clients. An Advocate must not behave in a manner which is acrimonious or offensive or otherwise inconsistent with his or her position as an Advocate.
4. This Rule also applies to correspondence. An Advocate must not write offensive letters to other members of the profession, whatever the degree of bad feeling existing between the respective clients.

Rule 72

An Advocate should not interview or otherwise communicate with any party who to the Advocate's knowledge has retained an Advocate to act in the matter except with the other Advocate's consent.

Commentary

1. An Advocate who has been instructed by a client should not write directly to the client of another Advocate where the Advocate has reason to believe that the other Advocate's retainer still exists.
2. Despite this Rule, an Advocate may be justified in writing direct to the client of another Advocate if that Advocate fails to reply to a letter, or where the Advocate has refused for no adequate reason to pass on any messages to his or her client. However, this step should only be taken after warning the other Advocate of the intention to write direct to his or her client.
3. This Rule does not prevent an Advocate suggesting to a client that the client should communicate directly with the Advocate's client on the other side.
4. An Advocate, before accepting instructions from an institutional client, such as a bank, for whom another Advocate is on a standing retainer for that type of work e.g. bonds, is advised as a matter of courtesy to notify the Advocate normally retained.

Rule 73

An Advocate is under a duty to report any serious breach of conduct on the part of another Advocate which the Advocate believes falls short of the proper standard of conduct of the profession. Where appropriate the Advocate must obtain the client's consent. However, it is professional misconduct for an Advocate to threaten to report another Advocate where the breach of conduct is not serious, or the threat is made with a view to bringing pressure on the other Advocate.

P. LITIGATION

Rule 74

Advocates who act in litigation, whilst under a duty to do their best for their client, must never deceive or mislead the court.

Commentary

1. Although an Advocate is entitled to take every point, technical or otherwise, that is fairly arguable on behalf of the client, the court must be advised of relevant cases and statutory provisions by the Advocates on both sides; if one of them omits a case or provision or makes an incorrect reference to a case or a provision, it is the duty of the other to draw attention to it even if it assists the opponents's case: see the Oath and Articles.
2. Except when acting or appearing for the prosecution, an Advocate who knows of facts which, or of a witness who, would assist the adversary is not under any duty to inform the adversary or the court of this to the prejudice of his or her own client. But if the Advocate knows that a relevant affidavit has been filed in the proceedings and is therefore notionally within the knowledge of the court, then there is a duty to inform the judge of its existence.
3. An Advocate would be guilty of unprofessional conduct if he or she called a witness whose evidence is untrue to the Advocate's knowledge, as opposed to belief.

Rule 75

An Advocate must not make an allegation which is intended only to insult, humiliate or annoy the other side, the witness or any other person.

Commentary

1. This Rule would also preclude an Advocate from making an allegation which is merely scandalous.
2. In any litigation, an Advocate should, if possible, avoid the naming in open court of persons who are neither parties nor witnesses if their characters would thereby be impugned.
3. An Advocate should not, in a plea in mitigation, make an allegation which is likely to vilify or insult any person, without first being satisfied that there are reasonable grounds for making the statement.

Rule 76

Except when making an application to the court, an Advocate must not discuss the merits of the case with anyone before whom a case is pending or may be heard, unless invited to do so in the presence of the Advocate for the other side or party.

Commentary

If a written communication is to be made to any member of the Court, the Advocate should at the same time deliver a copy of it to his or her professional adversary or to the opposing party if not legally represented. Where oral communication is proper, prior notice to the other party or that party's Advocate or counsel should be given.

Rule 77

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

Commentary

An Advocate should be aware that in seeking to exercise the right to interview a witness who has already been called by the other side or who to the Advocate's knowledge is likely to be called by them, the Advocate may well be exposed to the suggestion that he or she has improperly tampered with the evidence. This may be so particularly where the witness subsequently changes his or her evidence. It is wise in these circumstance for such Advocate to offer to interview the witness in the presence of a representative of the other side. The proper course in these circumstances in a criminal matter where the Advocate is acting for an accused is for the Advocate to approach the Law Officers to arrange for the interview which, depending upon the circumstances, may be in the presence either of a Law Officer or a Crown Advocate or an appropriate police or customs officer.

Rule 78,

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

Commentary

1. There is no objection to the payment of reasonable expenses to witnesses and reasonable compensation for loss of time attending court. In the case of an expert witness, there is an implied obligation to pay a reasonable fee.
2. An Advocate is professionally responsible for payment of the reasonable agreed fees and expenses of expert, professional and other witnesses whom the Advocate calls to give evidence on behalf of the client, unless a specific disclaimer is first conveyed to the witness. This obligation includes witnesses who have been subpoenaed where they have been invited to give evidence and have agreed to do so. Therefore, an Advocate who does not wish to accept such responsibility should make this clear to the witness in advance.

Rule 79

An Advocate must not accept instructions to act as an Advocate for a client if it is clear that he or she or a member of the firm will be called as a witness on behalf of the client, unless the evidence is purely formal.

Commentary

1. An Advocate must exercise judgement as to whether to cease acting where he or she has already accepted instructions as an Advocate and then becomes aware that he or she or a member of the firm will be called as a witness on behalf of the client.
2. The circumstances in which an Advocate should continue to act as an Advocate, or at all, must be extremely rare where it is likely that he or she will be called to give evidence other than that which is purely formal.
3. It may be possible for an Advocate to continue to act as an Advocate if a member of the firm will be called to give evidence as to events witnessed whilst advising or assisting a client. In exercising judgment, the Advocate should consider the nature of evidence to be given, its importance to the case overall and the difficulties faced by the client if the Advocate were to cease to act. The decision should be taken in the interests of justice as a whole and not solely in the interests of the client.

Rule 80

Where a client, prior to or in the course of any proceedings, admits to his or her Advocate that the client has committed perjury or misled the court in any material matter in relation to those proceedings, unless the client agrees fully to disclose his or her conduct to the court.

Rule 81

An Advocate must comply with any order of the court which the court can properly make requiring the Advocate or the firm to take or refrain from taking some particular course of action.

Rule 82

An Advocate appearing in court as an Advocate should appear duly robed where this is customary and must always wear suitable clothing.

Rule 83

An Advocate who appears in court or in chambers in civil proceedings is under duty to say on behalf of the client what the client should properly say for himself or herself if the client possessed the requisite skill and knowledge.

Commentary

1. An Advocate who appears in civil proceedings is under no duty of disclosure to the other parties or the court, save that he or she is bound to reveal all relevant cases and statutory provisions. Moreover, save in exceptional and specific circumstances, the client's privilege precludes the Advocate from making a disclosure of privileged material without the client's consent. However, the Advocate should act in such a way that, in the context of the language used, failure to disclose amounts to a positive deception of the court.
2. It is an implied term of the Advocate's retainer that he or she is free to present the client's case at the trial or hearing in such a way as the Advocate considers appropriate. If the client's express instructions do not permit the Advocate to present the case in what the Advocate considers to be the most appropriate manner, then unless the instructions are varied, the Advocate may withdraw from the case after seeking approval of the court to that course, but without disclosing matters which are protected by the client's privilege.
3. Whilst an Advocate may present any technical argument which is available to the client, he or she must never fabricate an argument on the facts for the client.
4. In general, there is no duty upon an Advocate to enquire in every case where he or she is instructed as to whether the client is telling the truth of what the client says to the extent that such statements will be relied on before the court or in pleadings or affidavits.
5. If, either before or during the course of proceedings, the client makes statements to the Advocate which are inconsistent, this is not of itself a ground for the Advocate to refuse to act further on behalf of the client. Only where the Advocate knows that the client is attempting to put forward false evidence to the court should the Advocate cease to act. In other circumstances, it would be for the court, and not the Advocate, to assess the truth or otherwise of the client's statement.

Q. MISCELLANEOUS

Rule 84

Where these Rules are silent or ambiguous as to any matter of conduct, an Advocate shall be bound *mutatis mutandis* by the relevant rules and principles of professional conduct from time to time obliging English barristers and solicitors.

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Passed by Resolution of the Guernsey Bar Council on the 25th October 1994

Approved by Her Majesty's Procureur on the 25th October 1994

Sanctioned by the Bailiff on the 25th October 1994

To come into effect on the 1st January 1995