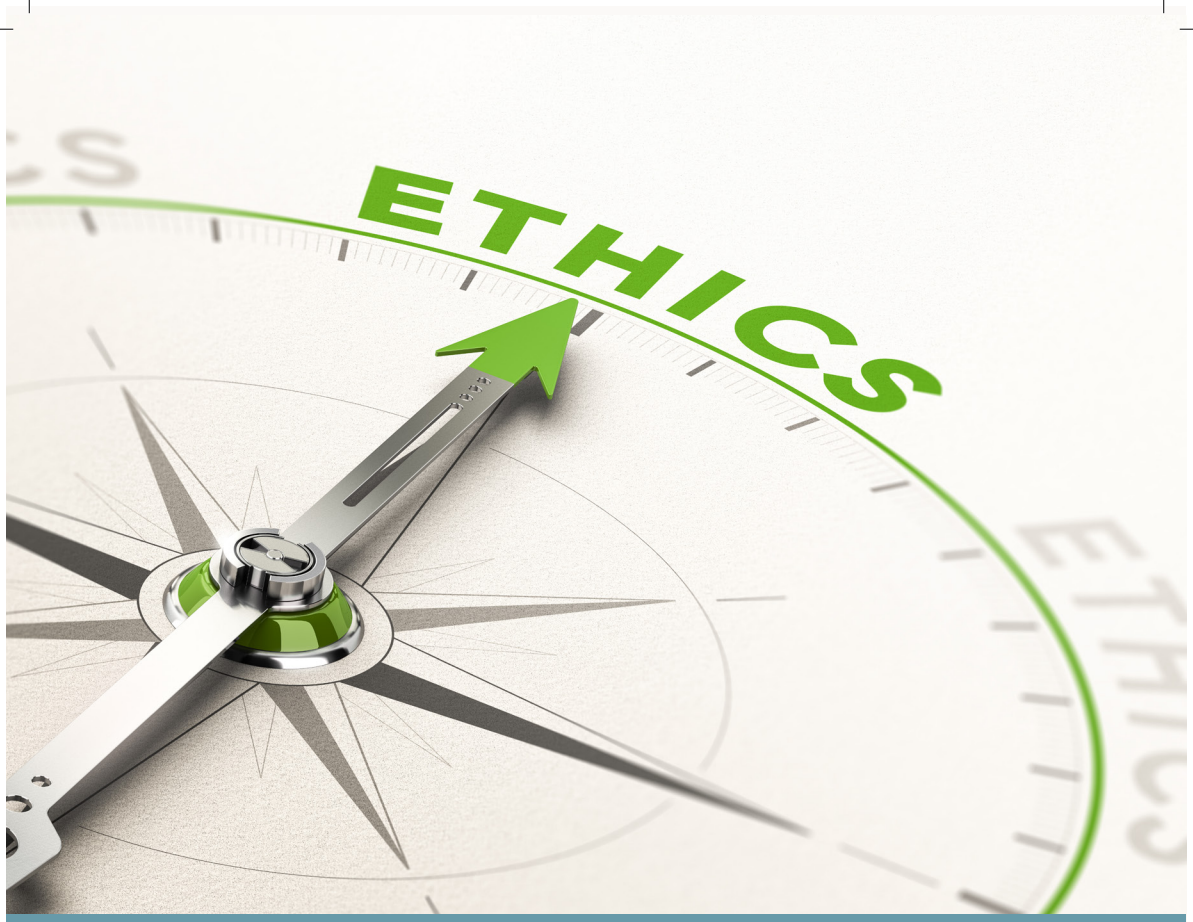

PROFESSIONAL ETHICS DIGEST 2019

Advisory Committee of the Professional Conduct Council

A Publication of the Law Society of Singapore

THE LAW SOCIETY OF SINGAPORE

PROFESSIONAL ETHICS DIGEST

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PROFESSIONAL ETHICS DIGEST

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Advisory Committee of the Professional Conduct Council

2019

FOREWORD

It has been famously written by Richard Tur that "*... a life in the law is necessarily an adventure in applied ethics*". Unfortunately, for some, legal practice is a misadventure leading to a quixotic or chaotic journey. Resolving ethical conundrums as part and parcel of legal practice is a truism. Ethical rules are a lawyer's visible compass, and offer an invaluable starting point for the lawyer to evaluate and determine the right course of action. But the legal compass is only one navigational tool. The lawyer who has thought through the issues and shares his or her wisdom and insights with you shortens your learning curve.

And so, because of the complexity of current practice scenarios, lawyers seek guidance from senior members of the Bar. These elders are beacons to illuminate an ethical path out of the quagmire and quicksand. For many years, the Law Society's Ethics Committee discharged this function with distinction: rendering non-binding written opinions to local lawyers encountering an ethical enigma.

With the enactment of the Legal Profession (Professional Conduct) Rules 2015 ("2015 PCR") on 18 November 2015, the Advisory Committee of the Professional Conduct Council ("Advisory Committee"), comprising a mix of local and foreign lawyers, seamlessly continued the good work of the Ethics Committee. The 2015 PCR is a self-contained ethical regime embedding thoughtful and thought-filled development in ethical regulation. It includes a set of generally accepted principles and rules of conduct applicable to all legal practitioners in Singapore, whether local or foreign. The Advisory Committee's role has therefore expanded and extended to giving guidance to foreign lawyers.

This tome you are perusing is a compelling compilation of the Advisory Committee's guidance on the application of the 2015 PCR. Aptly called the "Professional Ethics Digest", it is opportune. Several years have now passed since the 2015 PCR was promulgated. The Advisory Committee has had sufficient time to crystallize its views on key provisions in the 2015 PCR that are at issue in practice. As the reader will discern, the conflicts of interest rules in the 2015 PCR are one of the most popular areas of clarification that lawyers frequently seek the Advisory Committee's expert ethical evaluation on.

Replete with relevant illustrations on the application of the 2015 PCR based on actual queries submitted by lawyers to the Advisory Committee, the Digest is a helpful, practical and valuable resource to legal practitioners, new and experienced.

I am fully persuaded that this handy guide will play a vital role in the continuing efforts of

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the Law Society and other stakeholders to strengthen the ethical core of legal practitioners practising in the Singapore legal profession. I encourage all lawyers practising in Singapore to have recourse to the Digest as a ready reference as well as to seek the advice of the Advisory Committee. And yes, if you are in doubt when facing an ethical dilemma, look at the compass and read this instructor's guide. You won't go wrong.

Gregory Vijayendran, S.C.
President, Law Society of Singapore

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- The members of the Advisory Committee in 2018;
- Abigail Kway and Jacqueline Lin, Secretariat to the Advisory Committee; and
- Stella Chen, formerly Executive Officer, Legal Research and Development department of the Law Society of Singapore.

ABBREVIATIONS

GENERAL

Council	Council of the Law Society
Law Society	The Law Society of Singapore

STATUTES

LPA	Legal Profession Act (Cap 161, 2009 Rev Ed)

PROFESSIONAL RULES

PCR 2010	Legal Profession (Professional Conduct) Rules (Cap 161, 2010 Rev Ed)
PCR	Legal Profession (Professional Conduct) Rules 2015 (GN No S 706/2015)

PRACTICE DIRECTIONS

PDR 2013	Law Society Practice Directions & Rulings 2013 (as updated on 13 November 2014)
PDR 2019	Law Society's Practice Directions & Guidance Notes 2018/2019

General Editor's Note: Readers should note that the guidances refer to various paragraphs in PDR 2013. These paragraphs may have been superseded by PDR 2019. A copy of PDR 2019 can be found on the Law Society's website.

COURT RULES

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INTRODUCTION

The Advisory Committee

I. Function and Composition

1. The Professional Conduct Council (the "PCC") is established under section 71(1) of the LPA, with the Chief Justice as its Chairman.

2. Pursuant to section 71(2) of the LPA, the PCC may, amongst others, make rules for regulating the professional practice, etiquette, conduct and discipline of every regulated legal practitioner and every person admitted under section 15 of the LPA (collectively known as "legal practitioners"). The PCC may do so by way of such practice directions, guidance notes and rulings as the PCC thinks appropriate (section 71(6) of the LPA).

3. The PCC appoints the Advisory Committee to better regulate and manage the ethical obligations of legal practitioners (section 71(10) of the LPA), and may delegate all or any of its functions and powers under section 71(6) of the LPA to the Advisory Committee.

4. The Advisory Committee is made up of Singapore legal practitioners and foreign lawyers, appointed by the Chief Justice. Members of the Advisory Committee are appointed for a two-year term, headed by their Chairman and Vice-Chairman.

II. Terms of Reference

5. The Terms of Reference of the Advisory Committee are approved by the Chief Justice. Members of the Advisory Committee are bound by the Terms of Reference:

   (a) To advise the Council in providing guidance on the ethical obligations of legal practitioners;

   (b) To collect, organize and publish, with the assistance of the Council, from time from to time in such form as it thinks fit the advice and guidance given under paragraph 5(a) above;

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(c) To keep under review the ethical obligations of legal practitioners and to make recommendations for the development, codification, amendment or reform of such ethical obligations from time to time to the PCC and/or the Council; and

(d) To work with the Council and/or committees of the Law Society to raise awareness and knowledge amongst lawyers of their ethical obligations.

III. Enquiries to the Advisory Committee

Summary of PDR 2019, Practice Direction 2.1.3

The Advisory Committee

6. Requests for advice or guidance from the Advisory Committee should comply with the following guidelines:

(a) Submit the request in writing to the Law Society Secretariat, which provides secretariat support to the Advisory Committee;

(b) Extend a copy of the letter to any other party who may be involved in the issue or problem raised, to enable the Law Society to consider any opposing views on the matter; and

(c) If the subject-matter of the inquiry has been the subject of correspondence between the inquirer and another legal practitioner, you should also provide such correspondence to the Law Society.

A. Information to Provide when Seeking Guidance

7. The written request for guidance should set out for the Advisory Committee's consideration:

(a) A full and accurate account of all material facts, bearing in mind the need to observe any obligation of confidentiality;

INTRODUCTION

(b) A summary of the ethical issues involved;

(c) All relevant authority bearing on the point such as legislation (including subsidiary legislation), practice directions, text books, articles and cases, whether from Singapore or elsewhere; and

(d) The specific question or questions upon which you are asking the Committee to express its views.

8. When drafting the written request, you are to comply with these further guidelines:

(a) Seek guidance only in respect of ethical matters which are not clearly dealt with by legislation (including subsidiary legislation), practice directions in force or common law or ethical matters in respect of which there is some genuine ambiguity or no other available guidance;

(b) The request should not be hypothetical – it must deal with a real ethical issue which has arisen or which it is reasonably expected will arise in your professional practice;

(c) The request should be a genuine inquiry and not a disguised complaint against another legal practitioner. In particular, requests for guidance should not be used to malign, harass or pressurise opposing parties or counsel or to gain tactical advantage; and

(d) The request should not be made in respect of matters which should properly be dealt with either by the court or between the parties.

9. The Advisory Committee reserves the right to seek further information or clarification from you or any third parties involved in the subject matter before issuing any guidance. If any additional information or clarification is not forthcoming or if you do not consent to the Advisory Committee seeking the further information or clarification from relevant third parties, the Advisory Committee reserves the right not to provide guidance on the inquiry.

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B. Significance of Guidance Provided by the Advisory Committee

10. The Advisory Committee's guidance is well-researched and generally entails substantial consideration and discussion by the Advisory Committee's members. The Advisory Committee aims to respond with a formal guidance within three to six weeks from the date that the Advisory Committee accepts a request for guidance.

11. The Advisory Committee provides guidance, not rulings. Neither you nor any affected third party is bound by the said guidance. Only the courts can provide rulings on the scope and extent of legal practitioners' professional obligations and bind legal practitioners or third parties with those rulings. Having said that, the courts do give some weight to the Advisory Committee's guidance representing, as it does, the professional body's view. The weight which will be given will depend to a large extent on the completeness and accuracy with which all relevant material has been placed before the Advisory Committee together with the request for guidance.

C. A Note on Confidentiality

12. Any guidance given is confidential and is intended only for your benefit. The Advisory Committee may publish anonymised versions of the inquiry and the guidance where the subject-matter of the request is one of general application or interest.

13. While the Law Society's and the Advisory Committee's starting point is that all inquiries are confidential, if the inquiry is in respect of completed conduct (as opposed to future conduct) and discloses potential professional misconduct or criminal wrongdoing, the Advisory Committee may be under a duty to report that misconduct through the relevant channels.

PROFESSIONAL ETHICS
DIGEST

Summaries of Advisory Committee's Guidances

from
Nov 2015 – Apr 2018

Disclaimer: The summaries are intended to allow legal practitioners to understand how the ethical rules are applied to real-life ethical scenarios placed before the Advisory Committee for guidance. As the summaries have omitted facts which are not considered crucial to the ethical obligations of the legal practitioner in question or to the guidance given, legal practitioners are advised to write to the Advisory Committee for a specific opinion on their query. Neither the Advisory Committee nor the Law Society shall be liable for anything a legal practitioner does or omits based on the summaries without seeking a formal opinion on the facts of his or her case from the Committee.

CLIENT CONFIDENTIALITY

Rule 6 PCR

Confidentiality

6.— (1) The following principle guides the interpretation of this rule.

Principle

A legal practitioner's duty to act in the best interests of the legal practitioner's client includes a responsibility to maintain the confidentiality of any information which the legal practitioner acquires in the course of the legal practitioner's professional work.

(2) Subject to paragraph (3) and any rules made under section 136, 150 or 166 of the Act, a legal practitioner must not knowingly disclose any information which —

(a) is confidential to his or her client; and

(b) is acquired by the legal practitioner (whether from the client or from any other person) in the course of the legal practitioner's engagement.

(3) A legal practitioner may disclose any information referred to in paragraph (2), if —

(a) the client referred to in paragraph (2) authorises the disclosure;

(b) the legal practitioner is permitted or is required by law, by an order of court, or by a tribunal to make the disclosure;

(c) the legal practitioner discloses the information in confidence, for the sole purpose of obtaining advice in connection with the legal practitioner's legal or ethical obligations;

(d) the legal practitioner discloses the information in confidence to a provider or broker of the legal practitioner's professional indemnity insurance, in connection with any claim or potential claim, or any complaint or

potential complaint, by any person against the legal practitioner; or

(e) the legal practitioner discloses the information for the sole purpose of responding to or defending any charge or complaint, relating to the legal practitioner's conduct or professional behaviour, brought against the legal practitioner in court, before a Review Committee, an Inquiry Committee or a Disciplinary Tribunal, before a complaints committee appointed under section 36S(5) of the Act, or before any relevant professional disciplinary body of a state or territory (other than Singapore) in which the legal practitioner is duly authorised or registered to practise law.

1 Rule 6(2), 6(3)(a), 6(3)(b) PCR – CPIB investigator's request for production of documents related to a client

Facts

An officer from the Corrupt Practices Investigation Bureau ("CPIB") informed Lawyer A by telephone and e-mail that CPIB needed to obtain documents from Lawyer A pertaining to the purchase of a property by Lawyer A's client.

The CPIB's e-mail also stated, amongst others, that its request for the relevant documents was made pursuant to the exercise of CPIB's powers under section 17 of the Prevention of Corruption Act and section 20(1) of the Criminal Procedure Code.

Guidance (12 July 2016)

(a) Assuming that the information held by Lawyer A and requested by CPIB was, within the meaning of rule 6(2) of the PCR: (a) confidential to the client; and (b) acquired by Lawyer A in the course of Lawyer A's engagement, it was proposed that Lawyer A first inform the CPIB officer that Lawyer A would seek client consent to authorise the disclosure, in order to satisfy rule 6(3)(a) of the PCR.

(b) This assumed that CPIB would not object to Lawyer A checking the above with the client. If the client consented, Lawyer A could then disclose the information to CPIB (or the client could disclose the information to CPIB, without the need for Lawyer A to do so).

CLIENT CONFIDENTIALITY

(c) If the client did not consent to the disclosure, or if CPIB objected to Lawyer A seeking client consent, the Advisory Committee proposed the following:

(i) A written order made by a CPIB officer/investigator for disclosure of documents e.g. under section 17 of the Prevention of Corruption Act ("powers of investigation") read with section 20 of the Criminal Procedure Code ("power to order production of any document or other thing") might *prima facie* appear to fall within the "required by law" exception under rule 6(3)(b) of the PCR. However, it might be possible to come to a different conclusion on this question of law. The court was the final arbiter on this and the only definitive way of determining the question was therefore by making an application to court for this question to be decided.

(ii) In any event, regardless of whether Lawyer A took the view that the order is sufficient in itself to satisfy rule 6(3)(b) of the PCR, or whether Lawyer A's intention was to make an application to court, Lawyer A should first request CPIB to issue the relevant written order under law to require the disclosure (instead of relying solely on CPIB's telephone call or email). While Lawyer A would generally be entitled to take the CPIB's written order at face value (unless there were facts to cause Lawyer A to suspect otherwise), Lawyer A still had an ethical duty to be satisfied that the power invoked by CPIB existed and had been validly exercised.

COURTESY AND FAIRNESS BETWEEN LEGAL PRACTITIONERS; ALLEGATIONS AGAINST ANOTHER LEGAL PRACTITIONER

Rule 7(1)-(2) PCR

Responsibilities of legal practitioners to each other

7.— (1) The following principles guide the interpretation of this rule.

Principles

(a) A legal practitioner must always accord to another legal practitioner the proper respect due to the latter as a member of a noble and honourable profession.

(b) A legal practitioner must deal with another legal practitioner in good faith and in a manner which is dignified and courteous, so that the matters on which they have been instructed can be properly and satisfactorily concluded or resolved in the best interests of their respective clients.

(c) A legal practitioner must not deal with another legal practitioner in any manner that may adversely affect the reputation and good standing of the legal profession or the practice of law in Singapore.

(2) A legal practitioner must treat other legal practitioners with courtesy and fairness.

Rule 29 PCR

Allegations against another legal practitioner

29. A legal practitioner (A) must not permit an allegation to be made against another legal practitioner (B) in any document filed on behalf of A's client in any court proceedings, unless —

(a) B is given the opportunity to respond to the allegation; and
(b) where practicable, B's response (if any) is disclosed to the court.

COURTESY AND FAIRNESS BETWEEN LEGAL PRACTITIONERS; ALLEGATIONS AGAINST ANOTHER LEGAL PRACTITIONER

Rule 31 PCR

Communication with another legal practitioner

31. Where a legal practitioner acts for a party in a matter, the legal practitioner must not disclose to the court any communication relating to the matter between the legal practitioner and a legal practitioner acting for another party in the matter, unless there is an agreement between the 2 legal practitioners to do so.

2 Rules 7(2) and 31 PCR – Communications with client's former legal practitioner – Disclosure of correspondence to court; Rule 29 PCR – Allegations against another legal practitioner to be made by way of letter – Opportunity for the other practitioner to respond

Facts

Law Practice A had been instructed by a client who was previously represented by Lawyer B from a different law practice. Certain advice which the client obtained from Lawyer B, as well as the instructions which the client gave to Lawyer B, might be relevant to the client's present legal proceedings.

Law Practice A had been corresponding with Lawyer B over the telephone and by email.

Law Practice A sought the Advisory Committee's guidance on two courses of action that it was considering:

(a) to disclose to the court, by way of an affidavit to be affirmed by the client, their correspondence with Lawyer B; and

(b) to set out, in writing, some further matters against Lawyer B.

On proposal (b), as some of those matters could be interpreted as allegations, Law Practice A wanted to ensure that Lawyer B was given the opportunity to respond. Law Practice A's anecdotal understanding was that where allegations were made against another practitioner, it was common for the allegations to be contained in a draft affidavit, which would then be sent to the other practitioner. The practitioner was then

invited to respond, and the response would be annexed to the affidavit which would eventually be filed.

However, Law Practice A wished to enquire whether Lawyer B could be given the same opportunity by way of a letter, instead of by sending over a draft affidavit.

Guidance (27 October 2016)

Proposal (a)

There appeared to be no issue in disclosing to the court the correspondence between present and former legal practitioners of a party to legal proceedings as rule 31 of the PCR was not intended to capture the same. That said, the responsibility of a legal practitioner to treat another with "courtesy and fairness" (rule 7(2) of the PCR) would call for the consent of the other solicitor to be sought first before any such disclosure was made.

Proposal (b)

(a) Filing both the letter containing the allegations and Lawyer B's response as annexures to the client's affidavit would seem to satisfy the requirements of rule 29 of the PCR, provided that the same allegations were contained in both the affidavit and the letter to Lawyer B.

(b) It would, however, be prudent practice to forward to Lawyer B the draft affidavit containing the allegations so that Lawyer B was cognisant about those allegations being put before the court as part of the client's affidavit.

(c) The purpose of inviting Lawyer B to respond was to not only give Law Practice A the opportunity to reconsider pursuing the allegations, but also allow Law Practice A the chance to modify the allegations after receiving Lawyer B's response. Hence Law Practice A ought to consider whether it should pursue or modify the allegations made, and not merely annex the correspondence exchanged between it and Lawyer B.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Rule 11 PCR

Conflict of interest in proceedings before court or tribunal

11.— (1) The following principle guides the interpretation of this rule.

Principle

A legal practitioner's duty to advance the interests of the legal practitioner's client, and to present the client's best possible case, is subject to the legal practitioner's duties as an officer of the court and to assist in the administration of justice.

(2) A legal practitioner must not appear before a court or tribunal in a matter where —

(a) it would be difficult for the legal practitioner to maintain the legal practitioner's professional independence by reason of any commercial, family, personal or other relationship between the legal practitioner and his or her client; or

(b) the impartial administration of justice might or might appear to be prejudiced by reason of the legal practitioner's relationship with the court or tribunal or any member of the court or tribunal.

(3) In any case where it is known or it appears that a legal practitioner will be required to give evidence which is material to the determination of any contested issue before a court or tribunal —

(a) the legal practitioner —

(i) must not accept instructions from any party to that case; and
(ii) must, if the legal practitioner was acting for any party to that case, discharge himself or herself, or, where the legal practitioner has represented that party in any proceedings relating to that case, apply to be discharged, from acting further for that party; but

(b) the law practice in which the legal practitioner practises, or a member of that law practice, may represent or continue to represent any party to that case, unless doing so would prejudice the administration of justice.

3 Rule 11(3) PCR – Legal practitioner acted for accused in one tranche of criminal trial – Legal practitioner subsequently moved to another law practice which took over conduct of the accused's matter – Legal practitioner was not involved in and had no access to information about the accused's matter in the new law practice – Whether legal practitioner can give evidence in the third tranche of criminal trial to explain the legal practitioner's conduct of the accused's matter in the first tranche

Facts

Lawyer E, practising with Law Practice A, acted for an accused person in the first tranche of a criminal trial. The accused person appointed Lawyer F and Lawyer G from Law Practice B to take over conduct of the matter.

Lawyer E subsequently joined Law Practice B but was not involved in and had no access to information relating to the matter. In the course of the trial, it became necessary for Lawyer E to give evidence during the third tranche of the trial on what transpired between Lawyer E and the accused person when Lawyer E was counsel for the matter and to explain why certain questions were not put to the Prosecution's witnesses during the first tranche.

Guidance (17 October 2017)

(a) If the accused person agreed to waive solicitor-client privilege, Lawyer E was not ethically prohibited from taking the witness stand, as the accused person's former lawyer, to explain decisions that Lawyer E made in the conduct of the matter and to disclose relevant communications between Lawyer E and the client. However, issues as to the quality of Lawyer E's testimony could arise since Lawyer E was concurrently employed by Law Practice B.

(b) Law Practice B should observe all of the same restrictions in connection with Lawyer E as it would in connection with an external witness for all matters under the trial. Law Practice B should refrain from engaging Lawyer E in

discussions on evidence given while he is under cross-examination and be mindful of counsel's duty not to coach a witness.[1] It would also be prudent for Law Practice B to advise Lawyer E to consider seeking independent legal advice in respect of Lawyer E's role as witness.

(c) Whether Law Practice B could continue to act for the accused person under rule 11(3)(b) of the PCR was a matter for the firm to assess. If there was anything that would prejudice the administration of justice (e.g. discussing with Lawyer E the evidence that he would be giving in court), then Law Practice B should discharge itself.

Rule 21 PCR

Conflict, or potential conflict, between interests of current client and former client

21.—(1) The following principles guide the interpretation of this rule.

Principles

(a) The duties of loyalty and confidentiality owed by a legal practitioner to his or her client continue after the termination of the retainer.

(b) The duties of loyalty and confidentiality owed by a law practice to its client continue after the termination of the retainer.

(2) Subject to paragraphs (3), (4) and (5), a legal practitioner or law practice must decline to represent, or must withdraw from representing, a client (called in this rule the current client) in a matter, if —

(a) the legal practitioner or the law practice holds confidential information relating to a former client (called in this rule the former client) that is protected by rule 6;

1 See Pinsler SC's *Ethics and Professional Responsibility*, including paragraphs 04-008 to 04-014, 08 021 to 08-022 and 08-034 to 08-038. See also generally the comments in an Ethics in Practice article on rule 64 of the PCR 2010 (the predecessor to rule 11(3) of the PCR) at http://v1.lawgazette.com.sg/2009-7/ethics.htm.

(b) the current client has an interest that is, or may reasonably be expected to be, adverse to an interest of the former client; and

(c) that information may reasonably be expected to be material to the representation of the current client in that matter.

(3) Paragraph (2) does not prevent a legal practitioner or law practice from acting, or continuing to act, for the current client, subject to any conditions agreed between the legal practitioner or law practice and the former client, if —

(a) the legal practitioner or law practice has adequately advised the former client to obtain independent legal advice; and

(b) the former client gives the former client's informed consent in writing to the legal practitioner or law practice acting, or continuing to act, for the current client.

(4) Where the requirements in paragraph (3)(a) and (b) are not met despite reasonable efforts by the legal practitioner or law practice to meet those requirements, paragraph (2) does not prevent the legal practitioner or law practice from acting, or continuing to act, for the current client, if —

(a) there are adequate safeguards in place to protect the former client's confidential information; and

(b) the legal practitioner or law practice has made reasonable efforts to notify the former client —

(i) of those safeguards; and

(ii) that the legal practitioner or law practice will act, or continue to act, for the current client.

(5) Where it would be illegal for the legal practitioner or law practice to meet the requirements in paragraphs (3)(a) and (4)(b), paragraph (2) does not prevent the legal practitioner or law practice from acting, or continuing to act, for the current client, if —

(a) there are adequate safeguards in place to protect the former client's confidential information; and

(b) the legal practitioner or law practice ensures that the former client's confidential information is not accessed, used or disclosed without the former client's consent in writing.

4 Rule 21 PCR – Legal practitioner previously worked as a legal specialist in a statutory board – Legal practitioner joined law practice and was engaged by client to act in a case – Whether legal practitioner received confidential information on client's case during his employment with the statutory board

Facts

Before joining Law Practice B as a partner, Lawyer A was employed as a senior legal specialist in a statutory board.

Two years later, another partner in Law Practice B, Lawyer C, was approached by a client ("D") to advise and act for D in a financing arrangement. Lawyer C was previously employed by the statutory board as a legal officer.

The statutory board regarded the financing arrangement as having elements of tax avoidance and disallowed expenses paid by D under the financing arrangement ("D's Case"). The statutory board was of the view that Lawyer C was conflicted because he was the legal officer at the statutory board to whom D's Case was first sent to before he assigned it out. Hence Lawyer C discharged himself from the matter and D engaged Lawyer A to advise and act in D's Case.

The statutory board subsequently notified Lawyer A that Lawyer A had received confidential information pertaining to D's Case during Lawyer A's employment with the statutory board and that Lawyer A's representation of D gave rise to a conflict of interest.

Law Practice B therefore sought the Advisory Committee's guidance on whether rule 21 of the PCR prohibited Lawyer A from acting for D.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Guidance (27 September 2016)

(a) It was arguable whether Lawyer A could be said to be acting against Lawyer A's "former client", since Lawyer A was an ex-employee of the statutory board and D did not have a retainer with the statutory board. Notwithstanding this, the Advisory Committee cautioned that a legal practitioner should nonetheless observe general standards of professional conduct and should not use confidential information previously obtained from a party in his capacity as a legal officer in that party's employ, against that same party in the same case or issue.

(b) In the circumstances, there was a dispute of fact between Law Practice B and the statutory board on whether Lawyer A held confidential information relating to the statutory board, and whether such confidential information could reasonably be expected to be material to Lawyer A's representation of D. The onus would be on Lawyer A to show that there was no real risk that Lawyer A had any relevant confidential information or that such confidential information would be used to the statutory board's prejudice.

(c) Should Lawyer A decide to withdraw from representing D, another lawyer from Law Practice B who was not in a position of conflict could continue to represent D with the appropriate information barriers and other safeguards.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

5 Rules 21(1)-(2) and 35 PCR – Legal practitioner's law practice acted for claimant in arbitration but legal practitioner was not involved in arbitration – Legal practitioner subsequently moved to another law practice and acted as assistant counsel for the respondent in the same arbitration – Objection by legal practitioner's former legal practice on the basis of conflict of interests

Facts

Lawyer A left Law Practice B for Law Practice C. While Lawyer A was working in Law Practice B, Law Practice B was acting for the claimant in the arbitral proceedings in question ("Arbitration"). When Lawyer A joined Law Practice C, Lawyer A was made the assistant counsel for the respondent in the Arbitration. Law Practice B objected to Lawyer A so acting on the basis of conflict of interests, since Lawyer A was an ex-employee of Law Practice B.

Law Practice C opposed the allegations of conflict, as Lawyer A confirmed that Lawyer A was not:

(a) involved in the Arbitration while working at Law Practice B;

(b) in the same practice group/team as the legal practitioners handling the Arbitration while working at Law Practice B;

(c) working with the particular legal practitioners handling the Arbitration while working at Law Practice B; and

(d) in possession of any information or knowledge of any document or correspondence in Law Practice B's files, any instructions from Law Practice B's clients or any other confidential information relating to the Arbitration in which solicitor and client privilege attached.

Law Practice C sought the Advisory Committee's guidance on whether Lawyer A could continue acting as assistant counsel for the respondent in the Arbitration.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Guidance (13 March 2018)

(a) Applicability of rule 21(2)(a) of the PCR: Although this rule does not specifically refer to a scenario where a legal practitioner has moved to another law firm, a purposive interpretation should be adopted based on the interpretive principle in rule 21(1) of the PCR, in that a legal practitioner's duties of loyalty and confidentiality to a client should continue after the termination of the retainer. Such duties should not cease to exist merely because a legal practitioner has moved to another law firm.

(b) *"[F]ormer client"* under rule 21(2)(a) of the PCR: Although not specifically defined in the PCR, "former client" was wide enough to include a client of a former law practice of a legal practitioner. The duty of confidentiality enveloped the whole firm and not only the legal practitioners who acted for the former client in the matter (see generally, rule 35 of the PCR). Accordingly, the claimant in the Arbitration was considered Lawyer A's "former client" even though Lawyer A did not act for the claimant in the Arbitration while working at Law Practice B.

(c) *"[H]olds confidential information"* under rule 21(2)(a) of the PCR: Whether Lawyer A held confidential information relating to the claimant, which could have been acquired from the claimant or a third party during Lawyer A's time at Law Practice B, was a question of fact which Lawyer A had to determine.

    (i) It appeared from the confirmations given by Lawyer A that Lawyer A did not possess confidential information relating to the claimant. Also, Law Practice B had not specifically identified any particular confidential information that Lawyer A might have had acquired about the claimant, or offered any other specific information which might have given rise to an inference, deduction or working presumption that Lawyer A had acquired confidential information about the claimant. Hence, no conflict would have arisen to prevent Lawyer A from continuing to act in the Arbitration.

    (ii) However, to put the matter beyond doubt, it would have been necessary for Lawyer A to evaluate whether Lawyer A was acquainted with the

Arbitration at all, during Lawyer A's time at Law Practice B. Lawyer A would have had to ensure that Lawyer A did not otherwise access confidential information about the claimant from any source which could have been by way of:

1. informal casual discussions with Lawyer A's colleagues/peers who were working on the Arbitration at Law Practice B, where sensitive information about the Arbitration was disclosed; or
2. inadvertently coming upon sensitive information about the arbitration from Lawyer A's conduct of unrelated searches on Law Practice B's electronic documents database.

(iii) In a letter from Lawyer A to Law Practice B, Lawyer A's confirmation that Lawyer A did not have "any other confidential information relating to this matter in which solicitor client privilege attaches" did not make it sufficiently clear that Lawyer A did not possess any confidential information at all, since confidential information need not necessarily be privileged.

(iv) Therefore, if Lawyer A's further evaluation confirmed that Lawyer A did not hold any confidential information about the claimant, then no conflict of interest would have arisen under rule 21 of the PCR, as the first condition (i.e. rule 21(2)(a) of the PCR) would not have been satisfied.

(v) If Lawyer A's further evaluation disclosed that Lawyer A did hold confidential information about the claimant, Lawyer A would have had to exercise professional judgment under rule 21(2)(c) of the PCR as to whether it was reasonably expected to be material to the representation of the respondent in the Arbitration. If rule 21(2)(c) of the PCR was satisfied, Lawyer A would have had to cease to be involved in the Arbitration unless any of the exceptions in rules 21(3)-(5) of the PCR applied.

(d) Since this scenario came before the Advisory Committee only in early 2018, the guidance provided was subject to the following qualifications:

(i) As there had been no judicial authority to date on the interpretation of

rule 21 of the PCR, it was possible that the court would take a different interpretation of the scope of the rule. The only definitive way of determining the scope of rule 21 of the PCR was to make an application to court for this matter to be decided.

(ii) Quite apart from rule 21 of the PCR, the court could, on the former client's application, exercise its powers to restrain the legal practitioner from continuing to act for the current client in the particular circumstances. In considering the application, the court could take into account considerations beyond protecting the former client's confidential information.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

6 Rules 6, 11(3) and 21(2) PCR – Different legal practitioners from same law practice appointed to act for plaintiff in divorce proceedings, and for plaintiff and defendant in sale of property

Facts

In a divorce suit, Law Practice A, through one of its legal practitioners, Lawyer B, acted for the plaintiff husband ("H"). Law Practice C acted for the defendant wife ("W"). H and W were joint owners of two properties, and another legal practitioner in Law Practice A, Lawyer D, had acted for them in the sale of one of the properties (the "Property").

The Property's sale had been completed by the time Law Practice A sought the Advisory Committee's guidance. However, Law Practice C objected to Law Practice A and Lawyer B acting for H in the divorce suit, on the ground of conflict of interest. Law Practice C alleged that the Property continued to form part of the pool of matrimonial assets for the purposes of the divorce suit. This was because when Lawyer D acted for H and W in the Property's sale, W had consented to selling the Property based on an oral agreement between H and W that H would transfer to her his rights, title and interest in the other property which they jointly owned. Further, Law Practice C alleged that Law Practice A and Lawyer B might be called as witnesses on the two properties which were disputed based on the oral agreement.

Law Practice A (through Lawyer B) denied Law Practice C's allegations. They stated that Lawyer D acted for the parties only in the Property's sale, and that Lawyer D was not aware that the parties had reached any oral agreement to transfer the Property.

Law Practice A sought the Advisory Committee's guidance on:

(a) Whether Law Practice A and/or Lawyer B were placed in a conflict of interest in acting for H, notwithstanding that Lawyer D, who acted for H and W in the Property's sale was not acting for H in the divorce suit; and

(b) Where in the event that the circumstances of the sale became an issue in litigation, whether there would be any conflict of interest in legal proceedings if Law Practice A or Lawyer D was called to give evidence.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Guidance (5 February 2016)

(a) **Rule 21 of the PCR:** Based on the facts disclosed, there was insufficient information for the Advisory Committee to determine whether Law Practice A or Lawyer B had to withdraw from representing H in the divorce proceedings under rule 21 of the PCR, as it was not clear whether Law Practice A or Lawyer B held confidential information relating to W that was protected by rule 6 of the PCR:

(i) Based on the conflicting versions of the facts disclosed, there was insufficient information for the Advisory Committee to determine whether there was in fact an oral agreement reached between H and W regarding the transfer of the Property and if so, whether such information was made known to Lawyer D.

(ii) It had not been shown to the Advisory Committee that such an oral agreement could be regarded as confidential information contemplated by rule 21(2)(a) of the PCR.

(iii) The Advisory Committee did not have sufficient facts to conclude that confidential information allegedly in the possession of Law Practice A or Lawyer B might reasonably be expected to be material to the representation by Law Practice A or Lawyer B of H in the divorce suit.

(iv) In this regard, the Advisory Committee observed that rule 21(2) of the PCR was relatively less restrictive as compared with the former rule 31(1) of the PCR 2010, because the emphasis in rule 21 of the PCR was on whether the legal practitioner had obtained confidential information from the former client that might reasonably be material to the representation of the current client. This was in contrast to the stricter and absolute prohibition under rule 31(1) of the PCR 2010 which could operate irrespective of whether the legal practitioner possessed any confidential information relevant to the matter.

(b) **Rule 11 of the PCR:** The position under rule 11(3) of the PCR was that Law Practice A or Lawyer B would be permitted to act for H unless doing so would prejudice the administration of justice. It was a question of fact and

degree for Law Practice A and Lawyer B to use their professional judgment to assess whether Law Practice C was able to show that the administration of justice under rule 11(3)(b) of the PCR would be prejudiced, if Lawyer B was to continue to act for H in the suit.

7 Rules 11(3) and 21(2) PCR – Same law practice acted for company in judicial management proceedings and advised company director's other company – Company liquidators sued company director for fraudulent conduct – Law practice represented company director in suit – Legal practitioners in law practice to be called to give evidence on company director's instructions concerning judicial management proceedings – Whether law practice and its legal practitioners could continue to represent company director in suit

Facts

Company A ran into financial difficulties and Law Practice B was engaged by Company A to apply to court to put Company A under judicial management. C was the director of Company A from its incorporation until a winding up order against Company A was made by the court.

C subsequently engaged Law Practice B to, amongst other matters, act for and advise C's other company in relation to certain alleged events of default under a term loan.

A couple of years later, Company A, acting through the liquidators, commenced legal proceedings against C for fraudulent conduct involving alleged sham documents and transactions, and breach of director's duty. C engaged Law Practice B to act against Company A in this suit ("the Suit").

In the Reply in connection with the Suit, it was stated that the legal practitioners in Law Practice B who acted for C would be called to give evidence on behalf of Company A, as to the instructions issued by C in respect of certain of C's affidavits in connection with the judicial management application.

Law Practice B then sought the Advisory Committee's guidance on whether Law Practice B or its relevant legal practitioners were restrained from acting against Company A under rules 11(3) and 21(2) of the PCR.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Guidance (5 July 2016)

(a) **Rule 11 of the PCR:** For rule 11(3) of the PCR to operate to restrain Law Practice B from representing C in the Suit, 2 elements had to be satisfied:

(i) It must be known or appear that Law Practice B's legal practitioners would be required to give evidence; and

(ii) Such evidence was material to the determination of any contested issue before a court.

(b) The parties were in dispute as to whether Law Practice B's legal practitioners were in a position to give evidence which was material to determining any contested issue in the Suit. The Advisory Committee was not in a position to make a determination as to the materiality of the testimony that may be given by Law Practice B's legal practitioners nor to assess what issues could be contested before the court as this was an issue to be decided by the court.

(c) The Advisory Committee was therefore of the view that Law Practice B could continue to act for C as the correspondence submitted for the Advisory Committee's consideration did not explain how, by acting for C, the administration of justice would be prejudiced. The Advisory Committee, however, reminded Law Practice B of its continuing duty to exercise its professional judgment to objectively assess whether representing C under such circumstances would be prudent.

(d) **Rule 21(2) of the PCR:** Only rule 21(2)(b) of the PCR was satisfied. The Advisory Committee was of the view that (i) Law Practice B and/or its legal practitioners did not hold information confidential to Company A and consequently, (ii) no such confidential information was reasonably expected to be material to the representation of C in the matter. Law Practice B and its legal practitioners were therefore not constrained from representing C by virtue of rule 21(2) of the PCR.

(e) The Advisory Committee however recommended that caution be exercised, and that a possible suspension of work on the matter pending a proper ruling

from the courts might be the most professionally prudent way to approach the matter.

8 Rules 11(3) and 21(2) PCR – Legal practitioner represented defendants in two suits involving dispute with plaintiffs over properties controlled by family partnership and family members – Legal practitioner advised family partnership 30 years ago on general matters and acted for certain plaintiffs in personal matters – Whether legal practitioner and law practice could continue to act for defendants in suits – Whether legal practitioner held confidential information – Whether legal practitioner would be required to give evidence which was material to the suits

Facts

A family dispute involving properties controlled by various family members and the family partnership gave rise to two High Court suits. Law Practice A and Law Practice B represented the plaintiffs and the defendants respectively in each suit. Although the parties to each suit involved different family members, the key issues in both suits pertained to whether the disputed properties were held by certain family members on trust for the family partnership and the percentage share held by certain family members in the family partnership.

Law Practice A objected to Lawyer C from Law Practice B acting for the defendants on two grounds:

(a) There was a conflict of interests since Lawyer C had previously been instructed by/had acted for the family partnership some 30 years ago on general matters and had previously acted for some of the plaintiffs in their personal matters which included property transactions; and

(b) Because Lawyer C had previously acted for the family partnership, he would be able to testify in the two suits on the managing and running of the family partnership.

Law Practice B therefore sought the Advisory Committee's guidance on whether it could continue to act for the defendants in the two suits.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Guidance (22 December 2017)

(a) **Rule 21 of the PCR:** The three elements under rule 21(2) of the PCR had to be fulfilled in order to disqualify Lawyer C from acting for the defendants in the two suits. The Advisory Committee was of the view that the facts provided to it, especially the lack of any particulars[2] as to what confidential information might have been in Law Practice B's possession and how that would have been material to the two suits, did not show that the first and third elements of rule 21(2) of the PCR had been satisfied. Further, whether Lawyer C held confidential information was a question of fact to be assessed by Lawyer C's professional judgment.

(b) **Rule 11 of the PCR:** Based on the facts provided to the Advisory Committee, it was not clear as to whether Lawyer C would or was likely to be required to give evidence, or whether such evidence would be material. Whether Lawyer C would become a material witness in either or both of the suits would depend on how the dispute might unfold. However, Law Practice B and Lawyer C would have to bear rule 11(3) of the PCR in mind and regularly review their position as the dispute unfolds. As a matter of prudence, Law Practice B should have advised their clients on the possibility of Lawyer C being required to give evidence in the future and the potential risks and consequences thereof. In particular, Law Practice B should give due consideration to any potential prejudice which would be caused to their clients should both Law Practice B and Lawyer C need to withdraw from acting in either or both of the two suits, as well as the risk of any professional embarrassment if Lawyer C was required to give evidence, even if such evidence was not material.

2 *Vorobiev Nikolay v Lush John Frederick Peters and others* [2011] 1 SLR 663.

CONFLICT OF INTEREST IN COURT/ TRIBUNAL PROCEEDINGS

Rule 20(1), (8) PCR

Conflict, or potential conflict, between interests of 2 or more clients

20.—(1) The following principles guide the interpretation of this rule.

Principles

(a) A legal practitioner owes duties of loyalty and confidentiality to each client of the legal practitioner, and must act prudently to avoid any compromise of the lawyer-client relationship between the legal practitioner and the client by reason of a conflict, or potential conflict, between the interests of 2 or more clients of the legal practitioner.

(b) A law practice owes duties of loyalty and confidentiality to each client of the law practice, and must act prudently to avoid any compromise of the lawyer-client relationship between the law practice and the client by reason of a conflict, or potential conflict, between the interests of 2 or more clients of the law practice.

...

(8) Where a legal practitioner or law practice has prepared a document on behalf of 2 or more parties concerning their rights and obligations, and 2 or more of those parties become involved in a dispute arising from the document, the legal practitioner or law practice must not represent any disputing party in the dispute.

9 Rules 11(3), 20(8) and 21(2) PCR – Law practice acted for company in negotiating shareholders' agreement and for subsidiary company in amending its constitution – Whether law practice can act for company to sue investor and subsidiary company under shareholders' agreement and constitution respectively

Facts

Law Practice A was instructed by Company B to act for Company B and its subsidiary company, Company C, where Company C was a 70% subsidiary of Company B. An investor ("D") was to invest in Company C. The shareholders' agreement for the investment was drafted by D's legal practitioner, and Law Practice A negotiated the

shareholders' agreement on Company B's behalf vis-à-vis D. To the extent that D required the salient rights and obligations agreed between Company B and D under the shareholders' agreement to be incorporated into Company C's constitution, Law Practice A acted for Company C in amending its constitution.

Law Practice A sought the Advisory Committee's guidance on whether Law Practice A was subsequently permitted to act for Company B principally against D and possibly against Company C, in respect of Company B's rights under the shareholders' agreement and Company C's constitution.

Guidance (10 October 2017)

(a) **Rule 11(3) of the PCR:** Whether a legal practitioner in Law Practice A would be a material witness in subsequent legal proceedings, would depend on how the dispute unfolds. Law Practice A would have had to regularly review its position under rule 11(3) of the PCR.

(b) **Rule 21(2) of the PCR:** Law Practice A could act against a former client unless the requirements under rule 21(2) of the PCR were triggered. This was an issue that Law Practice A had to assess for itself, since it was apprised of all the facts of the case.

(c) **Rule 20(8) of the PCR:** If the substance of the dispute was between Company B and D, subject to the duty to safeguard confidential information, rule 20(8) of the PCR was not intended to prevent Law Practice A from acting for Company B in such a situation. If, however, a dispute arose between Company B and Company C, as regards their rights/liabilities under any document drafted by Law Practice A for both of them, rule 20(8) of the PCR would prohibit Law Practice A from acting against Company C.

COMMUNICATIONS AND DEALINGS WITH WITNESSES

Rule 12(1), (8) PCR

Communications and dealings with witnesses

12.—(1) The following principles guide the interpretation of this rule.

Principles

(a) A legal practitioner must ensure that the legal practitioner acts in a manner consistent with the administration of justice when dealing with any witness, regardless of the effect or potential effect of the evidence given or to be given by that witness.

(b) A legal practitioner must exercise the legal practitioner's own judgment both as to the substance and the form of the questions put or statements made to a witness.

...

(8) A legal practitioner —

(a) may pay, or offer to pay, a witness any disbursements and expenses which the witness is allowed or entitled to under the law; but

(b) must not make, or offer to make, any payment to a witness which is contingent upon the nature of the evidence given by the witness or upon the outcome of a case.

COMMUNICATIONS AND DEALINGS WITH WITNESSES

10 Rule 12(8) PCR – Offering witness compensation for lost income – Whether payment is "contingent upon the nature of the evidence given by the witness or upon the outcome of a case" under rule 12(8)(b) PCR – Whether payment for loss of income in preparing and reviewing documents falls under rule 12(8)(a) PCR

Facts

A law practice requested that the Advisory Committee provide guidance on whether it could pay or make an offer to pay a factual witness compensation, in respect of lost income incurred (over and above disbursements and expenses) in making himself available for meetings, reviewing draft affidavits and attending court to testify. Would this amount to misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession?

Guidance (9 September 2016)

(a) Paying a witness for his lost income in taking time off to prepare or review his affidavits of evidence and to give evidence in court did not, on its face, amount to making a payment which would incentivise the witness to give his evidence in any particular way. Such payment would not, *prima facie*, be seen as being made "contingent upon the nature of the evidence given by the witness or upon the outcome of a case" and there should be no breach of rule 12(8)(b) of the PCR.

(b) On rule 12(8)(a) of the PCR, the Advisory Committee noted a decision which suggested that the lost income of a witness for attending a court or arbitration proceedings was recoverable in taxation proceedings, subject to the principle of reasonableness (see *Mero Asia Pacific Pte Ltd v Takenaka Corp* [2002] 2 SLR(R) 1083; [2002] SGHC 228). However, there was no local decision suggesting that a factual witness is allowed or entitled to lost income for preparing or reviewing documents. It remained an open position on whether payments to a factual witness for his loss of income in preparing and reviewing documents would come within the ambit of rule 12(8)(a) of the PCR.

(c) Nevertheless, as a matter of prudence, the following measures should be taken where the legal practitioner intended to pay the factual witness:

(i) A legal practitioner should consider putting any payment agreement in writing;
(ii) The agreement should state that the payment is not contingent upon the nature of the evidence given by the witness or upon the outcome of the case; and
(iii) The agreement should state that the payment merely compensates the witness for the reasonable value of the time and expenses actually incurred by the witness.

11 Rule 12(1), (8) PCR – Legal practitioner giving evidence as witness – Payment for loss of earnings due to trial

Facts

A legal practitioner giving evidence as a witness of fact sought guidance on whether:

(a) he had a right to claim payment for his time spent in preparing his AEIC and for attending trial; and

(b) he was prohibited by rule 12(8) of the PCR from being paid for his loss of earnings in connection with the preparation of his AEIC and attendance at trial.

Guidance (21 October 2016)

(a) Whether a legal practitioner had a right to claim payment for his time spent in preparing his AEIC and for attending trial was a question of law which had yet to be decided by the Singapore courts. *Mero Asia Pacific Pte Ltd v Takenaka Corp* [2002] 2 SLR(R) 1083 suggested that the lost income of a witness for attending court or arbitration proceedings was recoverable in taxation proceedings, subject to the principle of reasonableness.

(b) As stipulated in rule 12(1) of the PCR, the main intent of rule 12 of the PCR was to remind lawyers to conduct themselves in a manner that would not affect the neutrality and objectivity of the evidence given by a witness. Rule 12(8) of the PCR was aimed at preventing the mischief of making payments to

incentivise a witness to give evidence in a manner which would be favourable to one's client's case.

(c) Reimbursing a witness for his lost earnings due to time spent in preparing and reviewing that witness's affidavits of evidence and in giving evidence in court, would not, *prima facie*, be in breach of rule 12(8) of the PCR, and the legal practitioner who acted as witness was not prohibited by rule 12(8) of the PCR from being reasonably reimbursed for his lost earnings in connection with the same.

FEE ARRANGEMENTS

Rule 17(1), (7)-(8) PCR

Professional fees and costs

17.—(1) The following principle guides the interpretation of this rule.

Principle

A legal practitioner must act in the best interests of his or her client, and must charge the client fairly for work done.

...

(7) A legal practitioner must not charge any fee or disbursements, or render a bill (whether or not subject to taxation) for an amount, which constitutes overcharging, even if there is a fee agreement that permits the charging of the fee, disbursements or amount.

(8) For the purposes of paragraph (7), there is overcharging if a reasonable legal practitioner cannot in good faith charge the fee, disbursements or amount, taking into account all of the following matters:

(a) the legal practitioner's standing and experience;
(b) the nature of the legal work concerned;
(c) the time necessary to undertake the legal work;
(d) the instructions and requirements of the client concerned;
(e) any other relevant circumstances.

Rule 22 PCR

Conflict, or potential conflict, between interests of client and interests of legal practitioner or law practice, in general

22.—(1) The following principles guide the interpretation of this rule and rules 23, 24 and 25.

Principles

(a) A legal practitioner owes duties of loyalty and confidentiality to a client

of the legal practitioner, and must act prudently to avoid any compromise of the lawyer-client relationship between the legal practitioner and the client by reason of a conflict, or potential conflict, between the interests of the client and the interests of the legal practitioner.

(b) A law practice owes duties of loyalty and confidentiality to a client of the law practice, and must act prudently to avoid any compromise of the lawyer-client relationship between the law practice and the client by reason of a conflict, or potential conflict, between the interests of the client and the interests of the law practice.

(2) Except as otherwise permitted by this rule, a legal practitioner or law practice must not act for a client, if there is, or may reasonably be expected to be, a conflict between —

(a) the duty to serve the best interests of the client; and
(b) the interests of the legal practitioner or law practice.

(3) Where a legal practitioner, any immediate family member of the legal practitioner, or the law practice in which the legal practitioner practises has an interest in any matter entrusted to the legal practitioner by a client of the legal practitioner—

(a) in any case where the interest is adverse to the client's interests, the legal practitioner must withdraw from representing the client, unless —

(i) the legal practitioner makes a full and frank disclosure of the adverse interest to the client;
(ii) the legal practitioner advises the client to obtain independent legal advice;
(iii) if the client does not obtain independent legal advice, the legal practitioner ensures that the client is not under an impression that the legal practitioner is protecting the client's interests; and
(iv) despite sub-paragraphs (i) and (ii), the client gives the client's informed consent in writing to the legal practitioner acting, or continuing to act, on the client's behalf; or

(b) in any other case, the legal practitioner must withdraw from representing the client, unless —

(i) the legal practitioner makes a full and frank disclosure of the interest to the client; and
(ii) despite sub-paragraph (i), the client gives the client's informed consent in writing to the legal practitioner acting, or continuing to act, on the client's behalf.

(4) Where a law practice has an interest in any matter entrusted to it by its client —

(a) in any case where the interest is adverse to the client's interests, the law practice must withdraw from representing the client, unless —

(i) the law practice makes a full and frank disclosure of the adverse interest to the client;
(ii) the law practice advises the client to obtain independent legal advice;
(iii) if the client does not obtain independent legal advice, the law practice ensures that the client is not under an impression that the law practice is protecting the client's interests; and
(iv) despite sub-paragraphs (i) and (ii), the client gives the client's informed consent in writing to the law practice acting, or continuing to act, on the client's behalf; or

(b) in any other case, the law practice must withdraw from representing the client, unless —

(i) the law practice makes a full and frank disclosure of the interest to the client; and
(ii) despite sub-paragraph (i), the client gives the client's informed consent in writing to the law practice acting, or continuing to act, on the client's behalf.

FEE ARRANGEMENTS

12 Rules 17(8), 22(3)-(4) PCR – Part payment of legal fees using cryptocurrencies – overcharging and conflict issues – Relevance of Practice Direction on "Equity in Lieu of Fees"

Facts

A law practice's client intended to launch an Initial Coin Offering ("ICO") for a new cryptocurrency. The client had requested to pay part of their legal fees with some of the cryptocurrencies launched in the ICO.

The law practice noted that the Council had not issued any directions or rulings in relation to cryptocurrency, but had issued practice directions relating to receiving equity in lieu of fees.

The law practice was of the view that the principles relating to receiving equity in lieu of fees were applicable to their query, as receiving cryptocurrency launched at an ICO would give the firm some interest in the performance of the cryptocurrency company.

In this regard, PDR 2013, Paragraph 103 on "Equity in Lieu of Fees" stated that the Council did not have any objections to law firms accepting equity in lieu of fees for legal services provided by the firm, subject to the usual considerations of contingency fees, overcharging and secret profits.

Although there was an additional consideration of avoiding conflict of interest in the context of receiving equity, the law practice was of the view that such conflict of interest should not be an issue here as the cryptocurrency paid in lieu of the legal fees was neither a substantial share of the cryptocurrency market offered at the ICO, nor a grant of equity in the cryptocurrency company. The law practice would therefore not gain substantial interest in the future performance of the cryptocurrency company, which would in turn prevent conflicts of interest from arising in the future.

Guidance (26 April 2018)

(a) There was, in principle, no ethical prohibition on lawyers accepting cryptocurrency as payment of their legal fees and the considerations set out in PDR 2013, Paragraph 103 on "Equity in Lieu of Fees" would apply.

(b) The law practice should, however, take note of the following:

(i) *Overcharging:* As a best practice, cryptocurrency should be converted into cash immediately upon receipt. The test of overcharging under rule 17(8) of the PCR was whether a reasonable legal practitioner acting in good faith would have charged the same amount in light of objective factors. Immediate conversion of the cryptocurrency was likely to be an indicator of good faith as it evidenced an intention not to overcharge.

(ii) *Conflict Issues:*

1. Existing case law suggested that there was no general rule that a legal practitioner's interest in the amount of his fees that might be earned from the client amounts to an "interest in any matter entrusted to the legal practitioner" under rule 22(3)/(4) of the PCR. Rule 22 of the PCR governed conflicts (both actual and potential) between the lawyer's interest and the client's interest.

2. The law practice should, however, be mindful that, given the speculative nature of cryptocurrency and the regulatory issues surrounding ICOs, the law practice's interest in obtaining cryptocurrency as payment of legal fees might be construed, in certain circumstances, as an interest in the client's matter. In such a scenario, the law practice must ensure that the safeguards in rule 22(3)/(4) of the PCR (which varied depending on whether the interests were adverse or not) were fully complied with before the law practice continued to act for the client.

3. In this regard, the considerations mentioned in paragraphs 3.1 and 3.2 of PDR 2013, Paragraph 103 on "Equity in Lieu of Fees" (in particular, the ability to dispense impartial advice) were also relevant.

General Editor's Note: PDR 2013, Paragraph 103 on "Equity in Lieu of Fees" has been renamed to Practice Direction 5.1.1, "Equity in Lieu of Fees" in PDR 2019.

REFERRAL FEES

Rule 8(3) PCR

A legal practitioner —

(a) must not take unfair advantage of any person; and
(b) must not act towards any person in a way which is fraudulent, deceitful or otherwise contrary to the legal practitioner's position as a member of an honourable profession.

Rule 38 PCR

Business, trade or calling

38. A legal practitioner or law practice must not engage in any business, trade or calling which —

(a) derogates from the dignity of the legal profession;
(b) is likely to unfairly attract business in the practice of law; or
(c) is prohibited by —

(i) the Act;
(ii) these Rules or any other subsidiary legislation made under the Act;
(iii) any practice directions, guidance notes and rulings issued under section 71(6) of the Act; or
(iv) any practice directions, guidance notes and rulings (relating to professional practice, etiquette, conduct and discipline) issued by the Council or the Society.

REFERRAL FEES

13 Rules 8(3) and 38 PCR – Referral fee or commission – Acting as an introducer

Facts

A lawyer asked for guidance on whether he would be entitled to a referral fee or commission in the following situations:

(a) Introducing a business opportunity to a client, or introducing client A to client B. For the purpose of that transaction, the lawyer would not offer legal services to either client.
(b) Introducing a business opportunity to a party who had never been his client.
(c) Introducing two parties who had never been his clients to each other. One party was an expert whom he had worked with before.

Guidance (25 September 2017)

(a) The issue was whether paying introducer's fees would be compatible with the legal profession's dignity. The Advisory Committee could not give specific advice because the query and context were too vague. The Advisory Committee would require information on the specific opportunities contemplated, including information on the industry concerned, the area of practice, and the commission arrangement involved.

(b) As general guidance, whether within or outside of a solicitor-client relationship, a legal practitioner must:

(i) conduct himself in a manner that is not contrary to his position as a member of an honourable profession (rule 8(3) of the PCR); and

(ii) not engage in any business, trade or calling which derogates from the dignity of the profession (rule 38 of the PCR).

REFERRAL FEES

(c) *Referrals in a solicitor-client relationship:* A legal practitioner should:

(i) comply with rules as to conflict of interests;
(ii) be mindful of any conflict between his personal interest in earning the introducer's fee and his fiduciary duty to the client to act in the client's best interests;
(iii) at the very least, disclose to the client his arrangement with the third party, and advise that the client can seek business opportunities elsewhere; and
(iv) note that any undue influence over the client might trigger section 83(2)(h) of the LPA for conduct unbefitting an advocate and solicitor. (For more information on additional obligations, please see paragraph 1 of the article "Becoming an 'Introducer' for an Insurance Company" at http://v1.lawgazette. com.sg/2010-09/column2.htm).

(d) *Referrals outside a solicitor-client relationship:* The Advisory Committee's guidance is summarised in the table below.

Acceptable practices	Guidance
Referring his friends or acquaintances to a third party, and collecting a fee for successful referrals.	There should generally not be an ethical issue, as long as the legal practitioner did not contravene his ethical obligations under the LPA and its subsidiary legislation, including the PCR.
Carrying out a legitimate consultancy or referral business and receiving fees from such business.	There was no rule which prevented a legal practitioner from carrying on such a business, but his conduct must at all times be above board. If he conducted the business fraudulently or dishonestly, then he would be acting in a manner unbefitting his position as an officer of the court (see *Law Society of Singapore v Ong Teck Ghee* [2014] SGDT 7).

(e) If a practitioner used his law firm's name to carry on his consultancy or referral business, this would create a solicitor-client relationship and might create other regulatory issues.

REFERRAL FEES

Rule 39 PCR

Touting and referrals

39.—(1) A legal practitioner or law practice must not tout for business or do anything which is likely to lead to a reasonable inference that the thing was done for the purpose of touting.

(2) Without prejudice to the generality of paragraph (1), where there is reason to believe that a client is referred to a legal practitioner or law practice by any other person, the legal practitioner or law practice —

(a) must maintain the independence and integrity of the legal profession, by not permitting the referror to undermine the professional independence of the legal practitioner or law practice;
(b) must not reward the referror by the payment of any commission or other form of consideration;
(c) must not allow the referral to affect in any way the advice given to the client;
(d) must advise the client impartially and independently;
(e) must ensure that any wish to avoid offending the referror does not affect in any way the advice given to the client;
(f) must ensure that the referror does not in any way influence any decision taken in relation to the nature, style or extent of the practice of the legal practitioner or law practice; and
(g) must communicate directly with the client to obtain or confirm instructions when providing advice and at all appropriate stages of the transaction.

14 Rule 39(2) PCR – Online platform allowed potential clients to request quotes from legal practitioners – Whether using the platform to source for clients was "touting" – Whether legal practitioners could pay a fixed fee to use the platform – Whether legal practitioners could pay a fee to the platform based on the amount of work generated

REFERRAL FEES

Facts

Lawyer A had been approached to take part in a startup. The startup was designing an online platform for members of the public to source for lawyers and request fixed-price quotes for legal work. The user would request a quote for a specified type of legal work, and the platform would forward the user's request to lawyers who had registered. The lawyers would then provide the user with a fixed-price quote, and the user would decide which lawyer to engage, if any. The user had to pay the platform a fee in order to engage a lawyer.

The startup would charge lawyers a fixed subscription fee to access the platform. It would also charge lawyers a variable subscription fee based on the amount of work generated, and a fixed fee for each successful referral.

Lawyer A asked if it was permissible for lawyers to source for clients using the platform and if lawyers would face any ethical issues given the platform's proposed payment structure.

Guidance (4 November 2016)

(a) The Advisory Committee noted that sourcing for clients via the platform arguably did not amount to touting, because a user voluntarily came to the platform to look for a lawyer. However, the Advisory Committee questioned if potential clients who used such platforms had a chance to assess the competence of the lawyer they intended to engage.

(b) Lawyer A had suggested that the platform did not "refer" clients to any particular law firm because the user selected which lawyer to engage and could decide not to engage any lawyer. The Advisory Committee disagreed. It was of the view that it would constitute "reason to believe that a client is referred to a legal practitioner or law practice", for the purposes of rule 39(2) of the PCR, if the platform forwarded the user's request for a quote to lawyers the lawyers provided quotes and the user later decided to engage one of the lawyers.

(c) Given that rule 39(2)(b) of the PCR prohibited rewarding a referror by paying commission, the Advisory Committee advised on what payment structures were allowed for online legal marketplace platforms:

(i) Paying a fixed subscription fee for access to the platform was permissible as it was akin to paying for an advertisement.

(ii) However, paying a variable subscription fee based on the volume of sales derived from the platform would in all likelihood contravene rule 39(2)(b) due to its dependency on how much business the practitioner generated off the platform. Such would possibly amount to "reward[ing] the referror by payment of a commission or other form of consideration" and was therefore not permissible under rule 39(2)(b).

(iii) Similarly, paying a fixed amount for every successful job awarded through the platform would also amount to paying commission to a referror and was therefore not permissible under rule 39(2)(b).

15 Rule 39(2) PCR – Whether law practice could remunerate business development manager based on amount of work procured

Facts

A law practice asked if it could employ a business development manager in its conveyancing department. That person's role would be to procure conveyancing work by liaising with, for instance, bankers, agents and mortgage brokers. The law practice asked if employing a business development manager with this job description would amount to touting, and whether it could remunerate the manager based on the amount of work procured.

Guidance (1 August 2017)

There was no prohibition against employing a business development manager to market the law practice. However, remunerating the person based on the amount of work brought in would amount to paying commissions, which would breach rule 39(2)(b) of the PCR. The rule provided that a law practice "must not reward [a] referror

REFERRAL FEES

by the payment of any commission or other forms of consideration". The Advisory Committee advised against this remuneration structure.

GIVING OF FREE LEGAL ADVICE

Rule 47 PCR

Giving of free legal advice

47.—(1) A legal practitioner may give free legal advice to any person at or through any facility established with a view to providing legal assistance to members of the public.

(2) In the course of giving such free legal advice, a legal practitioner must take reasonable steps to ensure that no information pertaining to the legal practitioner is publicised except the legal practitioner's name, the fact that the legal practitioner is a legal practitioner, and the name of the law practice of which the legal practitioner is a director, a partner or an employee.

(3) To avoid doubt, a legal practitioner must not in the course of giving the free legal advice referred to in paragraph (1) —

(a) distribute any of the legal practitioner's business cards or any brochure, leaflet or pamphlet relating to the legal practitioner's practice or the practice of the law practice of which the legal practitioner is a director, a partner or an employee; or

(b) act for any person to whom the legal practitioner has given such free legal advice, unless the legal practitioner acts for that person in a pro bono capacity.

16 Rule 47(3) PCR – Client met legal practitioner through legal clinic – Client later contacted legal practitioner to represent client – Whether legal practitioner could represent client or refer client to another legal practitioner in the legal practitioner's law practice

Facts

Lawyer A met and advised an applicant ("B") in a pro bono capacity at a legal clinic. At the end of the session, B asked for Lawyer A's name, which Lawyer A gave. Lawyer A did not give any other information about Lawyer A's practice. The next day, Lawyer A received a text message from B, who had searched for Lawyer A's contact details online.

GIVING OF FREE LEGAL ADVICE

B wanted Lawyer A to represent B, but Lawyer A told B that Lawyer A could not do so because of rule 47 of the PCR.

[Rule 47(3)(b) of the PCR provides that "a legal practitioner must not in the course of giving…free legal advice [at a facility that provides free legal assistance to members of the public] …act for any person to whom the legal practitioner has given such free legal advice, unless the legal practitioner acts for that person in a pro bono capacity."]

Lawyer A asked whether Lawyer A could refer B to another legal practitioner in Lawyer A's law practice.

Guidance (30 March 2017)

(a) A narrow reading of rule 47(3) of the PCR suggested that Lawyer A could refer B to another legal practitioner from Lawyer A's law practice. However, if the rule was construed based on the broad principle that lawyers should not be permitted to unfairly attract work through free legal clinics, such an arrangement would be prohibited. Given that the scope of rule 47(3) of the PCR had yet to be decided by the courts, Lawyer A would have to make a judgment call on this.

(b) Rule 47(3) of the PCR did not prohibit Lawyer A from accepting a private retainer from B outside the free legal advice scheme, to the extent that the private retainer was on a pro bono basis.

17 Rule 47 PCR – Client referred to legal practitioner from legal clinic – Legal practitioner acted for client on a pro bono basis – Whether legal practitioner could accept paid work on a different matter

Facts

Lawyer A acted for a client ("B") on a pro bono basis on a matter regarding the proper beneficiary under a life insurance policy which B's deceased husband had purchased. B was referred through a pro bono clinic. This matter was settled amicably.

B then returned with her son to request Lawyer A's further assistance on other matters

GIVING OF FREE LEGAL ADVICE

relating to the deceased's other assets, as there had been complications with the CPF Board and various financial institutions. B and her son voluntarily offered to pay Lawyer A for further legal services, without any request from Lawyer A or his law practice.

Lawyer A asked for guidance on whether Lawyer A could accept B's request for further legal services on a paid basis, although B first began as a pro bono client on a matter which had since been fully resolved.

Lawyer A was of the view that rule 47 of the PCR was applicable. [Rule 47(3)(b) of the PCR provides that "a legal practitioner must not in the course of giving the free legal advice [at a facility that provides free legal assistance to members of the public] ...act for any person to whom the legal practitioner has given such free legal advice, unless the legal practitioner acts for that person in a pro bono capacity."]

Lawyer A had the following specific queries:

(a) How should the phrase "**in the course** of giving the free legal advice" in rule 47(3) of the PCR be interpreted? Lawyer A was of the view that the pro-bono phase had ended, as B had requested further legal representation on matters outside the original scope of the pro bono representation and volunteered to pay for such services.

(b) Whether Lawyer A could accept B's request for further legal services on a paid basis, or if rule 47 of the PCR would be read so widely so as to preclude the acceptance of such a request.

(c) Who should Lawyer A refer B to if Lawyer A could not accept the request?

Guidance (7 August 2017)

(a) It was not clear whether B's request related to a new or unrelated matter as the instructions related to the probate/administration of the same deceased person's estate. Lawyer A was asked to advise on various complications/issues arising out of the deceased's estate, whether on the first issue concerning the insurance (which had been resolved), or the second issue concerning CPF monies and dealing with financial institutions. Based on the information

provided, it could not be said that the matter of the probate/administration of the deceased's estate had concluded.

(b) Rule 47 of the PCR applied because B originally approached Lawyer A via a "facility established with a view to providing legal assistance to members of the public" (within the meaning of rule 47 of the PCR) to seek free legal advice on issues/difficulties concerning the probate/administration of the deceased person's estate. Advising B on the present issues concerning CPF and dealing with financial institutions could arguably be considered to be "in the course of" giving the free legal advice concerning the probate/ administration of the estate. This was different from a situation where a family member wished in the future to instruct the legal practitioner to act in a completely unrelated matter. If such new instructions had nothing to do with the probate/ administration of the deceased person's estate, there would be no issues with Lawyer A acting.

(c) The main substantive amendment to rule 47 of the PCR (the former rule 10 of the Legal Profession (Publicity) Rules) was to create a new exception under rule 47(3) of the PCR to expressly allow the legal practitioner to continue acting for the recipient of the free legal advice in a pro bono capacity. The underlying principle/safeguard, however, remained unchanged, i.e. that a legal practitioner was not allowed to attract paid work "in the course of" giving free legal advice via a pro bono legal clinic. The only exception to this was if Lawyer A continued to represent B on a pro bono basis.

(d) Lawyer A could introduce B to another legal practitioner as long as Lawyer A did not receive any commission in exchange for the referral.

EXECUTIVE APPOINTMENTS

Rule 34 PCR

Executive appointments

34.—(1) A legal practitioner must not accept any executive appointment associated with any of the following businesses:

(a) any business which detracts from, is incompatible with, or derogates from the dignity of, the legal profession;
(b) any business which materially interferes with —

(i) the legal practitioner's primary occupation of practising as a lawyer;
(ii) the legal practitioner's availability to those who may seek the legal practitioner's services as a lawyer; or
(iii) the representation of the legal practitioner's clients;

(c) any business which is likely to unfairly attract business in the practice of law;
(d) any business which involves the sharing of the legal practitioner's fees with, or the payment of a commission to, any unauthorised person for legal work performed by the legal practitioner;
(e) any business set out in the First Schedule;
(f) any business which is prohibited by —

(i) the Act;
(ii) these Rules or any other subsidiary legislation made under the Act;
(iii) any practice directions, guidance notes and rulings issued under section 71(6) of the Act; or
(iv) any practice directions, guidance notes and rulings (relating to professional practice, etiquette, conduct and discipline) issued by the Council or the Society.

(2) Subject to paragraph (1), a legal practitioner in a Singapore law practice (called in this paragraph the main practice) may accept an executive appointment in another Singapore law practice (called in this paragraph the related practice), if the related practice is connected to the main practice in either of the following ways:

(a) every legal or beneficial owner of the related practice is the sole proprietor, or a partner or director, of the main practice;

(b) the legal practitioner accepts the executive appointment as a representative of the main practice in the related practice, and the involvement of the main practice in the related practice is not prohibited by any of the following:

(i) the Act;
(ii) these Rules or any other subsidiary legislation made under the Act;
(iii) any practice directions, guidance notes and rulings issued under section 71(6) of the Act;
(iv) any practice directions, guidance notes and rulings (relating to professional practice, etiquette, conduct and discipline) issued by the Council or the Society.

(3) Subject to paragraph (1), a legal practitioner may accept an executive appointment in a business entity which provides law-related services.

(4) Subject to paragraph (1), a legal practitioner (not being a locum solicitor) may accept an executive appointment in a business entity which does not provide any legal services or law-related services, if all of the conditions set out in the Second Schedule are satisfied.

(5) Despite paragraph (1)(b), but subject to paragraph (1)(a) and (c) to (f), a locum solicitor may accept an executive appointment in a business entity which does not provide any legal services or law-related services, if all of the conditions set out in the Second Schedule are satisfied.

(6) Except as provided in paragraphs (2) to (5) —

(a) a legal practitioner in a Singapore law practice must not accept any executive appointment in another Singapore law practice; and
(b) a legal practitioner must not accept any executive appointment in a business entity.

EXECUTIVE APPOINTMENTS

(7) To avoid doubt, nothing in this rule prohibits a legal practitioner from accepting any appointment in any institution set out in the Third Schedule.

(8) To avoid doubt, this rule does not authorise the formation of, or regulate —

(a) any related practice referred to in paragraph (2); or
(b) any business entity referred to in paragraph (3), (4) or (5).

(9) In this rule and the First to Fourth Schedules —

"business" includes any business, trade or calling in Singapore or elsewhere, whether or not for the purpose of profit, but excludes the practice of law;

"business entity" —

(a) includes any company, corporation, partnership, limited liability partnership, sole proprietorship, business trust or other entity that carries on any business; but

(b) excludes any Singapore law practice, any Joint Law Venture, any Formal Law Alliance, any foreign law practice and any institution set out in the Third Schedule;

"executive appointment" means a position associated with a business, or in a business entity or Singapore law practice, which entitles the holder of the position to perform executive functions in relation to the business, business entity or Singapore law practice (as the case may be), but excludes any non-executive director or independent director associated with the business or in the business entity;

"law-related service" means any service set out in the Fourth Schedule, being a service that may reasonably be performed in conjunction with, and that is in substance related to, the provision of any legal service.

General Editor's Note: The First to Fourth Schedules to the PCR are not reproduced here due to space constraints.

EXECUTIVE APPOINTMENTS

18 Rule 34 PCR – Non-executive appointment – Appointment as non-executive director in a company – Applicability of rule 34 of the PCR

Facts

Whether a legal practitioner could be a non-executive director in a company (not a law firm), and give advice and be remunerated in that capacity.

Guidance (24 February 2016)

(a) Given that the query was for a "non-executive" directorship appointment, rule 34 of the PCR did not apply and thus the legal practitioner could accept the appointment.

(b) However, the rationale of rule 34 of the PCR is to prevent a legal practitioner from spending substantive time undertaking work of an executive nature in a corporate setting that would compromise his commitment to his practice of law.

(c) The legal practitioner was advised to determine, through the exercise of his professional judgment, whether the particular position held in the company, even though described as a non-executive directorship, constituted an executive appointment under the PCR.

(d) The legal practitioner had to continue to ensure that he was not expected to take on any responsibilities as a director which would amount to an executive role, such as (but not limited to):

  (i) management of the company's finances;
  (ii) responsibility for making decisions on legal matters involving the company; and
  (iii) operation of the company on a day-to-day basis.

(e) In keeping with the spirit of rule 34 of the PCR, if he accepted the proposed appointment, the legal practitioner had to ensure that:

(i) he would be able to handle the files of his law practice without compromising on the quality of his services to his clients; and
(ii) he would not use his appointment to unfairly attract business to the law practice that he was practising in.

(f) The legal practitioner's attention was drawn to the Fourth Schedule of the PCR – he was strongly advised to ensure that the position he sought to undertake did not fall afoul of the PCR.

19 Rule 34 PCR – Executive or non-executive appointment in a business entity – Equity shareholder in a business entity – Applicability of rule 34 of the PCR

Facts

(a) Whether a legal practitioner is allowed to accept an executive or non-executive appointment in a business entity providing wills, trust and estate planning advisory services; and
(b) Whether the legal practitioner can also be an equity shareholder in that same business entity.

Guidance (11 May 2016)

Issue 1: Executive/Non-Executive Appointment

(a) The legal practitioner should first exercise his own professional judgment, given his understanding of his role in the business entity, to determine whether his role in the business entity amounted to an executive appointment as defined in rule 34(9) of the PCR. Whether rule 34 of the PCR was applicable to his queries hinged on whether his appointment was of an executive nature.

(b) A legal practitioner may, pursuant to rule 34(3) of the PCR and subject to rule 34(1), accept an executive appointment in a business entity that provides law-related services. "Law-related services" as defined in rule 34(9) include "any service set out in the Fourth Schedule, being a service that may reasonably be performed in conjunction with, and that is in the substance related to, the provision of any legal service."

EXECUTIVE APPOINTMENTS

(c) From a market practice standpoint, the Advisory Committee understood that "wills, trust and estate planning advisory services" were services that might reasonably be performed in conjunction with, and are in substance related to the work of legal practitioners in the wills, probate and trust practice.

(d) As such, rule 34(3) read with rule 34(9) of the PCR allowed the legal practitioner in question to accept an executive appointment in such a business, subject to compliance with rule 34(1) of the PCR.

(e) However, as the legal practitioner's primary occupation was to practise as a lawyer, the legal practitioner should be prudent when assessing whether such an executive appointment could materially interfere with, or unfairly attract business to his law practice, or involved sharing of his practitioner's fees with, or paying commission to any unauthorised person (rule 34(1)(b) to (d) of the PCR).

(f) If the legal practitioner's appointment in the business was of a non-executive nature, the legal practitioner had to take note of other salient rules in the PCR that applied regardless of whether his appointment was executive or non-executive in nature:

(i) Prohibitions against entering a business which adversely affected his ability to discharge his professional responsibilities as a legal practitioner (see rules 4 and 5 of the PCR);
(ii) Prohibitions against a business which put him in a position of conflict of interest vis-à-vis a client of his practice of law (rules 20 to 22 of the PCR);
(iii) Prohibitions against engaging in any business, trade or calling that was likely to unfairly attract business in the practice of law (rule 38 of the PCR);
(iv) Prohibitions against touting and rules governing referrals for business (rule 39 of the PCR); and
(v) Prohibitions against sharing his legal practitioner's fees with an unauthorised person (rule 19 of the PCR).

EXECUTIVE APPOINTMENTS

<u>Issue 2: Equity shareholding in the business entity</u>

(g) Neither the LPA nor the PCR governed the issue of a legal practitioner's equity participation in a business entity.

20 Rule 34(1)(b)(i) PCR – Executive appointment – Appointment as in-house legal counsel of a bank – Concurrently holding a practising certificate

Facts

Whether a full-time corporate counsel of a bank, who concurrently held a practising certificate, would be in breach of rule 34(1)(b)(i) of the PCR.

Guidance (23 May 2016)

A full-time corporate counsel should not be allowed to hold a practising certificate concurrently.

(a) His engagement as corporate counsel reduced his ability to devote his professional time, energy and attention fully and solely to the practice of law in his law practice, which was contrary to rule 34(1)(b)(i) of the PCR.

(b) There was also a risk that his work for the bank might conflict with his duties to potential clients, given the breadth of the bank's business enterprise and scale of operations.

(c) Full-time corporate counsel should not be permitted to hold a practising certificate.

EXECUTIVE APPOINTMENTS

21 Rules 34 and 38(a), (b) PCR – Proposed appointments as non-executive nominee director, nominee shareholder and company secretary in a company

Facts

A prospective client approached legal practitioners in a law practice to take on the following roles in a company, which would be in the business of licensed money-lending:

(a) Non-executive Nominee Director (sole and resident);
(b) Nominee Shareholders (for overseas tax purposes); and
(c) Company secretary

The company would only have one director. The law practice intended to provide corporate secretarial services to the company.

Guidance (22 March 2017)

The majority of the Advisory Committee was of the view that the proposed appointments would infringe rules 38(a) and 38(b) of the PCR. The law practice and its practitioners were advised to exercise caution and note that:

(a) the legal practitioner's appointment as a sole nominee director/shareholder could be a cover for illegal conduct;

(b) as sole director, the legal practitioner was responsible for ensuring compliance with the regulatory framework on moneylending and overseeing the day-to-day business – this could bring rule 34 of the PCR into play; and

(c) the business of money lending was closely involved with the business of debt collection. The latter was a prohibited business under the First Schedule to the PCR.

EXECUTIVE APPOINTMENTS

22 Rule 34 PCR – Executive appointment – Appointment as in-house legal counsel in a company – Concurrently a legal practitioner in a law practice on a part-time basis

Facts

Whether a legal practitioner could be employed by a company as a part-time in-house legal counsel (e.g. once a week), while still working as a legal practitioner in a law practice.

Guidance (24 March 2017)

(a) The legal practitioner was reminded that he was to regard the practice of law as his primary occupation and to maintain high standards of professional service and conduct such that he could discharge all his professional duties. However, if his part-time in-house legal role with the company did not affect his ability to discharge his legal professional duties at his law practice, this role was permissible.

(b) The legal practitioner was cautioned to exercise his own professional judgment based on the facts best known to him, to ascertain the business of the company and whether his in-house legal role was an executive appointment within the meaning of rule 34 of the PCR.

23 Rule 34(1) PCR – Executive appointment – Appointment as general manager/manager in company – Concurrently a consultant in a law practice

Facts

Whether a legal practitioner could be employed by a private company as its general manager/manager, while still holding a practising certificate and working as a consultant in a law practice.

Guidance (13 July 2017)

The legal practitioner was referred to his obligations under rule 34(1) of the PCR, and in particular rule 34(1)(b) of the PCR, which potentially prohibited his concurrent

employment as a general manager/manager of a private company and holding a practising certificate as a consultant of a law practice.

24 Rule 34(1)(b), (c) PCR – Executive appointment – Legal consultant in a company – Concurrently holding a practising certificate as consultant in law practice

Facts

A legal practitioner was offered a job as a consultant in a company for 6 months, with an option for renewal for a further six months thereafter. The scope of the consultancy would be for general legal work and reviewing transactions for the company. The nature of work at the company would be flexible, although the legal practitioner was required to be in attendance at the company's office during office hours on weekdays, save for prior arrangements.

The consultancy appointment would effectively be on a full-time basis, although the legal practitioner would continue to service his current or former clients, including court attendances for current clients. The legal practitioner also proposed to undertake that he would not direct potential work from the company to his law practice, save with full disclosure.

Guidance (9 January 2018)

The legal practitioner should not accept the proposed consultancy appointment for the following reasons:

(a) **Rule 34(1)(b) of the PCR:** The legal practitioner's full-time consultancy employment with the company was likely to materially interfere with his availability to his clients. The legal practitioner's potential acceptance of the full-time consultancy employment also suggested that the practice of law would not be his primary occupation. As such, this consultancy arrangement was prohibited by rule 34(1)(b) of the PCR.

(b) **Rule 34(1)(c) of the PCR:** A guideline the legal practitioner had to consider under this rule was whether it was likely that he would use the proposed consultancy arrangement to refer potential work to his firm, taking into

consideration, for example, the nexus between the nature of the proposed work from the company and the nature of work done at his law practice. The legal practitioner was advised to exercise his professional judgment on whether his proposed consultancy arrangement with the company would be likely to unfairly attract business to his law practice.

In relation to the legal practitioner's proposal to undertake that he would not direct potential work from the company to his law practice, save with full disclosure, the Advisory Committee highlighted that there was no such exception under rule 34 of the PCR.

HANDLING AND TRANSFER OF CLIENT DOCUMENTS

25 Completed retainer – Original documents returned to client – Client requested further copies of documents which belonged to law practice – Whether law practice entitled to charge

Facts

Law Practice A had returned original documents to its client ("B") and retained copies of these documents. However, B subsequently requested Law Practice A to provide B with copies of the documents (i.e. from the copies which Law Practice A had earlier retained). Law Practice A asked if it could charge B for giving copies of the documents, or if such copies belonged to B.

Guidance (2 August 2017)

(a) Copies of files are usually made in anticipation of complications, i.e. for the practitioner's own protection. The Annexure to PDR 2013, paragraph 46 on Storage and Destruction of Documents provided that "...b) Documents prepared by you for your own benefit or protection ... belong to you."

(b) Ownership of such copies therefore belonged to Law Practice A and Law Practice A could charge B for providing B with copies of the above.

26 Rule 26(7) PCR – Legal practitioner moving to new law practice – Clients requested transfer of their matters to legal practitioner's new law practice – Legal practitioner's former law practice requested "reasonable security" to be provided – Meaning of "reasonable security"

Facts

Lawyer A recently moved from Law Practice B to Law Practice C. Several clients requested that their matters be transferred to Law Practice C. Under rule 26(7) of the PCR, an incoming legal practitioner has an obligation to provide "reasonable security" for an outgoing legal practitioner's unpaid legal costs. Law Practice B requested Lawyer A to provide details of the reasonable security.

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Lawyer A sought the Advisory Committee's guidance on:

(a) the meaning of the phrase "and provides reasonable security for ... unpaid costs" under rule 26(7)(a)(i) of the PCR; and

(b) whether Law Practice B was entitled to retain the documents on all matters and not transfer all files despite the client's request, even if the invoices on some matters from the same client had been paid.

Guidance (20 September 2016)

Issue 1: What is "reasonable security" under rule 26(7) PCR?

(a) In *Understanding Lawyers' Ethics in Singapore,*[3] the learned authors noted that rule 26(7) of the PCR is derived from rule 15 of the Australian Solicitors' Conduct Rules ("ASCR"). On the meaning of "reasonable security", the learned authors suggested the following:

"...commentary to the equivalent Australian rule may be helpful:

Reasonable security may include, but is not limited to:

(i) an undertaking given by a solicitor;
(ii) a deed entered into by the relevant parties, such as the first solicitor, the second solicitor and the client."

(b) Similarly, the Advisory Committee suggested that helpful guidance on what constituted "reasonable security" could be gleaned from the Australian authorities:

(i) In Australia, the courts have examined the similar phrase "satisfactorily secured" under the predecessor Legal Profession (Solicitors) Rules 2007. In *Bechara t/as Bechara & Co v Atie & Anor* [2005] NSWCA 268 ("*Bechara*"), McColl JA explained that:

3 Alvin Chen & Helena Whalen-Bridge, *Understanding Lawyers' Ethics in Singapore* (Singapore: LexisNexis, 2016).

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"The expression "satisfactorily secured" should be understood, both by reference to the authorities dealing with possessory liens, and in its textual context, to refer to the provision, in lieu of payment, of something of monetary value which would ensure the satisfaction of the possessory lien. Like should be replaced with like..." (Bechara at [64])

(ii) The court in *Bechara* suggested that on the facts where litigation was undertaken with payment only to be made in the event of a successful outcome, satisfactory security might constitute an agreement providing for retention by the incoming solicitors of the verdict or settlement monies to the extent necessary to meet the outgoing solicitors' costs (see *Bechara* at [65]).

(iii) In addition, the court in *Bechara* referred to a tripartite deed, to be entered into between the outgoing solicitors, incoming solicitors and client, which might operate as an alternative assurance that the outgoing solicitors will be satisfactorily secured (see *Bechara* at [66]). Under the deed, the incoming solicitors undertake to pay the outgoing solicitors' costs and to retain the amount claimed by the outgoing solicitors in their trust account, and the client agrees to give the incoming solicitors an irrevocable authority to receive money from the other party and to pay the outgoing solicitors' costs. The Advisory Committee noted that the Law Society of New South Wales had issued such a tripartite deed.[4]

(iv) However, a tripartite deed may not be sufficient in all cases and what is "satisfactory security" will depend on the parties' agreement and the relevant circumstances. Where parties have agreed that the costs will only be paid out of a verdict, judgment or settlement, satisfactory security will be less than if the parties' agreement provides for payment of costs as and when incurred and invoiced, since in the former category of case the solicitor is prepared to take a chance while in the latter he is not (see *Tyneside Property Management Pty Limited v Hammersmith Management Pty Limited & Ors* [2011] NSWSC 22, where the option of entering into a tripartite agreement did not result in a satisfactory outcome).

4 See <https://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/costs/tripartite deeds> (accessed 29 January 2019).

(v) Other alternative measures ordered by the courts as "satisfactory security" include the retention of the outstanding amount as security in the trust account of the incoming solicitors, the outstanding amount being paid into court, and the creation of a charge over real estate or other property sufficient to adequately secure payment of the outstanding amount (see *Mathew Chaina & Ors v The Presbyterian Church (NSW) Property Trust & Ors* (No 4) [2011] NSWSC 524; *Gigi Entertainment Pty Limited v Basil John Macree* (No. 2) [2011] NSWSC 869).

(vi) In examining the Australian authorities, it therefore appears that a number of things can constitute "reasonable security". In some cases, a simple undertaking by the incoming solicitor to pay the outgoing solicitor's outstanding fees may be sufficient if all parties are satisfied (see commentary to the ASCR at para. (a) above). However, depending on the circumstances of the case and the solicitors in question, additional security may be required which may take the form of, for example, a tripartite deed, retention of monies in a trust account or a charge over properties.

(c) Notwithstanding that examples of "reasonable security" can be gleaned from the Australian authorities, the Advisory Committee noted that the court is the final arbiter on the interpretation of "reasonable security" under rule 26(7) of the PCR and the only definitive way of determining the question is by making an application to the court for this question to be decided. Thus, the Advisory Committee's observations above were only meant for Lawyer A's consideration and were not intended to be the final word on this issue.

(d) Further, the Advisory Committee did not have information on the matters that Lawyer A had sought to be transferred from Law Practice B to Law Practice C in order to determine the "reasonable security" that Lawyer A was obliged to furnish to Law Practice B. In any case, this was a fact-sensitive question and the Advisory Committee suggested that, keeping in mind the utility of the Australian authorities, it would be best left for Lawyer A to exercise his professional judgment to work out a suitable arrangement with Law Practice B.

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Issue 2: Whether a previous firm is entitled to retain the documents where invoices on some matters from the same client have been paid

(e) The Advisory Committee noted that rule 26(7) of the PCR refers to "a lien for unpaid legal costs over any document of his or her client relating to **a matter**" (emphasis added). This would suggest that the retaining lien should only be exercised for each file pertaining to each matter in question, unless it can be argued that all these matters from the same client in fact touch upon the same "single matter". However, the Advisory Committee did not have sufficient information on the matters to give a specific answer and suggested that Lawyer A exercise his professional judgment to determine this issue.

The Professional Ethics Digest contains relevant illustrations of the application of the Legal Profession (Professional Conduct) Rules 2015.

Based on the Advisory Committee's guidance on practitioners' queries, this handy guide is a helpful and practical resource to all legal practitioners practising in Singapore.