American Bankruptcy Institute
International Caribbean Insolvency Symposium

Doing the Right Thing (in Court): Gratifying Some and Astonishing the Rest

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DOING THE RIGHT THING (IN AND OUT OF COURT): GRATIFYING SOME AND ASTONISHING THE REST

Professionalism and civility in the conduct of litigation in and out of court – a comparative discussion

INTRODUCTION AND OBJECTIVES

We will examine the different perspectives of the United States, the Cayman Islands, the United Kingdom and Colombia, in the framework of the respective ethics rules and cultural norms.

Ethical behavior is critical for practitioners handling cross-border insolvency and restructuring cases.

Adhering to professionalism influences credibility, cost efficiency, and judicial trust in disputes.

STRUCTURE

Comparative Jurisdiction Analysis

Compare how legal rules function in the USA, UK, Cayman Islands, and Colombia with a jurisdictional matrix.

Problem Areas

Discuss problem areas such as pleadings, discovery, witness preparation, and cross-examination techniques.

Practical Insights and Stories

Provide real-world lessons through judges' and practitioners' experiences looking at case examples and personal 'war stories'.

BRIEF COMPARATIVE MATRIX OF JURISDICTIONS

ASPECT	CAYMAN ISLANDS	UNITED STATES	UNITED KINGDOM	COLOMBIA
Profession Structure	Unified	Unified	Split: Solicitors/Barristers	Unified
Duty Priority	Court first	Client first	Court first	Client interests with candor
Discovery	Court-supervised disclosure	Broad, party-driven	Court-supervised disclosure	Judge-led inquisitorial
Witness Prep	Familiarization only	Permissive within limits	Familiarization only	No contact during proceedings
Costs	Loser pays	American Rule	Loser pays	Shared, loser pays more

CORE CONDUCT FRAMEWORKS

REGULATORY FRAMEWORKS AND KEY DUTIES

Distinct Jurisdictional Frameworks

Different countries have unique legal frameworks governing legal practice to ensure compliance and professionalism.

Attorneys in the Cayman Islands are regulated primarily by the Legal Services Act with a (soon to be) mandatory Code of Professional Conduct.

Attorneys in the US are governed by the ABA Model Rules of Professional Conduct, adopted (with variations) by most state and federal courts, federal statutes and specific local court rules, all emphasizing core principles.

In the UK, two regulatory bodies given powers by statute ; separate regulatory regimes exist: Solicitors Regulation Authority (SRA) for Solicitors, and Bar Standards Board (BSB) for Barristers.

In Colombia, attorneys are governed by Law 1123 of 2007 (Código Disciplinario del Abogado), a national statutory disciplinary code – centralized regulation by the Superior Council of the Judiciary CSJ).

Common Professional Duties

Across all of the above jurisdictions, lawyers share core duties including independence, integrity, conflict management, confidentiality, and client fund handling.

Modernization Initiatives

Regulatory systems are evolving with reforms, transparency drives, technology competence, and adaptation to arbitration norms.

SANCTIONS AND ENFORCEMENT

DISCIPLINARY MECHANISMS AND CONSEQUENCES

Range of Sanctions

Across the jurisdictions, sanctions include case management penalties and professional discipline ranging from reprimand or suspension to disbarment.

Collateral Consequences

Disciplinary actions can cause reputational harm and negatively affect client relationships.

PROBLEM AREAS IN PRACTICE

PLEADINGS

Merit-Based Claims

Ethical pleading demands claims with merit and factual accuracy to uphold justice and fairness.

In the UK and Cayman, pleadings must be concise, plead only material facts and provide fair notice to the other party. They should contain a statement of the legal and factual case, but not evidence or argument.

Specificity in Fraud Claims

US Rule 9(b) requires detailed and specific allegations when pleading fraud cases. Similarly, in the UK and Cayman , details of any allegation of fraud must be specifically pleaded.

Consequences of Breach

Violations of pleading rules can result in sanctions, strike-outs, and disciplinary actions by courts, e.g. *King and ors v Stiefel and ors* [2021] EWHC 1045 (Comm)

DISCOVERY AND DISCLOSURE

US Bankruptcy Discovery Rules

US rules include proportionality under Bankruptcy Rule 26, certification requirements under Rule 9011, and limits on depositions and interrogatories.

Sanctions and Civility Principles

Rule 37 mandates fee-shifting sanctions, while ABI principles promote avoiding harassment and resolving disputes informally.

International Disclosure Approaches

UK and Cayman courts emphasize managed disclosure and proportionality; Colombia relies on judge-led evidence gathering.

WITNESS PREPARATION

US Substantive Preparation

The US permits substantive witness preparation as long as it stays within ethical limits to ensure fairness.

UK and Cayman Procedural Limits

UK and Cayman Islands limit witness preparation to procedural familiarization without discussing substantive evidence.

Colombian Contact Prohibition

In Colombia, contact with witnesses during proceedings is prohibited to maintain impartiality and integrity.

Guiding Principle

The main goal is to prepare the witness but never to prepare or influence the evidence itself.

CROSS-EXAMINATION

Respectful Cross-Examination

Cross-examination should be conducted respectfully and focused on relevant facts to maintain court decorum.

Jurisdictional Styles

US and UK tolerate adversarial questioning within (differing) limits; Cayman adopts an almost identical approach to the UK, Colombia uses judge-led moderation.

Consequences of Misconduct

Improper cross-examination risks judicial censure and damages witness and lawyer credibility.

JUDICIAL AND PRACTITIONER PERSPECTIVES

JUDGES' PERSPECTIVE

Core Judicial Values

Judges' oaths across the jurisdictions emphasize efficiency, fairness, and integrity to uphold justice in their roles.

Judicial Roles by Region

US, UK, Cayman, and Colombia courts differ in sanctioning and supervising ethical conduct.

Professionalism Indicators

Professionalism is shown through dispute narrowing, accurate citations, and realistic schedules.

PRACTITIONERS' PERSPECTIVE

Balancing Client and Court Duties

Practitioners must manage the tension between fulfilling client demands and upholding obligations to the court.

Aligning Cross-Border Teams

Effective collaboration requires aligning teams on forum norms across different legal jurisdictions.

Maintaining Civility in Communications

Civility in communications is essential for preserving professionalism in legal practice.

Institutionalizing Protocols

Establishing clear protocols for disclosure, privilege, and witness preparation supports ethical legal practice.

WAR STORIES: LESSONS FROM THE TRENCHES

Attorney conduct during hearings – do's and dont's

Managing misconduct – giving warnings and imposing sanctions

Q&A AND CLOSING

Let's all get along!

CORE RULES AND DISCIPLINARY MECHANISM FOR EACH JURISDICTION

	Cayman Islands	United States	United Kingdom	Colombia
Regulatory Framework	Regulated by the Legal Services Act 2020 ("LSA") with a (soon to be) mandatory Code of Professional Conduct for attorneys-at-law.	Governed by the ABA Model Rules of Professional Conduct, adopted (with variations) by most state and federal courts, federal statutes and specific local court rules, all emphasizing core principles	Regulated by two regulatory bodies given powers by statute; separate regulatory regimes exist: Solicitors Regulation Authority (SRA) for Solicitors, and Bar Standards Board (BSB) for Barristers.	Governed by Law 1123 of 2007 (Código Disciplinario del Abogado), a national statutory disciplinary code – centralized regulation by the Superior Council of the Judiciary CSJ).
"Roots" of Rules	Common Law	Common Law	Common Law	Civil Law (codified) and Constitutional Mandates
Source of Ethical Rules	The Code of Professional Conduct, with commentary and best-practice guidance issued under Cayman law.	The ABA Model Rules and official commentary; states may tailor or supplement the rules.	SRA Principles and Code of Conduct (solicitors) and BSB Handbook (barristers).	Statutory rules set out directly in Law 1123, enacted by Congress.
Independence and Integrity	Strong emphasis on independence and integrity; conduct that undermines the administration of justice or brings the profession	Lawyers must act with honesty and integrity; misconduct defined under Rule 8.4 and related provisions.	Integrity is a core principle; lawyers must act independently and uphold public trust in the legal profession.	Lawyers must act with dignity, honesty, and respect for the Constitution, the law, and the administration of justice.

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	into disrepute is prohibited.			
Conflict of Interest	Requires identification, disclosure, and appropriate management of conflicts, including informed consent where permitted.	Highly detailed conflict rules addressing current clients, former clients, imputation, and government service, with informed consent requirements.	Strict conflict rules, particularly regarding independence and duties to clients and the court; client consent is regulated and limited.	Conflicts of interest are expressly regulated; representation in conflicting matters may trigger disciplinary sanctions.
Client Funds/Financial Management	Client funds must be segregated, properly accounted for, and retained in compliance with regulatory requirements.	Model Rule 1.15 mandates segregation of client funds, trust accounts, and detailed record-keeping.	Detailed accounts rules require segregation, transparency, and auditing of client money.	Lawyers must handle client funds honestly and responsibly; misuse of funds is a serious disciplinary offense.
Confidentiality	Confidentiality is a core ethical duty; improper disclosure or misuse of client information constitutes misconduct	Strong protection under Model Rule 1.6, subject to limited and defined exceptions.	Confidentiality is a fundamental duty, balanced against duties to the court and regulatory obligations.	Professional secrecy is both a duty and a right, strongly protected under law.

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Duty to Report/Self-Regulation	Breaches of the Code may result in disciplinary proceedings led by the Legal Services Council ("LSC"); oversight is formalized through statutory and judicial mechanisms	Rule 8.3 requires reporting certain professional misconduct; enforced by state bars.	Lawyers must report serious misconduct; regulators exercise active supervisory and enforcement roles.	Disciplinary authorities investigate complaints; lawyers may be sanctioned for ethical violations.
Disciplinary Mechanism	CILPA currently maintains the register, enforces its Code of Conduct, and oversees professional standards but with the full enactment of the LSA, regulatory responsibility will pass to the LSC. The newly formed Cayman Legal Services Supervisory Authority (LSSA) regulates law firms in respect of AML, CFT and CPF obligations, and the Cabinet and courts handle more serious rule-making and ultimate oversight.	State disciplinary boards handle complaints; sanctions range from reprimand to disbarment	Different bodies regulate solicitors and barristers the SRA (Solicitors Disciplinary Tribunal) handles solicitors, while BSB regulates barristers, using bodies like the Bar Tribunal & Adjudication Service (BTAS) that appoints Disciplinary Tribunals for disciplinary hearings, imposing sanctions such as fines or suspension for misconduct.	Disciplinary proceedings are conducted by Comisión Nacional de Disciplina Judicial (National Commission of Judicial Discipline, under statutory procedures, with sanctions including suspension

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International/Global Orientation	Code incorporates or aligns with IBA Principles, reflecting Cayman's role as an international legal and financial center	Primarily domestic in focus; no unified incorporation of IBA principles across states.	Increasingly international in outlook, especially for cross-border practice, but grounded in domestic regulatory structures.	Primarily domestic and statutory, with limited explicit integration of international professional standards.
Modernization and Reform	Recent reforms (including the LSA framework) have strengthened oversight and formalized professional regulation.	Model Rules remain structurally stable, though states continue to amend individual rules, creating variation.	Ongoing regulatory reform emphasizes consumer protection, transparency, and market competition.	Law 1123 remains the central framework; reforms tend to occur through legislative amendment rather than regulatory guidance.

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	Cayman Islands	United States	United Kingdom	Columbia
Structure of Profession	Unified profession – lawyers act as both advisors and advocates	Unified profession – lawyers act as both advisors and advocates	Divided into Solicitors (client facing, transactional but also High Court advocacy) and Barristers (specialist court advocacy)	Unified profession – lawyers act as both advisors and advocates
Duties to Court and Client	Overriding or primary duty as officer of the Court is to the Court, but must still act in best interests of clients	While an officer of the Court with duties to Court, including the duty of candor, the primary duty is to the client	Overriding or primary duty as officer of the Court is to the Court, but must still act in best interests of clients	Attorneys are not officers of the court, but must with candor and honesty and act in best interests of clients
Attorney Conduct	Attorneys shall not, in their professional and personal lives, act I any way which brings or may reasonably bring the legal profession or the provision of legal services in the Cayman Islands into disrepute	Lawyers must act with honesty and integrity as relates to practice of law; misconduct is defined under Rule 8.4 and related provisions – Rules do not speak to attorney's conduct in personal life	Attorney must act with honesty and integrity and competence – does not speak to manner in which attorney conducts himself in private life	Attorney must act with honesty and integrity and competence – there are some circumstances that consider how attorney conducts himself in private life
Scope of Application of Rules to Attorney Behavior	Principles and Code are (soon to be) mandatory and expressly binding on an attorney in both	Rules of Conduct are mandatory and binding on an attorney in professional life - not expressly binding on actions taken in	Principles and rules are mandatory and binding on an attorney in professional life - not expressly binding on actions taken in	Statutory code mandatory and binding on attorney in professional life – not expressly binding on actions taken in

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	professional and personal lives	personal life but could extend thereto in certain circumstances, such as a conviction for criminal activity	personal life but could extend thereto in certain circumstances	personal life but could extend thereto in certain circumstances
Discovery	Court-supervised "discovery" (documents must be produced if they are were in party's control/power/custody) – permits oral depositions	Incredibly broad and party driven (fishing expeditions allowed) – depositions standard procedure	Court-supervised "disclosure" (documents must be produced if they are were in party's control) – depositions for the purpose of obtaining pre-trial disclosure not allowed	Inquisitorial System (judge-led evidence gathering) but the parties bear the burden to bring or request the evidence to the court.
Pleading Fraud Cases	Requires particularity in pleading, but different procedural approach than USA- attorneys are professionally obligated not to make allegations of fraud or dishonesty without clear instructions and reasonable credible material supporting a prima facie case- courts have specific rules for evidence preservation and asset tracing as it relates to fraud	Requires high specificity (Rule 9(b)), detailing who, what, when, where, and how of the fraud	Requires particularity in pleading, but different procedural approach than USA- attorneys are professionally obligated not to make allegations of fraud or dishonesty without clear instructions and reasonable credible material supporting a prima facie case	No heightened pleading requirement per se, but focuses instead on statutory requirements - initial filing requires sufficient evidence and documentation to support the claim, and courts can order the exhibition of documents from third parties during pretrial stages to gather evidence

Witness Preparation	Very restrictive - lawyers may use "witness familiarization" (court procedure, cross-exam prep) but CANNOT rehearse testimony based on actual case facts	Lenient – lawyers can discuss the substance of testimony and how to present it, allowing client focused preparation	Very restrictive – lawyers may use "witness familiarization" (court procedure, cross-exam prep) but CANNOT rehearse testimony based on actual case facts	Before litigation – lawyer may meet with potential witness to 1) assess level of knowledge, truthfulness, coherence and spontaneity, and 2) to understand and outline the purpose of their testimony in the request for evidence During litigation: attorneys and witnesses cannot meet because the testimony must be spontaneous and not altered by anyone.
Costs and Fees	Generally loser pays all or part of winner's costs	"American Rule" –each side pays own costs, unless statute or contract provides otherwise	Generally loser pays all or part of winner's costs	The court will divide the costs, but usually the loser will be charged a grater proportion.

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JUDICIAL OATH AND ROLE IN ADDRESSING ATTORNEY MISCONDUCT

	Cayman Islands	United States	United Kingdom	Columbia
Judge's Oath	Judges' oaths compel them to uphold the law and justice impartially, which directly relates to handling attorney misconduct by ensuring they act without fear or favour when addressing breaches of professional duty, with disciplinary power to suspend or strike off attorneys for serious offenses, all under the framework of the Cayman Islands Legislation (Legal Services Act, 2020). While the oath sets the standard, specific disciplinary action for attorneys, including grave misconduct, falls under the Cayman Islands Law Society (CILS) and new legislation.	A judge's oath to "administer justice without respect to persons, and do equal right to the poor and to the rich," along with their duty to uphold the Constitution and the integrity of the judiciary (Canon 1 of the Code of Conduct for U.S. Judges), directly obligates them to address attorney misconduct, as such behavior undermines fair, impartial justice and the rule of law, requiring judges to report serious violations to disciplinary authorities, as per ABA Model Rule 2.15, to ensure attorneys act ethically as officers of the court	Judges, bound by their oath, are responsible for ensuring that cases before them are conducted properly and in accordance with applicable law, rules and standards. When a judge observes attorney misconduct (like misleading the court or acting unfairly), the judge will raise the issue with the attorney and seek an explanation and then consider whether further action is appropriate – the judge may refer the matter to the relevant regulatory body for investigation or to a prosecuting authority.	Judges in Colombia swear to "comply with and defend the Constitution and the laws". This oath compels them to ensure that the administration of justice is honest and transparent. Duty to Report: Under the General Code of Procedure, judges must personally maintain the integrity of their courtrooms. If they observe attorney misconduct, their oath and statutory duties require them to refer the matter to disciplinary authorities.
Role of judges in misconduct	Supervisory authority over court practice; may refer to regulators	May directly sanction in cases; may report	Generally do not discipline directly; refer matters to SRA/BSB	Refer misconduct to disciplinary chambers; ensure due process

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		misconduct to bar authorities		
Direct court sanctions available	Limited procedural sanctions; court access restrictions	Monetary sanctions, dismissal of claims, evidentiary sanctions, contempt of court	Generally limited to case management sanctions	Limited procedural sanctions in proceedings
Formal disciplinary process handled by	Legal Services Council / disciplinary tribunals – CILPA (Cayman Islands Legal Practitioners Association) regulates the profession	Bar counsel / disciplinary boards; ultimate authority often state supreme courts	Independent regulatory bodies (SRA/BSB)	National Judicial disciplinary chambers
Standard for triggers for discipline	Breach of professional duties under Legal Services Act	Dishonesty, fraud, violation of court orders, incompetence, conflicts of interest	Breach of professional standards, lack of integrity, misconduct	Statutorily defined disciplinary faults under Ley 1123
Duty to report misconduct	Judges and courts may refer misconduct	Judges and lawyers often required to report serious misconduct	Judges may refer concerns; lawyers have reporting obligations	Judges may initiate or forward complaints
Possible disciplinary sanctions	Fines, suspension, striking off, interim orders	Reprimand, fines, probation, suspension, disbarment	Warning, fines, practice restrictions, suspension, striking off	Warning, suspension, disbarment
Separation of judicial and disciplinary roles	Mixed – courts supervise; discipline handled by regulators	Partial – judges sanction in court; discipline handled separately	Strong separation between courts and regulators	Discipline integrated into judicial system

Appeal rights	Yes – appeals under statutory framework	Yes – disciplinary decisions appealable to higher courts	Yes – appeals to tribunals/courts	Yes – judicial appeal mechanisms

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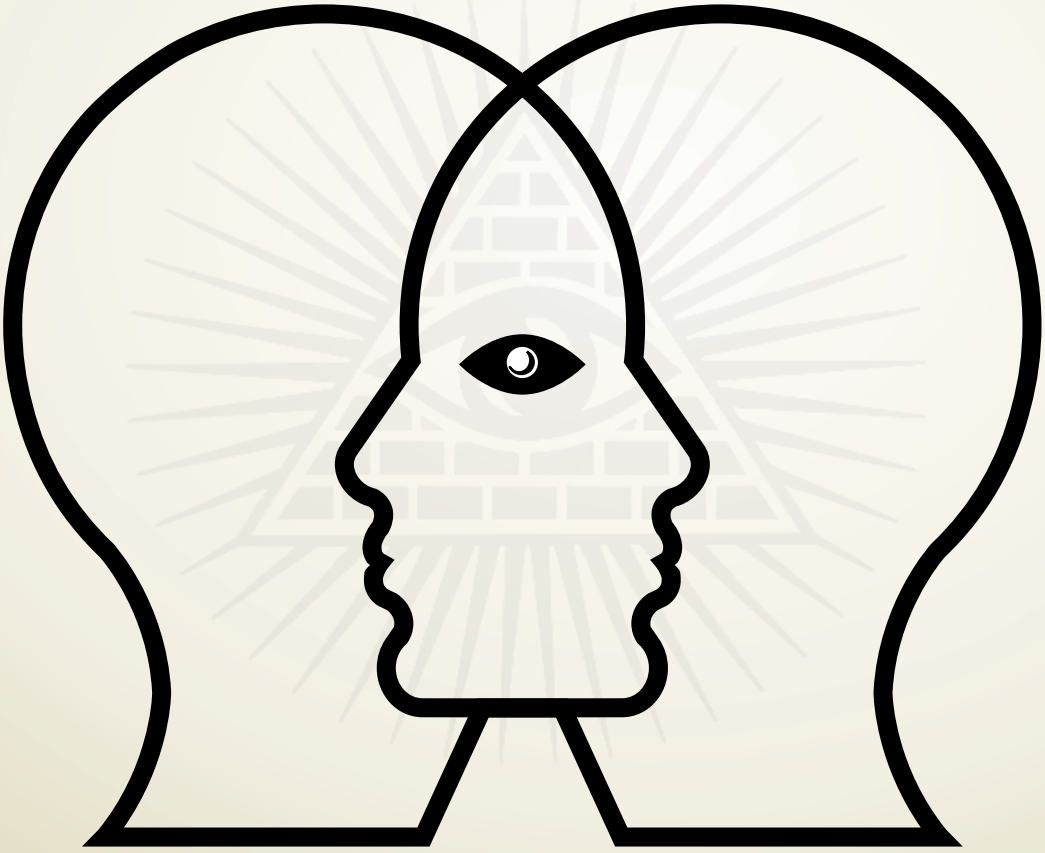
AMERICAN BANKRUPTCY INSTITUTE

REPORT ON STANDARDS OF PROFESSIONAL COURTESY and CONDUCT



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Report on Standards of Professional Courtesy and Conduct

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Report on Standards of Professional Courtesy and Conduct

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Reporter's Notes:[1]

The need to promote civility is not a new topic. After all, Abraham Lincoln said, "There is a vague and popular belief that lawyers are necessarily dishonest."[2] In 1992, the Seventh Circuit adopted its official civility code,[3] a turning point that inspired hundreds of jurisdictions to codify their own understandings of professionalism and civility.[4] This widespread codification is due in large measure to a perceived increase in incivility among business and legal professionals. What was once a watershed moment has now reached a tipping point. Indeed, over the past 30 years, the "biggest negative change [in the legal profession] has probably been the decreased emphasis on professionalism."[5] Yet despite this universal concern about incivility, there has been little discussion or study regarding unprofessional or uncivil behavior among insolvency professionals.[6]

I. Duties of civility and professionalism.

In striving to fulfill their duties and responsibilities to the public, insolvency professionals[7] must remain conscious of the broader duty owed to their profession. The bankruptcy process is part of a larger legal system that is adversarial by design, and insolvency professionals must ardently represent their respective positions to ensure that the system is effective and trusted. But also rooted in bankruptcy, perhaps more so than in other areas of litigation, are the concepts of cooperation and

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[1] James Patrick Shea (Civility Task Force Chair), David Houston, IV (Vice Chair), Emily Taube (Vice Chair), Nancy B. Rapoport, Deborah L. Thorne, and Bill P. Weintraub put together an excellent first draft of this topic, and I thank them. Additionally, I thank Civility Task Force members Rudy J. Cerone, Hon. Daniel P. Collins, Hon. Mary Grace Diehl, Edward T. Gavin, Hon. Bruce A. Harwood, Nina M. Parker, Andrea B. Schwartz, Hon. Elizabeth S. Stong, Hon. Howard R. Tallman, Hon. Gregg W. Zive, and James T. Markus. Finally, I thank Ashley D. Champion, Phillip Parham III, and Kimberly B. Reeves, graduates and students at Georgia State University College of Law, for their hard work in assisting our Task Force.

[2] Abraham Lincoln, July 1, 1850.

[3] STANDARDS FOR PROFESSIONAL CONDUCT, U.S.C.S. Ct. App. 7th Cir., Appx. (LexisNexis 2013).

[4] Howard Merten, *The Case for Self-Interested Civility*, F.D.C.C. Q., Jan. 1, 2012 at 214; *see also*, Ctr. for Prof'l Resp., *Professionalism Codes*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last updated August 2012) (listing more than 100 jurisdictional professionalism codes).

[5] Jim Maiwurm, *Above the Law Interrogatories: 10 Questions with Jim Maiwurm of Squire Sanders*, ATL INTERROGATORIES (MAY 22, 2013, 2:55 PM), http://abovethelaw.com/2013/05/the-atl-interrogatories-10-questions-with-jim-maiwurm-of-squire-sanders/; *see, e.g.*, Howard Merten, *The Case for Self-Interested Civility*, supra note 4.

[6] Despite the lack of empirical evidence related to the insolvency world, it is undeniable that, in recent years, there has been an increase in unprofessional and uncivil behavior among insolvency professionals; yet no civility code relates strictly to the bankruptcy profession.

[7] The American Bankruptcy Institute "includes more than 13,000 attorneys, auctioneers, bankers, judges, lenders, professors, turnaround specialists, accountants and others bankruptcy professionals." *About ABI*, AM. BANKR. INST., http://www.abiworld.org/AM/Template.cfm?Section=About_ABI (last visited July 5, 2013).

negotiation, and those components seem to have become misplaced in an increasingly uncivil legal climate.

While some headlines may make us snicker, others leave us disappointed. The collection of attorney misconduct stories reiterate that the system's integrity must be fortified by ensuring that members' conduct adheres to fundamental concepts of civility.[8] Undoubtedly, a professional owes his colleagues a certain level of candor, courtesy, fairness, and cooperation. Indeed, the bankruptcy system is a "civilized mechanism for resolving disputes, but only if the [professionals] themselves behave with dignity."[9] In disagreement, we must not be disagreeable.

II. Addressing civility among bankruptcy professionals.

Despite the apparently heavy-handed focus on changing the character of professionals' interactions, the lack of civil behavior continues to plague professional communities.[10] Incivility comes with a high price. As Judge Gene E.K. Pratter (addressing opposing litigators' incivility) commented, "[U]ncivil, abrasive, abusive, hostile or obstructive conduct . . . impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently."[11]

For over two decades, the legal community has attempted to quash incivility among members, but the problem seems more deeply entrenched in professional culture despite efforts to excise the growth. While the causes and effects of this troubling trend are numerous, growing

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[8] *See* Jennifer Smith, *Lawyers Behaving Badly Get a Dressing Down from Civility Cops*, WALL ST. J. (U.S.), Jan. 27, 2013 (the prevalence of in-court shouting and vulgar emails and phone calls to judges and clients further damages the already poor reputations of "Rambo" litigators), *available at* http://online.wsj.com/article/SB10001424127887323539804578263733099255320.html; *e.g.*, *Goldberg v. Mt. Sinai Med. Ctr. of Greater Miami, Inc.*, 2007 Bankr. LEXIS 2780, *6 (ordering bankruptcy attorney William P. Smith (appearing *pro hac vice*) to attend professionalism course for telling U.S. Bankruptcy Judge Laurell Isicoff, "[Y]ou're a few French fries short of a Happy Meal," because "there is no jurisdiction in the United States . . . [where Smith's comments] would fall within the bounds of professional behavior."); Debra Cassens Weiss, *11th Circuit OKs Sanction for Brief Calling Judge's Findings 'Half Baked' and Wine Peace Offering*, A.B.A. J., Oct. 17, 2012, *available at* http://www.abajournal.com/news/article/11th_circuit_oks_sanction_for_brief_calling_judges_findings_half_baked_wine (reporting that the Eleventh Circuit Court of Appeals upheld bankruptcy attorney Kevin Gleason's 60-day suspension for calling U.S. Bankruptcy Judge John Olson's rulings "half-baked," then sending a bottle of wine to the judge's chambers with a note inviting him to resolve the issue "privately"); G.M. Filisko, *Be Nice: More States Are Treating Incivility as a Possible Ethics Violation*, A.B.A. J., Apr. 2012, *available at* http://www.abajournal.com/magazine/article/be_nice_more_states_are_treating_incivility_as_a_possible_ethics_violation (reporting that famed Jack Kevorkian attorney Geoffrey Fieger compared three Michigan Court of Appeals judges to Hitler and other Nazis on his radio program after the three-judge panel overturned a $15M jury verdict for his client); Kyle Munzenrieder, *Lawyers Thrown Off Case for Drawing D*** Pics, Playing Angry Birds During Deposition*, Miami New Times Blog (May, 17 2012, 12:26 PM), *available at* http://blogs.miaminewtimes.com/riptide/2012/05/lawyers_drew_dick_pictures_and.php (reporting that two attorneys, Richard Cellar and Stacey Schulman, and the Morgan & Morgan firm were disqualified from a case because one lawyer drew pictures of male genitalia and played the video game Angry Birds during depositions); Debra Cassens Weiss, *Courtroom 'Shoutfest' over Scheduling Conflict Results in $200 Fine for Lawyer*, A.B.A. J., Apr. 3, 2012, *available at* http://www.abajournal.com/news/article/lawyer_is_fined_200_after_scheduling_conflict_spurs_courtroom_shouting.

[9] Melvin F. Right, Jr., *I'll See You in Court!,* N.C. CH. J.'S COMM'N ON PROF'LISM, (Feb. 2012), available at http://www.nccourts.org/Courts/CRS/Councils/Professionalism/Documents/seeyouincourt-feb2012.pdf.

[10] *See*, *e.g.*, Julie Kay, *Got Civility? Litigation Is Getting Uglier than Ever*, DAILY BUS. REV., Jan. 28, 2013, *available at* http://dailybusinessreview.com/PubArticleDBR.jsp?id=1202585857660&slreturn=20130607200553.

[11] Michael J. Newman, *Being the Lawyer You Want to Be,* THE LEGAL INTELLIGENCER, March 22, 2013 (citing *Huggins v. Coatesville Area Sch. Dist.*, CIV A. 07-4917 (E.D. Pa. Sept. 16, 2009)), *available at* http://law.com/jsp/pa/PubArticlePA.jsp?id=1202593170481.

incivility is likely attributable in large part to the business (and legal) world's rapidly changing landscape. Popular culture continually embraces over-the-top portrayals of hard-nosed lawyers, judges, and businessmen.[12] Factor in technological advances,[13] a globalized business market,[14] decreased mentorship within the legal community,[15] and vague professionalism policies,[16] and it creates a perfect storm that may affect young professionals' misguided understanding of professionalism.[17] Reversing the trend will require changing the culture. The task of clearly defining acceptable standards of conduct lies with each profession's governing body, but personal responsibility for one's actions must also be at the forefront of civility consideration.

During his tenure as president of the American Bankruptcy Institute, Geoffrey L. Berman created the Civility Task Force[18] to promulgate principles of civility within the context of the insolvency profession. Under the leadership of ABI's immediate past-president, Jim Markus, and current president Patricia A. Redmond, the Task Force drafted the proposed Principles of Civility, a professionalism initiative intended to be a framework on which to build civility among bankruptcy professionals and fortify ABI's leadership role in policymaking and education.

The bankruptcy profession largely is self-regulating. Thus, re-emphasizing professionalism must begin with each member's commitment to carry out his or her duties to colleagues, clients, and the public in a manner that instills trust and confidence in the profession. The Principles are designed to guide ABI's member community of more than 13,000 by codifying fundamental concepts of civility. Accordingly, the proposed Principles are not intended to supplement professional ethical codes, nor are they to be enforced by a disciplinary committee.[19] Rather, these Principles of Civility are aspirational — meant to encourage members to rise above the fray to promote the profession's integrity and instill in the public a trust in the bankruptcy system. Accordingly, the Principles' effectiveness relies on individuals maintaining accountability to themselves and their peers.

III. Standards of civility and professionalism across jurisdictions.

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[12] G.M. Filisko, *You're Out of Order! Dealing with the costs of incivility in the legal profession*, A.B.A. J., Jan. 2013, at 37.

[13] Gone are the days when written communications were carefully crafted with time to reflect on the content of letters before putting them in the mailbox. Today, typing a strongly worded email and hitting send is often a source of strife among colleagues. *See* G.M. Filisko, *You're Out of Order!*, supra note 12 ("By far, technology is cited most often as the foundation for boorish behavior."); David Bernstein, *A New Civility Standard*, VOLOKH CONSPIRACY (Mar. 4, 2013, 4:36 PM), http://volokh.com/2013/03/04/a-new-civility-standard.

[14] Generally, today's business environment requires interacting with colleagues from different towns, states, or even countries. *See*, *e.g.*, Julie Kay, *Got Civility?*, supra note 10 ("Now [professionals] frequently parachute in[] . . . from out of town and may not know or ever see the same [people] again.").

[15] G.M. Filisko, *You're Out of Order!*, supra note 12, at 37.

[16] *See*, *e.g.*, Kay, *Got Civility?*, supra note 10; Phillip Bantz, *All fun and games until free speech rights in S.C. get violated*, S.C. Law. Wkly., Feb. 1, 2013 (listing reasons judges and Florida bar associations have given for the rise of incivility in Florida's legal profession), *available at* http://sclawyersweekly.com/news/2013/02/01/all-fun-and-games-until-free-speech-rights-get-violated.

[17] G.M. Filisko, *You're Out of Order!*, supra note 12.

[18] The Civility Task Force is a stand-alone committee created to work with ABI's Ethics and Professional Compensation Committee in order to address standards of conduct within the bankruptcy profession.

[19] In this sense, the Principles fit within the "'Professionalism' as Focus of Aspiration" definition from Robert Atkinson: "voluntary conformity with legally unenforceable standards." Robert Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 275 (1995).

As a starting point, the American Bar Association's House of Delegates adopted Resolution 108, which, at a general policy level, encourages attorneys to promote public discourse. The Resolution also calls for lawyers to personally take notice and take charge of the degree to which they engage in civil discourse, and to exercise self-management of communicative etiquette in all of their professional dealings. The Resolution also puts the onus on bar associations to take "meaningful steps" toward fostering civil discourse and promoting the lawyer's role in its realization. This purposefully vague call to action is intended to encourage creative pursuits — no matter how big or small — provided that the step is taken to promote and embody civil public discourse in the law profession.

IV. The American Bankruptcy Institute's Principles of Civility

"Every action done in company ought to be with some sign of respect to those that are present." – George Washington, ca. 1744.

A. Goal(s) and purpose(s) of the Principles.

Purpose(s). In furtherance of the fundamental concepts of civility, these Principles are designed to define the expected degree of courtesy and professionalism among insolvency professionals and to provide specific guidance to those new to bankruptcy practice as to how to maintain an acceptable standard of professional conduct. The Principles are intended to educate and guide professionals who are representatives of — or practicing in — American bankruptcy courts.

Although professionals are encouraged to comply with the Principles, this civility code does not establish enforceable minimum standards of professional care or competence. Rather, the Principles should be considered against the context of the professional's duty to represent clients competently, diligently, and ethically, and to promote the ideals of professional courtesy, conduct, and cooperation.

The Principles are not a basis for litigation, sanctions, or penalties. Nothing in the Principles supersedes existing ethics rules or alters existing standards of conduct against which professional negligence may be determined. Instead, ABI intends that its members voluntarily agree to adhere to these Principles so as to improve the bankruptcy profession and the administration of justice for all of its participants.

Goal(s). Consider ethics and professionalism issues in bankruptcy practice and make recommendations for uniform standards.

B. Principles of Civility[20]

Preamble

Professionals should be mindful of the need to protect the integrity of the bankruptcy process in the eyes of the public and in the eyes of the legal community around us.

General Duties of Professionals

1. **Professionals should be courteous and civil in all professional dealings with other persons.**

    a. Professionals should act in a civil manner regardless of the feelings that they or their clients may have toward others.

    b. Professionals can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. In all communications, professionals should avoid vulgar language, disparaging personal remarks, or other indications of acrimony toward counsel, parties, witnesses, and court personnel.

    c. Professionals should require that persons under their supervision conduct themselves with courtesy and civility.

2. **When not inconsistent with their clients' interests, professionals should cooperate with other professionals in an effort to avoid litigation and to resolve litigation that already has commenced.**

    a. Professionals should avoid unnecessary motion practice or other judicial intervention whenever it is practicable to do so.

    b. Professionals should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another directly (in person or by telephone) and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

3. **Professionals should respect the schedule and commitments of others, consistent with the protection of the client's interests.**

    a. On receipt of any inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a professional should — if not inconsistent with the legitimate interests of the client — agree to the proposal or offer a counter-suggestion that is as close in time to the original proposal as is reasonably possible.

[20] Many of the concepts incorporated into the Principles of Civility began with the Administrative Order issued by the Bankruptcy Court for the Eastern District of New York that adopted the New York State Standards of Civility. *See* Ch. J. Judith S. Kaye, *Standards of Civility,* NEW YORK STATE UNIFIED CT. SYSTEM, (Oct. 1997), *available at* http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/2009_ethics_h.authcheckdam.pdf.

b. A professional should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected. Ordinarily, the first request for an extension of time should be granted as a matter of courtesy.

c. A professional should consult with others regarding scheduling matters in a good-faith effort to avoid scheduling conflicts. Likewise, a professional should cooperate with others when scheduling changes are requested, provided that the legitimate interests of his or her client will not be jeopardized.

d. A professional should not attach unreasonable conditions to any extensions of time. A professional is entitled to impose conditions appropriate to preserve rights that an extension otherwise might jeopardize.

e. A professional should not request a calendar change or misrepresent a conflict in order to obtain an undue advantage or delay.

f. A professional should advise clients against the strategy of refusing to accede to time extensions for the sake of appearing "tough."

4. A professional should not initiate communications with the intention of gaining undue advantage from the recipient's lack of immediate availability.

5. A professional should return telephone calls promptly and respond to communications that reasonably require a response, with due consideration of time zone differences and other known circumstances affecting availability.

6. The timing and manner of the servicing of papers should not be designed to cause disadvantage or embarrassment to the party receiving the papers.

7. A professional should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

a. A professional should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.

b. A professional should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

c. A professional should base discovery objections on a good-faith belief in their merit and should not object solely for the purpose of withholding or delaying the disclosure of relevant information.

8. **In out-of-court proceedings, professionals should not engage in any conduct that would not be appropriate in the presence of a judge.**

9. **A professional should keep his or her word.**

10. **A professional should not mislead others involved in the bankruptcy process.**

    a. A professional should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

    b. A professional exchanging drafts with others should identify any changes in the drafts or otherwise explicitly bring those changes to the attention of the recipient.

General Duties of Lawyers

1. **Lawyers should be respectful of the schedules and commitments of others.**

    a. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is calculated to permit full and fair representation of the matter to be adjudicated and to permit an appropriate time for the lawyer's adversary to prepare a full response.

    b. A lawyer should notify other counsel and, if appropriate, the court and other persons foreseeably affected at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed, and should inform the court as soon as possible as to whether the parties will seek to have the matter continued or whether the matter has been resolved.

    c. A lawyer should serve papers to other counsel with the understanding that all parties should have adequate time to consider their contents.

2. **In examinations and other proceedings, as well as in meetings and negotiations, professionals should conduct themselves with dignity and refrain from displaying rudeness and disrespect.**

    a. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at examinations, and at conferences.

    b. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary to protect the legitimate interests of the client.

    c. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

3. **Lawyers should not mislead others involved in the bankruptcy process.**

   a. A lawyer should not ascribe a position to another professional that he or she has not taken or otherwise seek to create an unjustified inference based on the professional's statements or conduct.

   b. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

Lawyers' Duties to the Court and Court Personnel

1. **A lawyer is both an officer of the court and an advocate. As such, a lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court and its personnel.**

   a. A lawyer should speak and write civilly and respectfully in all communications with the court and court personnel, avoiding histrionics and innuendo.

   b. A lawyer should stipulate to relevant matters if they are undisputed and if no good-faith advocacy basis exists for a refusal to so stipulate.

   c. A lawyer should use his or her best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

   d. A lawyer should not engage in conduct intended primarily to harass or humiliate witnesses, parties, or professionals.

   e. During court proceedings, a lawyer shall maintain neutral behavior and refrain from making inappropriate gestures, facial expressions, audible comments, or similar attitudes. A lawyer shall also advise clients to conduct themselves similarly.

2. **Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.**

   a. A lawyer should be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

   b. A lawyer should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible. Parties should notify the court of requested continuances or resolutions as soon as practicable.

   c. A lawyer should use his or her best efforts to ensure that persons under their direction act civilly toward court personnel.

Duties of Judges and Court Personnel to Lawyers, Parties, and Witnesses

1. **A judge should be patient, courteous, and civil to lawyers, parties, and witnesses.**

    a. A judge should maintain control over the proceedings and ensure that the proceedings are conducted in a civil manner.

    b. Judges should not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

    c. To the extent consistent with the efficient conduct of litigation and other demands on the court, judges should be considerate of the schedules of lawyers, parties, and witnesses when scheduling hearings, meetings, or conferences.

    d. Judges should be punctual in convening all trials, hearings, meetings, and conferences; if delayed, they should notify counsel when practicable.

    e. Judges should make all reasonable efforts to promptly decide all matters presented to them for decision.

    f. Judges should use their best efforts to ensure that court personnel under their direction act civilly toward lawyers, parties, and witnesses and be mindful of the far-reaching consequences of sanctions before imposing them.

2. **Court personnel should be courteous, patient, and respectful while providing prompt, efficient, and helpful service to all persons having business with the courts.**

    a. Court employees should respond promptly and helpfully to requests for assistance or information; if the requests are for information that a court employee is not permitted to provide, then the court employee should refuse that request with an explanation of the reason for the refusal.

    b. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

    c. Court employees should avoid unfounded and unreasonable attacks on lawyers and the judiciary.

    d. When circulating documents, a court employee should explicitly highlight all proposed changes.

Solicitors Regulation Authority

Guidance

Guidance

Conduct in disputes

Conduct in disputes

Published: 4 March 2022

Print this page [#] Save as PDF [https://www.sra.org.uk/pdfcentre/?type=Id&data=1079449811]

Status

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

Who is this guidance for?

All firms and individuals we regulate who conduct litigation and who give dispute resolution and pre-action advice.

Purpose of this guidance

To help you understand the application of our Principles and Codes of Conduct [https://www.sra.org.uk/solicitors/standards-regulations/] to these activities. As well as to highlight the different duties that you may owe to the court, to clients and to third parties (such as witnesses and opponents) in litigation. We describe situations in which these duties are not properly balanced to help illustrate how these can arise in practice and the serious consequences that can follow.

There will be situations where maintaining the correct balance between these different duties is not a simple exercise. This guidance is designed to help you identify the right course of action in such situations.

We are aware of concerns surrounding Strategic Lawsuits against Public Participation (SLAPP). This is a term commonly used to describe the misuse of the legal system, and the bringing or threatening of proceedings, in order to discourage public criticism or action. For example, cases in which the underlying intention is to stifle the reporting or the investigation of serious concerns of corruption or money laundering by using improper and abusive litigation tactics.

Features of these cases may include:

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- making excessive or meritless claims, aggressive and intimidating threats
- otherwise acting in a way which fails to meet the wider public interest principles
- duties to which solicitors must have regard, and which are highlighted in this guidance.

To help ensure compliance, you should always be vigilant in scrutinising your own and others' conduct in disputes you are involved in. The behaviours described this guidance can be evidence of misconduct capable of amounting to a serious breach of our regulatory arrangements, and can inform your duty to report. This will help us to consider whether a serious breach of our regulatory arrangements has occurred. Read see our guidance on reporting and notification obligations [https://www.sra.org.uk/solicitors/guidance/reporting-notification-obligations/] .

Standards and Regulations

The duties of a solicitor when conducting litigation are set out in our Principles and Codes of Conduct.

Our Principles

Our Principles state that solicitors should always act:

Principle 1: in a way that upholds the constitutional principle of the rule of law and the proper administration of justice

Principle 2: in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons

Principle 3: with independence

Principle 4: with honesty

Principle 5: with integrity

Principle 7: in the best interests of each client

Should the Principles come into conflict, those which safeguard the wider public interest take precedence over an individual client's interests. These include the rule of law and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services.

You should, where relevant, inform your client of the circumstances in which your duty to the court and other professional obligations will outweigh your duty to them. For example, you must not allow a client to knowingly mislead the court in order to further their case.

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Independence (Principle 3) clearly includes independence from the client. This has also been explained by the Solicitors Disciplinary Tribunal (SDT):

'A solicitor is independent of his client and having regard to his wider responsibilities and the need to maintain the profession's reputation, [they] must and should on occasion be prepared to say to [their] client 'What you seek to do may be legal but I am not prepared to help you to do it'' (In the matter of Paul Francis Simms, SDT, 2002).

Our Codes of Conduct

The standards in our Code of Conduct for Solicitors, RELs and RFLs [https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] (also reflected in our Code of Conduct for Firms [https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/]) help those conducting litigation to understand the standards which apply specifically in that area of work.

For example, paragraph 1 of the Code of Conduct for Solicitors emphasises the importance for all those conducting litigation to maintain trust and act fairly.

Paragraph 1.2 states that you must not 'abuse your position by taking unfair advantage of clients or others'. Paragraph 1.4 states that you must not mislead, or attempt to mislead your clients, the court or others, either by your own acts or omissions or by allowing or being complicit in the acts or omissions of others (including your client)'.

Paragraph 2 highlights further specific duties to the court. These include:

- not seeking to influence the substance of evidence (paragraph 2.2)
- only making assertions or putting forward statements, representations or submissions to the court or others which are properly arguable (paragraph 2.4)
- drawing the court's attention to procedural irregularities which are likely to have a material effect on the outcome of the proceedings (paragraph 2.7).

Situations where these duties have not been properly balanced

The following situations describe unacceptable behaviours and how these might arise in practice. They look at both pre-action activity, including matters settled out of court, as well as conduct in legal proceedings. We then illustrate some situations with case studies that we have seen in practice at the end of this guidance.

These are examples of where solicitors have failed to balance properly duties owed in the public interest, to the court, to their client and to certain third parties. Some of the situations involve the solicitor

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improperly prioritising the client's interests above others. They include situations where duties owed to others and to the court have been overlooked. In others, even the client's best interests have not been served.

1. Making allegations without merit

This involves solicitors bringing claims with insufficient investigation of their merits or of the underlying legal background. We understand, for example, that this has occurred in relation to some disrepair claims against social landlords. This is where claims have been issued before a proper inspection or survey has taken place and disrepair has been alleged where none exists.

Solicitors bringing claims may be reckless as to the merits of the case - or actively uninterested in the merits - and aim to pressure on an opponent to settle the case outside of court.

Some solicitors rely on the asymmetry of legal understanding which may exist between the defendant and the solicitor.

There have also been cases where letters of claim included a threat to reveal publicly embarrassing information if the opponent fails to settle or an unjustified threat of liability for significant costs. Such an approach could amount to a failure to act with integrity.

Threatening to issue proceedings, or to defend a claim in such cases, can also result in solicitors failing to act in the best interests of their clients. Or where their clients are encouraged to proceed with litigation where there is little legal merit in doing so. This might arise because of a conflict with the solicitor's own interest in generating fee income. Or where a solicitor wants to pursue the litigation notwithstanding the lack of merit in order to keep a longstanding client 'happy', and fails to act with sufficient independence.

Improper tactics such as these can also be seen in some group actions. In some cases, actions have been instigated in circumstances where the law firm carefully selects the lead case. However little has been done to check the validity of other claims made by individuals approached by the firm or by introducers. This is not in the interests of clients and can lead to a perceived risk of higher costs and damages, creating undue and inappropriate pressure on defendants to settle out of court.

Read case study 1 [https://www.sra.org.uk/solicitors/guidance/conduct-disputes/#case1] – Making allegations without merit: holiday sickness claims

2. Pursuing litigation for improper purposes

This involves the threat of litigation or the making of counterclaims and defence arguments for reasons that are not connected to resolving genuine disputes or advancing legal rights.

For example, the purpose could be to delay deportation in an immigration matter as illustrated in the second case study.

As mentioned above in the context of SLAPP, it might also involve making allegations without merit where the sole purpose is to stifle valid public discourse. Or action in respect of serious concerns of corruption or money laundering.

The rule of law and our legal system provides that there is a right to legal advice and representation for all. However, proceedings must be pursued properly and that means making sure that duties to a client do not override wider public interest obligations and duties to the court.

Further, when exercising your reporting duties, your decision to report - or threatening to - must not be improperly used for tactical reasons to attempt to influence another party's behaviour or the progress of the litigation. If you do this, you run the risk that you will be in breach of your obligations and subject to investigation by us.

Read case study 2 [#case2] – Pursuing litigation for improper purposes: immigration solicitor struck off by the SDT for abuse of the appeals process

3. Taking unfair advantage

Paragraph 1.2 of our Code of Conduct for Solicitors says that 'you must not abuse your position by taking unfair advantage of clients or others.'

In advancing a client's interests, solicitors must be careful not to take unfair advantage of an opponent or other third parties such as witnesses.

Special care is needed when dealing with or corresponding with an opponent who is unrepresented or vulnerable. Solicitors must make sure that such opponents are not taken advantage of, for example, by being given artificially short or wholly unnecessary deadlines to reply to correspondence.

Further, duties to the court and proper administration of justice may require solicitors to take steps to assist the court and litigant in person which may not have been required with a represented opponent.

Litigation will often involve putting a case against another party in strong terms. However, breaches of our standards can arise from oppressive behaviour and tactics including include:

- threatening litigation where there is no proper legal basis for a claim

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- making exaggerated claims of adverse consequences including alleging liability for costs that are not legally recoverable
- sending excessively legalistic letters with the aim of intimidating particularly unrepresented or lay parties
- sending letters in abusive, intimidating or aggressive tone or language

Read case study 3 [#case3] – Taking unfair advantage: non – disclosure agreements (NDAs) and harassment

4. Misleading the court

Paragraph 1.4 of the Code of Conduct for Solicitors sets out the requirement not to mislead the court, the client or others.

Solicitors who are complicit with their client in misleading the court, or who do so themselves, risk serious consequences. The courts have made it very clear that they regard this as 'one of the most serious offences that an advocate or litigator can commit'. Examples include:

- knowingly helping a criminal client to create a false alibi
- attempting to convince expert witnesses to alter their reports for the benefit of a solicitor's client
- knowing that a client has obtained information for use in their case by illegal means (such as by phone hacking or improper surveillance methods) but helping the client to provide a false explanation of where the evidence came from
- failing to disclose relevant evidence or authorities
- making false or misleading statements
- making applications to the court (for example, solely to delay proceedings and increase costs) which serve no useful purpose in upholding the rule of law or the proper administration of justice.

Read case study 4 [#case4] – Misleading the Court: hearing loss claims

5. Conducting excessive or aggressive litigation

This kind of conduct, whether in litigation or pre-action advice, can create disproportionate costs, cause distress and anxiety for the subjected parties and damage public trust and confidence in the profession.

The courts have made clear their disapproval of what they consider to be excessive litigation (see for example Excalibur Ventures LLC v Texas Keystone Inc and others [2013] EWHC 4278 (Comm) [2013]).

They have also criticised the conduct of cases that occupy court time to the detriment of others. Such cases can involve disproportionate valuations of the claim, unduly wide-ranging allegations of impropriety and inappropriate volumes of correspondence.

The courts often accept that such cases have been pursued in accordance with a client's instructions. However, while solicitors are responsible for the strategy of their client's case, they cannot abrogate their responsibility to the court and to regulatory principles and codes, on the basis that they are acting on their client's instructions alone.

Although solicitors are not routinely obliged to challenge their own client's case, they do have a duty to interrogate and engage properly with the legal and evidential merits. They must not advance arguments that they do not consider to be properly arguable and they must have regard to the rule of law and the proper administration of justice.

Equally, taking on or defending weak cases without making the potential costs, risks and merits clear to the client, may mean solicitors fail to act in their client's best interests. They may also be breaching other regulatory principles.

Further help

If you require further assistance, please contact the Professional Ethics helpline [https://www.sra.org.uk/contactus/] .

Case studies

Case study 1: Making allegations without merit: holiday sickness claims

Between 2013 and 2017 there was a five-fold increase in claims against hotels for gastric illness suffered by holiday makers. We received numerous reports of cases where claims had been dismissed as dishonest, leading to costs orders against claimants and criminal prosecutions.

Our concern was that firms were accepting cases from introducers who had recruited claimants by some form of cold calling. And that firms were not investigating the merits of cases before raising them with defendants and seeking settlement. In some of these cases, firms had also sought unreasonable costs for a limited amount of work.

While in many of these cases firms had not investigated the evidence available, in some the firms had even actively advised their clients to destroy evidence which might harm their case.

We have warned solicitors of concerns that many holiday sickness claims might not be genuine. Firms that do not take account of these signs and conduct questionable cases will face regulatory action.

Case study 2: Pursuing litigation for improper purposes: immigration solicitor struck off by the SDT

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for abuse of the appeals process

The SDT has struck off solicitors for abusing the court system by bringing hopeless appeals following immigration decisions. In one particular case, a solicitor made a practice of bringing last minute challenges to removal decisions. In one of these challenges, the solicitor left out important information which would have meant that their submissions and challenge would have been rejected.

The Immigration Tribunal found that the solicitor's appeals had no legal merit. And that they had designed them to exploit a 'weakspot' in the judicial system to delay deportations where there was no justification for doing so.

After we investigated the solicitor's conduct was referred to the SDT. They found that the solicitor's actions had demonstrated a lack of integrity and they were struck off the roll. On appeal, the High Court upheld this decision commenting that the deterrent effect of the decision was an important consideration for the SDT when deciding on sanction.

Case study 3: Taking unfair advantage: non–disclosure agreements (NDAs) and harassment

The role of solicitors in drafting NDAs in relation to allegations of harassment has received widespread public and political attention.

There are legitimate uses for these agreements, but solicitors must not threaten consequences that cannot legally be enforced. In particular, solicitors must not seek to prevent anyone from reporting offences or co-operating with a criminal investigation and other legal processes, including influencing the evidence they give. They must also not prevent someone who has signed an NDA from keeping a copy of the agreement.

People who have experienced some form of harassment may well be vulnerable, in large part because of the harassment itself. Solicitors need to carefully consider this when communicating with them and when drafting an NDA.

There have also been allegations of employers who solicitors represent threatening to give a hostile reference or otherwise to penalise a victim if they do not agree to sign an NDA. Other victims have reported being given the impression by a solicitor that they would be imprisoned if they did not comply with an NDA.

A solicitor will face disciplinary action if they are complicit in unreasonable pressure to take unfair advantage of a victim or an unrepresented person on the other side. Similar action will also follow if they are also effectively complicit in seeking to conceal criminal activity.

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Such conduct might also involve serious criminal offences as well as professional misconduct. Attempts for example to discourage or limit disclosure of evidence in civil or criminal proceedings can amount to perverting the course of justice.

It might be in the best interests of a client to avoid publicity concerning allegations of sexual misconduct. However, the duty to the client does not override the solicitor's duties to:

- uphold the proper administration of justice
- act independently
- behave in a way that upholds public trust and confidence in the solicitor's profession.

Our warning notice [https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/] on the use of NDAs provides more detail on the issues involved.

Case study 4: Misleading the court: hearing loss claims

A senior partner and solicitor employee were both struck off by the SDT after bringing a large number of noise-induced hearing claims which were mishandled and then cancelled.

The firm's failings included submitting claims after the final day for service, a failure to obtain proper medical evidence and misleading the other side.

The partner involved had tried to conceal the fact that their own failings had led to cases being struck out whilst making misleading statements to the court. These included saying that delays in obtaining/disclosing a medical report were due to experts failing to respond rather than because of his own shortcomings. A client's witness statement had also been substantively altered; from the client being unable to wear hearing protection provided by their employer, to them not recalling any protection being provided at all.

The Bar Council

Witness Preparation

Purpose	To assist barristers to identify what is permissible by way of factual and expert witness familiarisation and preparation, in both civil and criminal cases
Overview	Prohibition on coaching witnesses – permitted familiarisation for witnesses – guidance in *R v Momodou* – application in criminal cases – potential application in civil and family cases — witness statements in civil cases – discussions with factual witnesses – discussions with expert witnesses
Scope of application	All barristers
Issued by	The Ethics Committee
Originally issued	October 2005
Last reviewed	November 2019
Status and effect	**Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.**

Introduction

The aim of this document is to assist counsel in addressing:

- The ethical duties that may arise generally from managing one's client's witnesses outside court;

- The specific issues that arise in respect of witness coaching in the light of the decision of the Court of Appeal in *R v Momodou* [2005] EWCA Crim 177, [2005] 1 WLR 3442, [2005] 2 Cr App R 6.

It covers only the issues surrounding witness preparation, and should be read in conjunction with the relevant Rules C6.2 and C9 in the BSB Handbook, as well as gC6 and gC7, the latter of which provides guidance on putting conflicting evidence to witnesses. It is not intended to affect one's ability to discuss the merits of the case with one's lay client.

A. General points

1. Counsel can play a significant role in the preparation and presentation of witness evidence. Clients wish to ensure that the evidence in support of their case is presented to best effect. In addition, it is important that those facing unfamiliar court procedures are put at ease as much as possible, especially a witness who is nervous, vulnerable or may have been the victim of criminal or similar conduct. To those ends, barristers are increasingly being asked to prepare witnesses or potential witnesses for the experience of giving oral evidence in criminal and civil proceedings. The purpose of this document is to clarify what is and what is not permissible by way of witness interaction and preparation, in whatever form it is conducted.

2. The main rules which defines and regulate counsel's functions in relation to the preparation of evidence and contact with witnesses are Rule C9.2(d), which prohibits counsel from drafting any witness statement or affidavit that contains any statement of fact other than the evidence which one reasonably believes the witness would give if the witness were giving evidence orally, and Rule C9.3, which prohibits counsel from encouraging a witness to give evidence which is misleading or untruthful. (It is a contempt of court to try to persuade a witness to alter his or her evidence – see *Re B(JA) An Infant* [1965] Ch. 1112)[1] One should also take note of Rule C6.2 and gC6 and gC7.

3. Barristers should also be aware of the BSB's Guidance on Investigating and Collecting Evidence and Taking Witness Statements[2].

4. Those Rules and Guidance must be read together with Rule C9.4 which contains a fundamental prohibition, that "*you must not rehearse, practise with or coach a*

[1] It may not however be a contempt to seek to persuade a witness to tell the truth – see Stephenson LJ in *R v. Kellett* [1976] 1 QB 372.

[2] https://www.barstandardsboard.org.uk/uploads/assets/5769487c-c973-4b2a-bf7dde1c2a052d35/Investigating-and-Collecting-Evidence-and-Taking-Witness-Statements.pdf

witness in respect of their evidence". This is explained as flowing from Core Duty 3 (the duty to act with honesty and integrity): and see, too, Outcomes C6 and C7.

5. The guidance below is subdivided into separate sections for criminal, civil and family cases. Inevitably there is a significant amount of cross-over within the ethical duties applied to each area of law.

B. Criminal law

6. The Court of Appeal considered this topic in connection with witness training courses in the criminal case of *Momodou*, especially at [61]- [65]. The Court of Appeal emphasised that witness coaching is not permitted. However, the Court drew a distinction between witness coaching (which is prohibited) and arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants ("witness familiarisation"). Such arrangements prevent witnesses from being disadvantaged by ignorance of the process or taken by surprise at the way in which it works, and so assist witnesses to give their best at the trial or hearing in question without any risk that their evidence may become anything other than the witnesses' own uncontaminated evidence. As such, witness familiarisation arrangements are not only permissible; they are to be welcomed.

7. Although the Court of Appeal did not expressly address the point in *Momodou*, it is also appropriate, as part of a witness familiarisation process, for counsel to advise witnesses as to the basic requirements for giving evidence, e.g. the need to listen to and answer the question put, to speak clearly and slowly in order to ensure that the Court hears what the witness is saying, and to avoid irrelevant comments. This is consistent with the duty to the Court to ensure that one's client's case is presented clearly and without undue waste of the Court's time.

8. The Court of Appeal in *Momodou* further stated that it is permissible to provide guidance to expert witnesses and witnesses who are to give evidence of a technical nature (e.g., crime-scene officers and officers with responsibility for the operation of observation or detection equipment) on giving comprehensive and comprehensible evidence of a specialist kind to a jury, and resisting the pressure to go further in evidence than matters covered by the witnesses' specific expertise. Again, this would not diminish the authenticity or credibility of the evidence which is given by such witnesses at trial.

9. For further guidance concerning the evidence of experts, see paragraphs 30 to 33 below.

10. There is also detailed guidance on "Speaking to Witnesses at Court" in The Code for Crown Prosecutors[3], much of which is, in the opinion of the Committee, of value to defence counsel as well.

11. In relation to structured witness familiarisation or expert training programmes offered by outside agencies (i.e. not the routine familiarisation given by the witness service), the Court of Appeal gave broad guidance, as follows:

General requirements:

> 11.1 The witness familiarisation or expert training programme should normally be supervised or conducted by a solicitor or barrister with experience of the criminal justice process, and preferably and if possible, by an organisation accredited for the purpose by the Bar Council and Law Society[4].
>
> 11.2 None of those involved in the provision of the programme should have any personal knowledge of the matters in issue in the trial or hearing in question.
>
> 11.3 Records should be maintained of all those present and the identity of those responsible for the programme, whenever it takes place.
>
> 11.4 The programme should be retained, together with all the written material (or appropriate copies) used during the sessions.
>
> 11.5 None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events.
>
> 11.6 If discussion of the instant criminal proceedings begins, it must be stopped, and advice must be given as to precisely why it is impermissible, with a warning against the danger of evidence contamination and the risk that the course of justice may be perverted. A note should be made if and when any such warning is given.

[3] https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court

[4] Responsibility for accreditation of courses was subsequently passed from the Bar Council and Law Society to the BSB and SRA, and as of December 2016 is no longer undertaken by either.

11.7 All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the CPS (or other prosecuting authority[5]) as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed.

Prosecution witnesses:

11.8 The prosecuting authority should be informed in advance of any proposal for a witness familiarisation course for prosecution witnesses.

11.9 The proposals for the intended familiarisation course should be reduced into writing, rather than left to informal conversations.

11.10 If appropriate after obtaining police input, the prosecuting authority should be invited to comment in advance on the proposals.

11.11 If relevant information comes to the police, the police should inform the prosecuting authority.

11.12 If, having examined the proposals, the prosecuting authority suggests that the course may be breaching the permitted limits, it should be amended.

11.13 Although not directly addressed in *Momodou*, the Ethics Committee considers that prosecuting counsel, and those instructing them, have a duty to ensure that the trial Judge and the Defence are informed of any witness familiarisation programme organised for prosecution witnesses[6].

Defence witnesses:

11.14 Advice from counsel (whether defence counsel, or another independent counsel with no involvement in the proposed witness familiarisation course) should be sought in advance, with written information about the nature and extent of the proposed course for defence witnesses.

[5] *Momodou* was a case where the prosecuting authority was the CPS; although relevant prosecution witnesses were employees of Group 4 (now G4S), which had arranged the witness training programme. This explains the manner in which the Court of Appeal expressed itself. The guidance given must however apply where other prosecuting authorities are involved.

[6] The contrary view, that this is a matter of disclosure of relevant prosecution material in accordance with statutory tests, does not recommend itself to the Committee. It is rather a matter that goes to the integrity of the trial process itself, which should always be disclosed. See paragraph 12 of this Note.

11.15 The proposals for the intended familiarisation programme should be reduced into writing, rather than left to informal conversations.

11.16 Defence counsel should be invited to comment in advance on the proposals. If, having examined them, defence counsel suggests that the course may be breaching the permitted limits, it should be amended.

11.17 Defence counsel has a duty to ensure that the trial Judge and the prosecuting authority are informed of any familiarisation course or programme organised by the Defence using outside agencies.

12. In relation to counsel's professional obligations in relation to witness familiarisation programmes using outside agencies, in *Momodou* the Court of Appeal expressly stated that:

> "*63…. In any event, it is in our judgment a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process organised by the defence using outside agencies, and it will follow that the Crown Prosecution Service will be made aware of what has happened…*
>
> *"65… It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed in the trial itself, to see that this guidance is followed.*"

13. Two points arise from the Court of Appeal's guidance in relation to such courses or programmes offered by outside agencies:

13.1 First, the advice referred to in paragraph 11.14 should be sought from defence counsel or independent counsel with no involvement in the proposed witness familiarisation course. Such advice should be provided in writing.

13.2 Second, in view of the Court of Appeal's warning that none of the course materials should bear any similarity to the issues in the relevant criminal proceedings, it would be good practice for both the party subscribing to the familiarisation course and the participants to provide signed written confirmation that the course materials do not have similarities with any current or forthcoming case in which the participants are or may be involved as witnesses.

14. As part of such a familiarisation course or programme, a barrister (who should be independent counsel with no involvement in the anticipated hearing) may be asked to take witnesses through a mock examination-in-chief, cross-examination

or re-examination. One must bear the following points in mind when advising on, preparing or conducting any such exercise:

14.1 A mock examination-in-chief, cross-examination or re-examination may be permissible if, and only if, its purpose is simply to give a witness greater familiarity with and confidence in the process of giving oral evidence.

14.2 If, however, there is any risk that it might enable a witness to add a specious quality to his or her evidence, counsel should refuse to approve or take part in it.

14.3 If counsel is asked to approve or participate in a mock examination-in-chief, cross-examination or re-examination, all necessary steps should be taken to satisfy oneself that the exercise is not based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness. If it appears that such an exercise may not satisfy these requirements, counsel should not approve or take part in it.

14.4 In conducting any such mock exercises, counsel must not rehearse, practise or coach a witness in relation to his/her evidence: Rule C9.4. Where there is any reason to suspect that a mock examination-in-chief, cross-examination or re-examination would or might involve a breach of the BSB Handbook, one should not approve or take part in it.

15. When discussing evidence with experts in criminal cases, counsel should adopt a similar approach to civil cases, and must also keep in mind the expert's duty to help the court achieve the overriding objective as required by the Criminal Procedure Rules r.19.2. Pre-trial discussions between experts and the appointment of a single joint expert in criminal cases are also subject to the Criminal Procedure Rules rr.19.6-19.8.

16. In relation to the use of intermediaries in criminal proceedings, see paragraphs 43 to 44 below, within the family cases section, for guidance.

C. Civil cases

17. Civil proceedings differ from criminal proceedings in the form of witness evidence and the process of its preparation. The Civil Procedure Rules provide that witness evidence is to be adduced by way of witness statements and expert reports exchanged before trial, which are to stand as the evidence-in-chief of the witness in question unless the court orders otherwise: CPR rules 32.4(2) and 32.5.

18. There is no objection to showing a witness, before he gives evidence, any statement he has previously made.

19. If the witness upon reading such a statement, or spontaneously, discloses something material which is not part of his existing written evidence, counsel will have to consider with his client, and if necessary with the other parties, whether it is (i) appropriate to draft a supplemental witness statement at court to deal with the new matter raised or (ii) to deal with the issue within any evidence in chief, having given all parties notice of what is to be said by the witness. A small piece of new information may warrant the latter approach. Larger amounts of new evidence may best be set out in a supplemental statement.

20. Occasionally a witness may come to court (whether voluntarily or by witness summons) without any previous statement having been made and with no solicitor available to take a statement at court. There is nothing unethical about counsel drafting a witness statement in these circumstances, if it would otherwise be appropriate for a solicitor to do so. Counsel should seek permission from the judge, and notify the other advocates accordingly.

21. Counsel should in no circumstances discuss the case or exchange any more than common courtesies with witnesses to be called by opposing parties.

Witness statements

22. Counsel in civil proceedings are typically involved in settling witness statements[7]. However, the courts have emphasised that a witness statement must, so far as possible, be in the witness's own words: see e.g. *Aquarius Financial Enterprises Inc. v Certain Underwriters at Lloyd's* [2001] 2 Ll Rep. 542 at 547; Chancery Guide 2016 para. 19.2; Commercial and Admiralty Court Guide para. H1.1(i) and H1.2; Technology and Construction Court Guide, para. 12.1. When settling witness statements, great care must be taken to avoid any suggestion:

22.1 That the evidence in the witness statement has been manufactured by the legal representatives; or

22.2 That the witness had been influenced to alter the evidence which he or she would otherwise have given.

[7] As distinct from "Investigating and Collecting Evidence and Taking Witness Statements", on which see paragraph 3 above.

23. Furthermore, the evidence in a witness statement must not be partial; it must contain the truth, the whole truth and nothing but the truth in respect of the matters on which the witness proposes to give evidence: see Rules C6.2 and C9.2(d) in the BSB Handbook; Chancery Guide 2016, Chapter 19; Queen's Bench Guide, 2016, paras. 7.9.2 to 7.9.5; Admiralty and Commercial Courts Guide, para. H.1. One should remember that "*great care... must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true*" (Chancery Guide 2016, para. 19.6).

24. One should however bear in mind that "*a professional adviser may be under an obligation to check, where practicable, the truth of facts stated in a witness statement if you are put on enquiry as to their truth*" (Chancery Guide 2016, para. 19.6). For example, you may be put on enquiry in relation to witness X's evidence, because witness Y's evidence contradicts it, or because there is documentation which contradicts it. However, whilst you may be entitled or obliged to check the evidence "*it is not for you to decide whether your client's case is to be believed*"; see gC6 in the BSB Handbook. In this regard see gC7 - "*You are entitled and it may often be appropriate to draw to the witness' attention other evidence which appears to conflict with what the witness is saying and you are entitled to indicate that a court may find a particular piece of evidence difficult to accept. If the witness maintains that the evidence is true, it should be recorded in the witness statement and you will not be misleading the court if you call the witness to confirm their witness statement. Equally there may be circumstances where you call a hostile witness whose evidence you are instructed is untrue. You will not be in breach of Rule rC6 if you make the position clear to the court.*"

25. If any party discovers that a witness statement which it has served is incorrect in any way, it must inform the other parties immediately: see Rules C6.2, C9.2(d), and C9.3 in the BSB Handbook; Chancery Guide 2016, para.19.6; Queen's Bench Guide 2016, paras. 7.9.2 to 7.9.5. Counsel has a corresponding duty upon learning of the matter, to ensure that such notice is given, and if necessary a correcting supplemental statement is served: see paragraph 19 above. (However, if you only suspect or believe your instructions, and evidence reflecting them, to be untrue, for example because of contradictory evidence or documents, then it is not for you to decide whether this is in fact the case; see gC6 in the BSB Handbook and paragraph 24 above.)

26. If a court adjourns with a witness's evidence part-heard, and the judge fails to instruct the witness that he is not to speak to anyone about his evidence during the adjournment, counsel should give that advice. If counsel becomes aware that such discussions have taken place the judge will need to be told at the earliest opportunity.

Witness familiarisation

27. The principles set out in *Momodou* apply in criminal proceedings. There is currently no authority on these matters in relation to civil proceedings, although *Momodou* has been cited (with apparent approval) in at least one civil proceeding; *Ultraframe (UK (Ltd v Fielding* [2006] EWHC 1638 (Ch). Until further authority emerges, it would be prudent to proceed on the basis that the general principles set out in *Momodou* also apply to civil proceedings. Thus, while witness coaching is prohibited, a process of witness familiarisation is permissible and desirable (see paragraph 6 above), which may extend to advising witnesses as to the basic requirements for giving evidence (see paragraph 7 above), in order to assist witnesses to give their best at the trial or hearing. But that process must not risk their evidence becoming anything other than their own uncontaminated evidence.

28. The following approach is suggested in relation to any witness familiarisation process for the purpose of civil proceedings:

28.1 Any witness familiarisation process should normally be supervised or conducted by a solicitor or barrister.

28.2 In any discussions with witnesses regarding the process of giving evidence, there is no ethical difficulty about giving general guidance about *how t*o give evidence – e.g. to speak up, speak slowly, answer the question, keep answers as short as possible, ask for clarification if the question is not understood, say if you cannot remember and do not guess or speculate; etc. But great care must be taken not to do or say anything which could be interpreted as suggesting what the witness should say, or how he or she should express himself or herself in the witness box on any question or issue: that would be impermissible coaching.

28.3 If a formal or structured witness familiarisation course or programme is to be conducted by an outside agency:

28.3.1 Records should be maintained of all those present and the identity of those responsible for the programme, whenever it takes place.

28.3.2 The programme should be retained, together with all the written material (or appropriate copies) used during the sessions.

28.3.3 None of the material used should bear any similarity whatever to the issues in the current or forthcoming civil proceedings in which the participants are or are likely to be witnesses.

28.3.4 If any discussion of the civil proceedings in question begins, it should be stopped.

28.4 Counsel should only approve or take part in a mock examination-in-chief, cross-examination or re-examination of witnesses who are to give oral evidence in the proceedings in question if:

28.4.1 Its purpose is simply to give a witness greater familiarity with and confidence in the process of giving oral evidence; and

28.4.2 There is no risk that it might enable a witness to add a specious quality to his or her evidence; and

28.4.3 All steps have been taken to ensure that the exercise is not based on facts which are the same as or similar to those of any current or impending trial, hearing or proceedings at which a participant is or is likely to be a witness; and

28.4.4 In conducting any such mock exercises, counsel does not rehearse, practise or coach a witness in relation to his/her evidence: Rule C9.4. Where there is any reason to suspect that a mock examination-in-chief, cross-examination or re- examination would or might involve a breach of the Code, counsel should not approve or take part in it.

28.4.5 If any formal witness familiarisation course or programme has been delivered by an outside agency, the other parties and the court should be informed of that fact[8].

29. The points made above are equally germane to any contact that counsel has with witnesses, including in conference or outside court. There is no equivalent in civil or family proceedings to the witness service in the Crown Court and so counsel will often be a witness's first point of contact on arrival at court. An anxious witness may well ask counsel what they will be asked in cross-examination. Priming the witness with suggested questions would clearly infringe the Rule C9.4 prohibition. It is probably permissible to provide very general guidance/ reassurance (i.e. "you

[8] See the adverse comment on the effect of "over-training" of witnesses in *Energysolutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) at [81-82] (Fraser J).

may be asked about 'x' incident and why you think the child should live with 'y'")[9] but counsel should not address in any detail the issues likely to arise in cross-examination.

Experts

30. It is standard practice in civil cases for barristers to be involved in discussions with experts and to consider drafts of the expert's report prior to service of the report on the other side. In this connection, counsel has a proper and important role in assisting an expert as to:

30.1 The issues which the expert should address in his or her report;

30.2 The form of the report and any matters which are required by the rules of court to be included in it; and

30.3 Any opinions and comments which should not be included as a matter of law (e.g. because they are irrelevant or go beyond the expert's experience and expertise).

31. Beyond this, however, the courts have repeatedly emphasised that expert reports should be, and should be seen to be, the independent product of the expert in question: see, e.g., *The Ikarian Reefer* [1993] 2 Ll Rep. 68 at 81; Practice Direction - Experts and Assessors, para. 1.2; Queens Bench Guide para. 7.8; Admiralty and Commercial Court Guide, para. H.2; Chancery Court Guide 2016, para. 17.47. Accordingly, one should not seek to draft any part of an expert's report. Counsel's involvement may, however, include discussing or annotating a draft report with observations and questions for the expert to consider in any revisions to the draft. These comments might include assisting an expert to use plainer language, so that the expert's views are expressed accurately and clearly. When doing this, however, one must keep in mind one's obligations under Rules C9.2(d), C9.3 and C9.4.

32. Counsel may also assist in familiarising experts with the process of giving oral evidence, including:

32.1 Explaining the layout of the Court and the procedure of the trial, and

32.2 Providing guidance on giving comprehensive and comprehensible specialist evidence to the Court, and resisting the pressure to go further in evidence than matters covered by his or her specific expertise.

[9] Cf https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court,at para 3.4(d).

33. However, one must take great care not to do or say anything which could be interpreted as manufacturing or in any way influencing the content of the evidence that the expert is to give in the witness box.

D. Family cases
Witness statements

34. As in other civil cases, there is no difficulty about showing a witness before he goes into the witness box any statement he has previously made (including to the police, or any Children Act statement he has given earlier). See paragraphs 19 to 26 above, which apply equally to family cases.

Witness familiarisation

35. It would be prudent to proceed on the basis that the general principles set out in *R v. Momodou* apply to family proceedings. The guidance set out in paragraphs 27 to 29 above applies also to family cases.

Experts

36. The area in which family cases differ most significantly from other civil cases is in relation to expert evidence and contact with expert witness outside of court. Accordingly, the relevant section in the 'civil cases' section above should be read subject to what follows.

37. In cases involving the welfare of children, it is **not** standard practice for barristers to be involved in discussions with experts, or to consider drafts of an expert's report prior to service of the report on the other side. If therefore counsel is asked to speak to such an expert or to propose amendments to an expert report, caution should be exercised, and it may be necessary to refuse the request, to avoid any suggestion that the expert's evidence has been influenced or contaminated.

38. In such cases, experts will generally have been instructed on the parties' joint instruction. Usually the children's solicitor will have taken the lead on such an instruction and counsel for the children will be expected to call the witness. In such a case counsel for the children may introduce himself to the expert at court and ensure that he or she has an up to date set of court papers; but should not otherwise discuss the case.

39. There should be no discussion with a joint expert about the substance of the case unless all other advocates agree and are present – to do otherwise would risk breaching CD3 and CD5. Any such joint discussion should be fully noted, and a

summary provided to the judge before the expert witness starts giving evidence. Care will need to be taken to avoid cross-examining the expert outside court.

40. Any suggestion that two or more experts should speak together outside court should be approved by the court, even if all advocates agree. Any such discussions should again be undertaken in the presence of all advocates with a full note being taken. Where the court has directed that two or more experts give evidence at the same time ("hot tubbing"), there should still be no discussion between the experts outside court without the court's permission.

41. If the court has by direction limited the documents to be seen by a particular expert, then such direction must be obeyed irrespective of party agreement. Position statements and skeleton arguments should not routinely be given to such an expert outside court, unless all other advocates agree or, where controversial, the court has granted permission.

42. Other expert witnesses in family cases may however present no special issues. For example, in family money cases, expert accountants may be instructed; and there is no reason why counsel should not interact with them in the same way as in other civil cases. See the guidance at paragraphs 30 to 33 above.

Intermediaries

43. In family law cases involving vulnerable parties and witnesses and/or parties and witnesses with learning difficulties, the court will often appoint an intermediary to assist the person to give evidence. Typically, the intermediary will be involved when counsel discusses the case with the party/witness outside court as well as when they are giving evidence. Counsel will need to ensure that the intermediary does not rehearse the evidence with the witness and does not lead or prompt them with the 'right' answer when discussing the case outside court.

44. Where counsel meets a witness outside court and forms the view that they would benefit from an intermediary or other special measure, counsel must raise this with the court and if necessary, seek an adjournment so that an intermediary can be instructed and special measures considered by the court. It will be rare for such an issue to arise at the trial door – most witnesses will have had their statement taken in advance by counsel's instructing solicitor who will have formed their own view about the witness's vulnerability and their capacity to give evidence. If, however a witness's mental health has deteriorated since their statement was drafted or if a new unproofed witness comes to court, counsel will need to be aware of the possible need for special measures.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see here.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIA BOIS,

Plaintiff,

v.

LEVI STRAUSS & CO.,

Defendant.

Case No. 23-cv-02772-TLT

ORDER GRANTING-IN-PART AND DENYING-IN-PART MOTION FOR SANCTIONS

Re: ECF 196

The instant motion stems from a uniquely eye-opening breakdown in civility and professionalism, requiring this Federal Court to assume the role of a disappointed school principal. On May 5, 2025, after a mere 15 minutes of deliberations, the jury entered a unanimous verdict in favor of Defendant Levi Strauss & Co. and against Plaintiff Julia Bois. *See* ECF 185.

Before the Court is Defendant's motion for sanctions, requesting the Court address the repeated violations of Plaintiff's counsel Boies Schiller Flexner LLP ("Bois Schiller" or "Plaintiff's counsel"). ECF 196. The Court finds this matter appropriate for resolution without oral argument. *See* Civ. L. R. 7-1(b) (authorizing courts to dispense with oral argument on any motion except where an oral hearing is required by statute).

After review and consideration of motion, briefings, attachments and exhibits thereto, the Court **GRANTS-IN-PART** and **DENIES-IN-PART** the motion for sanctions.

I. RELEVANT BACKGROUND

On April 24, 2025, Defendant requested briefing schedule for a motion for sanctions. ECF 156. On April 29, 2025, the Court notified the parties that the motion to sanctions may be filed after the conclusion of the trial. ECF 173. On May 21, 2025, after the conclusion of the trial, Defendant filed the instant motion for sanctions. ECF 196-1. Plaintiff timely filed an opposition, ECF 202, and Defendant timely filed a reply, ECF 206.

The instant motion does not come as a surprise. The Court is very familiar with Bois Schiller's numerous violations of court orders throughout this litigation. *See* ECF 145, at 1–2 (outlining Bois Schiller's violations of Court orders); *see, e.g.*, ECF 115 (unilaterally filing individual pretrial statement in violation of Court orders); ECF 120 (filing joint pretrial statement six days after deadline); *id.* (failing to include exhibit list and objection and instead listing every document produced by each party); ECF 116 (failing to provide witness list to Defendant until March 1, 2025—one after the pretrial statement was due); ECF 122 (failing to meet own self-imposed objection deadline of March 7, 2025); ECF 125 (failing to provide exhibit list to Defendant until March 8, 2025—eight days after it was due to the Court and one day after Plaintiff's self-imposed deadline); ECF 160 (failing to meet and confer regarding joint jury instructions and verdict form); *see also* ECF 35 (failure to respond to discovery requests). Defendant's motion seeks sanctions regarding three of Bois Schiller's violations.

A. Boies Schiller's failure to meet and confer in advance of the parties' pretrial filing deadline.

The Court's Standing Order required Plaintiff and Defendant to file, on February 28, 2025, a joint pretrial statement and jointly file a proposed Statement of the Case to be read to the jury. After meeting and conferring with LS & Co. over the Statement of the Case and joint pretrial statement, Plaintiff unilaterally filed her own versions of those documents ("February 2025 Violation"), having rejected portions of Defendant's input on both. *See* ECF 115, 116.

Plaintiff's unilateral pretrial statement included a 38-page "Plaintiff's Exhibit List" that attached a full list of every document produced in the case by every party as her "exhibit list," along with the discrete list of Defendant's numbered trial exhibits that Defendant had provided to her, and a "Plaintiff's Witness List" that had not been shared with Defendant. *See* ECF 115.

The Court ordered the parties to meet and confer again and file a joint pretrial statement and joint Statement of the Case by March 5, 2025. ECF 117. However, Plaintiff did not provide Defendant with her real exhibit list until Saturday, March 8 (the day after the list was due to the Court, based on Bois Schiller's pledge to meet a new March 7 self-imposed deadline). The parties

were not able to file a complete exhibit list that included the parties' respective objections and responses to objections until March 17, 2025. *See* ECF 130, 131.

B. Boies Schiller's failure to meet and confer in advance of the parties' joint jury instructions and joint verdict form filing deadline.

On April 24, 2025, the Court ordered "[c]ounsel to submit any changes or corrections to the jury instructions or verdict form by the end of business today." ECF 155. Defendant sent Plaintiff its changes to the verdict form at 12:35 p.m. and, at Plaintiff's request, later submitted the same changes in redline at 2:02 p.m. *See* ECF 156 at 8–10. After Defendant's exchange, communication broke down with Plaintiff's counsel Joshua Schiller refusing to communicate further with Defendant's counsel. *Id.* at 8. Defendant repeatedly asked Plaintiff for any edits they had to the jury instructions and verdict form and explained why the CACI, rather than case law, was the appropriate citation for Defendant's proposed changes to the jury instructions. *See id.* at 5–7.

After Bois Schiller declined to communicate with Defendant's lead counsel or provide edits to the jury instructions or verdict form, at 5:03 p.m. on April 24, 2025, Defendant filed a Notice of Inability to Meet Court-Ordered Deadline & Request for Briefing Schedule on Sanctions Motion ("Notice"). *Id.* Approximately 15 minutes later, Plaintiff filed a unilateral proposed verdict form and unilateral jury instructions ("April 2025 Violation"). *See* ECF 157, 158.

The Court acknowledged Bois Schiller's behavior in a subsequent order:

> On April 24, 2025, the Court ordered counsel to meet and confer to discuss jury instructions and verdict forms as set forth on the record. Counsel were further ordered to submit any changes or corrections to the jury instructions or verdict form by the end of the business day, April 24, 2025. Plaintiff failed to meet and confer with Defendant and has missed another deadline in this case. In violation of court orders, Plaintiff then unilaterally filed their own revisions to the jury instructions and verdict form.

ECF 160.

C. Boies Schiller's failure to meet and confer in advance of the parties' joint certification of counsel regarding exhibits offered during trial filing deadline

The parties' deadline to file Admitted Exhibits and Offered, But Not Admitted, Exhibits during trial was May 15, 2025. The exhibit filing had to include a Joint Certification of Counsel.

Defendants sent the proposed filing to Plaintiff for sign-off. ECF 196-1, at 10. The parties disputed whether the closing slide decks be included in the Offered, But Not Admitted, Exhibits filing. *Id.* Rather than getting documents on file or continuing to meet and confer, Bois Schiller told Defendant's counsel that they "should agree to extend the deadline a week." *Id.* However, no extension was requested. The exhibits were not filed until May 19, 2025—four days after they were due to the Court ("May 2025 Violation"). ECF 194.

II. LEGAL STANDARD

A. Sanctions Under 28 U.S.C. Section 1927

Courts have the power to require an attorney who "multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. In other words, "Section 1927 authorizes the imposition of sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced." *Pacific Harbor Cap., Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000). The Ninth Circuit assesses sanctions when bad faith is found "under a subjective standard. Knowing or reckless conduct meets this standard." *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121–22 (9th Cir. 1991).

Bad faith "is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996) (citations omitted). If the conduct is merely reckless, the moving party must also show at least one additional factor such as frivolousness, harassment, or an improper purpose. *See Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) ("Sanctions [pursuant to Section 1927] are available for . . . recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose.").

Section 1927 renders any "attorney who reviews and approves motions, applications, and briefs filed in a case [] responsible for the resulting multiplication of proceedings even when he does not sign his name to those filings or personally argue them before the court." *Caputo v. Tungsten Heavy Powder, Inc.*, 96 F.4th 1111, 1154 (9th Cir. 2024).

B. Sanctions Under the Court's Inherent Powers

"Federal courts possess certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107 (2017) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). "That authority includes 'the ability to fashion an appropriate sanction for conduct which abuses the judicial process.'" *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991)). "It is well established that a federal court may consider collateral issues [like sanctions] after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). Imposing monetary sanctions under the Court's inherent power requires a finding of either: "(1) a willful violation of a court order; or (2) bad faith" or conduct "tantamount to bad faith." *See Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1090 (9th Cir. 2021); *Fink*, 239 F.3d at 994 ("sanctions are available if the court specifically finds bad faith or conduct tantamount to bad faith"); *see also Goodyear*, 581 U.S. at 107 (noting that a court may order "a party that has acted in bad faith to reimburse legal fees and costs incurred by the other" pursuant to its inherent power).

Bad faith extends to "a full range of litigation abuses." *Chambers*, 501 U.S. at 46. It includes "conduct done vexatiously, wantonly, or for oppressive reasons." *Am. Unites for Kids*, 985 F.3d at 1090. A party also demonstrates bad faith by "delaying or disrupting the litigation." *Primus Auto. Fin. Servs. Inc. v. Batarse*, 115 F. 3d 644, 649 (9th Cir. 1997) (internal quotation marks and citation omitted). A finding of bad faith "requires proof of bad intent or improper purpose." *Am. Unites for Kids*, 985 F.3d at 1090.

Conduct tantamount to bad faith includes "a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." *Fink*, 239 F.3d at 994. The assessment of whether an attorney's conduct

amounts to bad faith or conduct tantamount thereto is subjective. *Pacific Harbor*, 210 F.3d at 1118. Bad faith does not "require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of attorney's fees." *Fink*, 239 F.3d at 992 (citation omitted). A finding of willful disobedience of a court order, on the other hand, "does not require proof of [a] mental intent such as bad faith or an improper motive." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1035 (9th Cir. 2012).

III. DISCUSSION

In her opposition, Plaintiff spends ten pages excruciatingly detailing every communication exchanged between the parties' counsel and finger-pointing away all responsibility of her violations onto the Defendant. *See* ECF 202, at 3–13. The primary takeaway from this dissertation is that Plaintiff concedes that her unilateral filings violated Court orders but argues that each of her violations are in fact Defendant's fault. *Id.* at 13–14. Alarmingly, Plaintiff frames that her violations as zealous advocacy. *Id.*

Defendant argues that Bois Schiller engaged in bad faith and willfully violated this Court's orders, resulting in wrongful proliferation of this case. ECF 196-1, at 13. The Court will first determine whether Bois Schiller's repeated violations of Court orders necessitate sanctions. If so, the Court will then determine the appropriate sanction.

A. Requisite Conduct

Bois Schiller argues that Defendant's motion for sanctions in untimely, and even if it was timely, Bois Schiller's violations of court orders was Defendant's fault. ECF 202, at 13–19. The Court will address each argument in turn.

1. Defendant's motion for sanctions is timely.

As an initial matter, Plaintiff complains that the motion for sanctions is untimely. ECF 202, at 18–19. Pursuant to Local Rule 7-8(c), a motion for sanctions "must be made as soon as practicable after the filing party learns of the circumstances that it alleges make the motion appropriate." *See* Civ. L.R. 7-8(c). Defendant complains of Plaintiff's conduct throughout the pre-trial and post-trial period from February 2025 to May 2025. ECF 202, at 19. Plaintiff argues

that Defendant should have brought a motion for sanctions when Plaintiff's violations first began. *Id.* Plaintiff also argues that now that trial has concluded, the deterrent effect of sanctions will not be felt by Plaintiff. *Id.*

Plaintiff finally argues that Defendant should have brought discovery sanctions under Federal Rule of Civil Procedure 37 rather than under Section 1927. *Id.* at 18 n.6. However, this final argument has no merit as the sanctions are not pursued based on Plaintiff's conduct during discovery. Plaintiff's conduct during discovery has already been addressed by the Court. *See* ECF 35 (addressing Plaintiff's failure to respond to discovery requests).

Defendant points out that the Local Rules permit a motion for sanctions within 14 days of entry of judgment, which Defendant did so here. *See* Civ. L.R. 7-8(d). Defendant also point out that Plaintiff has been on notice of a motion for sanctions since April 24, 2025. ECF 156 (Notice by Levi Strauss & Co. Notice of Inability to Meet Court-Ordered Deadline and Request For Briefing Schedule on Noticed Motion for Sanctions); *see also* ECF 134, at 1 (On March 21, 2025, the Court made "note of Plaintiff's repeated violations in the event of a motion for sanctions.").

On April 29, 2025, after Defendant requested a briefing schedule on a motion for sanctions, the Court made clear that Defendant could file the motion for sanctions after the conclusion of the trial. ECF 173. Plaintiff did not object or raise any issue with timeliness. *Id.*

In this context, Plaintiff's timeliness argument has no merit. The parties agreed that a motion for sanctions regarding Plaintiff's numerous violations of court orders would be appropriate to address after trial. Now is the time to address them.

2. Bois Schiller has demonstrated deliberate disobedience, warranting sanctions under the Court's inherent authority.

Defendant argues that Boies Schiller has repeatedly disobeyed or ignored the Court's orders regarding meeting and conferring and submitting joint filings. ECF 196-1, at 13. On two separate instances, Boies Schiller unilaterally filed Plaintiff's own version of documents that were supposed to be submitted jointly by the parties. *Id.* Boies Schiller's violations were deliberate and therefore warrant imposition of sanctions under this Court's inherent authority. *Id.* Defendant contends Boies Schiller's conduct also constitutes recklessness motivated by the improper purpose

of harassing Defendant and its counsel and diverting attention away from trial preparation to gain a tactical advantage over Defendant. *Id.* Boies Schiller's failure to meet and confer and file unilateral filings resulted in the needless multiplication of proceedings forcing Defendant to file its Objections and Notice, in addition to the parties having to twice make a second attempt at filing required documents jointly. *Id.* at 13–14.

Before the Court turns to Plaintiff's objections, the Court finds that both parties failed to timely file the Admitted Exhibits and Offered, But Not Admitted Exhibits. In this instance, there was no unilateral filing by Bois Schiller—perhaps learning from its prior mistakes. The parties spend most of their briefing on the post-trial dispute pointing fingers. It is less clear whether Bois Schiller exhibited bad faith or willful disobedience. Thus, the Court declines to find the requisite misconduct and assess sanctions for the May 2025 Violation. However, the Court will consider Defendant's arguments for the February 2025 Violation and April 2025 Violation.

Plaintiff concedes to violating court orders. ECF 202, 13–14. Plaintiff argues that Defendant forced Plaintiff to file unilateral filings in violation of court orders because of disagreements with the joint filings. *Id.* However, Plaintiff's argument is unpersuasive. The parties are plenty capable of submitting joint filings that distill their disagreements for the Court to address. *See* ECF 119, 120, 142, 143, 178. Bois Schiller's conduct reeks of bad faith, stemming from their habit of preparing last minute incomplete filings. *See* ECF 120 (failing to include exhibit list and objection and instead listing every document produced by each party); ECF 116 (failing to provide witness list to Defendant until March 1, 2025—one after the pretrial statement was due); ECF 122 (failing to meet own self-imposed objection deadline of March 7, 2025); ECF 125 (failing to provide revised exhibit list to Defendant until March 8, 2025—eight days after it was due to the Court and one day after Plaintiff's self-imposed deadline).

It is less clear whether Boies Schiller's conduct was for the purpose of harassing Defendant and its counsel. Nor does the Court find that Boies Schiller conduct was frivolous or for improper purpose. Thus, The Court finds that requisite conduct for sanctions under Section 1927 is not present. However, the Court finds willful disobedience of a court order on two occasions. Boies Schiller willfully violated court orders by failing to meet and confer with

Defendant and filing unilateral filings which led to delays. Under the Court's inherent authority, the Court finds that sanctions are warranted.

B. Sanctions

Because of Bois Schiller's actions, Defendant (1) seeks $15,236.41 in monetary sanctions and (2) an order that the partners who represented Plaintiff in this case to develop and conduct a one-hour training for litigators in their respective offices regarding professional responsibility in the context of trial. ECF 196-1, at 15–16. The Court will consider each sanction in turn.

1. The Court finds that monetary sanctions are warranted.

Because the Court did not find willful disobedience or requisite bad faith from the May 2025 Violation, the Court will only consider monetary sanctions requested for the February 2025 Violation and April 2025 Violation.

For the February 2025 Violation, Defendant seeks "$5,560.04 (in attorneys' fees and staff overtime) to handle the late-night antics by Plaintiff's counsel, and to prepare and file LS & Co.'s Objections." ECF 196-1, at 8–9. Defendant's counsel's support staff worked three hours of overtime after Plaintiff's unilateral filings in an effort to get the documents on file. ECF 196-2, Declaration of Cameron W. Fox ("Fox Decl.") ¶ 3. On March 3, 2025, Defendant filed Objections to Plaintiff's Unilateral Statement of the Case and Pretrial Statement, incurring $5,317.20 in attorneys' fees to prepare the objections. *Id.* ¶ 4.

For the April 2025 Violation, Defendant seeks "$9,306[.00] in attorneys' fees in preparing its Notice and attempting to meet and confer with Plaintiff's counsel after they refused to communicate with LS & Co.'s lead counsel." ECF 196-1, at 10. On April 25, 2025, Defendant filed a Notice of Inability to Meet Court-Ordered Deadline & Request for Briefing Schedule on Sanctions Motion after Plaintiff's counsel refused to meet and confer with Defendant regarding the jury instructions or verdict form the parties had been ordered to file that day. Fox Decl. ¶ 5. Defendant incurred $9,306 in attorneys' fees in preparing its one-page Notice and time spent attempting to meet and confer with Plaintiff's counsel. *Id.*

Partner time was charged at $1,809.00 per hour and Associate time was charged at $1,368.00. *Id.* ¶ 8. These hourly rates are commensurate with counsels' experience, *id.* at

Exhibits ("Exs.") B & C, and the legal markets in San Francisco and Los Angeles, *id.* ¶ 8. Defendant has also provided detailed billing statements, displaying the attorney rendering the services, the dates on which the services were rendered, the hours spent, the applicable hourly rate, the extension (hours times rate), and descriptions of the services rendered. *Id.* at Ex. D. The Court finds the hourly rate and the time spent to be reasonable.

Plaintiff objects to the monetary sanctions, arguing that it was Defendant's choice to file objections. ECF 202, at 21. However, here, Defendant's counsel's objections was a response to Boies Schiller's unilateral filings and failure to meet and confer. These objections would not have been necessary if Boies Schiller had not violated the Court's orders. The Court finds that monetary sanctions in the total amount of **$14,866.04** are warranted for Boies Schiller's deliberate violation of court orders.

2. While beneficial, the Court declines to compel Partners Joshua Schiller and Benjamin Margulis to conduct professional responsibility training.

Defendant argues that monetary sanctions do not necessarily deter Boies Schiller from engaging in similar behavior in future litigations. ECF 196-1, at 16. Defendant contends that Boies Schiller's conduct in this action is a concerning practice that warrants corrective action from the Court. *Id.* Thus, in addition to monetary sanctions, Defendant requests the Court order that Joshua Schiller and Benjamin Margulis, the partners on this case, develop and conduct a one-hour training for the litigation attorneys in their offices (San Francisco and New York, respectively) on professional responsibility in the context of trials. *Id.*

Plaintiff objects to such a training. ECF 202, at 22. As an initial matter, Plaintiff calls out Defendant for requiring only the "male" members of its team to conduct the training. *Id.* The Court notes that Plaintiff's counsel only staffed male partners on this pregnancy discrimination action.

Plaintiff next argues that requiring Boies Schiller partners to conduct a professional responsibility training for the benefit of the litigation attorneys in their office violates the First Amendment. *Id.* However, Defendant points out that many courts have issued nonmonetary

sanctions requiring counsel to take steps to learn or teach. *See* ECF 206, at 12 n.11 (collecting cases).

Here, Plaintiff's counsel's conduct ultimately resulted in a swift verdict for the defense. The Court finds that such an outcome is a sufficient deterrent. Thus, the Court declines to sanction further training.

However, the Court finds Defendant's request to be creative. Neither party can dispute that any law firm would benefit from training on professional responsibility in the context of trials. Thus, the Court invites both Plaintiff's counsel and Defendant's counsel to fashion such a training for its litigation attorneys and schedule time to personally administer it. The Court invites both Plaintiff's counsel and Defendant's counsel to submit a status report upon scheduling of the training.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS-IN-PART** and **DENIES-IN-PART** the motion for sanctions. Boies Schiller is **ORDERED TO TENDER PAYMENT** for the full sum of **$14,866.04** to Defendant's counsel by **August 29, 2025**.

Both Plaintiff's counsel and Defendant's counsel are encouraged develop and conduct a one-hour training on professional responsibility in the context of trials in their respective offices. The Court invites Plaintiff's counsel and Defendant's counsel to submit a status report upon scheduling of the training.

This order is narrowly tailored to the unique disposition of this action. Bois Schiller's conduct throughout this action was eye-opening. It has inspired this Federal Court to consider instituting a new standing order on civility and professionalism to ensure such conduct does not happen again.

This Order resolves ECF 196. The Clerk of the Court is ordered to terminate the action.

IT IS SO ORDERED.

Dated: August 7, 2025

TRINA L. THOMPSON
United States District Judge

THE CAYMAN ISLANDS
LEGAL SERVICES CODE OF PROFESSIONAL CONDUCT, 2025

PREAMBLE

In exercise of the powers conferred by section 37(3) of the Legal Services Act, 2020, the Cayman Islands Legal Services Council, after consultation with the legal profession, issues the following Legal Services Code of Professional Conduct.

CONTENTS

DEFINITIONS

In this Code —

"Act" means the Legal Services Act, 2020;

"AML Regulations" means the Anti-Money Laundering Regulations (2025 Revision);

"client" means an individual or company or other corporate body or other entity for whom or on whose behalf an attorney-at-law or a recognised law entity is engaged to provide legal services;

"Code" means this Code of Professional Conduct;

"costs" includes fees;

"Court" includes a court, tribunal, or any other person or body of persons before whom an attorney-at-law appears as an advocate;

"employee" means an employee of an attorney-at-law, or a recognised law entity, or of the recognised law entity's service company;

"informed written consent" means confirmation in writing, by a client, permitting an attorney-at-law or a recognised law entity to act or continue to act in a matter where there exists a conflict or potential conflict of interest and where the relevant issues and risks have been explained to the client and there is a reasonable belief that the client understands the issues and risks;

"POCA" means the Proceeds of Crime Act (2025 Revision);

"Principle" or "**P."** means a principle set out at the beginning of this Code;

"professional client" means a client who is a professional person or a recognised law entity who instructs an attorney-at-law or a recognised law entity of that attorney-at-law on behalf of, or with respect to the interests of, a client of that professional client;

"Rule" or "**R."** means any rule set out in this Code;

"staff" means employees of an attorney-at-law, or of a recognised law entity, or of the recognised law entity's service company whether or not engaged in providing legal services.

INTERPRETATION

Ref.

1.1 In this Code —

(a) a reference to legislation includes any subordinate legislation (including regulations and orders) made under that legislation, whether before or after the date of adoption of this Code;

(b) a reference to law includes a reference to all applicable legislation and law in any part of the world, [all applicable rules and regulations, codes of practice, codes of conduct, handbooks, policy statements or other guidance (whether or not having the force of law) issued from time to time by any relevant authority];

(c) a reference to a "person" includes a natural person, partnership, company, association, joint venture, consortium, foundation, trust, government or state (in each case whether or not having separate legal personality);

(d) a reference to this Code or to any other document is a reference to this Code or that other document as amended, varied, supplemented, replaced, or restated at any time; and

(e) a reference to something being "in writing" or "written" includes a reference to that thing being produced by any legible and non-transitory substitute for writing (including in electronic form) or partly in one manner and partly in another.

A breach of this Code and the resultant remedies will be governed by the Act in accordance with section 37 and Part 11.

PRINCIPLES

Ref.	Principles
P.1	Attorneys-at-law shall, as officers of the Court, in compliance with the overriding duty to the Court, uphold the rule of law and the proper administration of justice in the course of their professional duties and the provision of legal services.
P.2	Attorneys-at-law shall not, in their professional and personal lives, act in any way which brings or which may reasonably bring the legal profession or the provision of legal services in the Cayman Islands into disrepute.
P.3	Attorneys-at-law shall, at all times, act with honesty and integrity.
P.4	Attorneys-at-law shall act in the best interests of their clients.
P.5	Attorneys-at-law shall not allow their professional independence to be compromised.
P.6	Attorneys-at-law shall provide a proper standard of work and service to their clients.
P.7	Attorneys-at-law shall protect client money and assets.
P.8	Attorneys-at-law shall manage their recognised law entities effectively and in accordance with good business practice, proper governance and sound financial and risk management principles.
P.9	Attorneys-at-law shall deal with their regulators in an open, timely and cooperative manner.
P.10	Recognised law entities shall have effective governance structures, arrangements, systems and controls in place that ensure compliance with applicable legislative and regulatory requirements.

RULES

Rule 1 – Application

1. The Code of Conduct applies to —

(a) all attorneys-at-law; and

(b) all recognised law entities.

1.1. A reference to an "attorney-at-law" or a "recognised law entity" applies equally to all employees acting under the supervision of an attorney-at-law or a recognised law entity for whom an attorney-at-law or a recognised law entity is otherwise responsible, so that —

(a) an attorney-at-law or a recognised law entity shall be responsible for procuring that such an employee complies with this Code as if that employee was an attorney-at-law; and

(b) an act or omission of an employee which, if the employee were an attorney-at-law, would be a breach of the Code, shall be treated as the act or omission of the attorney-at-law or recognised law entity responsible for that employee.

Accordingly, an attorney-at-law or a recognised law entity is responsible, under this Code, only for the actions of employees engaged in the delivery of legal services or otherwise acting in the course of employment with the attorney-at-law or the recognised law entity.

1.2. The Principles and Rules in this Code are mandatory and binding on an attorney-at-law. While the guidance notes in the Code are not binding on an attorney-at-law, the Council will have regard to the guidance notes when considering whether a breach of the Code has occurred.

1.3. An attorney-at-law or recognised law entity may make an ex parte application in writing to the Court for directions where there is —

(a) uncertainty as to whether or not in the relevant circumstances a specific breach of this Code has occurred or may occur; and

(b) a proposed course of conduct by the attorney-at-law or recognised law entity with the aim of ensuring compliance with this Code.

When acting pursuant to such directions, the attorney-at-law or recognised law entity shall be presumed to have discharged the attorney-at-law's or the recognised law entity's duty in accordance with this Code, unless the contrary is proven.

Except where there may be issues which may adversely affect national security or which would have similar detrimental implications, and, subject to such redactions as may be necessary, any direction shall be delivered promptly in writing and reported publicly.

Where there is a conflict of interest with the Court providing such direction, the application

for directions shall be heard by a judge from any of the other jurisdictions specified in section 32(3) of the Act.

Rule 2 – Duty to the Court

2.

2.1. **Duty to act with independence in the interests of justice**

An attorney-at-law owes a duty to the Court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which the attorney-at-law may have (other than obligations under criminal law and duties of confidentiality). It includes the following specific obligations which apply whether the attorney-at-law is acting as an advocate or is otherwise involved in the conduct of litigation in another capacity (with the exception of R. 2.1 ((a), which only applies when acting as an advocate before any Court).

An attorney-at-law shall —

(a) not knowingly or recklessly mislead or attempt to mislead the Court or permit the Court to be misled (R.2.4 applies);

(b) not abuse an attorney-at-law's role as an advocate (R.2.5 applies);

(c) take reasonable steps to avoid wasting the Court's time;

(d) take reasonable steps to ensure that the Court has before it all relevant decisions and statutory provisions; and

(e) ensure that the attorney-at-law's ability to act independently is not compromised.

2.2. **Competing duties**

Subject to R.2.3, an attorney-at-law's duty to act in the best interests of each client is subordinate to the duty to the Court.

2.3. **Protection of confidentiality**

An attorney-at-law has a duty to keep the affairs of each client confidential.

2.4. **Not misleading the court**

An attorney-at-law's duty not to knowingly or recklessly mislead or attempt to mislead the Court or to permit the Court to be misled includes the following obligations —

An attorney-at-law shall not —

(a) in respect of documents that the attorney-at-law knows, or is instructed, are untrue or misleading, or in respect of which the attorney-at-law does not hold the requisite authority or consent —

(i) make submissions, representations or any other statement; or

(ii) register, file or otherwise lodge any documents with the Court;

(b) ask questions which suggest facts to witnesses that they know, or are instructed,

are untrue or misleading;

(c) call witnesses to give evidence or put affidavits or witness statements to the Court which the attorney-at-law knows, or is instructed, are untrue or misleading, unless the attorney-at-law makes clear to the Court the true position as known by or instructed to the attorney-at-law; or

(d) invent a defence for a client or suggest to the client or to a witness the use of words in evidence which would distort the facts.

2.5. **Not abusing the role as an advocate**

Where an attorney-at-law is acting as an advocate, the attorney-at-law's duty not to abuse that role includes the obligations that an attorney-at-law shall not —

(a) make statements or ask questions merely to insult, humiliate or annoy a witness or any other person or which exploit, or attempt to exploit, the vulnerability of a witness or any other person;

(b) make a serious allegation against a witness whom the attorney-at-law has had an opportunity to cross-examine unless the attorney-at-law has given that witness a chance to answer the allegation in cross-examination;

(c) make a serious allegation against any person, or suggest that a person is guilty of a crime with which the attorney-at-law's client is charged unless —

(i) there are reasonable grounds for the allegation;

(ii) the allegation is relevant to the client's case or the credibility of a witness; and

(iii) where the allegation relates to a third party, the attorney-at-law avoids naming the third party in open Court unless this is reasonably necessary; or

(d) put forward to the Court a personal opinion of the facts or the law unless invited or required to do so by the Court or by law.

Rule 3 – Honesty, integrity and independence

3.

3.1. An attorney-at-law shall not do anything which could reasonably be seen by the public to undermine the attorney-at-law's honesty, integrity and independence.

3.2. An attorney-at-law's duty to act with honesty and integrity under P.3 includes the requirement that an attorney-at-law shall —

(a) not knowingly or recklessly mislead or attempt to mislead anyone;

(b) not draft any statement of case, witness statement, affidavit or other document containing —

(i) any statement of fact or contention which is not supported by the client;

(ii) any contention which the attorney-at-law does not consider to be properly

arguable;

(iii) any allegation of fraud, unless the attorney-at-law has clear instructions to allege fraud and has reasonably credible material which establishes an arguable case of fraud;

(c) not draft in a witness statement or affidavit, a statement of fact other than the evidence which the attorney-at-law reasonably believes the witness would give if the witness were giving evidence orally;

(d) not encourage a witness to give evidence which is misleading or untruthful;

(e) not rehearse, practise with or coach a witness in respect of the witness' evidence;

(f) not communicate with any witness (including a client) about the case while the witness is giving evidence;

(g) not make, or offer to make, inducements to any witness which are contingent on the evidence or on the outcome of the case; and

(h) only propose, or accept, fee arrangements which are legal.

Rule 4 – Client relations

4.

4.1. **Taking on clients**

An attorney-at-law —

(a) is free to decide whether to accept instructions from a client other than where an attorney-at-law is appointed to act under legal aid in which case the provisions of section 13 of the Legal Aid Act, 2015 apply;

(b) shall not do anything to compromise or impair a person's freedom of choice in placing instructions for legal services;

(c) shall not act in the following circumstances —

(i) if by acting, the attorney-at-law will knowingly assist in or commit a breach of the law, regulations or the rules of professional conduct (including this Code);

(ii) if the attorney-at-law, or a recognised law entity, does not have sufficient resources or competence to deal properly with the matter;

(iii) if instructions are given by someone other than the client, or by one person on behalf of others in a joint matter, and the attorney-at-law is unable to obtain confirmation that the client or all of the clients agree with the instructions given;

(iv) if the attorney-at-law knows or has reasonable grounds to believe that the instructions are given by a client who is under duress or undue influence;

(v) if the attorney-at-law knows or has reasonable grounds to believe that the instructions are given by a client who is vulnerable unless subject to R.4.1 (c)(iv)

(vi) the attorney-at-law is satisfied that the instructions represent the client's wishes and that the client understands the consequences of those instructions; or

(vii) where professional embarrassment arises during the course of an instruction, even if there is no actual legal conflict.

4.2. **Accepting instructions**

An attorney-at-law shall, when accepting instructions from a client, ensure that the client is advised in writing (in clear and unambiguous language) of the following —

(a) the work to be undertaken, including any limitations as to scope;

(b) the name and contact details of the member with overall responsibility for the client's matter and of any other member or employee dealing with the matter;

(c) the responsibilities of the attorney-at-law and of the client; and

(d) details of how to make a complaint and whom to contact and the circumstances in which a retainer may be terminated (by either the client or the attorney-at-law) together with reasonable details about the recovery of unpaid costs (at the point of termination), the ownership of documents and timescales for the destruction of files and data.

4.3. **Information about fees and disbursements**

An attorney-at-law shall provide to clients a reasonable indication of likely fees and expenses (or "disbursements"), both at the outset and as a matter progresses, unless otherwise agreed with the clients. The information shall be clear and in writing. An attorney-at-law shall advise clients of the following —

(a) the basis of the fees and disbursements and whether those fees may be increased and in what circumstances;

(b) details of the likely payments to be made to others, either by the client or the attorney-at-law (or the recognised law entity);

(c) details of the client's potential liability for costs in contentious matters;

(d) the terms of any limitation of the attorney-at-law's or the recognised law entity's liability;

(e) the terms of payment and relevant details;

(f) the terms on which funds are held on behalf of the client and how they will be used;

(g) any financial benefit that may be received in the course of acting for the client and whether the attorney-at-law or recognised law entity will account to the client for that benefit, and if so, how; and

(h) details of the circumstances in which the attorney-at-law or recognised law entity may be entitled to exercise a lien for unpaid fees and disbursements.

4.4. **Ongoing client care**

An attorney-at-law shall ensure that clients are aware of relevant issues during the course of the retainer. An attorney-at-law shall attend to all client affairs with diligence and answer all correspondence within the timescales agreed with the client or, if no

such timescales have been agreed, within a reasonable time. An attorney-at-law shall treat clients fairly and correctly at all times.

4.5. **Complaint handling**

An attorney-at-law shall have a written complaints procedure and ensure that complaints are handled promptly, fairly and in accordance with that procedure. Clients shall be told at the outset of a matter or the client relationship of the complaints procedure and existing clients shall be advised of their right to complain if they indicate that they are dissatisfied with an aspect of the legal service or conduct of an attorney-at-law.

4.6. **Limitation of liability**

An attorney-at-law or a recognised law entity may limit liability to clients in writing, provided that such limitation is in accordance with any conditions set, at the relevant time, by the Council.

4.7. **Termination of retainer**

An attorney-at-law may only terminate a retainer, other than in exceptional circumstances, on reasonable notice, unless the retainer is terminated automatically by law. A client is free to terminate a retainer at any time.

4.8. **Retention of documents**

In accordance with P.10, a recognised law entity shall maintain appropriate document retention policies compliant with applicable law and regulations, including in respect of data privacy.

Rule 5 – Confidentiality

5.

5.1. **Duty of confidentiality**

An attorney-at-law shall keep the affairs of clients, former clients and potential clients (where any information of a confidential nature has been provided) confidential except where —

(a) a recognised law entity is compelled or permitted by law to disclose the information; or

(b) the client, former client or potential client has given informed written consent to the information being disclosed.

Where the recognised law entity has a public duty to disclose, the recognised law entity may defend its own interests to disclose.

5.2. **Duty of disclosure**

5.2.1 An attorney-at-law shall disclose to a client all information of which the attorney-at-law is aware which is material to that client's matter regardless of the source of the information, subject to the duty of confidentiality in R.5.1, which always overrides the duty to disclose (and R.7.6 applies).

5.2.2 This duty does not apply —

(a) where such disclosure is prohibited by law or regulation;

(b) where the information in question is received under a duty of confidence, including mistaken disclosure, or receipt where it is agreed with the client that no duty to disclose arises or a different standard of disclosure applies;

(c) where the attorney-at-law reasonably believes that serious physical, mental or financial injury will be caused to any person if the information is disclosed to a client;

(d) where the information in question relates to state security or intelligence; or

(e) to information received, or that an attorney-at-law becomes aware of, after the instruction has been carried out or the matter completed, whichever occurs first.

Rule 6 – Acting in the best interests of each client

6.

6.1. An attorney-at-law's duty to act in the best interests of each client (P.4), to provide a proper standard of service to each client (P.6) and to keep the affairs of each client confidential (R.5.1) includes the obligation that an attorney-at-law shall —

(a) promote fearlessly, and by all proper and lawful means, the client's best interests without regard to —

(i) the attorney-at-law's own interests or to any consequences to the attorney-at law;

(ii)the consequences to any other person (whether to their professional client, employer or any other person);

(b) not permit a professional client, a recognised law entity or any other person to limit the attorney-at-law's discretion as to how the interests of the client can best be served; and

(c) protect the confidentiality of each client's affairs, in accordance with R.5.1.

6.2. An attorney-at-law's duty to act in the best interests of each client is subordinate to the duty to the Court (in accordance with R.2) and to the obligations to act with honesty, and integrity and to maintain the attorney-at-law's independence, in accordance with R.3, and may be qualified by R.11.2.

Rule 7 – Conflicts of interest

7.

7.1. **Duty not to act**

Except in the limited circumstances dealt with in R.7.3, an attorney-at-law or a recognised law entity shall not act if there is a conflict of interests or a significant risk of a conflict.

7.2. **Acting in the same or related matter(s)**

There is, for example, a conflict of interests if an attorney-at-law or a recognised law entity owes separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict. A related matter will always include any other matter which involves the same asset or liability or transaction.

7.3. **Exceptions to duty not to act**

An attorney-at-law or a recognised law entity may act, in non-contentious matters, for more than one client whose interests conflict in the matter only with the informed written consent of all clients. Similarly, an attorney-at-law or a recognised law entity may act, in such a matter, for a client whose interests materially conflict with those of another client (but the other client is not a party to the matter) with the informed written consent of both clients.

Where there is a client conflict and the clients are competing for the same asset or objective, an attorney-at-law or a recognised law entity may only act if —

(a) the clients have provided their informed written consent, confirming that they want the attorney-at-law or the recognised law entity to act for more than one or more other clients who are competing for the same asset or objective;

(b) there is no other client conflict in relation to that matter;

(c) unless the clients specifically agree, an individual attorney-at-law does not act for, or is responsible for the supervision of work done for, more than one of the clients in that matter; and

(d) the attorney-at-law or the recognised law entity is satisfied that it is reasonable to act for all of the clients and that the benefits to the clients of so acting outweigh the risks.

7.4. **Requirement to obtain additional informed written consent**

Where one or more parties to a transaction is a private individual, prior to acting in the circumstances outlined in R.7.3, an attorney-at-law or a recognised law entity shall write to the clients, in terms that make it clear, and the clients shall confirm in writing that they have understood that —

(a) in the event of an issue of a conflict of interest arising that cannot be managed by the attorney-at-law or recognised law entity; or

(b) where one of the clients is concerned that the attorney-at-law or recognised law entity is not acting in their best interests,

the attorney-at-law or the recognised law entity will be obliged to cease acting for one or all of the clients in relation to the transaction and to set out the attorney-at-law's or the recognised law entity's policy in those circumstances in relation to fees already billed and work as yet unbilled.

7.5. **Conflict when already acting**

Except in the limited circumstances dealt with in R.7.3, if an attorney-at-law or a recognised law entity acts for more than one client in a matter and, during the course of the conduct of that matter, a conflict arises between the interests of two or more of those clients, the attorney-at-law or the recognised law entity may only continue to act for one of the clients (or a group of clients between whom there is no such conflict), and provided that the duty of confidentiality to the other client(s) is not put at risk.

7.6. **Own interest conflicts**

An attorney-at-law or a recognised law entity shall not act where the attorney-at-law's or recognised law entity's own interests conflict with those of the client or there is a significant risk of a conflict.

7.7. **Apparent conflict between duty of confidentiality to former clients and duty to new clients**

An attorney-at-law or a recognised law entity may act for the adversary or counterparty (client A) of a client (including a former client, client B) provided that the attorney-at-law or recognised law entity —

(a) is not privy to confidential information in respect of client B that is materially relevant to such dispute or matter; or

(b) can protect such confidential information effectively by the use of safeguards and informed written consent has been obtained from client A and where possible client B,

and, in any event, effective safeguards including information barriers, are put in place and it is reasonable in all the circumstances for the attorney-at-law or the recognised law entity to act for client A with such safeguards in place.

7.8. **Public office or appointment leading to conflict**

Where an attorney-at-law, or a relative of an attorney-at-law, holds public office or appointment, the attorney-at-law shall consider whether this gives rise to a conflict of interests, or a significant risk of a conflict. If such conflict arises, the attorney-at-law shall decline to act.

7.9. **Accepting gifts**

An attorney-at-law shall ensure that any gratuitous benefit received from a client, whether monetary or non-monetary, is compliant with applicable legislation on bribery and corruption, and any other regulation applicable to attorneys-at-law and recognised

law entities in respect of gifts.

7.10. **Bail**

An attorney-at-law shall not stand bail or provide a surety for a client without obtaining the prior consent of the Council.

Rule 8 – Business management

8.

8.1. **Business structure**

An attorney-at-law who is a manager of a recognised law entity shall ensure that there is a clear and effective governance and management structure and proper reporting lines within the recognised law entity.

8.2. **Risk management**

An attorney-at-law shall —

(a) identify, monitor and manage risks within the recognised law entity on an ongoing basis;

(b) implement and maintain effective systems and controls to comply with this Code and all other legal and regulatory requirements of the jurisdictions in which the recognised law entity has offices or by which it is regulated;

(c) maintain appropriate records through good file management to demonstrate compliance with P.10, R.4.8 and this R.8.2; and

(d) ensure all employees comply with the requirements of this Rule as applicable to them.

8.3. **Professional Indemnity Insurance**

A recognised law entity shall maintain professional indemnity insurance against professional liabilities arising from practice with a level of cover no less than that determined by the Council from time to time.

8.4. **Financial stability**

An attorney-at-law shall —

(a) identify, monitor and manage risks to money and assets entrusted to the attorney-at-law by clients and others;

(b) implement and maintain effective systems and controls for monitoring the financial stability of the recognised law entity;

(c) maintain appropriate financial records including good file management/ accounting practices to demonstrate compliance with this R.8; and

(d) ensure all employees comply with the requirements of this R.8 as applicable to

them.

8.5. **Supervision and management**

An attorney-at-law or a recognised law entity shall ensure that appropriate arrangements are in place for the effective supervision of qualified and unqualified staff. These arrangements shall include the regular checking of the quality of work by suitably competent and experienced people so that clients' matters are properly supervised, the degree of regularity and extent of checking to be proportionate to the experience and known quality of work and advice done by, and specialisations of, the attorney-at-law or staff whose work is being checked.

8.6. **Training and development**

An attorney-at-law and a recognised law entity shall ensure that all employees have the experience and are properly trained to achieve and maintain, a level of competence, taking account of the supervision and management as referred to under R.8.5, appropriate to their work and level of responsibility.

Rule 9 – Client Accounts

9.

9.1. A recognised law entity shall properly account to clients for any financial benefit it receives as a result of instructions, except where they have agreed otherwise.

9.2. An attorney-at-law and a recognised law entity shall safeguard money and assets entrusted to them by clients and others.

9.3. An attorney-at-law is not permitted to personally hold client money.

Rule 10 – Duties under anti-corruption legislation

10.

10.1. **Compliance with relevant laws**

An attorney-at-law shall observe and comply with all applicable legislation in respect of crime prevention, including the POCA and the AML Regulations. It is essential for an attorney-at-law to be aware of the obligations under all such legislation and ensure full compliance with the legal obligations to prevent crime, including bribery, money laundering, sanctions, terrorist financing and proliferation financing activities.

Rule 11 – Relations with other attorneys-at-law and third parties

11.

11.1. **Dealing in good faith and courtesy**

An attorney-at-law shall —

(a) act towards another attorney-at-law in good faith subject to the duty to the client and the overriding duty to the Court*;* and

(b) behave with good manners and courtesy towards other attorneys-at-law and third parties.

11.2. **Not taking unfair advantage**

An attorney-at-law shall not take unfair advantage of anyone, either for the client's benefit or for the benefit of the attorney-at-law.

11.3. **Restrictions on contacting clients of other attorneys-at-law**

An attorney-at-law or a recognised law entity shall not communicate in respect of a particular matter with the client of another recognised law entity in respect of that matter except through that recognised law entity or with that other recognised law entity's consent, save that consent to such communication may also be given by that recognised law entity's client.

11.4. **Undertakings**

(a) An attorney-at-law who has given a personal undertaking to another attorney-at-law or a recognised law entity in the course of practice is personally bound by that undertaking, shall honour that undertaking and shall ensure that it is performed in a timely and effective manner, unless the attorney-at-law is clearly and unequivocally released by the recipient or the Court.

(b) A recognised law entity shall be responsible for honouring an undertaking given by an attorney-at-law with express or ostensible authority.

11.5. **Instructing other practitioners**

An attorney-at-law or a recognised law entity that instructs an attorney-at-law or a practitioner in the law of another jurisdiction will be responsible for the payment of the proper fees and disbursements of that other attorney-at-law or practitioner unless otherwise agreed. An attorney-at-law or a recognised law entity shall be responsible for paying the proper costs of any agent or other person who is instructed on behalf of the client, unless —

(a) the attorney-at-law or the recognised law entity and the person instructed make an express agreement to the contrary; or

(b) it is otherwise clear that the person instructed is instructed on terms that the attorney-at-law or recognised law entity is not so responsible.

For the purpose of this paragraph "**attorney-at-law**" does not include a Government attorney-at-law.

Rule 12 – Publicity and communications

12.

12.1. **Application**

This Rule applies to all forms of publicity including the name or description of an attorney-at-law's practice, stationery, advertisements, brochures, websites, directory entries, media appearances, promotional press releases, and direct approaches to potential clients and other persons, and whether conducted in person, in writing, or in electronic form or in any medium.

12.2. **Advertising**

An attorney-at-law shall ensure that any advertising, marketing or promotion in connection with the attorney-at-law or a recognised law entity complies with this Code and all legal and regulatory obligations. Such publicity shall not be —

(a) false;

(b) misleading or deceptive or calculated or likely to mislead or deceive;

(c) offensive to a reasonable standard of fairness and decency; or

(d) prohibited by law.

12.3. **Clarity as to charges**

Any publicity relating to charges shall be clearly expressed and state whether disbursements are included. There shall not be a breach of this Rule where it is intended that disbursements will be included, but without this being expressly stated, and this intention is honoured.

12.4. **Unsolicited visits or telephone calls**

An attorney-at-law's practice shall not be publicised in the Cayman Islands by means of unsolicited visits or telephone calls to members of the public. A member of the public does not include current or former clients, existing or former business or professional connections or other attorneys-at-law or other commercial organizations.

Rule 13 – Cooperation with Council

13.

13.1. **Duty to co-operate with the Council**

An attorney-at-law shall —

(a) co-operate with the Council by responding to proper and reasonable requests for information in an open, honest and timely manner;

(b) promptly notify the Council of any changes to relevant information about the attorney-at-law or a recognised law entity;

(c) not deceive or mislead the Council;

(d) report to the Council if convicted of any offence in any jurisdiction, other than a minor traffic offence;

(e) report to the Council any disciplinary sanction (including private rebuke or censure) imposed by another regulator (in the Cayman Islands or elsewhere);

(f) engage with the Council in relation to any matters of a disciplinary nature and co-operate with any reasonable requests or directions and in the conduct of disciplinary proceedings;

(g) promptly notify the Council where a recognised law entity is in financial difficulties or at material risk of being unable to meet its financial obligations; and

(h) subject to the completion of any internal process or reporting, within a recognised law entity, in respect of such matters, advise the Council where the attorney-at-law has good reason to doubt the professional integrity, or fitness to practise, of an attorney-at-law without prejudice to any restrictions on disclosure provided by statute.

13.2. **Provision of information and production of documents**

An attorney-at-law shall promptly (within 14 days or as otherwise determined by the Council) comply with any proper request or notice (which shall be in writing) served on the attorney-at-law or recognised law entity by the Council to produce documents, information and explanations relating to the recognised law entity, for the purpose of ascertaining whether the attorney-at-law or the recognised law entity is complying with or has complied with any rules, codes (including this Code) or mandatory guidance made or issued by the Council or which is necessary to deal with any issues of potential misconduct.

13.3. **Complying with conditions or limitations**

An attorney-at-law and a recognised law entity shall comply with any proper conditions or limitations reasonably imposed by the Council, including on the conduct of their practice.

13.4. **Obstruction of complaints**

An attorney-at-law shall not —

(a) attempt to hinder or prevent a person who wishes to report the attorney-at-law's conduct to the Council from doing so;

(b) take any action or enter into an agreement which would attempt to preclude the Council from investigating any complaint made to the Council which alleges misconduct;

(c) offer any incentive to a complainant to withdraw a complaint;

(d) victimise a person for reporting the attorney-at-law's conduct to the Council; or

(e) issue, or threaten to issue, defamation proceedings pending the resolution of a complaint to the Council, unless malice can be properly alleged.

Rule 14 – Waivers

14. Waivers

14.1. Subject as set out below, in any particular case, the Council shall have power to waive, in writing, the provisions of this Code for a particular purpose or purposes expressed in such waiver, to place conditions on and to revoke such waiver. The Council shall not have power to waive any of the Principles, or any of the provisions of the following Rules —

(a) Rule 5 – Confidentiality;

(b) Rule 2 – Duty to the Court;

(c) Rule 7 – Conflicts of interest; and

(d) Rule 14 – Waivers.

Dated this day of …. , 2025

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Cayman Islands Legal Services Council

GUIDANCE NOTES

TO

THE CAYMAN ISLANDS LEGAL SERVICES CODE OF PROFESSIONAL CONDUCT, 2025

GUIDANCE

Ref.	Guidance to the Principles
GP.1	As officers of the Court, attorneys-at-law (and their employees) have a fundamental duty to uphold the rule of law and the proper administration of justice. An attorney-at-law or a recognised law entity shall comply with an obligation imposed on the attorney-at-law or recognised law entity under the Act or Regulations made under the Act.
GP.2	In following or considering a particular course of action, attorneys-at-law and their employees shall ensure that they comply with the Code of Conduct. Certain standards of behaviour are required of attorneys-at-law, both in their business activities and in their professional lives. Disgraceful conduct (including conviction of any criminal offence, other than a minor traffic offence) outside an attorney-at-law's practice may place him or her in breach of P.2. If there is a conflict between the Principles, public interest will take precedence, especially the public interest in the administration of justice. Compliance with the Principles, as with all the Rules, is subject to any overriding legal obligations.
GP.3	Attorneys-at-law shall adopt high standards and act with honesty, propriety, integrity and professionalism at all times. They should treat others as they would like to be treated, e.g., by being civil and courteous.
GP.4	Subject to their overriding duty to the Court (but see R.2.3), attorneys-at-law shall act in the best interests of their clients.
GP.5	Attorneys-at-law shall maintain their independence at all times and not allow any other party to exercise undue influence when considering their actions. This not only relates to the independence of their advice but also the independence of their judgment.
GP.6	Attorneys-at-law shall ensure that they have sufficient knowledge and experience (or access to the requisite knowledge and experience) for the provision of appropriate legal advice in all matters for which they are engaged.
GP.7	Attorneys-at-law shall safeguard client money and assets by ensuring that there are proper systems and controls and that effective training is provided to all attorneys-at-law and other appropriate employees in a recognised law entity.
GP.8	It is not possible to cover every ethical problem or issue which may arise in the course of legal practice, but the Principles will guide the ethical thinking of attorneys-at-law and their employees in determining how to deal with a particular problem or issue. Attorneys-at-law shall manage their recognised law entities effectively and implement robust systems and controls, which are properly understood by attorneys-at-law and their employees.

GP.9 Disciplinary action may be taken by the Disciplinary Tribunal in relation to breaches of the Code of Conduct, whether it relates to a breach of one or more Principles or Rules.

The relationship between attorneys-at-law (and their employees) and the Council shall be open and transparent so that appropriate action can be taken to protect the public and assist attorneys-at-law and their employees when there are difficulties.

GP.10 The Principles provide the ethical infrastructure from which the Rules flow. Attorneys-at-law shall reasonably ensure that, in the course of their professional duties and/or the provision of legal services, everyone in their recognised law entities follows these fundamental Principles, regardless of whether they are client facing and/or legally qualified.

Ref. Guidance to Rule 1

G.1 Application - Guidance

G.1.1 The Principles and Rules apply to all attorneys-at-law and their recognised law entities, whether they are practising in the Cayman Islands or elsewhere.

G.1.2 If the attorney-at-law is practising in another jurisdiction, and subject to the legal practice regulatory regime in that jurisdiction, the attorney-at-law shall comply with the rules of that jurisdiction, when the attorney-at-law is carrying out an activity regulated by that jurisdiction's regulator. An attorney-at-law should be clear whose regulatory jurisdiction their work or practice falls into. An attorney-at-law may be subject at the same time to differing regulatory regimes. In the unlikely event of a conflict of regulatory requirements, the attorney-at-law should apply for a waiver of this Code.

G.1.3 It shall be made clear to the client, to whom, and in which jurisdiction, they can complain.

G.1.4 Certain Principles and Rules also apply outside practice as follows:

(a) under P.2, recognised law entities, attorneys-at-law and their employees shall not behave in a way which brings or which may bring the profession or the provision of legal services into disrepute. P.2 applies to the conduct of attorneys-at-law and their employees, both in relation to their professional practice and outside it, since an officer of the Court or an employee of an officer of the Court shall not behave inappropriately;

(b) under R.11.2 (Not taking unfair advantage), recognised law entities, attorneys-at-law and their employees shall not take unfair advantage of their position, whether this is in relation to their professional practice or outside it.

Ref. **Guidance to Rule 2**

G.2 **Duty to the Court - Guidance**

G.2.1 Knowingly misleading the Court includes the situation where, having inadvertently misled the Court, an attorney-at-law later realises that he or she has misled the Court, and fails to correct the position. Recklessness means being indifferent to the truth, or not caring whether something is true or false.

G.2.2 Attorneys-at-law shall take reasonable steps to ensure that the Court has before it all relevant decisions and statutory provisions, which includes drawing to the attention of the Court any decision or provision which may be adverse to the interests of their client. This is particularly important where an attorney-at-law is appearing against a litigant who is not legally represented.

G.2.3 R.2.2 makes it clear that an attorney-at-law's duty to act in the best interests of his or her client is subordinate to his or her duty to the Court, but subject to R.2.3. For example, if a client were to tell an attorney-at-law that the client had committed the crime with which the client was charged, in order to be able to ensure compliance with R.2.1 to R.2.4:

(a) the attorney-at-law would not be entitled to disclose that information to the Court without his or her client's consent; and

(b) the attorney-at-law would not be misleading the Court if, after his or her client had entered a plea of 'not guilty', the attorney-at-law were to test in cross-examination the reliability of the evidence of the prosecution witnesses and then address the jury to the effect that the prosecution had not succeeded in making them sure of his or her client's guilt.

However, the attorney-at-law would be misleading the Court and would therefore be in breach of R.2.1 and R.2.4 if the attorney-at-law were to set up a positive case inconsistent with the confession, as for example by:

(a) suggesting to prosecution witnesses, calling his or her client or the witnesses to show, or submitting to the jury, that his or her client did not commit the crime;
(b) suggesting that someone else had done so; or
(c) putting forward an alibi.

If there is a risk that the Court will be misled unless an attorney-at-law discloses confidential information which the attorney-at-law has learned in the course of his or her instructions, the attorney-at-law should ask the client for permission to disclose it to the Court. If the client refuses to allow the attorney-at-law to make the disclosure the attorney-at-law shall cease to act, and shall return his or her instructions. In these circumstances, the attorney-at-law shall not reveal the information to the Court.

Similarly, if an attorney-at-law becomes aware that his or her client has a document which should be disclosed but has not been disclosed, the attorney-at-law cannot continue to act unless the client agrees to the disclosure of the

document. In these circumstances, the attorney-at-law shall not reveal the existence or contents of the document to the Court.

G.2.4 Attorneys-at-law shall not discuss the merits of a case with a magistrate or judge before whom a case is pending or by whom it may be heard unless invited to do so in the presence of the attorney-at-law for the other side.

G.2.5 An attorney-at-law's duty to the Court does not permit or require the attorney-at-law to disclose confidential information which the attorney-at-law has obtained in the course of his or her instructions and which his or her client has not authorised the attorney-at-law to disclose to the Court. However, R.2.4 requires an attorney-at-law not knowingly to mislead the Court or to permit the Court to be misled.

G.2.6 Attorneys-at-law are obliged by P.4 to promote and to protect each of their client's interests so far as that is consistent with the law and with their overriding duty to the Court under P.1. Their duty to the Court does not prevent them from putting forward their client's case simply because they do not believe that the facts are as their client states them to be (or as they, on their client's behalf, state them to be), as against knowing their client's case to be false, as long as any positive case put forward accords with their instructions and the attorney-at-law does not mislead the Court. The attorney-at-law's role when acting as an advocate or conducting litigation is to present his or her client's case, and it is not for the attorney-at-law to decide whether his or her client's case is to be believed.

For example, an attorney-at-law is entitled, and it may often be appropriate, to draw to the witness's attention other evidence which appears to conflict with what the witness is saying and the attorney-at-law is entitled to indicate that a court may find a particular piece of evidence difficult to accept. But if the witness maintains that the evidence is true, it should be recorded in the witness statement and the attorney-at-law will not be misleading the Court if the attorney-at-law calls the witness to confirm their witness statement. Equally, there may be circumstances where an attorney-at-law calls a hostile witness whose evidence the attorney-at-law is instructed is untrue. An attorney-at-law will not be in breach of R.2.4 if the attorney-at-law makes the position clear to the Court.

G.2.7 Where a client admits to having committed perjury or having misled the Court in any material matter relating to ongoing proceedings, the attorney-at-law shall not act further in those proceedings unless the client agrees to correct the position.

G.2.8 Reasonable expenses, and reasonable compensation for loss of time attending Court, may be paid to witnesses.

Ref. **Guidance to Rule 3**

G.3 Honesty, integrity and independence - Guidance

G.3.1 An attorney-at-law's honesty, integrity and independence are fundamental. The interests of justice (P.1) and the client's best interests (P.4) can only be properly served, and any conflicts between the two properly resolved, if an attorney-at-law conducts himself or herself honestly (P.3) and maintains his or her independence from external pressures (P.5).

G.3.2 Other Rules deal with specific aspects of the attorney-at-law's obligation to act in his or her client's best interests (P.4) while maintaining honesty and integrity (P.3) and independence (P.5).

G.3.3 R.3.1 addresses how an attorney-at-law's conduct is perceived by the public. An attorney-at-law would be in breach of P.2 and R.3.1 if his or her conduct may be reasonably perceived as undermining his or her honesty, integrity or independence or is likely to diminish the trust and confidence which the public places in him or her or in the legal profession.

G.3.4 Examples of how attorneys-at-law may be seen as compromising their independence.

The following may reasonably be seen as compromising an attorney-at-law's independence in breach of R.4:

(a) offering, promising or giving: a gift (apart from items of modest value), to any client, professional client or other intermediary;

(b) lending money to any such client, professional client or other intermediary; or

(c) accepting any money (whether as a loan or otherwise) from any client, professional client or other intermediary, unless it is a payment for the attorney-at-law's professional services or reimbursement of expenses or of disbursements made on behalf of the client.

If an attorney-at-law is offered a gift by a current, prospective or former client, professional client or other intermediary, the attorney-at-law should consider carefully whether the circumstances and size of the gift would reasonably lead others to think that the attorney-at-law's independence had been compromised. If this would be the case, the gift should be refused.

The giving or receiving of entertainment at a disproportionate level may also give rise to a similar issue and so should not be offered or accepted if it would reasonably lead others to think that the attorney-at-law's independence had been compromised.

Ref. **Guidance to Rule 4**

G.4 **Client relations - Guidance**

G.4.1 Generally, attorneys-at-law should consider carefully whether it would be in the interests of the client and in the interests of the recognised law entity to accept instructions.

G.4.2 Attorneys-at-law are free to decide whether to take on a client, subject to R.4.1(a).

G.4.3 In determining whether to act, attorneys-at-law shall consider whether they have the knowledge, qualifications, expertise, time, and, where relevant, support staff and access to external expertise to advise or represent the client properly.

G.4.4 Rule 4.1(c) sets out a range of circumstances in which instructions shall be refused. An attorney-at-law or a recognised law entity shall not act if they would be in breach of the law or of the Rules: examples are where money laundering is suspected or there is a conflict of interest (unless it is a conflict where, if certain conditions are satisfied, it is possible to act, and those conditions are satisfied), or where an attorney-at-law is dealing with a potential client who is unable to instruct an attorney-at-law or the recognised law entity due to a lack of mental capacity. References to 'vulnerable' or 'vulnerability' in the Rules and this Guidance refer to individuals who lack mental capacity, and include minors.

G.4.5 Attorneys-at-law shall be satisfied that the client is giving the instructions without duress or undue influence. There may be occasions when the attorney-at-law suspects that a client's instructions are the result of undue influence, in which case the attorney-at-law or employee will need to exercise his or her judgment as to whether they can proceed on the client's behalf; see G.4.6.

G.4.6 If an attorney-at-law suspects that a friend or relative or anyone else is exerting duress or undue influence, it would be prudent to see the client alone or with an independent third party or interpreter. If the client appears to want to act against what one would expect their best interests to be, the attorney-at-law should explain the consequences of the instructions and get confirmation in writing, that refers to the explanation given, that the client wishes to proceed – but this will not negate duress or undue influence if it exists.

G.4.7 If an attorney-at-law or recognised law entity would be professionally embarrassed by acting, even if there were no actual legal conflict, instructions may be refused. An example would be where, by accepting instructions to act against a former client (where no duties of confidentiality prevented the attorney-at-law or recognised law entity so acting), the attorney-at-law felt inhibited from doing his or her best for the new client.

G.4.8 If professional embarrassment is not a factor and there is no prohibition or impediment under the Rules from acting, whether by reason of conflict or otherwise, it will be a purely commercial decision whether to act against the interests of another client or former client.

G.4.9 Attorneys-at-law should not act for a client who has instructed another attorney-at-law or recognised law entity in the same matter, without the agreement of that other attorney-at-law or recognised law entity. But a second opinion can be provided if the attorney-at-law has sufficient information and clarity of instructions to be able to provide proper advice.

G.4.10 The client should be provided with an explanation of the relationship of the attorney-at-law to the client including the duty of confidentiality, the need for the utmost good faith between attorney-at-law and client and the duty of the attorney-at-law to exercise reasonable skill and care. This is part of what is to be covered by the terms of business/letter or terms of engagement. The expression *'client care information'* used in this Guidance includes the points referred to in this paragraph, and typically all client care information will be set out in terms of business or a letter or terms of engagement.

G.4.11 It is important that the client and the attorney-at-law have a clear mutual understanding of what work is going to be undertaken (including any limitations as to scope), the timescales and the level of service and, if such reports are appropriate or required, the frequency of progress reports, as this will minimise the risk of misunderstanding, complaints or claims. Poor communication is a major source of complaints and can result in increased costs.

G.4.12 Treating the client fairly does not necessarily mean that the client will be satisfied but ensuring that the client has all the necessary information, that there is good communication and clarity about costs, and updates to these and desired outcomes, should mean that even if the client is dissatisfied at the outcome, the client does not complain or make a claim, because the client has been treated fairly.

G.4.13 Clients shall be told of the name and, if appropriate, the status and qualifications of the person(s) responsible for the day to day work and the overall supervision of the matter. Failure to tell the client the status of the person(s) with such responsibilities can result in misunderstandings as to whether the person is legally qualified or not, the proper level of responsibility borne by that person, and how appropriate it is to have different persons in the recognised law entity engaged on the matter with different responsibilities.

G.4.14 If the person dealing with the matter leaves the recognised law entity, the client shall be told as soon as possible and informed who will take over the matter, their status and any impact on cost for the client. Clients shall be informed of material changes to the composition of the recognised law entity which will affect that client.

G.4.15 An attorney-at-law and a client can agree either that certain information (of the information otherwise required under this Code) is not required or, once the terms of engagement are in place, to vary the contractual arrangements between the recognised law entity and the client, provided that the client understands the consequences and the agreed variation is in writing or evidenced in writing.

G.4.16 Existing clients, for whom a new matter is undertaken, shall be provided with information about any changes in the client care information. A client may agree with the attorney-at-law or employee that new terms of engagement are not

required for every new instruction but the attorney-at-law shall ensure that the client is provided with sufficient client care information on each instruction.

G.4.17 If instructions are received from someone other than the client, the client shall be given or also be given the relevant client care information although there may be exceptions to this particularly in relation to attorneys-at-law or persons lacking mental capacity. Such client care information can be given to the client via a reputable intermediary (as the case may be a professional client or other person giving the instructions).

G.4.18 Accurate information about costs enables the client to budget and reach informed decisions as to what the client can afford, before making commitments. As the matter proceeds, providing the client with up to date costs information reduces the risk of complaints.

G.4.20 The basis on which fees and expenses are to be charged shall be explained to the client, i.e. (in the case of fees) whether the fees are an estimate or set/fixed fees, or hourly rates. The client shall be advised of any factors or circumstances which may affect the level of fees and expenses such as the complexity and novelty of the matter, the specialised legal knowledge required, the monetary amount or other value of the matter, the number and length of documents, the urgency of the matter and the place and time of day when the work is to be carried out, the importance of the matter to the client and the time to be expended.

G.4.21 It may not be possible to tell at the outset what the overall costs will be but the attorney-at-law needs to provide the client, after careful consideration, with a reasonable indication of likely fees and disbursements, both at the outset and as a matter progresses, including risks as to the responsibility for other costs, unless otherwise agreed with the client. If it is not possible to give a precise figure at the outset, the reason should be explained to the client. An agreement should be reached, in such circumstances, with the client as to how the client will be updated as to current and future costs. The attorney-at-law shall tell clients when pre-agreed limits or caps on legal costs are reached or are likely to be inadequate and agree revised limits or alternative strategies.

G.4.22 Clients shall also be told the terms of payment and the time for payment, the rate of interest (if any) chargeable on late payment, the frequency of billing, and of their right at any time to be informed, on request, of the fees incurred to date.

G.4.23 Depending on the nature of the instruction, it may be necessary to provide additional costs/fees information, for example, ensuring that clients understand the cost implications of any offers of settlement, including details of the costs to be deducted and how the figures are calculated.

G.4.24 The client shall be advised of the liability for costs in contentious matters including a clear statement of the principles of the extent of recovery of costs awarded against an opposite party and a clear statement of the likely difference between the level of costs recoverable on an award of costs against such a party and the level of costs which the attorney-at-law will charge to the client.

G.4.25 If any financial benefit (other than legal fees payable by or on behalf of the client) is received during the course of or as a result of acting for the client, then the client shall be informed about the benefit and how it will be dealt with. As a fiduciary, the attorney-at-law (or their recognised law entity) is not permitted to make a secret profit.

G.4.26 The clients' right to complain is an important public protection so it is important that they know about their right and how to complain. Clients shall be confident that if they have a complaint, it will be dealt with promptly, fairly and effectively. They shall be told to whom the complaint should be addressed, about the dispute provisions referred to in R.4.5 and of the existence of the right of a client to refer a matter to the Council in the event that the client's complaint cannot be resolved satisfactorily through the recognised law entity's complaints procedures.

G.4.27 The complaints procedure shall be set out in writing (normally in the terms of engagement). The procedure should be clear and easy for clients to use, allowing complaints to be made by any reasonable means, i.e. not necessarily in writing. (This will allow complaints to be made by clients who are vulnerable or who have a disability.)

G.4.28 Complaints shall be dealt with effectively, which requires decisions to be based on a proper investigation of the circumstances leading to the complaint, and promptly. If a complaint is justified, an appropriate remedy or redress shall then be offered, where appropriate. It is important that everyone in the recognised law entity, or at least those dealing with clients, understands the recognised law entity's procedure and the importance of good complaints handling.

G.4.29 Clients shall be advised about what will happen on the termination of a retainer, including details of the file closure procedures and of where documents will be held and the date on which the file will be destroyed.

G.4.30 On the termination of a retainer, an attorney-at-law shall account to the client for any money still held on behalf of the client and, if so requested, deliver to the client all papers or property to which the client is entitled, or otherwise held to the client's order. The handing over of documents (which means letters, faxes, emails and other documents whether hand written, printed or stored electronically) on the termination of a retainer shall be in accordance with the provisions of the Annex 1.

G.4.31 Notwithstanding the provisions in G.4.29 – G.4.30 (including the guidance on ownership of documents at the Annex), all files or records of any material matter shall be retained by an attorney-at-law or a recognised law entity in either physical form or, if not reasonably affecting the status or value of the document concerned, electronically, for at least 11 years from the last material entry on the file/record and shall not then be destroyed unless it is reasonable to do so in the circumstances. In any event, an attorney-at-law or a recognised law entity may destroy files and records, other than original documents or items of intrinsic value or currency (e.g., wills, promissory notes) after 20 years from their date or the last material entry, whichever is the later, whether the attorney-at-law or recognised law entity has the consent of the client or not.

G.4.32 An attorney-at-law or a recognised law entity is not obliged to maintain the hardware of the computer system upon which such files or records or other documents or items may be stored for this 20-year period.

Ref. **Guidance to Rule 5**

G.5 **Confidentiality – Guidance**

G.5.1 R.5.1 sets out the fundamental duty to keep all clients' affairs confidential, which applies to everyone in the recognised law entity. The duty applies to all information held about a client and its affairs that is not in the public domain, regardless of the source of the information. There are some limited exceptions to the duty as explained below.

G.5.2 All employees shall be trained or instructed on the fundamental duty of confidentiality as well as on the recognised law entity's policies and procedures in this area. It needs to be made clear that failing to keep clients' affairs confidential can result in disciplinary action, not only by the recognised law entity but also by the Council.

G.5.3 There is a difference between the duty of confidentiality and the concept of legal privilege. Legal privilege protects certain communications with a client from being disclosed even in Court. However, not all communications, in particular those with third parties, are protected from such disclosure and reference should be made to the appropriate authority on the law of evidence.

G.5.4 Attorneys-at-law need to have robust systems and controls in place to ensure that client information is kept confidential (and also to comply with the data protection legislation), and need to identify if there are risks to client confidentiality and how those risks will be managed. Such systems and controls will need to take account of the impact of technology, the risks associated with social media and data security challenges.

G.5.5 Systems and controls to identify and forestall the particular risks associated with partners and staff leaving one recognised law entity and joining another will also be required. An individual joining a new recognised law entity could not act personally for the client of the new recognised law entity if he or she holds or maintains knowledge of relevant confidential information about a relevant client of the former recognised law entity.

G.5.6 The duty of confidentiality continues after the end of the retainer and the right to confidentiality passes to the personal representatives on the death of a client.

G.5.7 Recognised law entities shall always consider whether a particular course of action will result in a breach of confidentiality, for example, sharing office services with other businesses, selling book debts to a factoring company or outsourcing services.

G.5.8 Information received in relation to a prospective client may still be confidential even if that prospective client does not instruct the attorney-at-law. In addition, the receipt of that information may subsequently prevent the recognised law entity from acting for another party.

G.5.9 The duty of confidentiality may be overridden by law or regulation or by a court order. Any disclosure made in accordance with a statutory authority or Court order shall be strictly limited to what is required by law. If requested by a government or other body or the police to provide information, the attorney-at-law or employee should:

(a) ask under which statutory power the information is sought;
(b) ask whether the client's consent can be sought;
(c) consider the relevant provisions; and
(d) assess whether privileged information is protected from disclosure.

G.5.10 Where there are circumstances in which the attorney-at-law, employee or recognised law entity has strong prima facie evidence that they have been or are being used by the client for an unlawful purpose, the duty of confidentiality may fall away. If an attorney-at-law, employee or recognised law entity is unsure whether that is the case, it may be necessary to obtain specialist legal advice.

G.5.11 The money laundering legislation overrides the duty of confidentiality in certain circumstances. When deciding whether a report needs to be made to the relevant authorities, the recognised law entity's money laundering reporting officer (MLRO) will consider the law, the extent to which confidentiality is overridden and whether there is information which is subject to legal privilege. It may be necessary to obtain specialist legal advice.

G.5.12 If a client becomes insolvent, the recognised law entity will need to determine to whom the duty of confidentiality is owed. Reference should be made to the relevant legislation to assess whether the statutory power to require disclosure overrides confidentiality and, if so, to what extent. Any disclosure made shall be strictly limited to what is required by the law.

G.5.13 Confidential information may be disclosed to the recognised law entity's insurer to deal with a negligence claim or to the Council where an attorney-at-law, employee or the recognised law entity's conduct is under investigation.

G.5.14 Under R.5.2, there is a duty to disclose to the client all information material to the client's matter. That duty is limited to information of which the attorney-at-law is aware but is not limited to information obtained while acting on the client's matter. It is however subject to the qualifications set out in that Rule.

G.5.15 "Information which is material to the client's matter" is not defined but shall be information which is relevant to the particular retainer and shall be information which might reasonably be expected to affect the client's decision making in relation to the retainer in a significant way. There may be circumstances in which the client instructs the attorney-at-law, employee or the recognised law entity because of their specialist knowledge and agrees that the usual duty to disclose information about other clients (such duty being albeit always subject to the R.2.2

qualifications and G.5.17) would not apply. The duty to disclose information about other clients necessarily does not apply in circumstances under R. 7.3.

G.5.16 If, during the course of a matter, an attorney-at-law receives information or documents from either a client or a third party, which clearly appear to have been (a) disclosed inadvertently or (b) obtained improperly, the attorney-at-law shall return such information or documents to the rightful owner without use being made of the information or documents.

G.5.17 Where it is not clearly apparent that the information or document has been mistakenly disclosed but it appears that this may be the case, the attorney-at-law (or his or her recognised law entity) must inform his or her opponent of the attorney-at-law's intention to use the document and the circumstances (so far as are known) in which the information or document has been obtained. If the opponent objects to the use of such information or document, reference to the Court may be necessary.

G. 5.18 Where there is a conflict between the duty of confidentiality and the duty of disclosure, it will normally be necessary to stop acting or to refuse instructions. This reflects the fiduciary duty of loyalty which exists at common law.

G.5.19 An attorney-at-law (or his or her recognised law entity) should consider carefully whether the attorney-at-law (or his or her recognised law entity) can act for the adversary of a former client. Firstly, an assessment shall be made whether any confidential information, which is relevant to the dispute, is held by the attorney-at-law or the recognised law entity. Secondly, the attorney-at-law or the recognised law entity should assess whether it would be professionally embarrassing to act for the adversary. The reputational damage of acting against a former client may outweigh the benefits of acting for the adversary.

Ref. Guidance to Rule 6

G.6 **Acting in the best interests of each client - Guidance**

G.6.1 R.6.1 and R.6.2 are expressed in terms of the best interests of each client. This is because an attorney-at-law may only accept instructions to act for more than one client if he or she is able to act in the best interests of each client, as P.4 requires of the attorney-at-law, as if that client were his or her only client. See R.1 on the circumstances when attorneys-at-law are obliged to advise their client to seek other legal representation and R.7 on conflicts of interest, and the guidance to those Rules.

G.6.2 P.6 requires not only that an attorney-at-law provide a competent standard of work but also a competent standard of service to his or her clients. R.1 and R.6 are not exhaustive of what an attorney-at-law shall do to ensure his or her compliance with P.4 and P.6. By way of example, a competent standard of work and of service includes:

(a) treating each client with courtesy and consideration;
(b) seeking to advise each client, in terms the client can understand;
(c) taking all reasonable steps to avoid incurring unnecessary expense; and
(d) reading the attorney-at-law's instructions promptly.

This latter obligation may be particularly important if there is a time limit or limitation period. If an attorney-at-law fails to read his or her instructions promptly, it is possible that the attorney-at-law will not be aware of the time limit until it is too late.

G.6.3 In order to be able to provide a competent standard of work, attorneys-at-law should keep their professional knowledge and skills up to date, and regularly take part in professional development and educational activities that maintain and further develop their competence and performance.

G.6.4 Attorneys-at-law should remember that their client may not be familiar with legal proceedings and may find them difficult and stressful. They should do what they reasonably can to ensure that the client understands the process and what to expect from it and from the attorney-at-law. Attorneys-at-law should also try to avoid any unnecessary distress for their client. This is particularly important where attorneys-at-law are dealing with a vulnerable client.

G.6.5 The duty of confidentiality is central to the administration of justice. Clients who put their confidence in their legal advisers must be able to do so in the knowledge that the information they give, or which is given on their behalf, will stay confidential. Typically, such information is likely to be privileged and not disclosed to a court.

G.6.6 R.2.1 acknowledges that an attorney-at-law's duty of confidentiality is subject to an exception if (amongst other things) disclosure is required or permitted by law.

In other circumstances, an attorney-at-law may only make disclosure of confidential information where it is in the recognised law entity's own interests to do so or where their client gives informed written consent to the disclosure.

G.6.7 There may be circumstances when an attorney-at-law's duty of confidentiality to his or her client conflicts with his or her duty to the Court. (See also G.2.5.)

G.6.8 Similarly, there may be circumstances when an attorney-at-law's duty of confidentiality to his or her client conflicts with his or her duty to his or her regulator.

Ref. **Guidance to Rule 7**

G.7 **Conflicts of interest - Guidance**

G.7.1 If there is a conflict of interest or a significant risk of conflict, in the same or a related matter, either between the duty to act in the best interests of two or more clients or between the interests of an attorney-at-law (or the attorney-at-law's recognised law entity) and a client, then – as a general and not absolute statement – the client's best interests cannot be served, which would be a breach of P.4. Qualified as a general statement, given what underlies the exception at R.7.3, clients can choose to waive the general Rule, and there can be important commercial advantage (practicality, convenience, cost, expeditious mutual understanding) in having the same recognised law entity (albeit in different persons) act for both or more interests.

G.7.2 Identifying conflicts of interest is a major challenge for attorneys-at-law and it is critical for recognised law entities to have effective systems and controls to identify and manage and avoid conflicts of interest, or achieve clients' consent as referred to in R.7.3. A system will not be effective if insufficient relevant information is obtained from the client, e.g., about adverse or potentially adverse parties, other names (e.g., maiden or marital) and associated or related persons, including other advisers. The systems and controls shall be set up to ascertain commercial as well as legal conflicts. A recognised law entity shall also be alert, in considering whether it can take on instructions, to the conflicts of interest provisions of panel terms or equivalent, typically of financial institutions, by which they may be bound.

G.7.3 Attorneys-at-law and employees shall be properly trained on what a conflict of interest is, what information to seek from potential clients and how to manage and avoid conflict of interest situations.

G.7.4 The definition of conflict in R.7.2 requires an assessment as to whether two matters are "related". A related matter will always include any other matter which involves the same asset or liability or transaction. If the asset or liability or transaction is not the same, then there will need to be some reasonable degree of relationship of the clients' respective interests for a conflict to arise.

G.7.5 Attorneys-at-law and recognised law entities will need to make a judgement on the facts and, in doing so, should take into account the view of the existing client, if obligations of confidentiality to the prospective client allow the matter to be raised with the existing client. Consideration will also need to be given as to whether any relevant confidential information relating to the existing client is held and if so, whether R.5 can be complied with if the new client is taken on.

G.7.6 In considering whether there is a conflict of interest or whether it is appropriate to seek consent to act from all clients under R.7.3, an attorney-at-law shall take into account the obligation to act in the best interests of each client, the duty owed to each individual client and the extent to which such duty continues in respect of a former client following termination of the retainer.

G.7.7 R.7.3 only applies to non-contentious matters, and there shall be informed written consent (which is freely given). This means that the attorney-at-law or recognised law entity shall be satisfied that the clients understand the implications of the consent, or that the advantages to the clients of the recognised law entity acting for more than one client outweigh possible conflicts of interest or duty. If there is a risk that the parties do not fully understand the implications, or that the advantages do not outweigh possible conflicts, or any of the parties are vulnerable or subject to undue influence, it is likely to be prudent to ensure that they are separately represented. Without prejudice to the application of R.7.4 in the circumstances where it applies, it is a good practice, when entering into arrangements to act for two or more clients in the same matter or related matters, for the recognised law entity to agree with the clients which of the clients the recognised law entity will act for if the relations between the clients become contentious. See G.7.10.

G.7.8 In accepting instructions in a R.7.3 situation, the attorney-at-law or recognised law entity shall be satisfied that they can act even-handedly for both or all clients, so that one client is not favoured at the expense of the other and that unfettered advice can be given which is in the best interests of each client in accordance with P.4. The question of whether it remains reasonable to continue to act for both clients shall be kept under review.

G.7.9 Where it is decided to act under R.7.3, it would be prudent to set out the issues relating to conflict in the terms of business letter, or otherwise in writing,including how a conflict might affect the clients as the matter progresses. Written records of discussions with clients about the implications of acting for them as well as other(s) on the same matter or related matters, including that the recognised law entity may have to cease acting for one or more of the clients, should always be retained for the avoidance of doubt and for evidential reasons.

G.7.10 There may be circumstances where, when acting for two or more clients on a matter or related matters, it will be necessary to cease acting for one or more clients. There may not have been any indication of conflict at the outset but subsequently either a conflict or significant risk of conflict arises.

In such circumstances, if it is not possible or appropriate to achieve consent from the clients under R.7.3 or otherwise, the disruption to the clients should be limited as far as reasonably possible. Care should be taken to ensure that there is no breach of confidentiality.

G.7.11 An own interest conflict is not restricted to economic issues, for example, there may be circumstances in which there is a personal relationship which impairs the ability to act in the best interests of the client. The fiduciary relationship with the client prevents an attorney-at-law or a recognised law entity from taking advantage of the client (the 'no profit' rule) or acting where there is a conflict or potential conflict of interest with the client (the 'no conflict' rule).

G.7.12 Where an attorney-at-law or a recognised law entity is in doubt whether there is an own interest conflict, particularly where there is likely to be a perception that there is an own interest conflict, the attorney-at-law or recognised law entity should err on the side of caution and either insist that the client obtain independent legal advice or stop acting.

G.7.13 The public offices and appointments covered by R.7.8 include members of Parliament, judicial appointments and similar appointments which could give rise to a perception of conflict or unfair advantage.

G.7.14 When assessing whether there is any conflict or significant risk of conflict under R.7.8, the following issues should be considered:

(a) Is there any political or other interest in or arising from the office or appointment that may conflict with or affect the duty to act in the best interests of clients (including the ability to advise impartially and independently)?
(b) Are there any duties which arise from the office or appointment that may conflict with or affect the duty to act in the best interests of clients (including the ability to advise impartially and independently)?
(c) Do the terms of the appointment or any statutory provisions restrict the ability of the individual to act in any particular matter or for any class of potential clients? and
(d) Is there likely to be a public perception that the individual or the recognised law entity has been or will or may be able to obtain an unfair advantage for clients as a result of the office or appointment?

G.7.15 Attorneys-at-law shall ensure that all employees of their recognised law entity understand and comply with the provisions of R.7.9.

G.7.16 R.7.10 provides that an attorney-at-law shall not stand bail for a client (except with the consent of the Council) as standing bail for a client is likely to create a conflict of interest. At all times, attorneys-at-law (and employees) shall maintain their independence as officers of the Court.

Ref. **Guidance to Rule 8**

G.8 **Business Management – Guidance**

G.8.1 Attorneys-at-law shall manage their business in compliance with all the Principles, including the overriding duty to the Court. The culture of the recognised law entity comes from the principal or partners, and attorneys-at-law shall ensure that they (and their employees) uphold the rule of law and proper administration of justice by acting ethically at all times.

G.8.2 To manage their business effectively and efficiently, recognised law entities shall have clear governance and a management structure with defined reporting lines and clarity over supervision responsibilities so every individual at a recognised law entity knows where to go for help or to report or raise a problem.

G.8.3 A well-run business will identify and manage risk effectively. Having identified the risks for the recognised law entity, the recognised law entity will implement robust systems and controls to manage and mitigate those risks, which should include periodic reviews. The main types of risk are:

(a) strategic, for example, external factors (economic, political, legal changes, competition), internal factors (reliance on one area of work, merger risks, badly managed teams, loss of key partners or employees);

(b) financial, for example, lack of income, loss of client money, credit risks, poor financial hygiene (lack of regular billing, excessive write offs, poor budgetary controls);

(c) operational, for example, lack of IT and physical security, IT systems failures, damage to offices;

(d) regulatory, for example, breaches of the Code or Rules, negligence claims, complaints, CDD/KYC, money laundering and data protection risks.

G.8.4 A recognised law entity's systems and controls to mitigate the risks identified will cover at least the following:

(a) client care, costs information and complaints handling including compliance with R.4;

(b) confidentiality of client information;

(c) a systematic approach to identifying and avoiding conflicts of interests;

(d) the exercise of appropriate supervision over all employees and proper supervision of clients' matters;

(e) the training of individuals working in the recognised law entity to maintain a level of competence appropriate to their work and level of responsibility;

(f) supervision of less senior or experienced staff;

(g) compliance with the key regulatory requirements of the Council, including professional indemnity cover, Accounts, Rules/delivery of accountants' reports and obligations to co-operate with and report information to the Council;

(h) compliance with all legal and other regulatory requirements;

(i) the giving and control of undertakings;

(j) the identification and safekeeping of documents and assets entrusted to the recognised law entity, including client money, wills and investments;

(k) the continuation of the recognised law entity in the event of absences and emergencies, with the minimum interruption to clients' business; and

(l) the management of risk (in accordance with G.8.3).

G.8.5 R.8.2 (c) states the need to maintain appropriate records including good file management, as this is essential to an ethical and competent practice. This includes keeping appropriate notes and records of communication which will have the added effect of protecting employees and the recognised law entity in the event of a complaint or claim. Good practice includes:

(a) a clear and risk-avoiding policy relating to records and file management;

(b) clear file opening procedures that ensure all necessary information is obtained and recorded and communicated as is requisite;

(c) robust filing systems;

(d) prudent file review procedures including a system for diarising reviews;

(e) file closing procedures that check material risks (e.g., prescription periods, any outstanding CDD);

(f) a clear and prudent policy for archiving, retention and destruction of files; and

(g) clear backup systems, both paper and electronic, including disaster recovery procedures.

G.8.6 Attorneys-at-law and their recognised law entities need to ensure that employees are properly trained or informed about the systems and controls and provided with easy access to the policies and procedures. Regular reminders of the importance of compliance will help to ensure that employees understand their obligations and comply with the requirements of R.8.

G.8.7 There are two key elements to R.8.4; firstly, the obligation to protect client money and assets and secondly, the obligation to ensure that the recognised law entity remains financially viable by ensuring there is financial control of budgets, expenditure, work in progress, invoicing and cashflow.

G.8.8 The impact of the failure of a recognised law entity is significant not only for clients who are directly affected but also for the reputation of the profession. Well-run recognised law entities tend to employ an experienced and capable financial manager or similar individual with strong financial skills.

G.8.9 Robust systems and controls to protect client money and assets are required to minimise the risk of dishonesty or inappropriate use of a client account. Every individual involved with client money and assets in the recognised law entity needs to know what the requirements are and what the implications are of a failure to comply.

G.8.10 Strong internal financial controls should enable the management of the recognised law entity to:

(a) measure and control financial performance;

(b) avoid over reliance on borrowing/overdraft facilities;

(c) ensure that drawings and remuneration do not exceed profits;

(d) avoid over-commitment to high fixed costs, such as premises and vehicles;

(e) implement efficient invoicing processes to obtain payment for work done in a timely way;

(f) ensure that any acquisitions follow proper legal and financial due diligence based on a well-thought-out business plan to control the associated risks; and

(g) plan properly for any diversification of the recognised law entity, in accordance with the business plan and using the right skills and the right people.

G.8.11 Effective supervision is essential for the success of the recognised law entity. Recognised law entities need to ensure that their supervisory arrangements are effective and robust and kept under regular review.

G.8.12 Effective supervision mechanisms are likely to include:

(a) the provision of clear and complete instructions regarding the work to employees, including appropriate background information and details of the end result required and how it is to be achieved;

(b) regular meetings to discuss progress in both client work and the individual's own development;

(c) the use of established and clear management policies and systems covering conflict checks, file management, work allocation on a file, documentation and communication;

(d) a level ofsupervision which is proportionate to the ability and experience of the person being supervised;

(e) the effective use of mentoring, where appropriate.

G.8.13 The supervisor's duty to ensure that the attorney-at-law or employee is effectively supervised applies no less where the attorney-at-law or employee is working at home or remotely.

G.8.14 If a complaint is made about work carried out by an attorney-at-law or employee, recognised law entities may have to demonstrate that their supervision arrangements are effective and regular. Work for clients that is subject to supervision includes the handling of client money and compliance with R.4 (Client relations).

G.8.15 R.8.6 requires attorneys-at-law and recognised law entities to ensure that all employees are properly trained and competent. 'Competent' is defined as being able to perform a task or role to a required standard by the application of essential knowledge, skill and understanding.

G.8.16 It is for attorneys-at-law and recognised law entities to decide what approach to securing and maintaining competence will work for their business model but it may be necessary to provide evidence to demonstrate that issues of competence are addressed in the recognised law entity's procedures in relation to, for example, recruitment, ongoing work assessment and training and the degree to which such assessment or training is formally structured.

G.8.17 A sole practitioner shall, in accordance with R.8, make appropriate and adequate provision for the running of the recognised law entity in the event of illness, death, incapacity or other absence. Proper arrangements need to be made for the supervision of the practice and employees, the operation of client and office accounts and the orderly closure or transfer of the practice, where necessary.

G.8.18 It is a matter for the sole practitioner as to the details of supervisory arrangements and for ensuring that the supervisor has sufficient experience. The recognised law entity's bank should be notified of the arrangements in advance so that the client and office accounts can be effectively managed.

G.8.19 If a sole practitioner decides to stop practising or is unable to practise for any reason such as disciplinary action, the clients shall be informed so that they can instruct another recognised law entity. Failure to do so could amount to misconduct or negligence.

Ref. **Guidance to Rule 9**

G.9 **Client Accounts – Guidance**

G.9.1 Client money is money of any currency that is received and held as cash, digital asset, cheque, draft or electronic transfer by a recognised law entity when the recognised law entity is providing legal services.

G.9.2 An attorney-at-law or recognised law entity may hold client money without a client account if the only client money received is advance payments for fees and unpaid disbursements. The money shall relate to fees or expenses incurred by the attorney-at-law or recognised law entity on behalf of their client and for which the recognised law entity or attorney-at-law is liable, for example, counsel or expert fees but this would not include, for example, disbursements for which their client is liable (such as stamp duty).

An attorney-at-law or recognised law entity shall ensure that the client has been properly advised and is given sufficient information about where their money will be held. It should be explained to the client that their money will not be held on account for them or specifically ring fenced, as the money may be held and used as part of the recognised law entity's own money in their business account. This is so that the client can make an informed decision about whether the client wishes their money to be held outside of a client account or consider other alternatives.

Ref. **Guidance to Rule 10**

G.10 **Duties under anti-corruption legislation – Guidance**

G.10.1 The purpose behind R.10 is primarily to reduce the risk of being inadvertently caught up in the commission of a crime by ensuring that an attorney-at-law is satisfied that he or she knows who he or she is dealing with at the outset of each retainer, the applicable legislation and the potential red flags.

G.10.2 The Code is not prescriptive; it does not specify the measures to be taken and it is therefore initially a matter for a recognised law entity to decide what arrangements are necessary. Attorneys-at-law and recognised law entities are expected to proportionate approach, depending on the circumstances, including knowledge of the client, the type of work involved and whether instructions are taken from the client in person or online. In deciding what is appropriate, therefore, recognised law entities may like to consider the size of the recognised law entity, the number of fee earners, the client profile, the different areas of work the recognised law entity does and the particular risks involved in those areas of work.

Ref. **Guidance to Rule 11**

G.11 **Relations with other attorneys-at-law and third parties - Guidance**

G.11.1 P.2 requires attorneys-at-law to avoid bringing the profession into disrepute in their dealings with other attorneys-at-law and third parties. (The same requirement in relation to clients is at R.4.5.)

G.11.2 Correspondence from other attorneys-at-law or recognised law entities should be answered with reasonable promptness. Where correspondence is received from a third party properly involved in a matter, and which requires a response, it should also be answered with reasonable promptness.

G.11.3 If an attorney-at-law of another recognised law entity involved in a matter is not responding to correspondence, he or she should be reminded of his or her duties under R.11.1 and the guidance at G.11.2. If, despite those reminders, the attorney-at-law of the other recognised law entity refuses to respond, the matter should be raised with the Council.

G.11.4 An attorney-at-law or employee of the attorney-at-law's recognised law entity should not make an electronic recording of a conversation with an attorney-at-law or employee of another recognised law entity without prior written notice having been given that the conversation will be recorded and the provision, if required, within a reasonable time, of a transcript to the attorney-at-law of the other recognised law entity at a reasonable cost.

G.11.5 Care should be taken when attorneys-at-law are dealing with someone who does not have legal representation. It is important to find the right relation between acting with a view to the best interests of the client and not taking unfair advantage of another person. If an unrepresented opponent provides badly drafted documentation, attorneys-at-law should suggest that the opponent obtain legal representation. If such an opponent refuses to do so, attorneys-at-law should ensure that a balance is maintained between doing their best for the client and not taking unfair advantage of the opponent's lack of legal knowledge and drafting skills.

G.11.6 When dealing with an unrepresented third party, attorneys-at-law should ensure that a contractual relationship is not inadvertently created and that the third party understands clearly that the attorney-at-law is acting for his or her client and does not owe the third party any duty to act in the third party's interests.

G.11.7 If a person sends an attorney-at-law documents or money subject to an express condition, the attorney-at-law shall return the documents or money if he or she is unwilling or unable to comply with the condition. If attorneys-at-law are sent documents or money on condition that they are held to the sender's order, attorneys-at-law shall return the documents or money to the sender on demand.

G.11.8 Attorneys-at-law shall give due consideration, taking into account the exceptions in R. 11.3 (as if it applied) whether it is appropriate to contact another party to a matter, if that party is represented by an attorney-at-law or a business carrying on the practice of an attorney-at-law.

G.11.9 R.11.3 is not intended to prevent attorneys-at-law from dealing with other types of representative, if appropriate. Any such dealings will, of course, be subject to other, applicable, provisions of this Code.

G.11.10 An undertaking is any statement, made by an attorney-at-law or an employee of the attorney-at-law's recognised law entity, that the attorney-at-law or the recognised law entity will do something or cause something to be done, or refrain from doing something or causing something to be done, given to someone who reasonably relies upon it. It can be given orally or in writing and need not include the word "undertake". It is recommended that oral undertakings be confirmed or recorded in writing for evidential purposes.

G.11.11 The requirement under R.11.4 is to perform an undertaking in a timely manner and therefore it is important that there is a clear time frame within which an undertaking should be fulfilled. If the undertaking does not contain a timeframe, fulfilment is likely to be expected "within a reasonable time". What that amounts to will depend on the circumstances but the giver should ensure the recipient is kept informed of the likely timescale and any delays to it.

G.11.12 Attorneys-at-law and recognised law entities shall maintain an effective system which controls the giving of undertakings (who can give them and in what circumstances) and records when undertakings have been given and when they have been discharged. Employees need to be provided with training on how to comply with the professional obligations arising.

G.11.13 The fees of a lawyer of another jurisdiction may be regulated by a scale approved by the relevant regulatory body, bar association or Council.

Ref. **Guidance to Rule 12**

G.12 **Publicity and communications – Guidance**

G.12.1 When publicising the recognised law entity or any of the activities of the recognised law entity, attorneys-at-law shall comply with P.2 and P.3 and ensure that all publicity and communications comply with the high ethical and technical standards of the legal profession.

G.12.2 Attorneys-at-law and recognised law entities shall ensure that all publicity is clear, fair and not misleading or inaccurate. All publicity shall comply with the general law on advertising, including provisions designed to protect consumers.

G.12.3 Advertising material may contain any factual statement the truth of which an attorney-at-law is able to justify.

G.12.4 If an attorney-at-law or recognised law entity is in doubt as to whether the publicity relating to charges is clear, they should err on the side of caution and re-word the publicity or provide further information.

G.12.5 R.12.4 prohibits unsolicited visits or telephone calls but not unsolicited emails. In addition, attorneys-at-law, employees and recognised law entities shall comply with relevant data protection legislation and any restrictions in relation to direct marketing by email.

G.12.6 When contacting prospective clients, care shall be taken to ensure that any publicity does not constitute harassment. Approaching people in the street, in hospital or at the scene of an accident, without invitation, will be in breach of R.12.4.

G.12.7 The letterhead, website and emails of an attorney-at-law's practice shall comply with all legal and regulatory requirements including the Code of Conduct. Attorneys-at-law are to be familiar with the legal and regulatory requirements relating to advertising.

G.12.8 Other than where specifically referenced in a reported case or judgment, clients can only be named in publicity if they have given consent.

Ref. **Guidance to Rule 13**

G.13 **Cooperation with Council – Guidance**

G.13.1 The aim of R.13 is to set out certain practice obligations of attorneys-at-law in particular in their relation with the Council (as principal regulatory body), including the duty to co-operate with the Council as required by P.9.

G.13.2 The duties imposed under this Rule may be restricted by an attorney-at-law's legal obligations to his or her clients or others, for example, the obligation to protect client confidentiality and privilege. Even so, attorneys-at-law are expected to co-operate with the Council by, as the case may be, redacting information or providing information on an anonymised or confidential basis or by obtaining their client's consent before proceeding.

G.13.3 Restrictions or conditions may be imposed by the Council on an attorney-at-law or non-practising attorney-at-law or employee in accordance with the Act for failure to comply with any regulatory obligations. Failure to comply with those restrictions or conditions may result in further sanction.

G.13.4 Failure to provide information within the stipulated timescale is likely to lead to disciplinary action and/or the imposition of conditions or restrictions on their ability to practise.

G.13.5 R.13.1 (e) and (f) exist to protect the public and the integrity of the profession. It is not unusual for professional colleagues to be aware of serious misconduct (such as dishonesty or deception) and/or risk arising from a recognised law entity's financial problems before any complaint has been made. There may be concerns that reporting such concerns would be unethical or discourteous. However, failure to do so places the public at risk and may result in damage to the good repute of the profession.

G.13.6 Unless attorneys-at-law are required by law to report a matter, R.13.1 (e) and (f) do not apply to confidential and/or privileged information disclosed by another attorney-at-law to the attorney-at-law.

G.13.7 If the Council is notified, under R.13.1 (e) or (f), it can take appropriate and timely action, minimise the impact on clients which should reduce the ultimate costs, both for the Council and for the attorney-at-law. The Council will consider information of this nature on an anonymous basis, if requested.

G.13.8 If attorneys-at-law discover serious issues regarding the competence and fitness and propriety of employees or attorneys-at-law, the attorneys-at-law shall take appropriate action internally, in addition to the obligations under R.13.1 (f). See also G.13.10.

G.13.9 If an attorney-at-law in a recognised law entity becomes aware of serious misconduct on the part of an attorney-at-law or employee in the same recognised law entity, he or she should bring the matter to the attention of the partners or attorneys-at-law of the recognised law entity so that they can report the matter under R.13.1 (f). If a report is made by those attorneys-at-law on behalf of the recognised law entity, they should discuss the issues with their insurer and take the steps required to limit any liability.

G.13.10 Where a recognised law entity concludes that it is not financially viable, the Council shall be informed immediately and the responsible attorneys-at-law shall take appropriate steps either to ensure an orderly wind down or to obtain assistance so that the recognised law entity becomes financially viable. Failure to notify the Council and take appropriate steps is a breach of P.8 and P.9.

G.13.11 Where a practice closes, whether as a result of financial issues or otherwise, the attorneys-at-law shall ensure that there are appropriate arrangements for the orderly transfer of clients' property and any assets held and that clients are provided with relevant information as to where their property or assets will be transferred.

G.13.12 An agreement, whether with a client or a third party, cannot affect the rights of the Council to investigate misconduct or to consider complaints. To attempt to make such an agreement would breach R.13.4. Examples are:

(a) accepting instructions to act for a client which involve any agreement preventing the Council from investigating an attorneys-at-law's conduct or the conduct of an attorney-at-law or employee of the recognised law entity;
(b) improperly offering or making payment in return for not reporting alleged misconduct;
(c) improperly demanding or accepting payment for not reporting a fellow attorney-at-law for misconduct; and
(d) harassing or bringing improper pressure to bear on a complainant or

G.13.13 It would not be improper to try to persuade the client that the client's complaint is unfounded, provided that is the case and, in a case of inadequate professional services, to make a genuine attempt to propose an agreement to compensate the aggrieved client. However, an attorney-at-law may not make the withdrawal of a complaint already made to the Cayman Islands Law Society a condition of compensating a client. Where a complaint is withdrawn for any reason, the Council may continue with a complaint in its own name.

G.13.14 The Council may use or disclose any information obtained under R.13:

(a) in proceedings before the Council or the Grand Court or other disciplinary tribunal;

(b) to the police or the Attorney General for use in investigating the matter and in any subsequent prosecution, if it appears that an attorney-at-law or any employee of a recognised law entity may have committed a serious criminal offence; and/or

(c) to any other relevant professional body.

G.13.15 Attorneys-at-law and their employees shall comply with all reasonable requests from the Council (or its appointee(s)) as to (a) the form in which documents held electronically are produced, and (b) photocopies of any documents to take away. The Council is not entitled to remove original documents.

Ref. Guidance to Rule 14

G.14 Waivers - Guidance

G.14.1 Waivers will only be granted in exceptional or very particular circumstances. The application will need to explain why the circumstances are exceptional or very particular in order for the grant of a waiver to be considered. Waivers will not be granted where to do so would place clients or clients' money or assets at risk or where the grant is likely to be in conflict with the purpose of the Rule.

G.14.2 The list in R.14 should not be taken as an indication that any other Rule may be waived in any given circumstances. Each application will be considered in the broader context of the Principles.

Ref.	Annex
Guidance to Rule 4 **G. 4.**	**Annex to Guidance 4 — Client relations - Guidance**
G. 4.30 and G. 4.31	On the termination of a retainer, a recognised law entity must consider which documents belong to the client, which documents belong to the recognised law entity and whether any documents belong to a third party, and accordingly what should be done with the documents in each category. The categories, and what should be done with the documents in this category, are as follows: (a) Physical documents, in existence before the retainer, held by the recognised law entity as agent for and on behalf of a client or third party belong to that client or third party; (b) Physical documents which belong to a client or a third party must be dealt with in accordance with the instructions of the client or third party subject to the recognised law entity's lien (if any); (c) Physical documents which come into existence during the retainer and for the purpose of the retainer fall into four broad categories; (i) Documents prepared by a recognised law entity for the benefit of the client which have been paid for by the client, either directly or indirectly, belong to the client. Examples are: instructions and briefs; most attendance notes; drafts; copies made for the client's benefit of letters received by the attorney-at-law; copies of letters written by the attorney-at-law to third parties if contained in the client's case or transaction file and used for the purpose of the retainer; (ii) Documents prepared by the recognised law entity for the recognised law entity's own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the recognised law entity; Examples are: copies of letters written to the client; copies made for the attorney-at-law's own benefit of letters received by the attorney-at-law; copies of letters written by the attorney-at-law to third parties if made for the attorney-at-law's own benefit; intra-office memoranda; entries in diaries; timesheets; office journals; books of account; (iii) Documents sent to an attorney-at-law by the client during the retainer, the property in which was intended at the date of dispatch to pass from the client to the attorney-at-law, belong to the attorney-at-law; Examples are: letters, authorities and instructions written or given by the client; (iv) Documents prepared by a third party during the course of the retainer and sent to the attorney-at-law(other than at the attorney-at-law's expense) belong to the client; Examples are: receipts and vouchers for disbursements made on behalf of the client; medical and witness reports; counsel's advices and opinions; letters received by an attorney-at-law from third parties.

Faculty

Hon. Bruce A. Harwood is a retired U.S. Bankruptcy Judge for the District of New Hampshire in Concord, appointed to the bench in March 2013, and currently resides in San Francisco. He also served as Chief Bankruptcy Judge prior to his retirement from the bench, and he served on the First Circuit's Bankruptcy Appellate Panel. Prior to his appointment to the bench, Judge Harwood chaired the Bankruptcy, Insolvency and Creditors' Rights Group at Sheehan Phinney Bass + Green in Manchester, N.H., representing business debtors, asset-purchasers, secured and unsecured creditors, creditors' committees, trustees in bankruptcy, and insurance and banking regulators in connection with the rehabilitation and liquidation of insolvent insurers and trust companies. He was a chapter 7 panel trustee in the District of New Hampshire and mediated insolvency-related disputes. Judge Harwood is ABI's President. He previously served as ABI's Secretary and Vice President-Communication, Information & Technology, as co-chair of ABI's Commercial Fraud Committee, as program co-chair and judicial chair of ABI's Northeast Bankruptcy Conference, and as Northeast Regional Chair of the ABI Endowment Fund's Development Committee. He also served on ABI's Civility Task Force. Judge Harwood is a Fellow in the American College of Bankruptcy and was consistently recognized in the bankruptcy law section of *The Best Lawyers in America*, in *New England SuperLawyers* and by *Chambers USA*. He received his B.A. from Northwestern University and his J.D. from Washington University School of Law.

Susana Hidvegi Arango is a senior advisor at Riveron Consulting, LLC and a partner at HB Legal in Bogotá, Colombia, where she advises on business insolvency, complex litigation and arbitration. Until December 2021, she was the Superintendent of Bankruptcy Proceedings in Colombia (Chief Justice of Bankruptcy of Colombia). Between 2019-21, Mr. Hidvegi Arango represented the Republic of Colombia at the United Nations Commission on International Trade Law (UNCITRAL) Working Group V (Insolvency Law). During her participation, the UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019) and the Legislative Recommendations on Insolvency of Micro and Small Enterprises (2021) were approved. Before taking office as Chief Justice of Bankruptcy of Colombia, Ms. Hidvegi Arango was the head of the Insolvency practice at Brigard Urrutia Abogados in Colombia, worked as international associate at Dechert LLP in New York City, and clerked for the International Court of Arbitration of the International Chamber of Commerce in Paris. She led the reforms to the bankruptcy regime to address the effects of the COVID-19 crisis, and as a result, the Government of Colombia issued Legislative Decrees 560 and 772 in April and June 2020 and the subsequent regulations, which provided for the creation of extra-judicial bankruptcy proceedings, the incorporation of artificial intelligence tools to the administration of bankruptcy cases by the court, and the creation of a simplified insolvency regime for small enterprises. These decrees were made permanent legislation in Law 2437 of 2024. Ms. Hidvegi Arango is a lecturer of bankruptcy law at several universities, including Universidad del Rosario, Universidad Javeriana and Universidad de Los Andes, and she has participated in multiple projects with organizations such as the World Bank and INSOL. She also has participated in numerous national and international conferences as a lecturer and panelist on insolvency, and she has published several papers and articles on bankruptcy law. Ms. Hidvegi Arango is a member of the International Women's Insolvency & Restructuring Confederation (IWIRC), for which she is co-chair for Latin America; the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL), where she is a member of its Legis-

lative and Regulatory Group, the Technical Research Committee and the Latin America Committee; the International Insolvency Institute (III), where she is a member of the board of the III Committee Model Laws@Work; and Colegio de Abogados Rosaristas, where she is a member of the directive board. She was honored in 2020 as one of ABI's "40 Under 40," and she is a member of the *Global Restructuring Review*'s 2022 "40 under 40" class. Ms. Hidvegi Arango was named Woman of the Year in Restructuring 2022 by IWIRC. Also in 2022, she was selected as part of INSOL's Future Forty, a celebration of the rising stars of the insolvency industry in recognition of the 40th anniversary of the organization. Ms. Hidvegi Arango is admitted to practice law in Colombia and the State of New York, and she is a Fellow of INSOL. She received her law degree as well as a specialization in finance law from Universidad del Rosario, Bogotá, and she pursued her LL.M. in business and bankruptcy law at the University of California, Los Angeles.

Jason Mbakwe is a senior associate in Carey Olsen's dispute-resolution and litigation team in Grand Cayman, Cayman Islands. He focuses his practice on contentious restructuring and insolvency matters, complex commercial litigation, regulatory and white collar crime investigations. Mr. Mbakwe has extensive experience advising a broad range of stakeholders in distressed situations, including financial institutions, investment funds, bondholders, ad hoc committees, corporate debtors, directors and insolvency practitioners. He regularly advises in relation to formal insolvency procedures in the Cayman Islands; shareholder disputes; minority oppression; directors' duties; asset-recovery; the enforcement of domestic and foreign judgments; information-gathering, including Norwich Pharmacal relief; and various forms of injunctive relief, including freezing and receivership orders. Before joining Carey Olsen, Mr. Mbakwe trained and qualified in the London office of Morrison & Foerster and also practised at Dechert in London. He was selected for and completed the INSOL Future Leaders Programme 2023. In addition, Mr. Mbakwe is a member of the Restructuring and Insolvency Specialists Association of the Cayman Islands (RISA) and also the Young Fraud Lawyers' Association. He speaks several languages and is proficient in both French and German. Mr. Mbakwe received his LL.B. in European law from the University of Warwick and a diploma in German Contract Law from the University of Konstanz.

Hon. Justice Nicholas A. Segal is a judge of the Grand Court in the Cayman Islands, where he has served on the Financial Services Division since 2015. He is admitted as a solicitor (1982), qualified to practice at the New York Bar (2003), and was called to the Bar of England and Wales in 2018. Before joining the judiciary, Justice Segal practiced for more than 30 years at leading international law firms, including partner roles at Cameron Markby (now CMS Cameron McKenna), Allen & Overy, Davis Polk & Wardwell and Freshfields Bruckhaus Deringer LLP. He later practised as a barrister at Erskine Chambers. Justice Segal is a Fellow of the Society for Advanced Legal Studies, INSOL, and the American College of Bankruptcy, and serves as a trustee of BAILII. He has contributed extensively to legal scholarship as a consulting editor and author on insolvency and restructuring and has held academic roles at Oxford University, where he was educated, and other institutions. Justice Segal has written and lectured extensively. He is one of the consulting editors of *Totty, Moss and Segal on Insolvency* (Sweet & Maxwell) and a contributor to a number of leading textbooks. Justice Segal is a Fellow of the Society for Advanced Legal Studies and a trustee of the British and Irish Legal Information Institute.

Emily C. Taube is a partner in the Nashville, Tenn., office of Burr & Forman LLP in its Creditors' Rights and Bankruptcy and Commercial Litigation practice groups, where she specializes in representing businesses in complex commercial disputes. She focuses her practice on representing private-equity groups and other secured creditors, vendors, corporate debtors, sellers, purchasers, liquidators, receivers and consultants in all aspects of distressed and insolvency-related matters, including the negotiation, structuring and documentation of asset acquisitions and/or divestitures, commercial loans and related transactions, and out-of-court workouts and restructurings. In addition to corporate and transactional matters, Ms. Taube regularly handles complex litigation matters, including fraudulent-transfer actions, successor-liability actions, asset-sale disputes, receivership actions, and other commercial and corporate disputes. Part of her practice also focuses on regulatory compliance and representing clients in the beverage industry on such matters as ABC licenses and beer permits, and other issues related to Tennessee's liquor laws. Ms. Taube is involved in several professional organizations and serves on the Board for Tennessee's chapter of the Turnaround Management Association, as Tennessee's NOW Chapter Liaison to TMA's national chapter, and on ABI's Ethics Committee. She is admitted to practice in the U.S. District Courts for the Western, Middle and Eastern Districts of Tennessee; the U.S. District Courts for the Western and Eastern Districts of Arkansas; the Sixth Circuit Court of Appeals; and the U.S. Supreme Court. Ms. Taube has been named a *Super Lawyer* in the area of Business Litigation and was named as a "Rising Star" in the areas of Business Litigation and Franchise/Dealership Law. in addition, the *Memphis Business Journal* named her to its "Top 40 Under 40" list and as a "Super Woman in Business." Ms. Taube serves on ABI's Southern Regional Development Committee and co-chaired the committee that drafted ABI's Report on Standards of Professional Conduct and Courtesy. She received her B.A. *cum laude* in 1994 from the University of Tennessee and her J.D. in 1998 from the University of Memphis Cecil C. Humphreys School of Law, where she was honored with the Dean's Award for academic excellence and the CALI Award for academic excellence in copyright law.