

# The Law Society of Upper Canada



## LECTURES ON PROFESSIONAL CONDUCT AND ETIQUETTE

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C.B.E.*

## **TO MEMBERS OF THE PROFESSION**

By direction of Convocation on the recommendation of the Discipline Committee, these lectures are sent to you with the hope that they may be of assistance to you in solving some of the problems that arise in the practice of your profession.

While some of Mr. Lund's material may not be strictly relevant in Canada, the Discipline Committee thought the lectures contained such a masterly statement on professional conduct and etiquette that they should be placed in the hands of the members of the Profession, who will be greatly rewarded by their careful reading.

OSGOODE HALL, TORONTO,  
June 15th, 1956.

# The Law Society



## A LECTURE

ON

# PROFESSIONAL CONDUCT AND ETIQUETTE

By

THOMAS G. LUND, C.B.E.

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and Deputy Registrar of Solicitors)*

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## A LECTURE

ON

## PROFESSIONAL CONDUCT AND ETIQUETTE

delivered to members of The Law Society in  
January 1950, by THOMAS G. LUND, C.B.E.,  
the Secretary of The Law Society.

Ladies and Gentlemen,—You will see from the Outline which you have in your hands that I have a wide field to cover and I would like to start by saying that, as I understand that there are many articulated clerks present as well as young solicitors, I hope that the senior members of the profession here to-night will bear with me if at times I appear to go into matters which may be rather elementary. My first obvious duty to you in a lecture of this sort, dealing as it does with professional conduct, is to make a clean breast of the fact (and I therefore give immediate “notice of change”) that the title of this Lecture has been altered from the advertised one of “Professional Practice and Etiquette” to “Professional Conduct and Etiquette” because I do not want you to think that I am going to discourse on what is or is not proper conveyancing practice or anything of that sort, which is far beyond my powers. I have, unfortunately, been quite unable to find any precedent for my lecture, to my great regret I am bound to admit, and therefore I have been forced to try to work out an arrangement of my subject and I can only hope that it may commend itself to you as being at least one practical way of dealing with it.

As you will see, I propose to begin by dealing with what is already established as being professional misconduct, and then to go on to deal in considerable detail with the Solicitors Practice Rules, 1936, upon which I think no authoritative pronouncements have yet been published, and I shall try to illustrate the operation of those Rules by applying them to particular cases about which many questions are asked. Finally, I shall come to difficult cases where a solicitor's duties to court, clients and others come into conflict. I would only add, finally in parenthesis, that the decisions which I will give to you are not by any means all based upon complaints that



have been made ; in many cases they are decisions given upon inquiry made in advance by solicitors what their professional duty in certain circumstances would be.

#### THE DISTINCTION BETWEEN PROFESSIONAL MISCONDUCT, UNPROFESSIONAL CONDUCT, AND A BREACH OF ETIQUETTE

First of all I want to distinguish the three grades of improper professional conduct. The distinction is at times a very fine one. There is, on the one hand, professional misconduct, the penalty for which, when such misconduct is found by the Disciplinary Committee or the Court, is striking off the Roll, suspension from practice, a fine of up to £500, or a censure and payment of costs. The next type of improper conduct is unprofessional conduct, that is conduct which, while not quite amounting to professional misconduct, is not approved—where, for example, the Court or the Disciplinary Committee may not have been prepared to find professional misconduct on the facts of some case, but have decided that the solicitor has had no one but himself to blame for having been charged with the offence, and they accordingly have ordered that he pay the costs. The act or omission in such a case we call unprofessional conduct. Finally, there is a breach of etiquette. That, I think, is really a breach of professional good manners, and the only sanction for that in an extreme case would be the exclusion of the offender from membership of this Society on the ground that he did not conform with the accepted conduct and traditional behaviour of solicitors, who are gentlemen.

I should point out at once that standards of professional conduct change as time passes. What is entirely proper for one generation may be slightly irregular for the succeeding generation and highly improper for the next. One can point quite easily in this connection to the banking of clients' moneys. Only a generation ago there was nothing at all improper in your keeping your clients' money in your own bank account and using it practically as though you were a banker. As you know, that position has changed very rapidly, and any such conduct as that now is without question professional misconduct.

#### PROFESSIONAL MISCONDUCT

First, as to what has already been held to be professional misconduct. That, I think, falls fairly easily into two main classes : statutory misconduct, that is to say a breach of a statutory duty or an infringement of some statutory prohibition ; and non-statutory misconduct, which is conduct which

the Court or the Disciplinary Committee have held to be conduct unbecoming a solicitor as an officer of the Supreme Court and as a member of an honourable profession.

(a) STATUTORY MISCONDUCT

Statutory misconduct falls into five divisions. First of all there is the offence under s. 51 of the Solicitors Act, 1932, committed by a solicitor who enables an unqualified person to conduct legal proceedings or to appear, act or practise as a solicitor or, indeed, who allows his name to be made use of for the profit of an unqualified person. That was the cardinal offence for any solicitor to commit up to the beginning of the present century. Even now anyone found guilty of that offence must have his name struck off the Roll. The section prescribes that penalty, and it is the only offence for which striking-off the Roll is the sole penalty. Any unqualified person who is so enabled to act or practise as a solicitor is liable to a term of imprisonment not exceeding one year. Related to that offence under s. 51, is the offence under s. 45 of the 1932 Act which is committed by a solicitor who while uncertificated conducts legal proceedings. If he does that he is guilty of a misdemeanour and contempt of court.

Covering an unqualified person

The second division of statutory misconduct which I have made, covers offences under s. 52 of the 1932 Act which prohibits the employment or remuneration of a solicitor who has been struck off the Roll, or one who is under suspension from practice, by any other solicitor without the consent of The Law Society; and to that has been added the additional offence of employing an unqualified clerk in respect of whom the Disciplinary Committee have made an Order prohibiting his employment by any solicitor. Section 16 of the 1941 Act provides that where an unqualified clerk has been convicted of a criminal offence in respect of money or has been a party to any act or default in respect of which his employer, had he been the offender, would have been liable to be struck off the Roll, the Disciplinary Committee may entertain an application in respect of the clerk. The Order is not against the clerk but is really against the profession generally and prohibits them from employing that clerk without express permission from The Law Society.

Employing an ex-solicitor or one under suspension

The third class of case is quite new, and is offences under s. 54 of the Solicitors Act, 1932, which was repealed in December last, and re-enacted by s. 7 of the Justices of the Peace Act, 1949. The new s. 54 provides that a solicitor who is a justice of the peace for any area, and his partner, if any, may not act in connection with proceedings before any justices of that area, either as a solicitor or as an agent for any other solicitor; provided, however, that if although he is a

Practising before Magistrates when a Justice of the Peace



justice of the peace the solicitor's name is on the Supplementary List only for that area, or if he is for the time being excluded from the exercise of his functions as a justice for that area under s. 4 of the Justices of the Peace Act, 1906 (which relates to *ex officio* justices), neither he nor his partner is to be disqualified from practising before the local justices. The new section also provides, however, that where a solicitor is a justice of the peace for the County of London by virtue of being a mayor of a metropolitan borough, his partner is not to be disqualified from practising before the borough bench.

It is quite clear that that sort of statutory prohibition is an important one from the public point of view, because it is most undesirable that anyone should think that by going to a particular solicitor or firm of solicitors he may obtain preferential treatment before a particular bench.

On the basis that not only should justice be done but it should manifestly appear to be done, there have been rulings given by the Council which extend the principle underlying this particular section. The Council have expressed the view that a solicitor ought not to appear before justices one of whom is his father or his partner's father or mother or his managing clerk, unless, of course, they are *ex officio* justices by virtue of being mayor and in fact do not sit. The Council have gone further than that and have said that, in accordance with the best traditions of the profession, even if a solicitor is in no way connected with the justices themselves, but if the clerk to the justices is the father or the husband of the solicitor, or even a partner of the solicitor's partner, he ought not to appear before those justices; nor should he if the clerk is his own unqualified clerk or, indeed, even if he is a pensioned clerk. In none of those cases is it desirable that a solicitor should appear before the bench.

False  
declarations

The fourth statutory offence is the making of a false statement in the declaration leading to the issue of a practising certificate. I am bound to say that the Council have been slow so far to take proceedings in respect of this offence, although it is astounding how many, if not false, at least one might say, highly inaccurate statements are made in declarations in connection with the issue of a practising certificate. The most frequent type of error is the statement that "I am exempt from compliance with the Solicitors Accounts Rules" when there is no exemption whatever; or solicitors have declared that "I have complied with the Solicitors Accounts Rules" when either shortly before or shortly after, an accountant's certificate has been lodged specifying breaches of the rules. However, all these declarations are examined, and so far, while the form of declaration



is comparatively new, the Council have been lenient about it and have tried to get inaccuracies corrected by kindness rather than in any other way. It does, however, lead to a great deal of unnecessary work in the office and one of these days I expect disciplinary proceedings will be launched based on a false declaration alone.

The last group of offences constituting statutory professional misconduct are breaches of the rules made under the Solicitors Act, 1933, or under the Solicitors Act, 1941, namely, the Solicitors Accounts Rules, 1945, the Solicitors Trust Accounts Rules, 1945, the Accountant's Certificate Rules, 1946, and the Solicitors Practice Rules of 1936. With regard to the first three sets of Rules I am not going to attempt to speak, first, because I think they would require a lecture entirely on their own, and secondly, because there is an excellent little booklet entitled "Solicitors' Accounts" which is obtainable in the office here at the price of 2s. which sets out all you need to know about proper accounts, and it gives the relevant sections of the Act, and the rules and interpretations of them. It sets it all out very much more shortly and at least ten times more accurately than I would be able to tell it to you tonight! On the other hand I am proposing to deal in considerable detail later with the Solicitors Practice Rules, 1936.

Breaches of  
Statutory  
Rules of  
Professional  
Conduct

#### (b) OTHER PROFESSIONAL MISCONDUCT

As regards non-statutory or other professional misconduct, I think this should be classified under two main heads, or, at least, that is the way in which I have classified it.

First of all, a conviction by a court of criminal jurisdiction makes a solicitor, *prima facie*, unfit to continue on the Roll, but the nature of the offence of which he has been convicted is a material consideration. The true test is whether the offence is of such a character as to make the person guilty of it unfit to remain an officer of the court and a member of an honourable profession. You can see for yourselves the difference between a criminal conviction involving fraud and a criminal conviction for example arising out of leaving your motorcar causing an obstruction in Bell Yard while this lecture is being delivered.

Conviction  
by a Court  
of Criminal  
Jurisdiction

Lord Esher as Master of the Rolls once put the proposition in this way in considering an application to strike a solicitor off the Roll after conviction: "Ought any respectable solicitor to be called upon to enter into that intimate intercourse with such a solicitor which is necessary between two solicitors even though they are acting for opposite parties? In my opinion if the offence is personally disgraceful he ought not to remain on the Roll." Therefore the test, as I see it, is ;

Is the offence of which he is convicted by a court of criminal jurisdiction a personally disgraceful offence? If so, it is professional misconduct. If not, it is not.

Breaches of  
duty towards  
the court,  
clients and  
others.

The second classification is a breach of a duty towards the court or a client or even other persons not clients. This was one of the hardest parts of my lecture to prepare because it involves an examination of the solicitor's duty towards court, client and public. I felt encouraged on reading a statement of the Master of the Rolls (again Lord Esher) which I shall presently mention, as I had come to the conclusion that those duties are really not capable of exact definition; but I think this much is clear, that part of a solicitor's duty to the court is not to keep back from the court any information which ought to be before it, and he must in no way mislead the court by stating facts which are untrue. At the same time a solicitor is bound to act with the utmost fairness with regard to his own client; he is bound to use his utmost skill for his client, but he is not bound to degrade himself for the purpose of winning his client's case. He ought never to fight unfairly, though he is bound to use every proper and fair effort to bring his client's cause to a successful issue. He ought not to forsake a client on mere suspicion of his own as to his case or on any view he might take as to his chances of success. The relationship between solicitor and client, however, involves the solicitor as I have said in a duty not to fight unfairly, and that arises from his duty to himself and to his profession generally not to do anything which is degrading to himself as a gentleman and a man of honour. Lord Esher said that, having regard to a solicitor's duty to the court, how far a solicitor might go on behalf of his client was a question far too difficult to be capable of abstract definition, but when concrete cases arose, everyone could see for himself whether what had been done was fair or not.

That may be true, but it is not always easy to decide at the time. It is clear that a solicitor must do for his client what is best for that client to his own knowledge and in the way which is best to his way of thinking, and if he fails in either of those respects he does not discharge his duty to his client. On the other hand, a solicitor is not bound to assist his adversary. If he knows that there is a witness who would assist the adversary and injure his own client, he is not only not under any duty to inform his adversary of this, but he would betray his own client if he did so; but if he knew that an affidavit had been made in the cause which he was conducting, and which, if it were before the court, would affect the mind of the judge, and if he knew that the judge was ignorant of that affidavit, he would fail in his duty to the court if he concealed the affidavit from the judge. Also, of course, if he were to make



any wilful misstatement to the court, he would be outrageously dishonourable.

Finally, may I give you this further statement by Lord Esher with regard to a solicitor's duty to those not his clients : " If a solicitor were instructed by a client to take proceedings which could legally be taken but which would to the knowledge of the solicitor injure his opponent unnecessarily, but the client nevertheless instructed him to go on in order to gratify his own anger or his malice, then, if the solicitor knew all this, he would be unfair and wrong if he took those proceedings, despite the fact that he would be acting on specific instructions in doing so."

That, in broad outline, is the best general guide I have been able to find to the duties of a solicitor in litigation towards the court, the client and the non-client. May I illustrate those guiding principles by giving you examples of actual conduct which has been held to be professional misconduct in breach of each of those three duties. Professional misconduct in respect of breaches of duty to the court—the filing of a false affidavit or the suppression of an affidavit ; false representation by a solicitor to the court that he is instructed to oppose a winding-up petition, subornation of perjury, and personation to obtain payment of moneys out of court are all dishonourable conduct towards the court. As to the duty towards the client—any form of fraud or dishonesty, for example, actual fraud or intentional dishonesty, whether committed on a client or on anyone else, and whether committed as a solicitor or not ; to allow fraud knowingly to be committed on your own client ; to make untrue representations or to conceal material facts from clients or others in a fiduciary relation with a dishonest or improper motive ; to take improper advantage of the youth, inexperience, want of education, lack of knowledge or unbusinesslike habits of a client (for example, by borrowing money on no or insufficient security without insisting on the client being independently represented in the transaction) ; of course, misappropriation of clients' moneys, or not applying clients' moneys paid to him for a specific purpose to that purpose ; and, indeed, advising or making unauthorised, rash or hazardous speculations or investments with clients' moneys. All those actions have been held to be breaches of a solicitor's duties to his client.

As regards the duty to the public at large, it is really a matter of any fraudulent conduct : for example, not disclosing to a purchaser when you are acting for the vendor the existence of a mortgage on the property ; permitting your client to suppress a will ; ante-dating deeds with intent to deceive



creditors or defraud the Inland Revenue ; or forging a signature to a mortgage even without any intent to defraud.

Finally, there are the cases of what has been called blatant impropriety. I am sure it will not come as a great shock or surprise to you to learn that intoxication in court is included under this head, as also is carrying on a business which is wholly inconsistent with the character and nature of the business which a solicitor carries on or ought to carry on (for example, carrying on a bookmaker's business) and, indeed, any conduct which, if committed prior to admission as a solicitor, would have been sufficient to prevent the intending solicitor from being admitted.

## SOLICITORS PRACTICE RULES, 1936

### RULE 1

#### (a) TOUTING

And now I propose to start a more detailed examination of the Solicitors Practice Rules\* which I have had printed for you on pages 3 and 4 of the Outline which is in your hands in order to avoid my having to refer continually to the rules or to read them out to you. As regards rule 1, you will observe that it covers three classes of offence: touting, advertising and attracting business unfairly. Touting does not really need very much definition. It ought, however, to be said that the offence may be committed either orally or in writing and either personally by the solicitor or by a member of his staff or someone acting as his agent.

Here are some examples of what constitute infringements of the rule against touting: a contract which provides that if the purchaser shall employ the vendor's solicitor, the vendor will pay the purchaser's costs; or any clause in a contract which is an inducement to the purchaser to employ the vendor's solicitor. It is an offence for a solicitor to allow that to be done and he should not act if it has been done. A second example is a letter which is used very frequently to be written: "I am instructed by the vendor to act for him on the sale to you" of certain property—and the letter ends—"If you have no solicitor to act for you, I shall be very glad to do so." That is a direct solicitation of instructions and an infringement of the rule. A third example, and the last I propose to give, is that of a solicitor for a building or similar society which advances moneys on mortgage who agrees two scales of mortgagees' costs with the society, one an ordinary mortgagees' scale and the other a reduced scale of mortgagees' charges to operate where the solicitor acts also for the borrower; or, indeed, any case where a solicitor allows the building or

\* See Appendix on p. 55

similar society to publish a purchasers' scale of costs (which obviously carries the implication that he as their solicitor will act on the sale under that scale), or a mortgagors' scale or any indication that the solicitor for the building society is willing to act for the borrower either on his mortgage or purchase. So much for touting.

#### (b) ADVERTISING

And now I come to what the rule refers to as "advertising." This is one of the more difficult topics, and one with which I am proposing to deal in considerable detail, principally for the benefit of the rising generation of solicitors. Times are changing, and continually will change, and views on what constitutes advertising have already changed very considerably. I think there has been a great relaxation in what used to be the very strict view of what constituted advertising, but in the hope that it may assist members and possibly avoid the need for them to write seeking advice I propose to deal with advertising under a series of homely sub-headings, beginning with name-plates and office windows.

What may be put on a name-plate? The answer is your degrees, legal or otherwise, and your qualifications properly so-called, including, if you like, your honours qualification or the fact that you are a chartered accountant or chartered secretary; but not an alleged specialist qualification such as, for example, "Legal Consultant in Town and Country Planning and Public Administration." That is objectionable on your plate. It may be true, but you must not say so. You may obviously put on your genuine descriptions as Solicitor and Commissioner for Oaths, Notary Public, Privy Council Appeal Agent, and so on; and there is no objection to a limited amount of information, particularly at provincial offices. For example, it has been held that there is no objection to including the words: "If absent, please telephone" such and such a number or "Office Hours: open from 9 a.m." to such and such a time. But that information must be limited and it is objectionable to put up a plate with an arrow or hand pointing, marked "Three doors down" or "First turning on the left" or something like that. The object of your plate, after all, is to indicate to your clients when they come down the street that that is where you are to be found; and it is not intended to be a general direction to the public to find your office wherever it may be.

Name  
Plates

The size and design of the plate is really a matter of taste for you to decide, subject to this, that it has been held to be quite improper to put the firm name and the description "Solicitors and Commissioners for Oaths" in gold letters about a foot high right across the width of the building.



As I have said, the object is to enable your client to find your office and not that the whole populace should be able to see it from the other end of the town. In fact, in certain exceptional circumstances, approval has been given to a plate being illuminated, but by that I do not mean that a neon sign flashing on and off would commend itself even in Piccadilly Circus. In a case where a solicitor had his office in a dark arcade, the entrance to which was entirely surrounded by neon lighting, it was held not to be unreasonable for that solicitor to be allowed modestly to illuminate his own name-plate.

Where may you put the name-plate? Oddly enough, this causes a lot of difficulty. The answer is: outside any building which is a bona fide office address of the solicitor, including his private house if he practises there, and even if it is his father's house in which he lives, if he does actually practise at that address; but certainly not on his father's house if he has no place of business there. Indeed, it may be placed outside the house of a clerk if it is a bona fide office address of the solicitor and used as an office, but the name of the clerk must certainly not appear on the plate, and in no circumstances whatever may the plate be put outside the houses of clients or friends even though it states that the solicitor will attend there on request, or that messages may be left for him there. That is highly objectionable.

#### A Solicitor's Notepaper

The next sub-heading is notepaper. I want to divide this sub-heading again into three categories: (a) a solicitor's own notepaper; (b) his clients' notepaper; and (c) other people's notepaper. On your own notepaper it is very much like your plate: you may have your decorations and degrees, legal or otherwise. In this connection I ought to have said that you must not include any degrees which are quite obviously valueless. By that I mean that if you have obtained, let us say, from a gentleman living at Chipping Norton in exchange for a £5 note a certificate that you are a Doctor of Philosophy of the University of Sidi Barrani, that degree is not suitable for inclusion. You may laugh, but it has been done. Your honours qualifications may go on; obviously your bona fide description as an international or dominion law agent, or Privy Council Appeal agent, and any legal appointments which are held may be shown, such as Clerk to the Justices.

Perhaps I might interpolate here that a Clerk to the Justices ought not to use his notepaper headed "Office of the Clerk to the Justices" in connection with his private practice, not because it is advertising but because it is calculated to make the recipient think that the letter comes with even greater force than it would from his office as a solicitor; it gives it a sort



of cachet of the court. Therefore, if your notepaper is headed "Office of the Clerk to the Justices," it must be used only for communications on official court business.

You may put on your notepaper "Member of The Law Society." But you must not put on things like "Registered United States Patent Agent," or, for example, "Solicitor to the So-and-so Building Society or Insurance Company," or, indeed, the names of any clients unless and except when that paper is used exclusively for that client's own business. You may, if you wish, include the name of a certificated managing clerk, but not the names of uncertificated or unqualified clerks or, indeed, the name of an uncertificated partner, as was done on occasions during the war when a partner was away on active service and did not renew his practising certificate. His name must be left off the paper. Further, where you put on the names of certificated managing clerks, they will normally be under a line or with some description such as "Associate," "Assistant" or "Consultant"; and there is no objection to that provided the solicitor above whose name that appears holds a practising certificate and in fact works in the same office.

London and country solicitors, on the other hand, are not free, if they are not in partnership, to advertise each other by putting one another's names on their notepaper under the heading "Associated with . . ." or under the title "London Agents"; and you may not put on your notepaper the name of a consultant in international law, for example, who happens to be in your office because you have given him a seat there, unless he is in fact a partner.

Finally, as regards the address, you should not print the words "and at Paris," or "Madrid," or wherever it may be, followed by an address if that address or office in Paris is in fact only the address of a foreign correspondent and is not your own bona fide office address.

As we have many enquiries on the subject of envelopes and Envelopes  
cheques, may I just say this, that there is no objection what- and  
ever to the use of a franking machine to include the name and Cheques  
address of the solicitor as well as the stamp and postmark; and there is no objection to your having on your envelopes a direction that if they are undelivered, the letters should be returned to a named firm of solicitors. There is no objection, either, to the names of the partners and the firm name and telephone number, if you like, and the description "Solicitors and Commissioners for Oaths," together with your office addresses, appearing on your firm's cheques, if you can find room to put them all on.

And now as regards your clients' notepaper, the general Clients'  
rule here is quite clear: You must not allow your names to Notepaper

be used on your clients' notepaper, whether it describes you as solicitor, honorary solicitor, honorary legal adviser, or otherwise, except only where you yourself use that paper *qua* solicitor on the business of that client. It does not matter whether it is the client's name at the top and yours underneath or yours at the top and his underneath, provided it is you yourself who use the notepaper and you use it exclusively on business relating to that client's affairs. You must never let him use it. That rule about being objectionable applies whether the clients are estate agents, building societies, benevolent societies or trade protection associations; even a patent agent by whom a solicitor is employed may not put, for example: "London Manager, Mr. So-and-so, Solicitor" on his notepaper; that is objectionable. A foreign client must not have the solicitor's name and description "Legal Counsellors for England" on his notepaper; that is clearly advertising the solicitor.

Other  
persons'  
Notepaper

As regards your name appearing on the notepaper of persons or bodies who are not clients, I think that practically always the answer is that it must not be done. Your name, for example, must not appear on the notepaper of a foreign lawyer employed by you and provided with a seat in your office. You must not allow your agents abroad to put on their paper "London Agents" or "English Agents, Messrs. So-and-so"; and where in fact you hold an office in some association such as president of a chamber of commerce or something of that sort, it is improper on their notepaper for you to allow the description "Solicitor" to appear after your name.

Directories

Now as to directories: I am glad to say that this rule is fairly straightforward and simple. The general rule is this: there is no objection to the inclusion, whether for payment or not, of a solicitor's name, address and description in a directory (and the term directory includes a local directory), so long as the directory is open to the whole profession (or as the case may be all the local solicitors); and provided both as regards general and local directories that the announcement does not take the form or have the appearance of an obvious advertisement for the solicitor himself. To include an entry covering half a page instead of a line or two would be objectionable; but it is not objectionable to print your name in heavy type in the London Telephone Directory, because it is comparatively rarely that a member of the public starts looking through the London Telephone Directory when he wants to find the name of a solicitor to act for him! There is no objection, therefore, if you wish to do it, to your having your name in heavy type there for the assistance of your clients who may want to find your telephone number quickly. Objection has, however, been taken to someone taking a whole page in the Irish Law List and occupying it with the



names of firms for whom he acts as professional agent. That is objectionable, and it is also objectionable to put in a legal diary, after the description "Solicitor," the words "Advocate in all Local Courts."

Finally, where a directory listed the members of a local chamber of commerce under particular trades or professions, including that of a solicitor, and stated in the body of the directory that members would be well advised to consult or deal with fellow members as shown in that directory, this was construed as constituting an advertisement of any solicitors who allowed their names to be included in that list.

I come next to brochures, and by brochures I mean any literature issued by organisations, whatever they may be. The broad rule is : A solicitor's name, description and address may appear in literature issued by a recognised body or society in the following circumstances only : the solicitor's particulars and description should not appear otherwise than in a list of officers and professional advisers of the particular body or when given in accordance with statutory requirements or Stock Exchange rules ; secondly, his name should be published bona fide in the interests of the client and not in order to advertise the solicitor ; thirdly, the solicitor must be acting for the body concerned *qua* solicitor and not only in some other capacity ; and fourthly, the solicitor's name should not in any circumstances appear on the organisation's letter paper. As examples of that, may I say that there is no objection to a solicitor's name and address appearing on a prospectus or on a pamphlet issued by an Income Tax payers' association alongside the names of the auditors, or, indeed, to the solicitor's name being printed on the book of rules of a sports club ; those are quite unobjectionable. But it is objectionable where a solicitor's name appears as a director in an annual report of a company, to publish as well as the description "Solicitor" the firm name in which he practises. It is objectionable for a solicitor to publish in, for example, an annual report of a chamber of trade, a letter referring to the good work he has done for the members of the organisation during the year ; and it is objectionable to allow your client to send out a calendar to all his customers which contains your name on it as his solicitor.

Finally, it is objectionable for a solicitor's name to appear in any brochure where the association recommends its members to consult the association's solicitors ; for example, a trade association which says "Members are entitled to consult our solicitors, Messrs. So-and-so, who can give very good advice on trade matters." That is objectionable.

Although it is not directly relevant to the subject of brochures, as inquiries are frequently received as to the

Brochures

Endorsements on documents



propriety of the endorsement of a solicitor's name upon deeds, may I say that, while in the Council's view it is not proper for a solicitor's name to appear on the endorsement of standard forms of deeds and wills which he may have drafted, there is no professional objection whatever to his name appearing on the endorsements of conveyances, leases, wills and other documents drawn by him on behalf of specific clients in the course of his normal professional practice.

#### Books

Now as regards books, the rules are not very many. You may write a book on a legal subject in your own name or in the pen-name "Solicitor," or indeed in both, but you must never include your firm name or professional address. There is no objection whatever to your writing a book to be published by clients for their members on a technical subject, for example, a book dealing with the Road Traffic Act to be published for the benefit of some road traffic concern, and there is no objection where you do write a technical treatise of that sort to a description in addition to "Solicitor" of something like "Legal Adviser to the So-and-so Transport Board," provided that that particular post is a whole-time one and you are therefore not free to accept instructions from members of the public. In that class of case there can be no question of the unfair attraction of business, and there is no objection to that description being included.

But a solicitor should not allow a foreign client to publish a book, in the preface of which the statement is made that the solicitor who is named is the author's solicitor and was engaged in certain proceedings in England on the author's behalf.

#### Press and other Articles

As regards articles in legal or other journals, a solicitor may write articles on legal matters to be published in legal journals over his own name and description "Solicitor," but if the articles are written, whether on legal subjects or otherwise, for a non-legal journal or a newspaper, they may bear either the name of the solicitor without any description or the word "Solicitor" only, but never both. If a solicitor writes such articles in his own name without the description "Solicitor," the article itself should not say or imply that he is in fact a solicitor. There is perhaps one small exception to this rule—I am not quite sure that it is an exception—but it seems that if you write a legal article for a technical journal, and that journal is distributed to a limited class, namely, the members of the association for which you are, let us say, honorary legal adviser, there is no objection to your writing it in your own name or under the pen-name "Solicitor" with your initials appended, but it would be most objectionable if that article were accompanied by an editorial note to the effect that "The writer of this article, Mr. So-and-so, is eminently qualified both academically and from practical

experience to write on this subject." That is a quite unjustifiable puff, and you should not allow it to be done.

Now I come to the rather difficult problem of Press announcements. There is quite obviously a big difference between the legal and the other Press. It is clear from the rulings that have been given that there is no objection to your publishing in the legal Press the fact that you are opening a branch office, but it is not proper to publish that in the general or local Press. The fact that two solicitors are starting in partnership together is a most ordinary entry in the legal Press. It must not be published in the public Press; and thirdly, advertising under a box number that a solicitor is prepared to undertake missions abroad as an agent for other solicitors is unobjectionable in the legal Press, but objectionable in the public Press. But on this subject of undertaking missions abroad I ought to sound a note of warning that even in the legal Press it is objectionable to advertise that you are prepared to act as London agent; that really offends against the rule as regards touting. No doubt dozens of people would be prepared to undertake work as London agents, and once advertising for such work is allowed, everyone would equally be entitled to advertise for it.

Press  
announcements

Similarly, it is objectionable to advertise under a box number even in the legal Press that a solicitor is prepared to entertain arrangements with suburban, country or foreign solicitors for assisting them in their work in the city and West End, for the same reason, that that is really an infringement of the rule against touting.

That is all I propose to say about the legal Press, because they are generally very careful to observe the proprieties of the profession when accepting advertisements, but of course the public Press are very different. They do not know, and I do not think they particularly care, whether they are allowing any infringement of any rule of professional conduct by accepting advertisements—except for one or two of the leading newspapers which are notable exceptions.

As to what may properly be published in the non-legal Press, I propose to take the most usual subjects upon which we are asked for advice.

First, change of address by a solicitor—I may say, that I am now speaking of the solicitor's own personal advertisements in the Press—there is no objection at all to it going in the legal Press. The proper method is to notify clients by circular letter, but it has also been held to be not unprofessional to insert one advertisement only in a local newspaper, provided that the announcement itself is a bare announcement of the change of address and does not in fact constitute an advertisement of the solicitor concerned. It would not be a bare

Change of  
address



announcement if it set out the solicitor's past experience, for example, "Mr. So-and-so, formerly of such and such an address, one time Legal Adviser to so and so." That would be more than a bare announcement of the change of address and objectionable. There was, I am bound to say, an exception to this general rule about one advertisement only. An exception was made during war-time when an office was destroyed by enemy action and the solicitors were allowed to insert the number of advertisements they thought proper in those exceptional circumstances to notify their clients of where their new offices were. That was a war-time exception when clients were scattered and their addresses probably lost, but even then it was held objectionable to insert an announcement that solicitors were staying on in the same offices and had not been hit.

Where you open a new office, the proper thing to do is to send a circular letter to your clients and to advertise in the legal Press, and the opening of a new office must not be advertised in the local Press.

Change  
of telephone  
number

With regard to a change of telephone number, there is no objection, if the Post Office arbitrarily changes your number, as it occasionally does, to your inserting one advertisement in the local Press, but once again it must be a bare announcement, and a particular announcement which read: "Mr. A B C, Solicitor of the Supreme Court, Commissioner for Oaths, Notary Public and Privy Council Appeal Agent, of So-and-so, begs to inform the public that his telephone number, etc.," was held to be objectionable.

Change  
of office  
hours

The other question that is sometimes asked is: "What about advertising a change in office hours?" That ought to be done by circular letter to your clients and not by a Press announcement at all, but there has been one decision where, provided the description "Solicitor" was omitted, one insertion in the local Press was allowed because it was a change of a long-standing practice under which for over a century the office had been closed on Wednesdays and opened on Saturdays, and it had been decided to reverse that practice, but that is a very limited class of case.

Other  
personal  
announcements  
by  
solicitors

Continuing with regard to a solicitor's own advertisements, there is no objection if you want to do it, to your publishing in the local Press a bare announcement once only of the retirement of a partner; or of the dissolution of a partnership even though the notice states that one partner will continue at the same address and the other partner will join a named firm and practise at another given address; or, again, one announcement that a particular practice, possibly of a deceased solicitor, has been taken over by your firm. But an amalgamation of two practices must normally not be

advertised. There was an exception made during the war because, as I have said, it was then often difficult to get in touch with clients, but that was a war-time exception, and amalgamations are not a proper subject for advertisement in the local Press. Having said that, broadly speaking all other personal advertisements of a solicitor in the general Press are objectionable; for example, it has been held to be objectionable to publish an advertisement denying a rumour that a solicitor has retired from practice or removed his office elsewhere. It is objectionable for a managing clerk who is leaving a firm to publish that fact and say he proposes to start up in practice on his own.

It is objectionable to interview the Press and give them information about the amount of specialised work you do, running-down actions or divorce or whatever it may be, in order to enable them to write up an article about you; or indeed to interview the Press at all if the interview is inspired by the solicitor. If it is not inspired, there is no objection, if the Press come round on their own and ask for details of your life for the purpose of writing up a "Pen-picture" of you as a local celebrity to your supplying reasonable information to enable them to do it. If, however, that interview is inspired, on the other hand, it is objectionable.

Interviewing  
the Press

May I add on the subject of interviewing the Press that it has been decided that as a rule it is undesirable to inform the Press that a solicitor has been instructed to institute proceedings, but if litigation in which you are already concerned is the subject of Press comment, there is no objection to your name being mentioned or to your giving information to the Press about the action, of course with your client's consent, provided that care is taken to see that the resulting articles are not worded so as to constitute an advertisement for you as a solicitor. If a matter is not the subject of Press comment, you may assist your client to publish the result of litigation in the Press if you are agreeable and he wants to do so, but you should see that your own name does not appear. Finally, where in litigation terms of settlement are agreed, and it is decided that those terms of settlement should be published in the interests of the clients, there is no objection to a solicitor's name appearing in that report, provided it appears with those of the solicitors on the other side and, no doubt, also those of counsel who were concerned.

Another type of Press announcement is that relating to a solicitor who is an agent of a building society. We have a great many questions raised about the propriety of building and similar societies' advertisements. The rule about such advertisements is as follows: There is no objection to a solicitor allowing his name to appear as secretary of or agent

Building  
Society's  
advertise-  
ments



for a building society in any advertisements issued by such society, provided the description "Solicitor" does not ever appear, and provided also that the advertisement itself does not assume the character of an advertisement for the solicitor rather than an advertisement for the society. That rule applies whether the advertisements are in the Press or in other literature or, indeed, even on slides at a cinema. If a society wants to publish: "Such-and-such a Building Society, Local Agent: Mr. A B C," there is no objection. It would be highly objectionable however if it referred to "Mr. A B C, Solicitor." The society's solicitor may be described as such on their prospectus but, as I have said before, never on their notepaper.

Foreign  
Press

Finally, as regards a solicitor's own advertisements in the Press, all personal advertisements of the solicitor which describe him as such are objectionable in the foreign Press, whether it be in the legal or public Press.

Clients'  
advertisements

Now, what about your clients' advertisements which they may ask you to publish? You may put your name, address and description "Solicitor" in all legal notices, for example, on behalf of executors and trustees or administrators. There is no objection to a solicitor's name appearing as an attesting witness to a public notice or, indeed, to a notice by a husband disclaiming his wife's debts (for what it is worth), or as a witness to an application for a licence or an application for naturalisation or anything like that. But if your client wants to publish an advertisement offering specific property for sale or as security for a mortgage investment, or a specific fund available for investment on mortgage, you must omit the description "Solicitor," and if a solicitor's name, address and description appear in that advertisement it is regarded as being highly objectionable. Indeed, it is objectionable for solicitors to insert a newspaper advertisement of property for sale at a price to include costs unless, as I have said, it is made clear that the prospective purchasers are free to employ their own solicitors at the vendor's expense should they so desire.

Broadcasting

That is enough about advertising in the Press, and I want to come on to broadcasting, where the rules are very simple and, I think, almost the same as those of the medical profession. There is no objection to a solicitor accepting an invitation from the British Broadcasting Corporation to broadcast lectures on law or to take part in a broadcast entitled, for example, "Is that the Law?" provided he does not allow the publication of his name or photograph, but takes part under the description "A Solicitor." It has also been decided on a particular application that there is no objection at all to a solicitor singing under his own or an assumed name,

whether he does it over the wireless or at concerts, provided the description "Solicitor" is not used with reference to these activities. I am not sure whether that decision is in his own interests or those of the rest of the profession!

Finally, the only other decision I could discover on the subject of broadcasting was that where solicitors wanted to broadcast for a missing person, it was decided that there was no objection to their doing so and to inquirers being asked to communicate with them, provided that the fact that they were solicitors and were concerned professionally in the matter was not disclosed.

Next, with regard to lectures and talks, to your great relief, I am sure, I have very few notes indeed. There is no objection to the name and description "Solicitor" being given where the talks are given on legal matters to members of an association, provided that the literature relating to those talks is circulated only to members of that association. Indeed, there is no objection to a report of the lecture afterwards being published in the local Press, provided that the solicitor does not instigate the publication of his talk, and that the lecture was not delivered with a view to the unfair attraction of business but was on the invitation of the association bona fide for the benefit of its members; and I base my case for the propriety of using my description on the Outline of this lecture on that ruling, because I hope it is bona fide for the benefit of the members of this Society that I am lecturing, and therefore I have risked calling myself a Solicitor of the Supreme Court. Lectures

With regard to talks on non-legal matters, you ought not to use the description "Solicitor" at all. If you talk on a non-legal matter, you do so as a member of the public and you ought not to describe yourself as a solicitor.

And now as to circular letters—there are two classes of circular letter; there are your own circulars and your clients' circulars.

There is no objection at all to your using your own notepaper with your name and address on it and sending out to your clients circular letters about opening additional offices, or taking in new partners, or acquiring new businesses, or "Offering" funds to invest on mortgage, about dissolutions of partnership or joining a new firm or, indeed, denying a rumour that you are dead or have retired from practice; all these things are properly done by circular letter to clients and not by advertisement. You may circularise your clients with a summary of new legislation, if you think you can tackle it, for example, with a nice concise account for the benefit of your clients of the Town and Country Planning Act or, indeed, of the Transport Act, though it is probably desirable to limit A Solicitor's  
Circular  
Letters



the circulation of that to clients who you think might be affected. A retired solicitor may circularise his former clients if, having regard to the exigencies of the times, he feels compelled to start in practice again, poor fellow. But I ought to say here that where a solicitor had dissolved his partnership in a particular town and covenanted not to practise in that town for a period of five years, and then practised in the neighbourhood, but outside the area within which he had covenanted not to practise, when at the expiration of the five years he wanted to start again in the same town, he was told that it would not be proper for him to circularise his former clients when he had been in partnership in that town, and that he must restrict the circulation of his letters to his then existing clients at the time of the despatch of the circular.

I suppose you all know that there is no professional objection at all to your circularising clients on behalf of whom you hold wills, if you want to ascertain whether the wills have been revoked or whether any deaths have occurred or, I suppose, if you think that the activities of the Chancellor of the Exchequer may be calculated to have influenced the minds of the testators since they made their wills. Anyway, that may be done, and you may tell your clients about your appointments, for example, as a notary public, but you are not, however, at liberty to send out circular letters broadcast on appointment as a notary public.

As regards circulars to non-clients, it has been held to be unobjectionable, when asked by a specific client, to circularise estate agents in the locality informing them that the client has a specific fund for investment in real estate or for the purposes of financing a business. It has also been held to be unobjectionable when asked by a specific client to send a circular letter to certain specified shareholders offering to purchase their shares. Otherwise, and generally speaking, circular letters should not be sent to non-clients.

On your clients' circulars, not your own, you must not allow your own name and description to appear at all; for example, it is objectionable to put the name of the solicitor on a circular letter announcing the formation of a trade protection association. Even circulars asking charitable persons to make a gift of land for a charity must not include the solicitors' names as it should be quite sufficient to say that solicitors' references are available. It has been held objectionable to send a circular with the solicitor's name on it to prospective members of a debt collecting association and, finally, it is not proper to have a solicitor's name on a poster offering a reward for information about persons defacing hoardings. I do not know that it is limited to posters referring to defacing hoardings,

but that happened to be one case ; it may be that it is equally objectionable in the case of other posters.

So much, I am glad to say, for advertising. I still think myself that the best advertisement of any is efficiency at your job, the speed and skill with which you do your work, the courtesy shown in your business life, and probably also your personality and characteristics as a good fellow in your non-professional life. I would say to the articulated clerks here that I believe that you are far more likely to attract a good clientele by those qualities than by publishing, even if it is allowable, some advertisement which you may mistakenly think may bring you in a few odd clients. I very much doubt whether these advertisements bring in any client worth having in any case.

### (c) UNFAIR ATTRACTION OF BUSINESS

Finally, under rule 1, we come to unfair attraction of business and first of all, to possible infringements of the rule through having offered to give free legal advice. The rule here was laid down by the Disciplinary Committee in a fairly recent case as follows : A solicitor who is originally consulted either at a legal advice centre or elsewhere on the basis of giving free legal advice, is in a position of advantage as regards obtaining a retainer from such a person, and if he uses that advantage to obtain a retainer, he does an act calculated to attract business unfairly, even though he may act in good faith ; that is to say, in any case in which a solicitor is found to be acting for reward for a client first introduced to him on the basis of his giving free legal advice, a presumption arises that an offence against the rule has been committed. The presumption is not irrebuttable, but it imposes on the solicitor the onus of showing that the initiative resulting in his employment was entirely on the client's side, and that he himself did nothing to suggest that he was prepared to act personally in such a capacity. If the solicitor indicates to his client that he is himself available to act, even though at the same time he makes a quite clear statement that any other solicitor is equally available, there is inevitably still a pressure on the client to instruct the solicitor then before him. Therefore, where you are first put in touch with a client on the basis of giving free legal advice, you should be very, very careful before accepting any instructions to act in the same matter on a paying basis. The Council are empowered to waive the rule in favour of a solicitor in any proper case, and they have said that they are prepared to exercise that power in certain circumstances in the case of solicitors at legal advice centres or Poor Man's lawyers or in the case of certain solicitors for associations or bodies of persons having a common interest which may wish

Free Legal  
Advice



to make available to the members of such association the advice of their honorary or otherwise appointed solicitor.

The circumstances in which the Council will be disposed to grant a waiver are these: the original arrangement must be a bona fide arrangement in the interests of the persons or classes of persons for whom the advice is available and must not have been designed to benefit the solicitor or have any other indirect object. Secondly, there must be nothing in the arrangement aimed at attracting business unfairly or likely to damage the practices of other solicitors. Thirdly, the solicitor would have, before accepting instructions, to obtain from the applicant a written assurance that he had no solicitors, and that it was his wish that that particular solicitor should act for him for normal legal charges, and finally, every application for a waiver of the rule in any case will be considered on its merits and may be granted subject to conditions.

Finally, to finish rule 1, there is the question of the propriety of engaging in other professions or businesses. This is not really germane to rule 1, but we receive so many inquiries from solicitors whether they may properly engage in some other employment or occupation, that it may perhaps help if I now state the rule and the exceptions to it. Broadly, there is nothing wrong whatever in a solicitor employing his surplus time and energy—and I would add if any—in carrying on any honourable profession or business, but the Council cannot express any opinion upon questions of detail without knowing the exact facts of each case. Perhaps I may give you a few examples of what is quite unobjectionable and then examples of what is objectionable. There is no objection to your engaging in business as a stockbroker, land agent or building contractor or indeed, a reed merchant and thatcher. One solicitor has been registered as a coal merchant, it is true as clerk to charity trustees who proposed to buy coal and retail it to tenants so as to alleviate the difficulties of these tenants in buying coal, but he was a registered coal merchant. You may be an election agent, a building society agent and, indeed, chairman or director on the board of a building society; an insurance agent, patent agent and agent for a savings bank. We are a very flexible profession and do some interesting things. You may be the manager of a theatre and hold a stage plays licence, which can only be granted to a responsible manager, and you may sing with or without fees at concerts and over the wireless. You may hold classes in elocution for articled clerks and young solicitors, provided that they are not held at The Law Society's Hall, or, indeed, advertised as being approved by The Law Society. You may hold a restaurant licence and, as executor, you may hold a wine, beer and spirit licence, but I cannot find any authority for saying

that you may be a publican. Oddly enough, we provide the Bar with their "refreshers," but it has never been laid down whether or not we may provide the public with theirs. A solicitor has been authorised to be secretary of a club catering for the racing and sporting community at a race course, but he was told that the position would be quite untenable if the conduct of the club was such that a police raid was to be expected.

Then we have solicitors who are members of institutes, such as the Institutes of Chartered Accounts or Chartered Secretaries, secretaries of road haulage associations or directors of a company formed to negotiate price regulation agreements. You may be managing director, director or secretary, paid or unpaid, of a private limited liability company or a property investment company, and while such a director may act as solicitor to the company. You may be secretary of a provident society and also act as its solicitor. You may be a member of a chamber of commerce or its secretary, or indeed its president or other officer. All these occupations are unobjectionable. There is no objection to your being a member of the Metropolitan Police College so long as you do not hold a practising certificate, and you may even be a member of a trust corporation for the purpose of being named as executor and trustee in the wills of clients; but—and here we start on "buts"—it is not proper to enter into partnership with a layman carrying on the business of negotiating mortgages, advancing money on mortgage, transacting insurance work, acting as advertising or general agents on commission, acting as secretaries of limited companies, trustees under deeds of arrangement and executors and income tax experts. If you hold a practising certificate, that is objectionable because I think it must inevitably mean that business will be attracted to you unfairly. You may hold an auctioneer's licence, but here the position with regard to conducting the business of estate agents and auctioneers is not entirely clear. The majority of the decisions seem to me to lead to the conclusion that while that business is an eminently respectable one and there is no possible objection to a solicitor carrying it on, he should not do so actively if he holds a practising certificate, for the same reason, that almost inevitably business will be attracted to him unfairly.

I have said, earlier on, that you may not carry on business as a bookmaker and, let me add, you may not be personally registered as a money lender or a pawnbroker, but you may become a director of a company carrying on business as jewellers and pawnbrokers. You may not carry on business or become a director of or have any financial interest in a company formed for the purpose of trade protection and debt



collecting ; nor must you act as secretary of a trade protection society, the principal object of which is to circulate details of defaulting bookmakers ! You may not enter into partnership with a trade mark agent and, finally, you may not be a barrister at the same time as you are a solicitor.

Ladies and gentlemen, that brings me to the end of rule 1.

## SOLICITORS PRACTICE RULES, 1936

### RULE 2

Under-  
cutting

And now we come to rule 2 of the Solicitors Practice Rules, 1936, which is intended to prohibit a solicitor from attracting business to himself by undercutting and not to prevent him from reducing his charges in a proper case. I want to make it clear that it is the unfair attraction of business by undercutting at which this rule is aimed.

" Holding  
out "

A solicitor does not, in the Council's view, " hold himself out," within the meaning of those words in the rule, to a bona fide client of his in respect of that client's own business, so that if he agrees with a client to do that client's work at a special fee and the circumstances justify it, there is no infringement of the rule. But, on the other hand, he would infringe the rule if he were to agree with even a bona fide client to do the work of some third party for less than the prevailing scale as laid down in the rule ; and if he habitually reduced his charges even to his bona fide clients, he would also infringe the rule because it would inevitably become known that his charges were less than those of other solicitors and business would thereby be attracted to him unfairly.

Bona fide  
Client

The words " bona fide client " do not (as you will observe) appear in the rule at all ; they only occur in the interpretation of the rule which the Council have published, and they have not attempted to define who is and who is not a bona fide client. The Council think that that is a matter which the solicitor ought to be able to decide for himself without much difficulty. They take the view, however, that the fact that a solicitor has once been instructed by a client does not necessarily make that client a bona fide client, any more than the fact that one of your clients has instructed some other solicitor in a particular matter on some other occasion necessarily involves the conclusion that he is not a bona fide client of yours. The onus is on the solicitor who wants to quote less than the prevailing scale to satisfy himself that the client is a bona fide client, and that the reduction in the charges which he is going to make is not made with the object or will have the result of attracting business to himself unfairly—business which might not otherwise reach him.

As an example of the application of the principle underlying the rule, let me take the case of a solicitor for a building society or any similar society which advances money upon mortgage or advances moneys to assist in the purchase of house property. He would not infringe the rule in permitting the building society to advertise in its prospectus or otherwise some special scale of mortgagees' solicitors' charges, because those charges are the charges of the building society, in other words the bona fide client, notwithstanding the fact that they are paid by the borrower; but, of course, he would infringe rule 1 if he were to allow the building society to advertise a mortgagors' scale or a purchase scale.

Secondly, a solicitor who acts for both vendor and purchaser is entitled to make a full scale charge against each on the assumption that he has done substantially all the work contemplated by the Remuneration Orders. If such a solicitor were to hold himself out as being prepared to undertake the work for a vendor and purchaser, neither of whom was a bona fide client at less than the full prevailing scale as against each he would infringe the rule.

You will observe that the scale of charges referred to in the rule is the "prevailing" scale. What is the prevailing scale is a matter of fact. The rule does not refer to minimum scales nor does it seek to enforce as such minimum scale charges adopted by Provincial Law Societies; but, of course, if a sufficient number of solicitors in any district have adopted a minimum scale, and habitually adhere to that scale, then it means that the prevailing scale there must be at least the amount of that minimum scale. Any solicitor, therefore, who quotes a charge to a new client would almost certainly infringe the rule if he quoted a fee less than such a minimum scale, because the prevailing scale would not be less than the adopted minimum scale of the local Law Society. He would not, however, be bound to observe that minimum scale in respect of transactions he undertook for his own bona fide clients. On the other hand, the Council take the view that, apart altogether from the rule, if a solicitor is a member of a Provincial Law Society which has adopted a minimum scale, then he ought, as a matter of professional etiquette, to adhere to that minimum scale, even in respect of his bona fide clients.

Prevailing  
Scales

Finally, I would direct attention to subsection (8) of rule 2, which you will see provides that the secretary of a local Law Society in the district may be called upon to certify what is or what is not a prevailing scale. The certificate of that secretary is only *prima facie* evidence of the existence of a prevailing scale, and therefore that evidence is capable of rebuttal in any specific case by direct evidence that the



alleged prevailing scale is not in fact the one which generally prevails there.

**Free Conveyances** One of the problems which arises under this particular rule is the problem of the free conveyance. Where property is sold subject to a condition of sale offering to a purchaser a free conveyance, it does not infringe the Practice Rules in general, or this rule in particular, provided that the transaction is carried out on the proper lines. The Council take the view that from a professional standpoint, and apart altogether from the legal position under s. 48 of the Law of Property Act, 1925, a solicitor for the vendor ought in such a case to have due regard to the prohibition against undercutting or doing anything which is calculated to attract business unfairly. He should not allow his name, therefore, to appear on any particulars or prospectus of an estate, for example, which intimates that the work will be done by him at charges below the prevailing scale, and such statements by vendors in their particulars as: "We have made arrangements with Messrs. A & B to convey the property free to all purchasers" are objectionable, because, in the first place they advertise the solicitor, and, secondly, they suggest that the solicitor may be carrying out the work at a cut rate. Where an offer is made to convey property with a free conveyance, the Council consider that the purchaser should be put in as good a position as if he had been separately represented; otherwise, in their view, the offer of a free conveyance is misleading, and would tend to bring both the vendor and his solicitor into disrepute. The vendor's solicitor would become responsible both to the vendor and to the purchaser that the form of conveyance is proper and vests in the purchaser the estate which he has contracted to purchase, and that the conveyance contains all the necessary and proper acknowledgments and undertakings as to documents of title. The vendor's solicitor must see that the certificates of search and a complete and examined abstract of title are handed over on completion so that the purchaser will be in a position to satisfy a mortgagee or purchaser from him that he has a good title in accordance with his contract. The purchaser must not be left in a position in which where, if he wishes to deal with the property by way of mortgage or sale, he would have to pay some fee to the vendor's solicitor for an abstract of title or copies of documents before he was in a position to deal with his own property.

Therefore a vendor's solicitor who by arrangement with his client offers to draw and prepare a conveyance for the purchaser should, in the Council's view, be deemed (if the purchaser accepts that offer) to have undertaken the same obligations towards the purchaser as he would have done if

he had been retained by the purchaser to act for him in his purchase. To sum up therefore, all such conditions and contracts should clearly preserve the right of the purchaser to consult his own solicitor if he wishes, and they must not contain words which may appear in any way to advertise the vendor's solicitors as being prepared to undertake the work at all, or to suggest that they have agreed to perform the work for the purchaser at a cut rate. If in fact the purchaser accepts the vendor's offer of a free conveyance so that the vendor's solicitor alone is concerned in the transaction, then he must place the purchaser in as good a position as if he had employed his own solicitor.

The Council have added to those views one further important view, I think, namely, that as the price quoted by the vendor must be deemed to include a sum for the remuneration of the vendor's solicitor when acting in the preparation of the purchase and carrying through the transaction for the purchaser, if the purchaser elects to employ his own solicitor, then a reasonable sum must be allowed off the purchase moneys towards the expenses to which he will in that event be put; and furthermore, if the vendor's offer includes arrangements for a loan and a purchaser either does not require such accommodation or prefers to make his own arrangements for it, then equally, a reasonable sum in addition should be allowed off the purchase money.

Finally, may I say that it is not in accordance with the best etiquette of the profession for a vendor's solicitor to advise a purchaser not to take independent legal advice. That is all I want to say on rule 2.

## SOLICITORS PRACTICE RULES, 1936

### RULE 3

Passing now to rule 3, you will find that this is the rule which prohibits a solicitor from agreeing to share his profit costs, roughly speaking, with unqualified persons. Only a few points arise on it. First of all, what are profit costs? It is not quite as easy as it sounds to give an answer. In the Council's view the term does include negotiation fees, but it does not include brokerage or insurance commissions or commissions paid to a solicitor as agent for a building society. Those may, if you wish, be shared with somebody else; and there is no objection to your doing so.

As to persons with whom you may share, you will notice the words: "... shall not agree to share with any person not being a solicitor or other duly qualified legal agent practising in . . .," etc. The Council have construed those words on the basis that the words "practising in" do not qualify the

Profit  
Sharing

Profit  
Costs



word "solicitor" but only the words "other duly qualified legal agent." Accordingly, in their view you would not infringe the rule by agreeing to share your profit costs with any solicitor, be he certificated or not, and be he in the Commonwealth or not. On the other hand, if he is a duly qualified legal agent, he must be actually practising in the countries, Dominions, Colonies and Dependencies mentioned in the rule. The rule therefore does prohibit an agreement to share costs with foreign lawyers, for example.

Employed  
Solicitors

The next point of importance on the rule is proviso (b). This really relates to that genus of solicitor of which, I suppose, I am one, called the "tame solicitor." The "tame solicitor" may agree to set off the costs which he recovers in respect of work he does for his employer against his own salary and the proper expenses of his office incurred by his employer, but to the extent of his salary and those office expenses and no more. If by agreement with his employer he is allowed to transact work for other people, he must in no circumstances whatever agree to pay over to his employer any share of the profit costs which he may earn when acting for those third parties. That is quite clearly prohibited, and even in respect of his own employer's work, it is his duty to see that his employer does not make a profit out of his services. If he does allow his employer to make a profit, then he infringes the rule and he may be, indeed, even infringing s. 51 of the Solicitors Act, 1932, on the ground that he is covering an unqualified person and allowing his name to be made use of for the profit of that person. The rule puts an end to what used to be a long-standing practice (and I am not sure that it is a practice which is yet entirely eradicated despite the rule) of agreeing to pay to unqualified clerks a commission on business introduced by them. An agreement to pay a commission on business introduced by clerks is wrong, although the courts have held that such an agreement is legal.

Therefore, a solicitor who makes such an agreement would find that it was enforceable in law against him, but he would have rendered himself liable to disciplinary proceedings for having entered into it. I want to make it quite clear that any such agreement is professional misconduct under the rule.

Staff Bonus  
Schemes

On the other hand the Council do not think that there is any reason for prohibiting bona fide staff bonus schemes, which many solicitors have adopted, and others may wish to adopt. Such schemes, however, require a waiver of the rule by the Council, who have announced that they will be prepared in proper cases to waive the rule where certain conditions are complied with. First of all, the amount to be distributed amongst the staff under any such bonus scheme must not be calculated by reference to the costs earned by any one employee

or by a department in the office or by a branch office or, certainly, by reference to the amount of business introduced. Normally the scheme should provide that the amount to be distributed is to be arrived at by reference to the total net profits or total profit costs earned during a stated period, though it is not necessary that either the amount of the profits or the relationship between the profits and the amount to be distributed should be disclosed to the staff. That is entirely a matter for the partners to decide ; but all employees should normally be entitled to benefit under the scheme, though not necessarily on the same basis. Those who have served during part of the period may be entitled to only part of the normal share, and there is no objection to employers requiring a short qualifying period before the members of the staff are admitted to the benefit of the scheme.

Each scheme will be considered on its merits by the Council, and the Council are quite prepared to consider schemes even though all the employees do not share under them, provided that those employees or categories of employees who are to share or are not to share respectively are disclosed and good reasons are given why certain of them are to be left out. So much for staff bonus schemes.

## SOLICITORS PRACTICE RULES, 1936

### RULE 4

On the subject of rule 4, I think I need not detain you long. This is the rule designed to put an end to the activities of what we here have called Legal Aid Societies and what the Americans call Ambulance Chasers ; that is to say the gentlemen who turn up at the hospital or at the home of an accident victim and obtain instructions to take up the claim almost invariably on the basis that if they do not recover anything by way of damages they do not expect to be paid anything, but if they do recover something, they expect to be paid generally 10 per cent. on whatever they recover. I can recall a case long before this rule was made where one of these Ambulance Chasers arrived at the house of the wife of a man knocked down by a motor car and injured, got a retainer to act for the husband (although the wife was quite unaware until then that he had been injured) and arrived at the hospital before the victim himself arrived there in the ambulance because the local constable (I think it was) had phoned up the local agent of the Legal Aid Society—knowing he was to get 10s. for the name—before he called the hospital.

However, that was a long time ago. Ambulance chasing has, as you may imagine, certain undesirable features about it,



and this rule is designed to prevent any solicitor accepting instructions where the client has been introduced through such an organisation as that. It ought to be stressed that it is the solicitor's duty to make inquiries when he receives instructions from a new client to take proceedings in such cases and to bear this rule in mind so that he satisfies himself that the instructions have not been obtained by solicitation through a society or organisation described in this rule. They are still active. And that brings me to the end of the Solicitors Practice Rules.

#### RELATIONS WITH OTHER MEMBERS OF THE PROFESSION

Relations  
with the  
Bar

Increasing  
Brief fees

In considering the relations of solicitors with other members of the profession, it must be remembered that we are only one branch of the legal profession, and that there are very many important points of etiquette which affect the relations between the Bar and ourselves. For example it should be known, and I do not think it is generally or sufficiently widely known, that once a brief is accepted with a knowledge of its contents and the other matters essential to the question of a fee, a barrister's clerk should not ask to have that fee increased; and the fact that the solicitor on the other side has marked a higher fee is no justification for a barrister's clerk asking to have the fee increased. Indeed, the Council have expressed the view that a solicitor should decline to increase or diminish a brief fee merely because the fee marked is less or more than the fee marked by the other side.

The two-  
thirds Rule

Secondly, as regards the two-thirds rule: that is the rule under which a junior barrister is entitled to two-thirds of the fee marked on his leader's brief. It is now the case that that two-thirds rule only applies in respect of the fees of leading counsel up to 150 guineas. Where the leader's fee exceeds 150 guineas the amount, if any, by which the junior's fee exceeds 100 guineas is entirely a matter of arrangement between the solicitor and junior counsel, and you are not bound to mark the junior's brief at two-thirds of the leader's fee when that fee exceeds 150 guineas.

Liability for  
payment of  
Counsel's  
fees

On the other side of the picture there is our etiquette as it affects the Bar. Where a solicitor receives moneys from his client for the express purpose of paying counsel's fees, and does not so apply them, it is obviously professional misconduct. He has had moneys for a specific purpose and failed so to use them. Apart from this case, however, as a matter of professional etiquette, a solicitor is personally liable for payment of counsel's proper fees whether or not he has received moneys from his client, with which to pay them. That is a matter of etiquette. A barrister cannot sue for his fees: in theory a

brief fee should be paid when the brief is delivered, and as between the two branches of the profession, a solicitor ought to be deemed to have put himself in a position to pay counsel's fees when he instructs counsel if in fact he does not pay the fees at the time. Therefore I stress this point, that it is our duty as a matter of professional etiquette to pay counsel's proper fees whether or not we have had the money from our client with which to pay them.

There is an immense amount of etiquette affecting the relations between the two branches of the profession, and it would in fact take a lecture on its own to deal adequately with it. Therefore I am not going any further into the subject to-day, but I shall come at once to matters of etiquette as between solicitors themselves and take a number of small and disconnected points which, however, very frequently arise in practice.

First of all I would say that in our relationships with one another the words "Do unto others as you would have them do unto you" are or should indeed really be applicable. I think that when we are dealing with another member of our profession, there should be the maximum of frankness and good faith, consistent with our overriding duty to a client in any special case. I know that the client's interest must prevail, but I like to think that that means the interests of our clients in general taking the long view, and I do not believe that it is a good thing that, one client who perhaps is not straight or brings improper pressure to bear upon you, should succeed in getting you to do something unfair or underhand. I do not think that that is in the interests of your clients generally; I think it is better for your clients that you should lose that one man as a client than that you should acquire a reputation as being a man who is not straightforward or a man whose word cannot be relied upon.

Relations  
with other  
solicitors

I think that as between solicitors, one's word should be one's bond—that it should not be necessary to have committed yourself to writing, but that even if it may cost you personally something to live up to what you have said you will do or refrain from doing, you should live up to it. If a colleague says to you on the telephone "That is all right; you can have another seven days to deliver your defence," you ought to be able to know with certainty that though the statement may not be confirmed in writing, you will in fact have another seven days and that you will not have a judgment snapped against you. I believe that that is the absolute essence of the proper relationship between members of an honourable profession. I think solicitors should also stand behind their clerks in these matters, and that if your clerk, quite misguidedly perhaps, commits you to a certain course, maybe on the



telephone, you should stand behind him, and though it may cost you something occasionally, stick to your word, pledged on your behalf by your clerk.

That brings me to the subject of undertakings. Undertakings when exchanged between solicitors are really a matter *uberrimae fidei*. They should be absolutely unambiguous in their terms, and if the solicitor giving the undertaking does not intend to accept personal responsibility, he should expressly say so quite clearly in the undertaking itself; and, in the absence of such a clear statement that personal responsibility is not accepted, then the solicitor on the other side should be deemed to expect the one who gave the undertaking to honour it personally.

The Council, indeed, have published their views on this matter with particular reference to the extent to which a solicitor incurs personal liability when giving an undertaking on behalf of a client. For example, it is common knowledge that in order to facilitate completion of a sale and purchase, a solicitor will give an undertaking, which nearly always the solicitor on the other side, knowing nothing of the client, would not accept unless he thought he was getting an undertaking from the solicitor himself. Therefore, the Council's view is that the use of such words as "on behalf of my client" or "on behalf of the vendor" does not make the intention of the solicitor not to accept personal responsibility—if such be his intention—sufficiently clear, and they think that further or different words are necessary if the solicitor does not really intend to accept personal liability.

For that reason the Council proceed on the assumption that where on the completion of a sale or purchase a solicitor gives an undertaking "on behalf of" his client without any further qualification, he intends to accept personal responsibility and accordingly, in their view he should fulfil that undertaking and the Council will bring pressure to bear upon him to do so as a matter of professional etiquette.

There are one or two other rulings in connection with undertakings, to which I should like to refer.

A solicitor who has undertaken to pay another solicitor's costs in consideration of the latter handing over certain papers belonging to a client is, unless a contrary intention is expressed, bound by his undertaking whether or not he is repaid by his client. That I think bears out the principle which I have just enunciated. Again, when a solicitor asks another to supply him with copies of documents, in the Council's view, there is an implied undertaking there to pay for them. Finally, where a solicitor receives documents in a pending action from another solicitor in exchange for an undertaking not to give up possession of the papers and to

preserve the former solicitor's lien, the Council have expressed the view that it is implied—because otherwise the undertaking would have no value—that the former solicitor's costs would be provided for in any settlement reached. Of course, that does not mean that a solicitor is under any duty to accept such an undertaking before handing over the papers; he may be perfectly entitled to retain the papers until his proper costs are paid, but it is right that he should know that if he does hand over his papers against that undertaking, he can properly expect his costs to be provided for if there is to be any settlement of those proceedings thereafter.

As a part also of what I think should be the close and friendly relationship which ought to exist between us as members of one profession, there is the etiquette as between agents, and a solicitor in the Council's view should always personally discharge the proper costs of any professional agent whom he may employ whether or not he receives payment from his client. In fact, the same principle applies here as applies in the case of Counsels' fees.

Agency  
relation-  
ships

For example, an English solicitor who instructs an Australian, Canadian, Scottish, or, indeed, any other lawyer, should accept personal responsibility for payment of that lawyer's proper fees, just exactly as he would expect, if the positions were reversed, that the Dominion or foreign lawyer would be responsible for his fees for the work which he had done in England.

With regard to agency costs generally, may I interpose here and remind you that there is no custom as to the allowance of agency costs except as between provincial solicitors and London agents, and vice versa. There is no customary allowance as between English and Scottish solicitors, and there was a case just before the war where Scottish solicitors sued for and recovered in full their costs of undertaking agency work, the court holding that there was no custom whereby Scottish solicitors had to allow any agency rebate to their English principals. That principle applies, I think, equally to all lawyers in the Dominions. There is not the slightest objection to your making your own individual arrangements as to agency allowances in these transactions. If you do, no question or dispute will then arise.

What is the etiquette about communicating with the clients of other solicitors? The general rule is very well known; it is that a solicitor should not interview the client of another solicitor, particularly in pending proceedings, without the consent and approval of that solicitor, even if the interview is only with a view to obtaining information as to the client's ability to pay costs. This rule applies by way of example to the case of a solicitor-clerk to a local authority.

Communi-  
cating with  
clients of  
other  
Solicitors



Where such a solicitor is acting for his authority in litigation, it has been held to be a breach of etiquette for the solicitor on the other side to discuss the matter directly with the chairman of a committee of the local authority. There are only two very minor exceptions that I have been able to find to this general rule of etiquette about communicating with a client of the other side. In the first case it was held not to be a breach of etiquette for the solicitors for the petitioner in divorce proceedings to communicate direct with the respondent at the express request of their client where the respondent's solicitors absolutely refused to pass on any messages at all to their client. The second case was almost the same: where a husband's solicitors wanted the wife to agree to accept a reduced payment on a separation, the wife's solicitors refused to pass on any such communication; it was held not to be an infringement of the rule in those exceptional circumstances, because, I suppose, the attitude of the respondents' solicitors was regarded as being obstructive, and that was the only reason why the general rule was not followed.

Inter-  
viewing  
witnesses

Now, the very important matter of communicating with witnesses. The Council have always held the view, and held it very strongly, that there is no property in a witness, and that so long as there is no question of tampering with a witness or seeking to persuade a witness to change his story, it is open to the solicitor for either party in civil or criminal proceedings to interview and to take a statement from any witness or prospective witness at any stage of the proceedings whether or not that witness has been interviewed, or, indeed, called as a witness by the other party. That statement was published in January, 1944, and before publication it received the approval of the then Lord Chief Justice as a correct statement. It is not, I think, sufficiently widely known.

Change of  
solicitors

Next, what is the etiquette on a change of solicitors? Where a client has made up his mind to transfer his business from one solicitor to another, there is no general obligation on the new solicitor, from the point of view of professional etiquette, to inform the late solicitor of that fact; although in litigation, of course, there is a duty to notify the late solicitor. Where a client consults a second solicitor on a particular point, and the second solicitor finds himself unable to give the same advice as the first one has given—a not altogether unusual event—in the Council's view it is desirable and courteous for him to inform the former solicitor of this fact, if the client is agreeable, although there is no general duty on him to do so. Finally, executors are entitled to employ any solicitors whom they may choose, and can employ solicitors other than those who may have been named in the will. Where executors of their own free will desire at some

stage to instruct other solicitors, there is no professional objection whatever to the new solicitor whom they desire to instruct acting for them. That is a question we are very often asked: Is it in order in those circumstances for the new solicitor to accept instructions. The answer is certainly Yes.

Next a word or two about the etiquette where you are instructed to proceed against another solicitor. There is an opinion of the Council that, while the procedure of making a prior informal communication to such solicitor is commendable where practicable, in view of the feeling among certain sections of the public that solicitors are averse from taking proceedings against other solicitors, no different procedure should be adopted where a solicitor is instructed to make a claim against another solicitor from that adopted where he is making a claim against a layman.

Proceedings  
against  
solicitors

There is, I am glad to say, no professional objection to a solicitor accepting instructions from whomever he may choose. There was no professional objection, for example, to acting for someone detained under Defence Regulation 18B, and the Council decided just after the war that there was no professional objection to solicitors accepting instructions, if they wished to do so, for the defence of war criminals to be tried before the International Military Tribunal at Nuremberg. That is an interesting decision of the Council because the Bar Council ruled at almost the same moment that it was undesirable that a member of the English Bar should appear for the defence of such criminals. I have, however, read quite recently that members of the English Bar have been appearing for the defence at war trials, though they did not at Nuremberg, so it may be that on second thoughts the Bar Council have decided to follow the Council's lead.

Acceptance  
of instruc-  
tions

Again, on another topic, it is in accordance with the best traditions of our profession that a solicitor should supply information concerning documents in his possession, of course, upon satisfactory provision being made for payment of his costs for looking up the papers. We have had cases where one solicitor has asked another "Have you got the will of Mrs. So-and-so?" and the other solicitor has said: "I am not going to be bothered to look it up." The view of the Council is that that is not the proper answer, and that in fact he should, on proper provision being made for his costs, let the inquirer know whether he has or has not the papers in his possession.

Supplying  
information  
on request

Now as to reference numbers—I have been asked by several members who have written to me about it to mention this subject. I must say that I myself think it is a great discourtesy to omit someone else's reference number and put

Reference  
numbers on  
correspond-  
ence



your own on your letter heading. It seems to me to carry the inference that the other fellow's practice is so small that he can remember everything in his office. I cannot tell you how many hours are wasted here through trying to find out to what subject some incoming letter relates. I feel that it is part of the etiquette of the profession that solicitors should always put the reference numbers on their letters when they write. I hope all articulated clerks who are here to-day will make an absolute rule of that when they come into practice.

Reporting  
unpro-  
fessional  
conduct

Another question that is often asked is: Are we under any duty to report to The Law Society suspected impropriety on the part of a solicitor? The Council have expressed the view that unless there are strong reasons to the contrary, such as a conflicting duty towards his client, it is highly desirable that a solicitor should report immediately to the Council any facts which give him good reason to believe that another solicitor may have been guilty of professional misconduct, so that the Council may investigate the case as quickly as possible. In the view of the Council, that is a professional obligation, unpleasant though it may be, which, in the general interests of us all, it is your duty to discharge subject only to the prior interests of your client.

#### OTHER POINTS ON PROFESSIONAL CONDUCT AND ETIQUETTE

Dealing with  
unqualified  
agents

Where the party on the other side is represented by an unqualified agent, what ought you to do? The Council's view is that, once again subject only to the interests of your client, your proper course is to ignore the agent and send documents direct to the party himself. If he insists on going to some unqualified agent to assist him with his conveyance or whatever it may be, you cannot help it, but there is no reason why you should have to communicate with that agent, and, as I have said, your proper course is to address communications direct to the other party and not through the agent.

Debt  
collecting

On debt collecting matters, there are one or two points to remember. It is not in accordance with proper professional practice for a solicitor to communicate or threaten to communicate with a debtor's employer or commanding officer. That is one point. Secondly, I want to mention an interesting case where solicitors were instructed by a creditor, and the debtor who was unrepresented called to see them and said: "May I talk to you for a moment in confidence?" The solicitors having agreed, the debtor gave them highly confidential information. The solicitors asked the Council's advice what they should do in the circumstances. They were advised that they had acted quite wrongly in ever putting

themselves into the position of giving the other party an opportunity to speak to them in confidence, but, having done so, they ought not to disclose the information and their only fair course was to tell their clients that they had been supplied in confidence with information by the debtor which they were not at liberty to pass on, and therefore they could no longer continue to act. I mention that case because it does show that you are unwise to allow yourself to be forced into the position where you agree to see confidentially someone who is not your client—it may put you in an embarrassing and impossible situation.

We are often asked whether there is any professional objection to a solicitor accepting instructions to sue for a statute-barred debt. The answer is that there is none.

Suing for statute barred debt

Another ruling involving a somewhat similar principle is that which provides that there is no professional objection to a solicitor preparing a lease at more than the permitted rental, provided that he first explains fully the effect of the Rent Acts to his client, so that the client realises the position in which he may be placed.

Lease at more than permitted rent

And now a point of interest to those engaged in courts of criminal jurisdiction. A solicitor who is instructed for the defence in a murder trial should not enter into any arrangement with the Press to supply them with a statement by his client of that client's life story on certain terms, as the writing or sending out by prisoners of any matter for publication is absolutely prohibited by prison regulations and a solicitor should not be a party to a breach of those regulations.

Breaches of prison regulations

Next is a small but very important point which may affect a lot of you. There have been occasions where inspectors of taxes have disallowed as a deduction for income tax purposes expenditure incurred in entertaining clients on the ground that such entertainment is contrary to the proper practice of the profession. That ground for disallowing them is bad. It is not so. It would, no doubt, be unprofessional to entertain persons who were not your clients with the object of attracting business to yourself unfairly, but in the Council's view there is no professional objection whatever to solicitors entertaining their existing clients, and indeed under modern conditions unless at times they did so they could probably not get through their day's work.

Expenses of entertaining clients

The only other matter under this heading is a frivolous one, upon which I will not detain you long. Some time ago a solicitor inquired the etiquette in the following circumstances: A solicitor, Mr. A, wanted to ring up another, Mr. B, and told his switchboard operator to get him on the line. She rang up Mr. B, and Mr. B's operator said: "Yes, Mr. B is here, will you put Mr. A on the line?" Mr. A's girl said: "No,

Telephone priorities



you put Mr. B on the line first." Mr. B's girl said: "My instructions are never to put Mr. B on till the caller is on the line," and Mr. A's girl said: "My instructions are never to put Mr. A on till the person he is calling is there," and in the end the phone call never went through. The Council were then asked for some of that wise advice which they are always ready to give, but I regret to say that on that occasion—the only one I can recall—the Committee's instructions to me were: "Knock their heads together; there is no question of professional etiquette involved." That was no doubt correct. I actually wrote to suggest that the problem would be solved if both sacked their telephonists and then one would have to be on the line first. I only mention that case to show that common sense is sometimes wanted rather than a ruling on a point of etiquette!

#### PROFESSIONAL SECRECY

Now I come to the most difficult topic with which I propose to deal. Earlier in this lecture I made a reference to some of the duties which a solicitor owes to his client, the court and the other side respectively in legal proceedings. Now I intend to examine the subject as it arises in daily practice in various guises and not necessarily only in litigious matters.

It seems to me that to a very large extent the really embarrassing and difficult positions in which solicitors are most frequently placed arise where they are anxious to be frank with the court, their colleagues and others and, above all, to be fair to themselves as men of honour, but at the same time they are faced by an overriding duty to keep the secrets of their clients and to maintain that confidential relationship between solicitor and client which is summed up in the word "Privilege." So many decisions which solicitors have to make are primarily governed by the existence or non-existence of privilege that I think it is important that everyone should understand it and recognise it when it crops up in daily practice.

#### Privilege

Of course, the first essential is to realise that the privilege is not the solicitor's but the client's, and therefore the client can waive it at any time; and if he does consent to disclosure, the solicitor may reveal and, in certain circumstances, must reveal even the most confidential communications. But, first of all, before mentioning some of the decisions arising out of this rule, I would like to state as concisely as I can the law as to privilege as I understand it. Afterwards I will give examples of the way in which it has been applied in practice. I confess at once that I do this with the greatest trepidation in the presence of the Principal of the Society's School of Law,

because he will tell me afterwards, I know, how I ought to have understood the law and how I have misunderstood it, and he will probably add that it did not matter so long as I alone misunderstood it but now there are some 500 others in the same position as myself. Nevertheless I am prepared to take that risk and, as concisely as I can put them, these, I think, are the major points of principle.

All oral or written communications are privileged, whether they be letters, deeds, bills of costs, entries, statements, or any other communications made to the solicitor in the normal course of professional employment—including information obtained by him in collecting evidence on behalf of a client. The privilege applies to communications whether they are made directly or indirectly to the solicitor by his client, provided they are made to him in his professional capacity and in the legitimate course of his professional employment, even though they do not relate to a cause in progress or even in contemplation at the time the information is communicated. By the words "directly or indirectly," I cover the cases of communications made by a client to his solicitor through an agent—a father, wife or son of the client or even an interpreter, and it is not necessary to establish that an agent was himself necessary. It is sufficient that the communication made by the agent was a confidential one.

The law as  
to Privilege

The object of the rule of privilege is to ensure that a client can confide completely and without any reservation whatever in his own solicitor, and the privilege extends to communications made to solicitors' agents and to counsel.

The duration of the privilege is for ever. It is not determined by the fact that proceedings have ended or that a retainer is withdrawn, and it is most important here to remember that it operates so as to prevent one solicitor, without the client's consent, from passing on to a solicitor who has been instructed in his place, confidential information in his possession. You are not at liberty if they are privileged, without your former client's consent, to pass on privileged communications even to another solicitor; and although normally communications are not privileged which are made before the solicitor is retained or after his retainer is ended, they are privileged if they are made under the false impression that the solicitor had agreed to act or, indeed, that the solicitor was still acting for the client.

Finally, the solicitor's privilege is no greater than the client's right, and therefore if a client cannot refuse discovery a solicitor cannot establish privilege. I think that is clear.

Now, what is not privileged? There are five categories of information, of which the last two I think are the most important in practice. First of all, any information which is



not confidential, for example, information derived from collateral sources and not through professional confidence. Therefore, the name of your client is not privileged, or his address, unless it was communicated to you confidentially. In any case, you are bound to disclose to the court the address of a client who is a ward of court. Secondly, facts which are patent to the senses, for example, the date on which you were first instructed, the fact that your client executed a particular deed, or that you yourself witnessed that deed. The fact that certain handwriting is that of your client is not privileged or that a particular document is in your possession.

The third class is records of public proceedings. They are never privileged. Fourthly, and much more important from our point of view, communications made to a solicitor acting for several persons; I mean by that where several parties employ a common solicitor, communications are not privileged if made to him in his common capacity, for example, where a husband and wife had distinct interests, and the wife was induced to act under the advice of a solicitor employed by the husband, the solicitor was held by the court to have acted for both husband and wife so that the wife was able to call for production of all documents which came into the solicitor's possession during such employment, even though he received them from the husband. But even where there is a solicitor common to several parties, the privilege extends to communications made by one party to the solicitor in his exclusive character of solicitor for that party. Despite the fact that two or three persons may be instructing you in a joint transaction, if one says "I want you to advise me personally on this," and consults you exclusively on his own business, that communication would be privileged, but otherwise there is no privilege as between the several clients.

The fifth category of case in which there is no privilege is communications made in furtherance of a fraud or crime. That, I think, is the most important from our point of view. Communications which are relevant to the commission or furtherance of a fraud or crime, even where the solicitor is ignorant of the criminal or fraudulent purpose for which his advice or assistance is sought are not privileged. Before the court, however, in such a case will order disclosure and so displace the privilege on the ground of fraud, there must be a specific allegation of fraud, and there must be a *prima facie* case of fraud made out. On the other hand, however, communications made to a solicitor for the purpose of a defence in criminal proceedings are within the rule and are privileged, provided that they are not made in furtherance of a criminal purpose.

That is, as shortly as I can put it, the law relating to privilege. There appears to be one case, and one case only, in which, despite the existence of privilege, a solicitor is at liberty to disclose confidential information, and that is where in a National Emergency the national interest demands disclosure. There are four, and only four, rulings I have found on this point. First, the Council advised that in time of war a solicitor should disclose to the authorities information which he considers should be disclosed, if given to him by a client of enemy nationality, even if he has consulted him professionally. Secondly, a solicitor would not be justified in maintaining as secret information which might reveal an enemy spy in time of war. Thirdly, there was a case where a solicitor was advised that he should disclose to the Home Office certain details of an anarchist client. The fourth decision was that it was the duty of solicitors acting for British persons resident abroad who were held and deemed to be enemy aliens, to inform the Custodian of Enemy Property of information in their possession regarding the property of such clients in England.

National  
interest  
overriding  
Privilege

Those four cases are the authorities for my proposition that the national interest, and the national interest only, in a time of national emergency can ever justify privilege being ignored.

There are a great many cases in which the Council have been asked to advise individual solicitors upon their duties or proper courses of action in given circumstances, but time will allow me to give only a few examples.

Where a testator is alive, a solicitor having the custody of his will is not free to disclose the contents of that will to anyone, even to the testator's wife if the testator is in a lunatic asylum. If the testator is dead, the solicitor who has the custody of the will must not disclose any information, before probate is granted, except to the executors, without the consent of the executors.

Some  
examples of  
privileged  
communica-  
tions

Solicitors who have acted for one client and obtained confidential information, are not at liberty to disclose it to new clients, even though it might be of the greatest possible assistance to them; it is privileged and must not be disclosed.

Solicitors, who are asked by solicitors on the other side to supply copies of letters written by their client to the client of the other solicitors, are not at liberty to part with such copies without their client's consent and it has been held that they are under no duty to obtain such consent.

Where, in the course of representing a client, a solicitor obtained information as a result of which in the client's subsequent bankruptcy he was aware that the trustee could have claimed certain property for the benefit of the creditors, it was held that the solicitor must not disclose the information



to the trustee without the client's consent ; and again, in a very similar case, a solicitor who acted for executors, who were also residuary legatees, were informed after distribution of the estate by one of the executors that he was an undischarged bankrupt. It was held that the information was privileged and the solicitor was not at liberty to disclose any information to the trustee in bankruptcy.

Those are fairly straightforward examples of privileged communications. Even if it is clear that privilege exists or does not exist, however, the question still often arises, " What should a solicitor do, having regard to his other professional duties ? " The answer, I think, appears to depend to a very large extent upon the facts in each specific case. Here are some examples of advice which has been given by the Council.

Solicitors acting for executors in proving a will were informed that one of the executors was an infant. At that stage the estate had been administered except for an assent by the executors in their own favour, which assent could be postponed till the infant came of age. The advice was that the solicitors were not at liberty without their clients' consent to disclose the facts to the Probate Registry, but they ought to advise their clients not to execute the vesting assent till the infant was of age, and they should refuse to act further if that advice was not accepted.

As regards a gift *inter vivos* by the testator, it is the duty of a solicitor to advise the executors to disclose it to the Inland Revenue. Unless the executors do so, or authorise the solicitor to do so, the solicitor must decline to act, though he is not at liberty to disclose the information without authority.

Where a solicitor acted for executors and found that under the intestacy of one of the beneficiaries his share should pass to the Crown, but the executors wished the solicitor to pay the share over to them and leave them to deal with it, the advice was given that the solicitor should advise the executors in writing of their duty to notify the Crown, but he was not under any professional obligation to disclose the facts himself without permission.

A solicitor acting for a bankrupt who had filed his petition is not under a duty or at liberty, without consent, to inform the trustee of furniture which the bankrupt had in store and which he asked the solicitor to sell for him, but the solicitor was advised that he should strongly urge his client to make the disclosure and that if he did not do so, he should decline to act further for him.

The same advice as to his duty was given to a solicitor who acted for the proposed administrators of a deceased intestate, who died in undischarged bankruptcy, having acquired property after his adjudication.

Where solicitors were informed that their client, who was seeking a loan, was an undischarged bankrupt, they were advised that they should bring pressure to bear upon their client to disclose that fact, or to authorise them to do so, and if he did not, they should decline to act further in the matter.

I referred a little earlier to the fact that privilege applied to communications made under the false impression that the solicitor had agreed to act; that refers clearly to the case where it is the false impression of the client and not the false impression of the solicitor. We had a rather unusual case where solicitors were instructed by a husband to start divorce proceedings and were supplied with the necessary evidence. They later discovered that the instructions had come from the wife purporting to be the husband. The husband instructed another solicitor to take divorce proceedings and called for disclosure of the evidence. The solicitors were advised that they were justified in allowing the husband's solicitor access to the information with the husband's consent. There was no privilege.

Some examples of communications not privileged

And now for a few examples of cases where information was received other than under the seal of professional confidence. Solicitors were acting for a wife who had been granted a divorce and collected from the father maintenance for a child of the marriage. The solicitors inquired whether, in view of the fact that the child had attained the age of twenty-one and had married—and the marriage had received considerable publicity in the Press—they were justified in continuing to receive the maintenance payments from the father. They were advised that as they had obtained the information from a collateral source it was not privileged but, on the other hand, their duty was to their client. They were under no duty to inform the father, but they should advise their client that she ought to do so.

As regards disclosing information about a client's address, I have said that the test is whether it is communicated in secret or not. If it is communicated in secret, it must not be disclosed, and that applies to disclosing it to a trustee in bankruptcy, or to the police, even if they have a warrant to serve. In an unfortunate and difficult case where a solicitor for a husband who had left his wife was sent from the wife a medical certificate saying that her health and mental condition were breaking down, through ignorance of her husband's whereabouts, the solicitor was advised that it would be a breach of privilege to disclose the client's address in view of the express request of his client to treat it as secret.

Disclosure of client's address

In another case solicitors were approached by the police who wished to serve a warrant on a client with whom the



solicitor had lost touch. The client's address was supplied to them through their London agents, who had obtained it quite accidentally. The solicitors were advised that the information in the circumstances was not privileged, but nevertheless they were not bound to disclose the address to the police. In yet another case a solicitor gave a reference for a client, who failed to fulfil his obligations, and moved to another address, known to the solicitor but not known to the creditor. The solicitor was advised that he was at liberty to disclose that address unless it had been communicated to him in confidence.

Again, a solicitor who was instructed to act for one proposed administrator of an estate, in the winding up of which other solicitors were acting, received the papers back from his client duly completed, but his client informed him and asked him not to disclose that she was serving a sentence in prison. The solicitor was advised that as this address was communicated confidentially to him by his client, it was privileged and must not be disclosed to the other administrator or his solicitors.

Solicitor  
employed by  
two or more  
parties

An example of the absence of privilege where a common solicitor is employed by two parties, arose in a case in which a solicitor acted for a married woman in the purchase of a house and for a building society from which she was obtaining moneys on mortgage. After the transaction had proceeded for some time but before completion the solicitor was informed that the woman was not of age. He was advised that as he was acting in a common capacity in the transaction the information was not privileged and he would be justified in disclosing it to the building society and informing the lady client that he had done so.

Another example of this class of case was where a solicitor, who was acting for a vendor and a purchaser, had made to him by one of the parties a disparaging remark about the other. He was advised by the Council that, if the remark was made to him in his capacity exclusively as solicitor for the party who made it, it must not be disclosed, otherwise the remark was not privileged and he was at liberty to disclose it to his other client, although he was not bound to do so.

Communica-  
tions made in  
furtherance  
of a fraud or  
crime

As regards communications made in furtherance of a fraud or crime which are not privileged, this means, I think, that if a solicitor is called on by due process of law to give information about the matter in question, he cannot refuse to do so, but whether in such cases he should volunteer the information to the proper authorities depends on the circumstances of each case. In the case of a serious crime, I think he should certainly do so; I think the authorities bear that out; but in the case of minor offences he certainly need

not disclose, and it is for the solicitor himself to decide his duty in each case. In any case the decisions seem to me to make it clear that a solicitor must not take part in any transaction which is tainted with illegality or fraud, and he must advise the client to disclose illegalities with which he is at present concerned.

May I give these examples : A solicitor acted for a client who made threats to murder the other party to the action if he, the client, was unsuccessful ; it was in fact a divorce proceeding. The Council advised that the statement was not privileged and that if the solicitor really thought that his client was likely to carry out that threat, it was his duty to inform the police.

A solicitor learned that certain documents handed to him by his clients had been forged by a third party. He was told that he should advise his clients that the forgery must be disclosed, and if they declined to disclose it the solicitor should refuse to act further, and in that event he would be under a duty to disclose the forgeries to any solicitors subsequently instructed by the clients to carry through the transaction to which the forgeries related.

Where a will is forged, the solicitors must decline to prove it, and any attempt to prove it being in furtherance of a fraudulent or criminal act the instructions are not privileged and the facts may be disclosed. There has been a case where solicitors were informed that blanks in a will had been filled in by the executor after signature and attestation. The solicitors were advised that they must not prove the will, they should tell the executor that the will was not admissible to probate in its present form, and if they continued to act for the executor they must disclose the facts to the Probate Registry.

A somewhat similar case was where a solicitor was instructed by a residuary legatee, but not by the executors, and was informed by an independent person who saw him as agent for the legatee that one of the witnesses did not see the testator sign. The view was expressed that the information was privileged and though the solicitor was not at liberty to disclose the information without his client's consent, he should advise his client to disclose it and should decline to act further if his advice was not acted upon.

Solicitors acted for a wife who was a party to a separation deed containing a *dum casta* clause and received payments under the deed from the husband's solicitors. They learned from their client that she was living with a man against whom a decree *nisi* had been granted, she having been cited as the woman named. They were advised that they should press their client to discharge her duty of informing the husband's



solicitors of the facts, and if she declined to do so, it would be improper for them to continue to collect the money for her.

A slightly different class of case is one where the solicitor learns of something not in the nature of a fraud or an illegality, but of a breach of duty on the part of a trustee. A solicitor acted for three trustees on the sale of trust property and had advised two of them that they could not purchase the property themselves. After the contract had been signed the third trustee informed the solicitor that he knew of the advice, but had contracted to purchase the property himself through a nominee. The solicitor was advised that as this knowledge was acquired by him while being consulted by one client in his exclusive capacity as solicitor for that client, he was not free without the consent of that client to disclose the information so obtained to the other two trustees. He should not, however, continue to act for the trustees in the sale in view of his knowledge of the circumstances, but there was no professional objection to his informing the other two trustees that the reason why he must cease to act on the sale was that he had information in his possession which compelled him to take this action. On the other hand there was no objection to his continuing to act for the trustees generally in the winding up of the estate.

Where a client was engaged in an illegal building transaction, the solicitors were advised that they should discourage the client from so acting and should themselves decline to act for him.

### CONFLICTING DUTIES

Now I come to what I have rather loosely called conflict of duty. The first class of case with which I want to deal is that in which a solicitor has disclosed to him some past illegality, irregularity or criminal offence committed by his own client or material to his client's case. Let me illustrate what I have in mind here. Solicitors were instructed by a wife to draw up an agreement to secure weekly payments for the maintenance of two children of the marriage, and the client then informed them that she had just learned that her husband had married her bigamously: What was the duty of the solicitors? They were advised that provided there was no agreement not to prosecute, for which the maintenance agreement was a consideration, there was no objection to their assisting their client to carry out the proposed arrangements, and furthermore they were not at liberty without the client's consent to disclose the bigamy.

Again, solicitors who had recovered damages for a client were, after the case was concluded, told by their client that one of the witnesses had given false evidence in consideration

of a money payment. The advice given to them was that they were not at liberty to disclose the facts but they should decline to act further in any matter for that client. Similarly, a solicitor who learns after a decree absolute that his client's petition was presented in collusion is not under a duty to disclose the alleged collusion to the court.

In short the position in these cases seems to be that discovery of some past illegality or irregularity does not involve a duty to disclose or involve a duty to cease to act for the client, unless the act concerned was so personally disgraceful on the part of the client as to involve the inference that he is utterly untruthful and disreputable.

Now I come to the rather difficult topic of confessions. What course should you take where you get a confession from your client? What is the duty of a solicitor where a client is charged with a criminal offence—whether the offence be capital or otherwise is immaterial—and the client admits to the solicitor that he has committed the offence charged? If the client is prepared to plead guilty, no difficulty whatever arises. But how often is he? He usually wishes to plead not guilty, and then you are placed in the position where you have your duty to your client on the one hand and your duty to the court as an officer of the court, on the other hand. It appears that the solicitor's proper course is to bear in mind in these circumstances that it is for the prosecution to establish their case in accordance with the rules of evidence and for the prosecution to prove that the accused is guilty of the offence charged; it is not for him to establish his client's innocence. That is the first principle. He is therefore not only fully entitled but he is under a duty to test in every proper way the evidence of the prosecution, and particularly whether it is worthy of credence. He may quite properly seek to establish that the evidence is insufficient to justify a conviction, that is to say, that there is a break in the chain of evidence, and he may certainly seek to establish that his client was not responsible by reason of want of criminal capacity or lunacy. In fact, he must carry out his duty to do all that he fairly and honourably can in these respects on his client's behalf. But if he is satisfied in his own mind that his client did in fact commit the offence charged, which he has admitted—and I shall have a word or two to say on that point in a minute—he must not state anything to the court which he knows to be untrue, or attempt any form of fraud or call, for example, evidence which in view of the confession he knows to be false, or seek to establish an alibi; and still less must he assert or even infer that the offence was committed by some other person or persons. In other words he must not set up an affirmative defence. But before he

Confessions  
by clients  
of criminal  
offences



does make up his mind that his lines of defence are limited in this way, he should satisfy himself so far as he possibly can that his client realises exactly what is the alleged offence, and he should bear in mind that there are many cases in which persons, possibly through some twist of the mind, admit offences notwithstanding that they may be innocent. They may do so perhaps for the sake of notoriety or because they believe that they are protecting someone else. Therefore, the limitation to which I have referred on setting up an affirmative defence must be restricted to those cases in which there is a clear confession from the accused and the solicitor is really irresistibly driven to the conclusion that his client is guilty of the offence charged, of which the client clearly understands the nature. But he would not be justified in drawing such a conclusion merely because his client has given perhaps a whole series of contradictory statements. That may make you suspicious of your client's innocence but it is not a sound reason for treating your client as though he was in fact guilty and had admitted that fact. It is not our task to judge our clients on that issue.

And now a few words on the case where a solicitor is acting in, perhaps, civil proceedings, and the client admits to the solicitor in the course of those proceedings that he has committed perjury. It seems to me from the authorities that the solicitor's duty is to advise his client to disclose that perjury forthwith to the court, and if he does not do so, the solicitor should withdraw from the case at once. After he has withdrawn, if the evidence was false to the solicitor's own knowledge, for example, if it was to the effect that the solicitor had advised him to take some dishonest or dishonourable course, the solicitor would be at liberty to disclose those details himself to the court, because the client by purporting to refer to the interview and confidential communications has waived any question of privilege. It is in that event I think, for the solicitor to decide whether it would be dishonourable for him to remain silent if he in fact knew of the perjury personally and no question of privilege arose.

That class of case must be distinguished from the case where a solicitor finds out for himself while acting for a client facts which drive him to the conclusion that his client has done a criminal act, the client perhaps stoutly denying that he has done any such thing. What is a solicitor to do then? Let me take the case, for example, of an action to prove a will in solemn form. The solicitor becomes suspicious because of the defence set up and he sends the will to a handwriting expert, and he is advised by that expert that the expert has no doubt whatever (a) that the signature of the testator is forged, and (b) that the forgery is in his own client's

Suspicious  
of criminal  
acts by a  
client

hand-writing. That was one case we have had. The second example was where a case before the Court of Appeal turned on whether process had been served on the appellant. The appellant denied that he had ever had any notice of the original proceedings, and the question was whether the receipt for service was signed by the appellant or not. Again, the view of a handwriting expert was taken and he advised that the receipt was forged, and that it was almost certainly forged by the respondent to the appeal. Here is another case which is based on suspicion—deep suspicion but still only suspicion. The client denies that he forged the document but the solicitor is forced by the opinion of what he regards as an expert witness to look upon himself as being made use of by his client in furtherance of a criminal purpose. It is not necessarily so, however, merely because even the greatest handwriting expert in the world says it is so. There, it seems to me on the authorities that the solicitor's duty, if he is driven to that conclusion about his client, is to withdraw from the case forthwith, to notify his client why he has done so, and to take no further part in the proceedings whatever, but he is not at liberty to disclose the information he has to the court or to the other side. It is a very difficult class of case, but that seems to be our duty in those circumstances.

That is all I have time to say on the subject of a solicitor's duty where he is faced with a conflict between his duties to his client and to the court respectively arising out of information which has come into his possession. I now want to finish by saying a few words about a solicitor's position where a conflict of interest has arisen or may arise between two clients for whom he acts or is asked to act.

First of all it is clear that where a solicitor acts for two clients successively, and the interests of the second client are or may be contrary to the interests of the first client, the rule is that the solicitor should not accept instructions from that second client, if the first client would be injured by the use of confidential information acquired while the solicitor was acting for him or, indeed, if the solicitor himself would be embarrassed in representing that second client by having such information in his possession. There have been a great many cases where the Council have advised against solicitors accepting instructions from a second client because the Council took the view that the solicitors would inevitably be embarrassed by reason of their knowledge of their former client's cases. But in the case of *Grissell v. Peto* the court refused to restrain the defendant's solicitor from acting for him on the ground that he had previously obtained knowledge of the plaintiff's case when representing him and of the evidence

Conflicting  
interests of  
clients



on which it was to be supported, the solicitor having deposed that he had not in fact obtained from the plaintiff any more information about his case than would have been disclosed by a particular of demand. As an example of that class of case, the Council have expressed the view that there is no objection to a solicitor acting for a defendant upon whom he has served a writ as agent for the plaintiff's solicitor. He has no further knowledge of the plaintiff's case than appears on the face of the writ.

There is no objection to a solicitor accepting instructions on behalf of the police to prosecute a car driver for manslaughter merely because he has represented the relatives of the deceased at the inquest. Those are examples of cases where there is no embarrassment. Again, the Council decided on the facts of a particular case that there was no objection to solicitors for a plaintiff in a running down action accepting instructions from the defendant car driver in another action which he proposed to bring against his insurers, who had repudiated liability under the policy, provided that they themselves did not consider they were likely to be embarrassed by conducting both cases and that the original plaintiff agreed to their so acting for the original defendant in his other action. On the other hand, solicitors who had acted for a petitioner in divorce proceedings, and whose instructions had been withdrawn, were advised that they should not subsequently act for the respondent even in respect of a petition for maintenance which had been served upon him; and again, solicitors were advised that they should not act for a husband in divorce proceedings where they had previously acted for the wife in obtaining a judicial separation unless there was no possibility whatever of their being embarrassed by being in possession of information previously obtained.

In a case where you are acting for two or more clients at the same time, the general rule is that you should not act for conflicting interests in litigation. That is patent. If there is any possibility of embarrassment by the knowledge obtained from one client, the solicitor's duty is to insist that the opposing interests should be separately represented. For example, a solicitor was instructed by a car driver as plaintiff in a claim against the driver of another car for damages. The Council expressed the view that he should not at the same time act for a relative of the plaintiff who was injured in the same accident while travelling in the plaintiff's car and who wanted to sue both drivers.

In another case a solicitor was instructed by a passenger in a car and also by the driver to make a claim for damages against the driver of another car. The driver client later instructed other solicitors to defend a claim brought against

him and against the driver of the other car by the passenger. The solicitor was advised that, having accepted instructions from the first driver, he could not continue to act for the passenger in proceedings against him.

One more example of this type of case. A solicitor acted for a wife in divorce proceedings, having previously acted for the husband in the purchase of a house and on its mortgage. After the divorce proceedings started the solicitor carried out a rearrangement of the mortgage. The wife proposed to petition for alimony *pendente lite* and for maintenance and to apply for an order for security for costs. The Council advised the solicitor that he ought to obtain the consent of both parties to his continuing to act for the wife in the circumstances and he should cease to act if that consent were not freely given.

And now, finally, there is the position which arises where a solicitor is concerned in non-contentious business for two or more clients, which might possibly become contentious. The position seems to be reasonably clear that as soon as litigation is probable the solicitor must see that one at least of his clients is separately represented, and if he would be embarrassed in representing even one in litigation by reason of the knowledge which he had acquired of the other one's case, he should see that both clients are separately represented. On the other hand unless litigation is probable this course of action is not absolutely essential; for example—and it is the last example I shall give you to-day—a solicitor acted for two ladies in forming a partnership and later when they desired to dissolve the partnership both wished to instruct him to act for them. The Council expressed the view that his proper course was to advise both the ladies in writing that they should be independently represented, which was the desirable course, but if they both persisted in wishing to instruct him with the knowledge that the other was doing so also, there was no professional objection to his acting for them both, unless and until litigation ensued.

Ladies and gentlemen, that is all I have time to say, and I have omitted much that I would like to have been able to include. I have gone, I know, too rapidly at times, from the sublime to the ridiculous, and I fear that I may often have confused the issue by dealing with broad principles and at the same time interspersing a number of insignificant points of detail. I have, however, felt that the most practical way of tackling this subject of professional conduct and etiquette was, where possible, to state the broad principles involved and then to show you how they applied to actual cases in practice. In that way I believed that I could render the best service to those who have been good enough to come here to-night to

Peroration



listen to me. In retrospect, I feel I have been too ambitious in fixing the scope of this lecture, but when there is so much with which to deal, the problem is not what to include but what to leave out. I have endeavoured to select for inclusion those matters which, from communications received in my office, appear to give the greatest trouble to members of the profession. The time at my disposal has been three hours.

It was in 1235 that the first reference to an attorney was made in the Statute Book, although Glanville wrote a book in 1190 on "Attorneys who are put in the place of their principals in Court to gain or lose for them." When it is recalled, therefore, that year by year over seven centuries the customs, usages, etiquette, practice and law affecting our branch of the legal profession have developed, it becomes patent that three hours is quite inadequate to do more than merely scratch the surface of what could and what, I think, should be said upon this important topic.

Be that as it may, I think that what I have said has been sufficient to satisfy anyone who did not know it already that we solicitors are beset by many, many pitfalls and difficulties in our daily endeavours honourably to discharge our duties to our clients, the court, other members of our profession and the public at large.

That comparatively so very few have failed to live up to the great traditions which our predecessors over the centuries have laid down and to the very high standard of ethics which we set ourselves is, I believe, a magnificent tribute not only to the wisdom of our profession, but to its great integrity and honesty of purpose.

I thank you all for the infinite patience with which you have listened to me.

## APPENDIX

## SOLICITORS PRACTICE RULES, 1936

*RULES UNDER SECTION 1 OF THE SOLICITORS  
ACT, 1933, MADE BY THE COUNCIL OF THE LAW  
SOCIETY, AS APPROVED BY THE MASTER OF  
THE ROLLS.*

22nd July, 1936.

## RULE 1

A solicitor shall not directly or indirectly apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly.

## RULE 2

(A) A solicitor shall not hold himself out or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business in contentious matters at less than the scale fixed by Rules of Court and in non-contentious matters at less than the scale of charges (if any) prevailing in the district in which the solicitor practises, or if no such scale exists then at less than two-thirds of the scale of charges fixed by the General Order made under the Solicitors' Remuneration Act, 1881, which came into force on the 1st January, 1883, and the General Orders amending that Order, or at less than the full scale prescribed by the Solicitors' Remuneration (Registered Land) Order, 1925, as amended by subsequent similar Orders: Provided always that if the charges in question shall be in respect of a transaction affecting an interest in land then the scale of charges prevailing in the district where the land is situated shall for the purposes of this rule be substituted for the scale of charges prevailing in the district in which the solicitor practises.

(B) In order to ascertain the scale of charges, if any, prevailing in any district, the Council may request the Law Society of such district or, if there be no such Law Society, then any Law Society in the neighbourhood of such district to make inquiries and report by their Secretary as to the existence of any such scale. Such report shall constitute *prima facie* evidence as to the scale, if any, prevailing in such district.



## RULE 3

A solicitor shall not agree to share with any person not being a solicitor or other duly qualified legal Agent practising in the United Kingdom of Great Britain and Northern Ireland, India or in any British Dominion, Colony or Dependency his profit costs in respect of any business either contentious or non-contentious : Provided always that—

(A) A solicitor carrying on practice on his own account may agree to pay an annuity or other sum out of profits to a retired partner or predecessor or the dependents or legal personal representative of a deceased partner or predecessor.

(B) A solicitor who has agreed in consideration of a salary to do the legal work of an employer who is not a solicitor may agree with such employer to set off his profit costs received in respect of contentious business from the opponents of such employer or the costs paid to him as the solicitor for such employer by third parties in respect of non-contentious business, against (1) the salary so paid or payable to him and (2) the reasonable office expenses incurred by such employer in connection with such solicitor (and to the extent of such salary and expenses).

## RULE 4

(A) A solicitor shall not join or act in association with any organisation or person (not being a practising solicitor) whose business or any part of whose business is to make, support or prosecute (whether by action or otherwise and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury, including claims under the Workmen's Compensation Acts, 1925 to 1934, or any statutory modification or re-enactment thereof in such circumstances that such person or organisation solicits or receives any payment, gift or benefit in respect of such claims, nor shall a solicitor act in respect of any such claim for any client introduced to him by such person or organisation.

(B) A solicitor shall not with regard to any such claim knowingly act for any client introduced or referred to him by any person or organisation whose connection with such client arises from solicitation in respect of the cause of any such claim.

(C) It shall be the duty of a solicitor to make reasonable inquiry before accepting instructions in respect of any such claim for the purpose of ascertaining whether the acceptance of such instructions will involve a contravention of the provisions of Subsection (A) or (B) of this rule.

### RULE 5

The Council of The Law Society shall have power to waive in writing any of the provisions of these Rules in any particular case or cases.

### RULE 6

In these Rules, unless the context otherwise requires, expressions shall have the meanings assigned to them by Section 81 of the Solicitors Act, 1932.

Words importing the masculine gender shall include females and words in the singular shall include the plural and words in the plural shall include the singular.

### RULE 7

These Rules may be cited as the Solicitors Practice Rules, 1936, and shall come into operation on the 1st day of October, 1936.

PROFESSIONAL CONDUCT AND  
ETIQUETTE

THOMAS G. LEWIS, Esq., F.R.S.

(Attorney at Law, Solicitor General and Secretary of the Law Society)

By The Hon. Council of The Law Society, F.R.S.  
in February 1937





# The Law Society



## SOME ADDITIONAL ASPECTS OF PROFESSIONAL CONDUCT AND ETIQUETTE

*Delivered by*

**THOMAS G. LUND, Esq., C.B.E.**

*(Solicitor of the Supreme Court and Secretary of The Law Society)*

At The Law Society's Hall, Chancery Lane, W.C.2,  
in February, 1951



## OTHER PROFESSIONAL MISCONDUCT

So much for statutory misconduct, and now I come to the other forms of professional misconduct. I have sub-divided this branch of my lecture into the same headings as I did last year :—

- (a) Convictions by a court of criminal jurisdiction.
- (b) Breaches of duty to the court.
- (c) Breaches of duty to clients; and
- (d) Breaches of duty to third parties, including duties owed to other solicitors and to the public generally.

### (a) CONVICTIONS BY A COURT OF CRIMINAL JURISDICTION

Convictions  
(a) By  
English or  
foreign  
criminal  
court

As I indicated last year, *prima facie* the conviction of a solicitor for a criminal offence makes him unfit to continue on the Roll, although the nature of the offence of which he has been convicted may still be taken into consideration. Usually the Disciplinary Committee will find professional misconduct on the certificate of conviction by a competent court of criminal jurisdiction in this country, and the same principle appears to apply to a criminal conviction of a solicitor by a foreign competent court of criminal jurisdiction; there is one case of a solicitor having been struck off the Roll on conviction by a Belgian court for fraud and on other charges of a similar nature.

(b) Courts  
martial

The same principle applies more or less to convictions by court martial. I think the operative words are "more or less," because in each such case the Disciplinary Committee may reconsider the evidence given to the court martial and take into consideration the conduct of the proceedings at the court martial. Indeed, there have been cases in which the Disciplinary Committee have refused to find professional misconduct after a solicitor has been convicted by court martial of a very serious criminal offence because, in the view of the Committee, either the proceedings of the court martial were irregular and improper, or on the facts given to the Disciplinary Committee they were not prepared to accept the evidence and find the solicitor guilty of the offence of which he had been accused and convicted by the court martial.

The test whether the offence of which a solicitor has been convicted by a court of criminal jurisdiction will justify a finding of professional misconduct is whether or not it is a personally disgraceful offence.

Offences  
involving  
fraud or  
dishonesty

Accordingly, no question can arise where a solicitor is convicted, whether or not in his capacity as a solicitor, of any offence involving intentional dishonesty or actual fraud: for example, fraudulent conversion; embezzlement; obtain-

ing money or goods by false pretences; bribery and corruption; conspiring to defraud, fraudulently to convert, or to obtain by false pretences; the fraudulent misapplication of public property; and obtaining credit without disclosing that he was an undischarged bankrupt. Those are obviously all cases where on conviction striking off would follow automatically. So, too, is it professional misconduct to be convicted of forging deeds, inducing the execution of a document of title to land with intent to defraud, and fraudulently concealing documents of title to land. Perjury and the wilful making of false statements by solicitors fall within the same category of offence. A solicitor convicted of having made a statutory declaration falsely certifying the due execution of a deed of covenant in connection with certain income tax proceedings in which he was acting was struck off the Roll, as was a solicitor convicted under s. 5 of the Perjury Act, 1911, for unlawfully, wilfully and knowingly making false statements in a statutory declaration supporting an application for leave to renew a practising certificate.

It is by no means material that the false statements should have been made in the solicitor's character as a solicitor. For example, in his character as a taxpayer a solicitor delivered false accounts of his practice and false returns of his income to the Inland Revenue authorities; on conviction he was found to have been guilty of professional misconduct.

Again, a solicitor in his character as a lessee swore an affidavit in answer to a summons for arrears of rent in respect of his own home, in which he falsely stated that he had paid Schedule A tax on the premises and claimed that the sum in question should be offset against the amount due for rent. On proceedings before the Disciplinary Committee instituted as a result of his conviction, it was pleaded that the fraud or intended fraud had no connection with his status as a solicitor, but he was nevertheless held to have been guilty of professional misconduct.

It is of great importance to the profession that complete reliance can be placed on a solicitor's statements. This is well illustrated by the conviction of a solicitor for making untrue statements in order to procure a passport for another person. The leading case in this connection is that of a solicitor who, in correspondence with the Passport Office subsequent to his signing the usual declaration of personal knowledge of the applicant for a passport, stated that he had known the applicant for about six months as a client and that he had been introduced to him by another client of some years' standing. When questioned by the police the solicitor subsequently acknowledged that in fact he had no personal knowledge of the applicant, but had relied solely on



the assurances of the client who had introduced him. He was found guilty of professional misconduct.

What, however, presents rather greater difficulty, if one is asked to forecast the decision of the Disciplinary Committee or the court, is the case where a solicitor has been convicted by a court of criminal jurisdiction of offences not committed as a solicitor and not involving fraud.

*Other offences* We know that a conviction for breaking and entering, and, in one case, a conviction and sentence of imprisonment for driving a motor car under the influence of drink, have both been held to be professional misconduct, but in another case a conviction for manslaughter by motor car was not so held, though there was a prison sentence. Here, I think, the distinction turned directly on the facts, which in the last case were not "personally disgraceful"; the offence was, in fact, committed by reason of excessive speed, and there was nothing, so to say, derogatory of the solicitor. In yet another case a conviction for libel was held to amount to professional misconduct. The facts here are not uninteresting, as the libel was contained in an open letter to a partner in another firm of solicitors, couched in deliberately opprobrious terms, accusing the firm in question of wrongful and fraudulent dealings with a deceased's estate. The question whether such a conviction could amount to professional misconduct was argued at length before the Committee, and counsel for The Law Society based his case on the oft-repeated proposition that "any misconduct by a solicitor which would, if committed before he was a solicitor, have been sufficient to prevent him from being admitted as a solicitor, will be sufficient to warrant his being struck off the Roll or suspended from practice," and submitted that if an articled clerk had been guilty of publishing such a libel he would certainly not have been admitted as a solicitor. I am inclined to agree. The Disciplinary Committee did not say whether or not they accepted this argument, but they did find that the respondent had been guilty of "misconduct" and may by inference, therefore, be taken to have endorsed the argument put before them.

Certainly this is not the only occasion upon which the Disciplinary Committee have relied on the proposition just quoted, but it may be doubted that the test proposed is really very helpful in deciding what is and what is not professional misconduct, since it leaves open the question of what is sufficient misconduct to prevent an articled clerk from being admitted as a solicitor.

*Common  
assault*

Again, another rather difficult class of case is that of conviction for common assault. In one case, a solicitor entered

a club, of which he was a member, at about 2.45 in the afternoon and ordered a drink. The steward, and later the chairman of the club, refused to serve him on the ground that it was prohibited at that hour of the day. Thereupon the solicitor, becoming highly incensed, assaulted the chairman and used language which the Disciplinary Committee described as of a "most unseemly and disgraceful character." The respondent was convicted of a common assault and fined £2, with £3 costs. The Disciplinary Committee subsequently found him guilty of professional misconduct and suspended him from practice for six months. Their findings and order were upheld, on appeal, by the Divisional Court.

This case, however, must be contrasted with an earlier one in which the same solicitor was concerned. He had called at the chambers in the Temple of a barrister, who refused to see him or to accept a brief from him. The solicitor thereupon waited outside the chambers and, when the barrister ultimately emerged, struck him a blow on the jaw. For that he was convicted before the magistrate of a common assault and fined £2, with £3 costs (an interesting example of consistency, as both fine and costs were the same as in the case I have just previously mentioned). At the hearing before the Disciplinary Committee the solicitor apologised for his conduct, which he attributed to his being in an abnormal state of health, and he was merely ordered to pay the costs, there being no finding of professional misconduct.

The fact that in the first case I mentioned, which was later in point of time, it was held professional misconduct and a term of suspension was imposed for assaulting the chairman of a club, while in the second case it was held not professional misconduct to assault the barrister, must not, I suggest, be taken as supporting the proposition either (1) that barristers are fair game or suffer from some disability such as "common employment" in the law; or (2) that solicitors are not *feræ naturæ* and therefore are allowed one free bite.

It is a fact that reference was made to the earlier case, as was proper in view of the order for costs in that case, before the Disciplinary Committee made their finding of professional misconduct in the second case. The apparent discrepancy is, I cannot help feeling, probably attributable to the reluctance of the Committee to make a finding in the earlier case of professional misconduct after apologies had been given and accepted, and after a plea of ill-health. But the Committee could not really take that twice running.

In 1925 a solicitor who had been convicted of a common



assault upon a married woman in a place of public resort, whatever that may mean, after having been severely cautioned by the Chief Constable and the Chief Police Superintendent on three other occasions after complaints by other women of his having assaulted them, was found guilty of "reprehensible behaviour and reckless disregard of the high standard of conduct and responsibility required from a member of an honourable profession," and he was suspended from practice for two years. And yet, in 1936, a solicitor charged with indecent assault on three boys pleaded guilty to a common assault, and his plea was accepted by the prosecution, with the consent of the bench. The Disciplinary Committee held that the solicitor deserved "severe censure," but they were not prepared to find that for the common assault, of which alone he had been convicted, he had been guilty of professional misconduct.

*Indecent  
assault, etc.*

It is clear from a number of decisions that a conviction for indecent assault, acts of gross indecency or persistent importuning for an immoral purpose will normally involve a finding of professional misconduct. The Disciplinary Committee, however, at a full meeting in 1942, decided that each case must be considered on its merits. It would appear that two pre-1939 war cases in which the Committee were not prepared to find that convictions for an act of gross indecency and for persistent importuning respectively amounted to professional misconduct were, strictly speaking, wrongly decided. In the first case the Committee took into consideration the solicitor's undertaking not to practise again; and in the second case they appear to have been influenced by the respondent's distinguished war record in the 1914-18 war. But I cannot help feeling that while these are, no doubt, proper matters to consider in assessing penalty, they are not proper in deciding whether or not the offence is professional misconduct. I am confirmed in that view by the fact that subsequent convictions for the same type of offences have been held to be professional misconduct.

The penalty normally imposed for this type of offence has been to strike the name of the offender off the Roll, with a proviso in one or two cases that the time might come when the respondent could properly apply to have his name restored, in accordance with the principle laid down by Lord Esher in the leading case of *Re Weare* [1893] 2 Q.B. 439, which I mentioned last year. But in individual cases where there has been a finding of professional misconduct the penalties have been less; where, for example, the Committee have been influenced by the state of the solicitor's health and the unlikelihood of his practising again; by the fact that the

jury at a previous trial had disagreed and that on the second trial a nominal penalty only had been imposed ; by medical evidence that a cure was likely, or at least possible ; and generally by the seriousness of the offence as evidenced by the penalty imposed by the court.

The last class of convictions which I want to mention are those for some technical offence, for example, under the Companies Act for permitting default to be made in submitting annual returns of a limited liability company of which a solicitor is a director, or for breaches of regulations not involving dishonesty. *Technical offences*

My interpretation of the various decisions which have been given with regard to this class of offence is that normally such a conviction does not constitute professional misconduct, although I have found one case in 1942 where a solicitor was held to have committed professional misconduct as a result of his conviction for breaches of the Consumer Rationing Orders of 1941. I cannot help feeling that that decision was probably influenced by the national situation at that time, and I think that on precedent it is probably wrong. It is indeed worthy of comment that disciplinary proceedings have not even been instituted in respect of a conviction of a solicitor for being a party to a breach of the Building Materials and Housing Act, 1945. So that I think there is ground for the view that technical offences not involving dishonesty or fraud are not normally held to be professional misconduct.

#### (b) BREACHES OF DUTY TO THE COURT

Now I turn to breaches of duty. Last year I outlined, so far as I could, the broad principles which govern in contentious matters the solicitor's duty towards the court, his clients and others respectively, but it was only an outline that I gave, and this year I shall try to give some practical examples of what, as I see them, have been held to be breaches of these various duties. First of all, it is clear that failure to comply with an order of the court is professional misconduct—whether the solicitor acts *qua* solicitor or in some other capacity in connection with his practice ; for example, as a solicitor, failing to comply with an order of the court in an administration action to pay moneys in his hands over to a beneficiary ; or, as an executor, failing to comply with an order of the court to pay moneys in his hands into court ; and, the fact that after proceedings were instituted for contempt a solicitor complied with an order of court to pay moneys over to clients, did not prevent his prior failure to comply with the order from being held to be professional

*Failure to  
comply with  
an order of  
the court*



misconduct. I cannot find that non-compliance with a court order made against a solicitor in a purely personal capacity unconnected with his practice has ever been found to be misconduct.

*Deceiving  
the court*

Secondly, any kind of deliberate deception of the court is equally professional misconduct—for example, delivering false accounts as a trustee in proceedings relating to the trusts of a will, or vouching payments before the taxing master by wrongly receipted accounts. Equally a solicitor offends if he knowingly permits a client to attempt to deceive the court, for example, allowing a client to swear a false affidavit as to the value of an unadministered estate in support of an application for a grant of letters of administration, or preparing and lodging papers at the Principal Probate Registry to lead to a grant of probate knowing that the signature of the testatrix had not been properly witnessed and that the affidavit of due execution was untrue. Both acts were held to be professional misconduct. The duties of the profession, as regards the presentation to the court of evidence, the truth of which is suspect, are more difficult to define. I cannot myself doubt that it would be professional misconduct to call as a witness someone whose evidence, to the knowledge of the solicitor, would be untrue. Many solicitors, however, must often suspect the truth of their clients' statements and those of their witnesses. I do not think there is any other obligation on the solicitor in such cases than to warn them of the importance of speaking the truth. If, however, *prima facie*, the evidence to be tendered is false, then I cannot believe that the solicitor would avoid the penalties of misconduct if he called the witnesses after having deliberately refrained from taking some straightforward or elementary step—if it were possible—to check its accuracy. This much is, however, abundantly clear—that if the solicitor himself is a witness he must not depose to facts which are false, either wilfully or recklessly or negligently.

By way of illustrating this point, let me refer to a case in 1905 where a solicitor, having failed to obtain through agents, for his client, a wife, the necessary evidence of her husband's adultery, decided to make investigations himself. Eventually he obtained a written admission of the husband's adultery from a prostitute with whom the husband was known to have been associating. The woman concerned identified the husband, only after difficulty, by a photograph, and the evidence later showed that the solicitor induced her to sign the statement, although he knew, or must have suspected, that the identification was insufficient, if not incorrect. A decree *nisi* was granted, but subsequently

rescinded on the intervention of the King's Proctor on the grounds that the identification was insufficient. The Disciplinary Committee found that the solicitor had thereby been guilty of professional misconduct and the court upheld this finding, but made no order against the solicitor other than for the payment of costs. On the other hand, in a slightly later and very similar case, a solicitor who presented to the court a divorce case which he knew to be false, having instigated and connived at acts to induce a husband to commit adultery, was struck off the Roll. In that case the solicitor acted through a clerk, who induced a prostitute to sign a false admission of adultery with the husband, after the clerk had deliberately induced the husband to commit adultery in a brothel. The sequel here proved the personal part which the solicitor had played in this sorry story, for, after being struck off the Roll, he left for Constantinople, where he was, in due course, joined by his client, the wife—whose decree had meanwhile been rescinded. It was suggested to me that I might put that to you as a happy ending, but I do not know!

The need for care in presenting facts to the court is again illustrated by the finding of professional misconduct against a solicitor who brought a number of High Court actions in the name of a person who was in fact dead, the ground being that, in having failed to make any proper inquiries as to the identity or even the existence of his purported client, he had, in the circumstances, been guilty of deceiving the court. This case may be compared with another, in which a solicitor appeared before magistrates to oppose the grant of a temporary licence and stated falsely that he represented certain residents in the district. The Disciplinary Committee found that he had acted "wrongfully and contrary to professional practice," but did not make a finding of professional misconduct, as there was a certain conflict of evidence in the case and the solicitor was able to give some colour to his explanation that he had received instructions, as he alleged, in an hotel bar.

In another case a solicitor, in the course of an action in which he was *personally* concerned, recklessly and without investigation deposed, in an affidavit, to certain facts as being within his own knowledge, which he subsequently admitted in cross-examination to be untrue. He was held to have been guilty of professional misconduct, though he was acquitted of any intentional dishonesty.

It goes without saying, therefore, that the solicitor in another case, who at different times deliberately swore four affidavits containing false statements as to his true financial



position, by which he deceived the court into dismissing or adjourning bankruptcy proceedings pending against him, was found guilty of professional misconduct and was struck off the Roll.

*Duty towards  
the  
Disciplinary  
Committee*

It is not always realised that the duties towards the court are also owed to the Disciplinary Committee, which is, in fact, a court. One solicitor, charged with misappropriation of client's moneys, sought to throw the blame on to his brother, an unadmitted clerk of his, whom he said he had dismissed from his employment. The matter came before the Disciplinary Committee on a second occasion owing to a reference back from the court, and at the second hearing it was disclosed that the solicitor was, in fact, still employing his brother. The false representation to the Committee was held to be professional misconduct.

A solicitor found to have given false evidence before the Committee of the non-receipt of a cheque or the proceeds thereof was held guilty of professional misconduct; as was another solicitor who, with the object of demonstrating his solvency, put before the Committee as an existing security a certain promissory note which, in fact, had already been satisfied.

The obligation of solicitors as officers of the court to honour undertakings given to the court applies equally to undertakings given to the Disciplinary Committee. Failure to honour such an undertaking to the Committee to produce certain documents to the complainant's solicitors, to permit the inspection of a ledger account and to send in a bill of costs for taxation within a limited period have all been held to be professional misconduct.

The Disciplinary Committee have also found guilty of professional misconduct a solicitor who attempted to suborn a witness from giving evidence before the committee; as they did also a solicitor who attempted to persuade a civilian witness not to give evidence before a court martial.

So much for the decisions which appear to me to involve breaches of duty to the court, and I come to the subject of Breaches of Duty towards Clients.

### (c) BREACHES OF DUTY TOWARDS CLIENTS

*Fraud*

If one thing is more certain than another it is that in his dealings with a client a solicitor must behave with the utmost honesty and frankness. Any form of fraud or dishonesty, that is to say, anything that constitutes actual fraud or intentional dishonesty, on the part of a solicitor will inevitably constitute professional misconduct, as will also allowing a fraud to be committed on a client. It has been held to be

professional misconduct to misinform a client of the amount received in settlement of proceedings, and in a poor person's case a solicitor who systematically obtained sums of money for disbursements which he had not made was found guilty of professional misconduct. These are straightforward cases of fraud.

It is also a disciplinary offence to make untrue representations to, or to conceal material facts from, clients or others in a fiduciary relation, with a dishonest or improper motive. A solicitor, who was instructed by a client to obtain a grant of probate and was paid the sum of £26 on account of fees and disbursements to be incurred, represented falsely to his client for a period of over two years that he was carrying out the instructions, though he had taken no action. He was found guilty of professional misconduct, as was another solicitor who, in order to explain his delay in conducting cases on a client's behalf, made false statements as to the progress which had been made in those cases. *Falsehoods*

In another case, in order to facilitate a settlement with a client on his own terms, a solicitor improperly and without authority endorsed and cashed a cheque which he had received in payment of a claim for damages made by the client and endeavoured to induce the client to accept a settlement with the solicitor contrary to the client's interests and without disclosing certain material facts. Here the Disciplinary Committee found that the respondent had throughout failed in his duty as a solicitor to serve and protect his client's interests and that that amounted to professional misconduct. Again, it was held to be professional misconduct to mislead a client, by false representations, into the belief that the solicitor was taking legal proceedings on his behalf and to that end to endeavour to obtain a sum on account of costs.

It is of paramount importance in the relationship between solicitor and client that a solicitor should at all times disclose with complete frankness whenever he may have any personal interest in any transaction in which he is concerned for a client, and failure to disclose such personal interest is, as I read the cases, unquestionably professional misconduct. Between 1941 and 1947 a solicitor was concerned in a number of sales of real property on behalf of both vendor and purchaser; in each case the purchaser was an associate or nominee of the solicitor and in each case the property was speedily resold at a profit which the solicitor and his associate shared equally. There was no evidence that the original purchase price was not a fair market price, but the solicitor took no steps to inform the respective vendors that he had a personal financial interest in the transactions and he did not advise *Disclosure of solicitor's personal interest*



them to be separately represented. He was found guilty of professional misconduct. Again, a solicitor was found guilty of professional misconduct who, when acting for clients in the administration of an estate, obtained their instructions for the sale of certain premises forming part of the estate to the solicitor's daughter at a price less than the full value of those premises, without disclosing the connection between the purchaser and himself or advising his clients to be separately represented in that transaction.

*Taking  
advantage of  
inexperience,  
etc.*

Very close to making untrue representations and concealing material facts is the offence of taking improper advantage of the youth, inexperience, want of education, lack of knowledge or unbusinesslike habits of a client. Where a solicitor took advantage of the inexperience of a client to induce him to pay a sum on account of costs to be incurred which was out of all proportion to what could be justified by the business which the solicitor had been instructed to carry out, this was held to be professional misconduct, as it was also where a solicitor made it a regular practice to retain sums received on behalf of his clients and only to account for them on the institution of legal proceedings. A curious case occurred where a solicitor who claimed to be a spiritualist improperly advised a client to dispose of his life interest in certain settled funds and to place the proceeds and other property in the solicitor's hands, contrary to the client's interests. This was held to be professional misconduct, as was the conduct of a solicitor in taking advantage of his client's inexperience of business affairs to induce her to deposit certain securities with a bank to secure a loan to the solicitor. An interesting decision in this same class of case is the finding of professional misconduct in the case of a solicitor who permitted his client to execute two codicils to his will at a time when the client was unable to form an independent judgment. It may have been relevant to the decision that by one of the codicils the solicitor's appointment as the client's attorney was procured. In another case advantage was taken of the mentally weak state of a client to persuade him to advance moneys to a solicitor at a time when the latter was financially embarrassed and to approve of the investment of some of his funds in unauthorised securities. This conduct was also held to be professional misconduct. In a recent case advantage was taken of the ignorance of a client, who was induced to instruct a solicitor to act for him on a paying basis instead of under the Poor Persons Rules, which he wished to do, on the representation that the case would come on more quickly for hearing if it did not proceed as a poor person's case. It is, perhaps,

fair to add here that this representation was made by a clerk during the solicitor's absence on war service and the penalty imposed on the solicitor, therefore, was but a nominal one; I mention the case because there was a finding of professional misconduct.

Another type of offence in respect of a client is failure to apply moneys received from a client for the specific purpose for which they have been paid. I do not mean by this merely to refer to a case of misappropriation, which is obviously misconduct, but, for example, to the following type of case—a solicitor was paid a sum of money for the specific purpose of offering it to the client's creditors on the condition that the client would be allowed further time for the payment of the balances due to those creditors. The solicitor failed to carry out his instructions and as a result legal proceedings were instituted against the client (of which proceedings, in fact, the client himself was kept in ignorance by the solicitor). The Disciplinary Committee found that the solicitor had acted with entire disregard of his client's interests and was thereby guilty of professional misconduct. Another example of this type of case is that of a solicitor who failed to complete a conveyancing transaction after being put in funds by his client, with the result that the vendor rescinded the contract and the purchaser lost the property. It was held that the solicitor acted with entire disregard of his client's interest and was thereby guilty of professional misconduct. So, too, has it been held to be professional misconduct where the solicitor failed to carry out a client's instructions to invest money in a particular way. Where a solicitor was instructed to invest funds in a named security, but, contrary to those instructions, invested the money upon another security, which turned out, in the events which happened, to be insufficient, he was held to have been guilty of professional misconduct.

*Failure to  
apply clients'  
moneys for a  
specific  
purpose*

These two last cases bring us naturally on to the two subjects of negligence and delay. Negligence or want of professional skill on the part of a solicitor are not, I think, in themselves grounds for the exercise of disciplinary jurisdiction, and the proper remedy for such matters is a civil action for damages. The Disciplinary Committee have, recently, stated the principle as follows: "While not holding that mere negligence of itself constitutes professional misconduct or conduct unbefitting a member of the solicitors' profession, negligence may be of such a character and so aggravated as to merit either of those descriptions."

*Negligence*

It is, therefore, a question of degree whether negligent conduct by a solicitor is or is not a disciplinary offence. While



one would suppose that mere failure to issue a writ within a statutory time limit would involve a civil liability but would not amount to professional misconduct, there is one case in which a solicitor's failure to carry out clients' instructions to defend an action was held to be professional misconduct, as it was in another case where a solicitor, who had been instructed in a Privy Council matter, neglected or failed to inform his professional client that he did not propose to act on those instructions or to brief counsel.

In yet another case, a solicitor was instructed to take proceedings to recover payment of certain sums due to his client, and, as a result of those proceedings, he received payments from three of the debtors. It was held to be professional misconduct on his part that, although he had been frequently requested to do so, he wilfully neglected to render either to his professional client or to his lay client any report of the proceedings which had been instituted, or any statement as to the moneys received.

#### *Delay*

Now as regards delay. As with negligence, so with delay, it seems that to constitute a professional offence the delay must be gross or excessive. Here, also, it is a question of degree depending on the facts of each individual case. The first decisions of the court on the subject of delay relate to some very early cases where the solicitor had been dilatory in rendering an account to his client for moneys due, or in paying over what was due to the client, and it looked as though it was getting a little near misappropriation. Failure to render an account in respect of tithes and glebe rents collected on behalf of a client from 1892 onwards until 1902 was held to be professional misconduct, and so was failure to account until 1903 for moneys recovered in an action in 1900. In this last case it was held that the delay in rendering the accounts and paying over moneys due to clients was partly in consequence of the solicitor devoting his time to his own affairs and his advocacy practice to the neglect of his other business, and that was no proper excuse for the delay.

Again, in 1910, a solicitor who had failed to account by June, 1910, for a sum of £4 15s. received prior to April, 1909, was found to be guilty of professional misconduct.

More recently, in 1928, misconduct was found in a case where there was delay in connection with conducting divorce proceedings. The solicitor was instructed in December, 1926, and was paid £30 on account of costs. He had done nothing by June, 1927, when other solicitors were instructed, and it was not until August, 1927, that finally he handed over to

them the papers and returned the £30 deposit. It looked as though he had intended to misappropriate the money and I think that that is probably why he was severely dealt with.

Delay in the conduct of poor persons' cases has always been a matter for adverse comment. The Disciplinary Committee have said that, while they recognise the voluntary nature of the work done by solicitors under the Poor Persons Procedure and the charitable motives which lead them to undertake it, to accept a case under the Poor Persons Procedure and to fail to attend to it is in their view a denial of justice to the client who, by the very nature of his circumstances, is unable to protect his own interests in any other way.

It may be that decisions relating to poor persons' cases are no longer material now that the Legal Aid Act has superseded these former proceedings. On the other hand, even Legal Aid cases are still undertaken voluntarily and, no doubt, partly from charitable motives as full remuneration is not paid in respect of them, and since, apart altogether from disciplinary proceedings—as I mentioned in my lecture last week—proceedings may be taken under the Legal Aid Scheme against solicitors and barristers before the Panel (Complaints) Tribunal in respect, presumably, of conduct calculated to bring the Legal Aid Procedure into discredit, it may be helpful if I mention one or two of the cases which have been considered by the Disciplinary Committee arising out of the neglect of poor persons' cases.

Instructions were given in a divorce case in October, 1935 ; counsel was not instructed until February, 1937, to settle the petition, which was filed in May, 1938, and though served shortly afterwards the affidavit of service was not sworn and no further step was taken until the case was removed from the hands of the conducting solicitor in December, 1943. This was held to be professional misconduct. As a result of the delay, the petitioner in that case had to ask for discretion, and the committee decided that it was no excuse that the solicitor was ignorant of divorce procedure and did not like to admit this fact, or indeed that, he felt "attached" to the case and hesitated to part with it to anyone else.

*Neglect of  
poor persons'  
cases*

In a still more recent case, a solicitor was instructed in a poor persons' matter in June, 1947, and did not file the petition until April, 1949. Professional misconduct was found on the grounds of gross neglect of a client's business and unconscionable delay, and of acting in a manner calculated to bring both the Poor Persons Procedure and the solicitors' profession into disrepute.

Another respect in which delay or neglect may amount to professional misconduct is in failure to reply to letters written on professional business, and this is not always recognised.

*Failure to  
reply to  
letters*



Between June, 1944, and February, 1947, a solicitor failed to acknowledge or reply to sixty letters addressed to him on business matters, and, indeed, he only finally replied after he had been stirred up by my office—in fact he did not reply to some of our letters to start with. He was held to have been guilty of professional misconduct in respect of his neglect and delay; but nevertheless I believe that the Disciplinary Committee would still hesitate to find that such negligence or delay is so gross as to amount to professional misconduct, and I would not encourage laymen to start making applications to the Disciplinary Committee, particularly at times where war service or illness had put a heavy strain on solicitors' practices generally, merely in respect of the failure to reply to a comparatively few letters. I think the chances of success would not be high, but laymen still do it; laymen may apply direct to the Disciplinary Committee—one cannot stop them—and the cure is, of course, to answer your correspondence.

I cannot help feeling from the decisions in connection with these two last subjects (negligence and delay) that the standing of the profession has improved greatly during the last thirty years, for I notice that in a case in 1916 a client made an application direct to the Disciplinary Committee in respect of delay where his solicitor had been paid £2 10s. on the 21st January to issue a summons and to set down the case for trial in the county court, and he had failed to carry out those instructions by the 18th February!—in fact, something under a month elapsed before the client lodged an application with the court. In another case, where instructions to take county court proceedings were given on the 7th June, 1921, and the summons was not issued until the 1st November, 1921, the lay client lodged a complaint with the Disciplinary Committee on the 8th November. I am glad to say in both these cases it was held that there was no such delay as to justify a finding of professional misconduct.

*Delay in  
non-  
contentious  
business*

Now a few words as regards delay in non-contentious business. There is a case where the Disciplinary Committee found that, by reason of his persistent delay and neglect, a solicitor had been guilty of conduct deserving of the severest censure, where he had been instructed in October, 1926, by the vendor to prepare and complete the transfer of a house and also to act for the purchaser, both on his purchase and on the mortgage of the property. Apart from preparing the conveyance, no other step had been taken when instructions were withdrawn from him in March, 1927, and he was required to hand over the deeds, which he failed to do prior to the hearing of the disciplinary proceedings in July, 1927.

The committee did not find professional misconduct, but they ordered the solicitor to pay the costs of the proceedings. I mention this merely as showing the time factor in delay.

Finally, on this subject of negligence there is an interesting case which is not unconnected with privilege. A solicitor acted for a client and failed to prevent that client from giving him certain confidential information, of which he subsequently made use for the purpose of advising another client who was engaged in litigation with the first one. The solicitor satisfied the Disciplinary Committee that his failure to prevent the disclosure of this information, or alternatively his use of it for the benefit of the second client, was not through any improper motive, but solely through lack of experience, and having found that as a fact the Committee stated that, while the solicitor was deserving of grave censure, they did not find that the error amounted to professional misconduct, and merely ordered the solicitor concerned to pay costs.

Finally, on the subject of breach of duty towards clients I want to mention the subject of overcharging costs. It is well settled that overcharging a client in a bill of costs may amount to professional misconduct. Whether or not it does so is once again a question of degree and depends on the facts of the individual case. In many of the cases which have come before the Disciplinary Committee there has been an element of fraud present, which has tended to overshadow the issue of overcharging.

An example of such a case, where the fraud element is present, is that of a solicitor instructed by a wife to obtain a grant of letters of administration to her husband's estate, of which the only substantial asset was a claim for damages arising out of the death of the husband in an accident. The claim was settled for £1,650 and the party and party costs were taxed and paid at about £250. The solicitor, without disclosing the fact that the party and party costs had been paid, deducted from the damages a further sum of £150 in respect of solicitor and client costs plus his costs in obtaining the letters of administration. This was held to be a gross overcharge and to amount to professional misconduct.

In another such case a solicitor received £200 in settlement of an accident claim and 30 guineas costs, but, without informing the client that his costs had been paid, he sought to obtain a further £50 from the client for his solicitor and client charges by deducting this sum from the damages. He sought to justify this charge by delivery of an account which included disbursements of £18, but the committee found that part of the disbursements claimed, amounting to £13, were not

*Overcharging  
costs*



justified and they found that the respondent had committed professional misconduct "by delivering a memorandum of costs which he knew or ought to have known he could not justify."

Again, in a conveyancing case some forty years ago, a solicitor acting on a purchase for £3,500 and mortgage, by fraud obtained payment of his costs twice over, but, quite apart from this fraud, the Disciplinary Committee held that his charges of £152 11s. for the conveyance and £130 3s. 6d. for the mortgage were "extortionate" and in themselves evidence of professional misconduct.

That is all that I have either the time or the knowledge to say to-day with regard either to breaches of duty to clients in general or to overcharging costs in particular. The lengthy recital which I have given to-night of disciplinary offences tends to create the impression that solicitors collectively are guilty of every type of fraud and trickery. You do not need me to remind you that this is not so, and that it is but a very small percentage indeed of the profession who discredit the rest of us—indeed, only one out of each thousand practising solicitors goes wrong each year; nevertheless, it is from their experiences that the future generations of solicitors must learn what are the professional offences which they must not commit and what are the penalties if they do commit them. Many of the offences which I have mentioned were committed many years ago, when the reputation of the profession was not high; certainly it was nothing like as high as it stands to-day. In preparing this lecture I have often been struck by the rather obsolete nature of some of the cases which I have nevertheless thought I ought to report. For example, I do not recall, in my twenty years here, a case of gross overcharging, though I do recall conversely several cases of undercutting. In these days a solicitor who grossly overcharged would soon find his practice dissipated. On the other hand, I do not believe that any responsible person who really knows the work that has to be done these days to earn a living in the profession can believe that even the full scale charges are adequate. Accordingly, I cannot see any advantage in undercutting, and at the same time, I see from the cases I have mentioned, the disadvantages of grossly overcharging.

Let me finish on a lighter note and recall to you a story on the subject of undercharging—for a change—by a member of the Bar, who was observed by his colleagues to have appeared in court after having had some silver coins thrust into his hand. After the case was over he was tackled about this as he appeared to have received less than the minimum

brief fee of a guinea and replied : " Well, it is perfectly true I had to accept silver from the client because he had not any gold, but on the other hand, I took every sixpence he had in the world so I do not see how you can possibly say that I have disgraced the profession ! "

## PROFESSIONAL MISCONDUCT AND POINTS ON PROFESSIONAL CONDUCT AND ETIQUETTE

### (d) BREACHES OF DUTY TO THIRD PARTIES

Ladies and Gentlemen,—To-night I am going to start by giving you a number of decisions which, as I interpret them, show where solicitors have failed in their duty to persons other than clients or the court, or have committed offences inherently disgraceful or improper.

Any conduct towards members of the public which is fraudulent or contains an element of fraud is a professional offence, and it matters not that the solicitor concerned may not have been convicted of that fraud by a court of criminal jurisdiction ; that is quite immaterial. So, too, it is professional misconduct for a solicitor to have been guilty of the offence of maintenance, or to have been a party to a champertous agreement if the Committee or the court so find, and without having been prosecuted to conviction. *Fraud*

An example of fraud committed not in a professional capacity is that of a solicitor who acted as agent for a candidate at a parliamentary election and submitted a false return of the candidate's expenses, in support of which he made a declaration which, in the view of the Disciplinary Committee, was made with the intention of avoiding an election petition. He was found guilty of professional misconduct.

It is equally an offence for a solicitor to enable another person to perpetrate a fraud on a member of the public. For example, a solicitor entered into an arrangement with an unqualified man under which that man became, in name only and in no sense *bona fide*, the solicitor's clerk and as such was allowed to use the solicitor's name as that of his employer ; by this means the unqualified person, purporting to be the clerk of the solicitor, was enabled to assist a third man in carrying out certain frauds on members of the public, for which they were ultimately convicted by a court of criminal jurisdiction. The solicitor was found guilty of professional misconduct for having entered into the arrangement in the first place, to allow that clerk to say that he was employed by the solicitor.



On the same principle, a solicitor, who through failure to exercise proper supervision over his clerks and his practice, enabled two of his employees to commit frauds on the public, was found guilty of professional misconduct.

*Uncertified  
solicitors*

It is not always realised that a solicitor who wilfully pretends to be qualified to act as a solicitor at a time when he is under suspension by the Disciplinary Committee or, indeed, when he is without a practising certificate, not only renders himself liable to a prosecution under s. 46 of the Solicitors Act, 1932, but also commits professional misconduct, for which he may be struck off the Roll, and one solicitor was so dealt with for having falsely represented himself to be a solicitor before he was admitted.

In a recent case a solicitor refused to lodge a declaration leading to the issue of his practising certificate and persistently affirmed, despite everything that could be done to persuade him to the contrary, that he held such a certificate, having had the stamps for the appropriate amount of the certificate duty impressed on his professional notepaper by the Inland Revenue office. As he would not take out a certificate and continued to practise, he was charged with professional misconduct and was struck off the Roll on the ground that he was unfit to remain on it.

*Lack of  
supervision  
of a  
solicitor's  
practice*

A slightly different class of case is that of the solicitor who knowingly employed a man who had been imprisoned for contempt of court in having wrongly practised as a solicitor, and allowed that man to have sole charge of the solicitor's office. That was professional misconduct. So, also, has it been held to be, where a solicitor employed a man of known bad character and failed to supervise him, although he knew he had been dishonest in the past. It does not appear, however, from the decisions that it is essential that the solicitor should know or have reason to suspect that his clerk is dishonest. If, in fact, the clerk is enabled to commit a fraud because of the failure of the solicitor adequately to supervise him, then the solicitor fails in his professional duty to the public.

As regards dealings between one solicitor and another, the same principle as to frauds appears to apply. Where one solicitor induced another to delay instituting proceedings to recover a debt due from a third party, in order that he might use the period of delay in order himself to obtain judgment against that third party and so obtain priority for his own debt, he was held to have been guilty of professional misconduct.

*Forgery*

Apart altogether from any question of fraud or dishonesty, I think it is clear from the decisions that a solicitor who

forges a document is guilty of professional misconduct, and it is immaterial that the forgery was a pointless one, that a criminal prosecution would not lie and that there was no intent to defraud or actual fraud committed, or dishonesty involved. The mere fact of the forgery of a material document is misconduct. Where six co-trustees had advanced money on mortgage and the mortgagor decided to discharge the mortgage, the solicitor acting for the co-trustees was asked on payment off of the moneys to hand over the mortgage deed with the discharge endorsed and signed by the six trustees. Owing to illnesses, absence of staff on war service and very heavy pressure of business, a considerable delay ensued and the solicitor was pressed to forward the discharge. He obtained in due course the signatures of four of the trustees, but ascertained that the other two had recently died. He did not like to report this fact, which would have involved further delay, and, solely for the purpose of saving time and trouble, he forged the signatures of the two deceased. The forgery came to light accidentally when someone who knew the two trustees who had died and their dates of death respectively noticed that both had been dead for some months before the date on which they had purported to sign the discharge. Although their signatures were not necessary for the purpose of giving a valid receipt, and although the mortgage moneys were quite properly applied by the solicitor when the mortgage was discharged, and there was no question of misappropriation, the Disciplinary Committee found that he had committed an act, as they said, of almost incredible folly in order to avoid trouble and delay, and he was struck off the Roll in respect of the forgeries.

Last year I expressed the views of the Council on the etiquette of the profession with regard to communicating with the clients of other solicitors. As I then said, the general rule is well known, namely, that a solicitor should not interview the client of another solicitor, particularly in pending proceedings, without the consent and approval of that other solicitor, even if the interview is only with a view to obtaining information as to the client's ability to pay costs. Since then I have found a case heard by the Disciplinary Committee which raised this question of a solicitor's right to communicate direct with someone represented by another solicitor. The facts in the case were that after a dispute with a former client, for whom he had acted in a compensation claim, a solicitor was sued by that client for moneys had and received. He wrote three letters protesting against the client's ingratitude, although he knew that the client was represented by another solicitor. The Disciplinary Committee held that for a solicitor for a party to litigation to

*Communicating with a client of another solicitor*



communicate directly with the other party, who was separately represented, is universally condemned as contrary to the etiquette of the profession and to good taste, but is not in itself professional misconduct. They held, however, that although the solicitor concerned had pleaded that he himself was a party to the litigation and therefore did not technically come within the rule of etiquette because he was not a solicitor for one party communicating with the other party, the course pursued by the solicitor was in fact contrary to the rule of etiquette in question, which applied as well to a solicitor litigant as to a solicitor acting for a litigant.

*Employment of inquiry agents*

Since I lectured last year on this subject, the Council have further considered the question of the employment of inquiry agents with a view to obtaining direct information as to the means to pay costs of the party on the other side in litigation. The Council have expressed the opinion that as a matter of general principle they do not approve of such a course of action unless it is with the consent and approval of the other party's solicitor; they understand, on the other hand, that the practice is not uncommon and, therefore, they have added a kind of rider to that general opinion, viz: that such conduct would not be professionally improper, in their view, provided—and provided only—that the inquiry agent limits the scope of his inquiry to ascertaining the means of the party, and that this expression is very strictly interpreted.

*Communicating with witnesses*

Last year, also, I stressed the important subject of communicating with witnesses, and I repeat the view of the Council, which was published in January, 1944, in the *Gazette*, with the approval of the then Lord Chief Justice, that there is no property in a witness and that so long as there is no question of tampering with a witness or seeking to persuade the witness to change his story, it is open to a solicitor for either party in civil or criminal proceedings to interview or take a statement from any witness or prospective witness at any stage of the proceedings, whether or not that witness has been interviewed or, indeed, called as a witness by the other party.

In a fairly recent case the Disciplinary Committee heard a complaint against a solicitor acting for a party to litigation that he had communicated with a witness upon whom the other party had served a subpoena. The Disciplinary Committee rejected the contention put forward by the complainant that this was professionally improper and dismissed the complaint.

In relation to the standards of professional conduct as between solicitors, I want again this year to make a special reference to breaches of solicitors' undertakings. A breach of an undertaking given by one solicitor to another has, on many occasions, been held to be professional misconduct. Where a solicitor represented at petty sessions a client against whom an order was made to pay a sum by way of maintenance to his wife, the solicitor asked that a case might be stated, and the magistrates agreed to state a case upon the husband entering into recognisances for £50. In lieu of the recognisances, the solicitor gave a written undertaking to be personally responsible for the costs of the case in the event of the appeal failing. His failure to honour that undertaking was held to be professional misconduct.

*Solicitors'  
under-  
takings*

In another case a solicitor, acting for a judgment debtor, obtained an adjournment of his examination on an undertaking given to the judgment creditors' solicitors that he personally would pay the sum owing. Failure to implement this undertaking was held to be professional misconduct. On the other hand, where a solicitor, as vendor of certain property which he had received under his mother's will, undertook to pay the death duty payable on her death within three months of completion of the sale and failed to carry out this undertaking within the specified period, without offering any satisfactory explanation apart from the fact that he was suffering from ill-health, the Court held that the delay was unprofessional and improper, but, on the facts, the breach of the undertaking did not amount to professional misconduct. Nevertheless, the solicitor was ordered to pay the costs, and I think that draws the distinction between the breach of an undertaking given by a solicitor in a professional capacity, which is professional misconduct, and where he gave the undertaking in an entirely personal capacity; here it was still found to be improper but not to be professional misconduct.

A breach of an undertaking given to The Law Society or to accountants employed by The Law Society has also been held to be professional misconduct. In a case in which The Law Society required a solicitor to furnish an account of moneys received by him on behalf of a client, the solicitor wrote to me, after a series of delays, undertaking to supply the required information by a fixed date, which, however, he failed to do. He subsequently undertook to deliver his books to the Society's accountants and again failed to comply with that undertaking. He was charged before the Disciplinary Committee with breaches of those undertakings, and, although the money position was all right, he was found



guilty of professional misconduct for having failed to honour those two undertakings.

Although it is not directly connected with the subject of undertakings, it may be, perhaps, as well for me to mention here that, where a solicitor is invited by the Council to give an explanation of his conduct, he is not bound to do so (apart from where there is statutory authority to require such an explanation, as under the Accounts Rules), but it must be borne in mind that if in fact he does offer an explanation which is false, that false explanation may well amount to professional misconduct ; this has been so held on several occasions.

Before leaving the subject of undertakings, may I once again pass, rather illogically, from the rulings of the Disciplinary Committee and the court to the opinions which the Council have expressed on this subject. I do so because it was a topic which aroused considerable interest at the annual conference at Torquay last year, as a result of which the Council have again considered the whole question of undertakings given by solicitors to one another or to third parties. In the light of the views expressed at the annual conference the Council have expressed certain additional opinions, which will be published in the next issue of the *Law Society's Gazette*.

You may recall that last year I said that undertakings, when exchanged between solicitors, are a matter *uberrimæ fidei* and should be unambiguous in their terms. Therefore, if a solicitor giving an undertaking does not intend to accept personal liability under it, he should say so clearly in the undertaking itself. I went on to refer to the views of the Council on this subject, which were originally published in the *Society's Gazette* for May, 1937, and republished in March, 1948. Those views related particularly to undertakings given to facilitate the completions of sales and purchases. They were to the effect that a solicitor could not evade personal responsibility for implementing an undertaking merely by the use of such words as "on behalf of my client," or "on behalf of the vendor," and that some further and clearer words were needed if it was not intended to accept personal responsibility. The Council took the view that, as a matter of professional etiquette, an undertaking given by a solicitor should be honoured as a personal one, unless in the undertaking he very clearly disclaimed personal liability.

In certain respects this opinion has not been considered to be wholly satisfactory, for two reasons. First, it was not wide enough, being limited, as I have said, to undertakings

given "to facilitate completions of sales and purchases," whereas many undertakings are given and accepted by the profession in matters quite unconnected with conveyancing transactions. When this subject was discussed at the annual conference at Torquay, it was clear that there was unanimity in favour of extending the opinion to cover all undertakings exchanged between solicitors.

Secondly, the opinion was in one way too wide, as it made no allowance for those undertakings given by a solicitor expressly on behalf of his client to do something which, on the face of it, the solicitor himself is not personally able to do—for instance, an undertaking to vacate possession of premises not in his occupation, or to hand over documents which are not and never have been in his possession.

As is well known, the number and variety of undertakings given by solicitors in the course of their professional practice are legion. The undertakings are given not only between members of the profession, but to banks, business houses and similar bodies as a means of expediting and facilitating the transaction of normal professional business.

I ought to interpose here to say that in expressing their previous opinion, set out in the Society's Gazette, the Council were concerned solely with the professional aspect and not with the legal effect of an undertaking expressed to be given on behalf of a client. In the view of the Council, where an agent states that he undertakes on behalf of a disclosed principal the liability in law, if the agent acts within the scope of his authority, is clearly that of the principal and not the agent.

As regards solicitors' undertakings, however, given on behalf of their clients, questions of professional etiquette arise quite apart from the strict legal position, and this is quite properly so for a number of reasons; for example, (1) so far, at all events, as members of the public are concerned, the words "on behalf of my client" or "on behalf of the vendor" may be ambiguous in that they do not make it clear whether the solicitor is merely acting as the mouthpiece of a particular party to a transaction and whether he is accepting personal liability; (2) if, as between members of the profession themselves, solicitors do not accept personal liability, the transaction of normal professional business would be seriously prejudiced, because solicitors, asked to accept undertakings on the part of a person of whom they had no personal knowledge, would be reluctant in their own clients' interests to accept them; and (3) the fact that the undertaking is given by a member of the legal profession is very often the decisive factor in inducing its acceptance, for example, by a bank.



So the Council have now really expressed a new opinion, which is this : It is of the utmost importance that a solicitor who gives an undertaking, if he does not intend that he personally should be responsible for implementing it, should make this plain beyond doubt in the words that he uses, and particular care should be taken with regard to the wording employed so as to avoid, as far as possible, different views being held as to the extent to which the solicitor giving the undertaking is to be held personally responsible for carrying it into effect.

Where, therefore, an undertaking is given by a solicitor, which, while not clearly implying personal liability, nevertheless does not in terms deny such liability, the Council will take all appropriate steps to induce him to honour his undertaking, as the Council are of the opinion that the reputation of the profession requires that such undertakings should be honoured. Where, however, a solicitor has given an undertaking expressed to be on behalf of a client, which the solicitor is clearly not personally able to implement, the Council believe that he is under a duty to persuade his client to honour it, and that he would fall short of his duty if he failed to take any action which lay within his power to induce his client to implement that undertaking.

Finally, the Council take the view that much greater attention should be paid to the wording of undertakings, both by those giving them and those accepting them, and especially so where the undertaking is to do something which the solicitor concerned cannot personally do and which he cannot compel his client to do.

*Duty of a solicitor where the other party is not independently represented*

So much for undertakings. Let me now return to our topic of breaches of duty to third parties and to those obligations which arise where the solicitor is concerned in conveyancing transactions in matters where the other party is not independently represented. Obviously, if anything in the nature of fraud is committed, this is misconduct. For example, a solicitor acting for a vendor failed to disclose to the purchaser a mortgage on the property in the solicitor's favour and a sub-mortgage to a bank. The solicitor contended before the Disciplinary Committee in this case that it was the practice in his part of the country to keep temporary mortgages off the title. This contention was not accepted by the Committee, who returned a finding of professional misconduct.

Again, it was held to be professional misconduct for a solicitor to supply a false abstract of title which omitted any reference to a prior charge on the title. The fact that the solicitor himself is a party to the transaction does not affect

his professional liability in cases of this sort. A solicitor who, as vendor of a plot of land which he owned, conveyed the property to the purchaser without disclosing to him a charge material to the title, and the terms of an order *nisi* in foreclosure proceedings, was held guilty of misconduct.

There is yet another case which shows the importance of full disclosure by a solicitor, even where he is not acting in a professional capacity, if he is in a fiduciary relationship with a third party. Where the solicitor was co-executor of a will but did not represent the other executor, he purchased part of the property included in the estate through a nominee. Before the Disciplinary Committee he was acquitted of the charge that the price which, on his recommendation, his co-executor had agreed to accept on the sale was not the best obtainable, but the Committee held that he should not even have recommended the sale to his co-executor without disclosing his personal financial interest in it.

Now, as regards cases in which a solicitor is concerned with the police. It must be borne in mind that, if a solicitor makes a statement to the police in a matter on which he is questioned involving the public interest, that statement must be made honestly and truly, and where the Committee found that a solicitor had made a statement to a police officer in the course of such an enquiry, which statement the solicitor knew to be untrue in a material respect and which he subsequently denied on oath before a court of enquiry, he was held to have committed conduct unbecoming a solicitor.

*Statements  
to the police*

So, also, is it professionally improper for a solicitor to obtain access to a man detained on remand in order to obtain instructions from him on the false representation that he had been instructed by friends of the detained man to go there and see him. The false representation to the police was the misconduct, apart altogether from the element of touting.

While I am mentioning prisons, it may be of interest to record that it is professional misconduct for a solicitor in breach of prison regulations (1) to obtain access to a prisoner for a newspaper reporter, who is thus able to obtain material for publication in a newspaper; or (2) himself to obtain a statement from a convict under sentence of death for the purpose of obtaining information for publication in the press. In a third case where, after a visit to a prisoner under sentence of death, a solicitor aided and abetted the publication in a newspaper of false information in the form of a letter purporting to emanate from the prisoner, though he knew that no such letter existed, the solicitor was found guilty of professional misconduct and the court confirmed that finding on the ground that he had been guilty of dishonourable conduct



which made him unfit to remain a member of an honourable profession and an officer of the court.

Now I want to pass on to some other cases of conduct which has been held to be dishonourable in a professional respect, or completely inconsistent with the duties and obligations of members of our profession.

*Cases of an  
indecent  
nature*

First, a few cases of a quasi-indecent nature. There is a curious one in which a solicitor attempted to persuade a client to have an injection with a sedative prior to giving evidence in the Divorce Division. The client resolutely refused to approach her doctor for the purpose and the solicitor subsequently, having represented that it was most desirable that some such sedative should be given, with the client's permission injected her in the thigh with what he later admitted was only distilled water, but which he stated he had found to act well in the case of nervous clients who had to go into the witness-box. That solicitor was found guilty of professional misconduct and suspended from practice for a period of three years.

In another case a solicitor was charged with having used his position as a solicitor to a married woman to cloak and further an adulterous association with her. Though on the facts of that case the solicitor was found not guilty of professional misconduct, he was ordered to pay the costs, and I cannot help feeling that the committee were influenced by the relative ages of the parties and by the fact that no complaint had been lodged until the solicitor had broken off the association with the woman concerned, so that, in my view, it is still possible that on different facts such a charge, if proved, might be held to be professional misconduct. I think, however, that it is now abundantly clear that to be a co-respondent in a divorce suit is not in itself professional misconduct.

*Writing  
offensive  
letters*

On this general subject of conduct inconsistent with that of a member of an honourable profession, I next refer to cases where a solicitor has been found guilty of writing offensive and improper letters, whether they be to clients, other solicitors, Government departments, or other members of the general public. There have been several of these cases, in the earliest of which a solicitor was consulted by a married woman with regard to the relations which she alleged existed between her husband and a single woman. The solicitor proceeded to address a series of three letters in extravagant language accusing the single woman of adultery, each letter being contained in an envelope with the letter "A" in scarlet ink inscribed upon it. The solicitor's conduct was held to be professionally improper as being conduct which,

as the Disciplinary Committee worded it, was "reprehensible, derogatory to the solicitor's position as an officer of the court, and wholly unbecoming a solicitor."

In a subsequent case, a solicitor signed letters written by his managing clerk, but with full knowledge of their contents, complaining of the conduct of a client with whom he was having a dispute over his costs. He used such expressions to his client as, "You are a sinister little creature," and "an offensive little wretch," and referred to "a most hideous and offensive attitude to adopt." At the hearing the solicitor sought to justify his letters, which he said he would, in similar circumstances, be prepared to write again. The expressions used were held to be wholly unbecoming those of a solicitor of the Supreme Court, and the Committee expressed the view that no provocation could justify the use of them and the offensive and unprofessional tone which characterised the letter.

In a comparatively recent case in which a solicitor wrote over an extended period a large number of letters in connection with professional business to public officials, other firms of solicitors and, I regret to say, even to me, the Committee, without finding it necessary to decide whether the same tests and the same standard of conduct must be applied in all cases, held that the solicitor had been guilty of professional misconduct and in general "deplored the tone of the letters complained of and the unbridled language and misplaced sarcasm which the solicitor employed, often on the slightest or on no provocation." I may, perhaps, add that the Committee expressly stated that they did not take into consideration in assessing the penalty the letters written to the Secretary of The Law Society, so that I am still fair game.

Finally, as regards the duty owed to third parties, I want to deal with that arising from the giving of references. Many people are inclined not to take sufficient care when asked to supply references, but in the case of a solicitor he has, I think, on the authorities, clearly a professional duty, if he gives a reference at all, to give one that is true. There has been a number of cases where the giving of a false or wrongful reference has been held to be professional misconduct. The early cases are, for the most part, those in which, as a result of a false reference, a fraud has been committed, although it was not necessarily established that the solicitor himself had any actual knowledge of the intended fraud.

In one case a solicitor was representing a bankrupt who, with the intention of defrauding his creditors, for which he was subsequently convicted, left England for Canada. He

*Giving of  
references*



later returned to England under an assumed name and the solicitor gave him a reference in that assumed name to a London bank. The giving of this reference was held to be professional misconduct.

In another, rather similar, case a solicitor acting for a firm of outside brokers, the members of which firm were subsequently convicted of conspiracy to defraud, had good reason to suspect that the brokerage business was fraudulent, but, nevertheless, he introduced a member of the firm to a bank with a view to his opening an account there, and gave him a reference. This action was a disciplinary offence.

In the third and last case I want to mention of this type, a solicitor gave a reference for a man in connection with business negotiations, in which reference it was stated by the solicitor that the man had always met his obligations and that he, the solicitor, had no reason to doubt the man's integrity. In fact, the solicitor had no personal knowledge of his integrity whatever and had good reason to suspect that he was using a false name. As a result of the reference a fraud was committed. The solicitor was found guilty of professional misconduct.

So much for breaches of duty to third parties and my review of decisions of the Disciplinary Committee.

#### RULINGS OF THE COUNCIL ON QUESTIONS OF PROFESSIONAL CONDUCT AND ETIQUETTE

I propose now to give you some further rulings of the Council on a few subjects upon which questions of professional conduct or etiquette arise, and I hope that they may be of interest to you. First of all Agency. As a general rule, a solicitor should not accept instructions to act direct from a client on whose behalf he has previously been instructed to act as an agent by another solicitor, except with that other solicitor's consent, or except where, as agent, he has merely performed some administrative function such as effecting service of a writ, when there is no objection to his accepting instructions from the client direct—or, if it comes to that, to his accepting instructions to defend the action. Furthermore, there is no professional objection to a solicitor acting for a client on taxation of the costs of another solicitor in a matter in respect of which he had previously acted as agent for that solicitor, provided that he is not likely to be embarrassed by any knowledge gained while acting as such agent.

Other rulings of a general nature relating to agents are that there is no objection to a country solicitor with a London office employing a firm of London solicitors as his agents,

though it may be that in such circumstances no agency allowances would be allowed on taxation. Where a provincial solicitor was instructed by a London solicitor to present a bankruptcy petition in a provincial county court as agent for a London firm and received the amount of the taxed costs in respect of work done by him as such agent direct from the Official Receiver in Bankruptcy, on a complaint by the London firm it was held that the provincial agent had done nothing unprofessional in accepting that payment, although the Official Receiver had not been expressly authorised to make such payment by the firm of London solicitors.

Next, a few words on the subject of the acceptance of commission by solicitors, and first on the principles which, in the Council's view, govern commission payable on Stock Exchange transactions. They are these: (1) Full disclosure to clients; (2) No retention of the commission without the client's consent. The Council think the application of these principles should be left to the individual solicitor concerned, because the question arises, for example, where you are acting for trustees, whether the persons to whom you must make the full disclosure are the beneficiaries or the trustees, the life tenant or the person entitled in reversion, and so on. But I would add here, on this subject of Stock Exchange commission, that a solicitor, before he can receive commission, must be on the General Register of the Stock Exchange and have paid the annual fee, and, moreover, the solicitor, under the Stock Exchange rules, must not share the commission with the client. That last is a Stock Exchange rule and not a Law Society rule.

(b) *Commission*

The general principle of full disclosure to the client applies to all commissions received by a solicitor, and bearing this in mind, the following other decisions of the Council may be of interest.

There is no professional objection to a solicitor accepting a commission from an estate agent or surveyor in respect of business introduced to the latter, provided that the client consents to the arrangement first. On the other hand, the Council deprecate the practice of solicitors sharing the commission due to auctioneers, estate agents, surveyors or architects, because it is contrary to the rules of professional conduct of those bodies for their members to share commission with persons other than those in their own professions. Again, there is no professional objection to a solicitor accepting an agency fee from a patent agent in respect of the registration of designs and applications for patents made on behalf of clients of the solicitor, provided the full consent of the client



is obtained, nor to the acceptance by a solicitor of commission from a newspaper in which he has inserted advertisements for missing beneficiaries.

So much for accepting a share in the commissions received by others. As you know, a solicitor is by law prohibited from agreeing to share his costs with any legally unqualified person, but commissions payable to solicitors as agents for various concerns or persons are not necessarily legal costs, for example, building society commissions. The Council have ruled that, where a solicitor had taken over an insurance agency from a deceased insurance agent, there was no professional objection to his sharing the commission with the widow of the deceased agent; in other words, it was not "legal costs" and there was no objection to his agreeing to share it.

I have referred here to agency commission and not to legal costs, but I want to add a word about agreements to remunerate a solicitor for legal work on a commission basis in respect of the recovery of debts. A solicitor can enter into an agreement on a commission basis to recover debts due to a client, provided that the agreement is limited strictly to debts which are recovered without the institution of legal proceedings. If the agreement relates to debts which may be recovered after the institution of legal proceedings, then the agreement itself becomes champertous and illegal and amounts to professional misconduct. Therefore, any debt-collecting agreement on a commission basis must provide for the remuneration of the solicitor in accordance with the proper scale of charges in respect of the recovery of debts by the institution of legal proceedings.

(c) *Conflict of interests*

Now may I return to a subject which I found extremely difficult last year, namely, a conflict of interest between clients whom you are representing. I concluded my last year's lecture by dealing, very shortly indeed, with cases where a solicitor acted, or wished to act, for two or more clients whose interests might conflict. It is an extremely difficult subject. I think, put briefly, the position is that where a solicitor is asked to act for two or more clients contemporaneously, or for one client in a matter where he has acted previously for another client in the same matter, he should have regard to the following considerations: where he is asked to act contemporaneously, whether the interests of the clients might conflict; where he is asked to act for *B* after he has already acted for *A* in the same matter, has he obtained knowledge from previously acting for *A* which would injure *A* if it were disclosed to *B*; or, to put it in another

way, will he himself be placed in an embarrassing position by reason of information already in his possession, which he must not pass on to the second client? If so, he should not act for *B*.

Here are one or two examples of cases which have been considered. The same solicitor should not act for an infant whose legitimacy is to be settled by the court as well as for the legitimate beneficiaries and the trustees; but it is not objectionable for a solicitor to continue to represent children of a deceased testator whose will he had prepared, even though the will might be the subject of an action in which the solicitor himself would be called upon to give evidence as to the testator's intentions; nor is it objectionable for a solicitor who has acted for a company in the sale of its property and undertaking and is advising it as to liquidation to act as liquidator in a member's voluntary winding up. That is not objectionable. I found it extremely difficult to see in every case where the line is drawn, and that is why I am afraid I have only given you cases on both sides of the line and hope that they may help, if you ever need help, to make up your own mind.

Now a few words on another very difficult subject, which is *(d) Conflict of duty*. Last year I also tried to cover the position where a solicitor finds himself with conflicting duties to the court and a client. There are other aspects of conflicting duties, however: where, for example, a solicitor occupies a dual position through being a solicitor in private practice and also holding some official office or appointment. There are many considerations which govern professional conduct in these cases—all really flowing from that well known principle that not only should justice be done but it should manifestly appear to be done.

It is obviously undesirable that by virtue of some office or appointment a solicitor should be in a position to influence a decision or to acquire knowledge which might affect a client's position. He ought not to be embarrassed by being unable to disclose to a client material information obtained in another capacity—and it would be just as bad if the public were to believe, rightly or wrongly, that by instructing a particular solicitor they could obtain preferential or exceptional treatment because of his connection with a particular office.

It is with these considerations in mind that the Council have ruled that, if a solicitor might be embarrassed by having acted in some official capacity, or even by reason of some member of his firm, whether a partner or a clerk, having acted in an official capacity, then the solicitor should not accept instructions in a professional capacity as solicitor.



For example, the Council have held that a solicitor, who was sitting as clerk to magistrates when the drivers of two cars were committed for trial on charges of manslaughter, ought not to accept instructions from either of the drivers in connection with civil litigation arising out of the accident.

Rather similarly, they have ruled that a solicitor, who is an under-sheriff and as such usually sits with the sheriff, the mayor and the recorder at quarter sessions, should not accept instructions to prosecute at quarter sessions.

Again, in the reverse case, where a solicitor, who was a clerk to justices, had been consulted by a client in his private practice, which he subsequently sold to other solicitors whom the client wished to instruct, the Council expressed the view that it would not be proper for the solicitor to sit as clerk to the justices at the hearing of the proceedings in respect of which the client had originally consulted him, and, what is more, the firm which had taken over the practice of the clerk to the justices ought not to continue to act for the client, except with the consent of the other side.

Now as regards cases where a solicitor is a member of some body: for example, a solicitor was a member of a river catchment board which, when it was constituted, had taken over a claim by the riparian owners for compensation, and this was to be the subject of arbitration. He was advised that he ought not to accept instructions *qua* solicitor to act for the riparian owners so long as he remained a member of the river catchment board.

As regards the propriety of acting for a local authority of which a solicitor or any member of a firm of solicitors is a member, one has to bear in mind that, if it were objectionable for a solicitor member of a local authority to act for that authority, it might prevent the local authority from obtaining the best available legal advice, or, conversely, it might prevent them from being served by the best men. Therefore there does not appear to be anything professionally improper in a solicitor member of a local authority accepting instructions to act for that authority after signing a declaration under s. 77 of the Local Government Act, 1933, which provides that a member of a local authority who has any pecuniary interest, direct or indirect, in any proposed contract or other matter, and who is present at a meeting of the local authority at which that matter is the subject of consideration, shall disclose the fact to the local authority and shall not take part in the meeting at which the matter is considered.

Alternatively, without making that declaration there appears to be nothing improper in a councillor partner of a firm handing the matter over to be dealt with by a partner of

his in his place, he himself being expressly excluded from receiving any share in the profits arising from the business of the local authority.

Finally, there is a ruling which says that a solicitor should not appear either for the defence or the prosecution in a case in which the police are involved if he is a member of the local authority where the police are controlled by the watch committee, whether or not he himself is a member of that watch committee.

Now a few words about the duties of commissioners for oaths and some cases which have regard to that duty.

The general principle is well known and is that, subject to the exception as to blind and illiterate persons stated in R.S.C., Ord. 38, r. 13, all that a commissioner is required to do is to ascertain that the deponent is actually in his presence by enquiring whether the signature to the document before him is the name and in the handwriting of the deponent; that the deponent is apparently competent to depose to the affidavit; and that he knows that he is about to be sworn by the commissioner to the truth of the statements it contains, and that the exhibits (if any) are the documents referred to. If the answers to the commissioner's questions on these points are satisfactory, the oath may be administered. The responsibility for the contents of the affidavit rests with the deponent and the solicitor who prepares it. Obviously the commissioner cannot possibly determine whether the deponent understands every statement made in the affidavit, unless he himself has read it to the deponent and has mastered its contents, and that task is not considered by the Council to be within the duties of a commissioner. This general principle is subject to the qualification, however, that it is the duty of a commissioner to satisfy himself that the oath is in form and upon the face of it an oath which his commission authorises him to administer. Thus, if it came to the notice of the commissioner that the affidavit or declaration was incomplete, for instance, because it contained blanks, he would be entitled to and, indeed, should refuse to take it, but the commissioner may not refuse to take a declaration merely because it has been prepared by an unqualified person or because he has some personal reason for not taking it, such as having quarrelled with the solicitor who asks him to take it.

On the other hand, there may be cases where the commissioner already knows from personal knowledge that the affidavit which he is asked to take is false.

In this connection, there was a case where a solicitor was consulted, *qua* solicitor, by a client who brought with him two copies of a writ which had been issued against himself and his elder son. In fact, both copies of the writ had been

(e) Duties of  
commis-  
sioners for  
oaths



served upon his younger son, and the solicitor thereupon wrote to the solicitors who had caused the writs to be served informing them that they had not been properly served. A few days later the same solicitor in his capacity as commissioner for oaths received a call from a clerk employed by solicitors acting as London agents of the firm of solicitors who had caused the writs to be served, who wished to swear an affidavit of service in the same matter. The commissioner knew that the writs had not been properly served. He drew the attention of the clerk to this fact and refused to take the affidavit. The Council considered that, although the duty of a commissioner was limited to the formalities of administering an oath and they agreed that he was not under any duty to concern himself with other than the formal parts of an affidavit, yet, if for some extraneous reason, as in this case, he had good reason to believe that the affidavit was false, even if unknown to the deponent, he should decline to take it.

Difficulty is sometimes experienced by commissioners in deciding whether to administer an oath to a deponent when they are not sure that the deponent has the necessary capacity to understand the oath. An example of this kind of difficulty which the Council had to consider was where the commissioner was asked to administer an oath to a deponent whom he knew to be a voluntary patient in a mental hospital. It appeared that the deponent had behaved in a most excitable manner when in the presence of the commissioner, who came to the conclusion that, without cross-examining the deponent, it would be impossible to ascertain whether or not he appreciated the contents of his affidavit. The Council thought that, in order to satisfy himself that the deponent understood that he was swearing to the truth of a document and also understood the contents of the document, the commissioner was entitled to take into account such facts as the deponent's behaviour before him and that, where he knew that the deponent was a patient in a mental hospital, he would do well to obtain a medical opinion on the matter.

It may be remarked that these views of the Council are not entirely consistent with the *dictum* of Mr. Justice Kay in *Bourke v. Davis*, 44 Ch. 110, who stated that the duties by law of a commissioner taking an affidavit are to satisfy himself, from the deponent personally, that he understands that to which he is about to swear.

Next, what sort of documents should a commissioner take? The answer is that it is undesirable that he should swear anyone to any document which is neither a statutory declaration within the meaning of the Statutory Declarations Act, 1885, nor a document falling within the provisions of

subs. (2) of s. 1 of the Commissioners for Oaths Act, 1889, nor a document to be deposed to before a commissioner in pursuance of some statute, rule, regulation or order having statutory authority. Only those three classes of documents should be accepted.

Next, questions sometimes arise upon s. 1 (3) of the Commissioners for Oaths Act, 1889, which provides that a commissioner shall not exercise any of the powers of a commissioner in any proceedings in which he is solicitor retained to act for any of the parties to the proceedings or is clerk to such solicitor, or in which he is interested. With this must be read the terms of Ord. 38, rr. 16 and 17, which provide that no affidavit for the use of the Supreme Court shall be "sufficient" if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent, correspondent, clerk or partner of such solicitor or before the party himself.

There have been several cases in which the Council have had to interpret these provisions. For instance, a solicitor who receives an annual retainer from a company at whose office he attends daily ought not, as a commissioner for oaths, to take affidavits for the general manager of that company to be used in the company's litigation, even though an independent firm of solicitors may be conducting the litigation. A commissioner who is a member of a local authority should not take affidavits and declarations relating to that local authority's business, and a solicitor should not take affidavits regarding proofs in bankruptcy when acting for a proving creditor, or regarding the winding up of an estate when acting for the personal representatives of the testator.

We have received several inquiries as to the proper duty as a commissioner of a solicitor who is employed part time as a clerk by another solicitor. In the Council's view it is not proper for him to take oaths for a client of his employer. On the other hand, where a commissioner merely shares accommodation in the office of another solicitor, pending his removal to a permanent office of his own, and there is no question of his employment, there is no objection to his taking affidavits for clients of that other solicitor.

On the same basis, where a commissioner acted as managing clerk to a firm of solicitors, the Council expressed the opinion that a declaration made before him by a client of the firm in connection with non-contentious matters, for example, for death duty purposes or for conveyancing matters, would not be "sufficient" within the meaning of Ord. 38, rr. 16 and 17, and he should not take them.



There have been certain other miscellaneous opinions on this subject, which may be of interest. For example, there is no obligation upon a solicitor to take oaths outside his normal office hours. It is grossly improper for a commissioner to share any part of his fee by, for example, allowing to a solicitor's clerk for whom papers are being sworn some part of his fee as a gratuity.

Points of difficulty sometimes arise as to the duty of a commissioner in connection with documents exhibited to an affidavit. The Council have expressed the opinion that it is not the duty of a commissioner to mark such documents unless requested to do so, because he cannot have any knowledge of them without reading the affidavit, which he is not required to do; accordingly a commissioner is not concerned to see, for example, that schedules to Inland Revenue affidavits have been signed by the deponent.

Another quite interesting little point on this subject: a solicitor acting as agent for another was instructed to examine orally a judgment debtor who, however, sent in a doctor's certificate as an excuse for not attending at the hearing. On an application to have the debtor committed for contempt the solicitor mentioned to the judge that, a few days after the date of the doctor's certificate, the debtor had deposed to an affidavit before his partner, when he appeared to have been in good health. The Council expressed the view that the solicitor had not acted improperly in so doing.

Finally, let me add that a solicitor who abused his position as a commissioner for oaths by obtaining a retainer from a client who called upon him to swear papers relating to administering an estate was found guilty of professional misconduct and, on appeal, was suspended from practice for a period of five years.

(f) *Unqualified persons*

Now a few points with regard to unqualified persons. There have been certain opinions on the subject of dealings by solicitors with unqualified persons purporting to act for another party to a transaction.

Where a solicitor finds in the course of undertaking some conveyancing business for a client that a legally unqualified person is concerned for the other party, the Council take the view that there is a duty to the profession, subject only to the overriding duty to the client, to report the facts to the Society with a view to the institution of proceedings under the Solicitors Acts for practising as a solicitor.

A slightly different aspect of the same problem arises where, for example, the solicitor acting for a vendor finds that the purchaser has decided to act for himself. In the Council's view the solicitor for the vendor, if the draft contains

errors which can be put right by a reasonable amount of correction, should himself amend the draft conveyance sent to him by what I may call the optimistic purchaser ; on the other hand, if the draft is so badly drawn as to be quite inappropriate, he should return it to the purchaser and recommend him to consult a solicitor on its preparation—bearing in mind again here that he must always be guided by what he considers to be in the best interests of his client, the vendor. Where, on the other hand, a party to such a transaction insists on being represented by someone without legal qualifications, the solicitor should, subject, as I have said, to the prior interests of his client, decline to communicate with the unqualified person and should write his letters and send his deeds always direct to the other party himself, so that the party acts absolutely entirely on his own responsibility if he sees fit to take advice from an unqualified person.

From time to time questions arise as to the propriety of a solicitor or firm of solicitors undertaking the control of the legal department of some business concern or corporation. The Council have expressed the view that there are six basic rules to be borne in mind :—

*(g) Solicitors  
controlling  
the legal  
department  
of a  
commercial  
undertaking*

(1) Such a legal department can only legally undertake work which by Statute is properly solicitors' business when it is conducted and controlled by a solicitor, duly certificated.

(2) It follows that such a department must be conducted or managed by a solicitor, or a firm of solicitors, as he or they would manage his or their own office or a branch office.

(3) In so far as the legal department performs the functions of a solicitor, those functions must be performed by the solicitor or firm of solicitors in his or their own name ; for example, letters threatening legal proceedings must be signed in the name of the solicitor or firm of solicitors.

(4) It also follows that the solicitor's name must appear on the notepaper as required by the Registration of Business Names Act. There is no objection to the solicitor's name being printed on his client's notepaper, provided that the paper is used exclusively by the solicitor in connection with the client's business and is not used by the client itself.

(5) It further follows that the address where the business of the legal department is carried on is the place, or one of the places, where the solicitor practises, and he must, therefore, register this address with The Law Society as one of his professional addresses ; and



(6) It will be the duty of the solicitor in such circumstances to observe carefully r. 3 of the Solicitors' Practice Rules, 1936, as to not agreeing to share his costs, and he will also have to keep the appropriate books and bank accounts, and to deliver accountants' certificates in respect of that practice.

(h) *Debt collecting*

Next, a few words on the subject of Debt Collecting. First of all, the Council strongly deprecate the practice of including in a letter demanding payment of a debt a demand also for the costs of that letter, and in this connection they do not distinguish between a demand for the payment of costs and a statement that "the costs of the letter are so much." This view was published in the Gazette in May, 1930.

Moreover, the Council deprecate a letter being sent to a mortgagor demanding payment of arrears due under the mortgage, together with a sum for the costs of that letter, unless it is explained that the costs can be added on to the amount of the mortgage debt.

Where, on the other hand, a creditor wrongly made a demand for payment of a debt alleged to be due to him by a third party, and that third party consulted his solicitor, the Council decided that there was no professional objection to the solicitor for the third party writing back stating that he would be prepared to advise his client to accept an apology for the libel provided his charges of one guinea were paid. On the other hand, again, if a solicitor offers to assist the Director of Public Prosecutions by supplying information relating to a pending prosecution, he is not justified in refusing to supply that information unless his charges are paid. He owes a duty to supply it, once he has offered to do so, without charge.

There is, however, no professional objection to a solicitor making arrangements on behalf of a creditor client for the payment of a debt by instalments subject to the stipulation that the debtor shall pay the creditor's solicitor's costs in the matter, and similarly there is no professional objection to an agreement to accept payment of a judgment debt by instalments with a further proviso that the judgment creditor's solicitor's costs of the agreement should be paid by the judgment debtor.

On the same principle, though it was thought to be somewhat unusual, the Council saw nothing improper in a solicitor acting for a creditor agreeing to accept payments in liquidation of a debt only if the debtor's solicitors guaranteed the payment.

(i) *Practical points on taking over a solicitor's practice*

Last week I referred very shortly to the accounting aspects of taking over the practice of a deceased solicitor. I am proposing to conclude this series of lectures by dealing

with a few practical points which have been raised from time to time by solicitors desirous of taking over the practice of some other solicitor for some cause—for example, on his death, retirement, bankruptcy, lunacy, suspension or striking off. The first point to bear in mind is that, where a practice is taken over, the conducting solicitor must register the practice as his under the Business Names Act and with The Law Society, and his name must appear on the notepaper, as the practice must, in law, be his regardless of any financial arrangement that he may have entered into within the provisions of r. 3 of the Solicitors' Practice Rules with the former solicitor or his legal representatives. Where the practice acquired is that of a deceased solicitor, the Council have expressed the view that a firm of solicitors may conduct the practice under an arrangement with the legal representatives of the deceased solicitor for such reasonable period as may be necessary to make and complete the arrangements for its disposal, but any such arrangement should not continue beyond the executor's year without the express authority of the Council. There would be, in such circumstances, no objection to the solicitor himself arranging to purchase the practice in due course, but in that event the personal representatives should be separately represented.

During the *interregnum* between the death and the sale of the practice, if the conducting solicitor carried it on with the help of the staff of the deceased solicitor, he must personally exercise effective control over that staff. The Council have not been prepared to express any opinion as to how many days a week a solicitor should be required to attend in the office personally, but they consider it is for the solicitor himself, in such circumstances, to be quite certain that the control he exercises is full and effective.

Ladies and gentlemen, time is drawing to an end and I know that many of you want to go. I am afraid that the first of these lectures, on the subject of committees, was a little dull. The second two have been rather hard going and I have not found it altogether easy to make the talk—is there such a word?—listenable, or, at all events, interesting, because where one talks continuously on rather a gloomy subject it is not easy to introduce a light note into it. I have wondered, looking back over the 108 hours I spent preparing last year's lectures—I am glad to say that I did not count what I spent this year, because it was too depressing—what, after all, is a short summary of a solicitor's duties. I suppose, really, it is the old principle: "Do unto others as you would they should do unto you," and not: "Do others as they try to do you." If I had to advise, very briefly, a young



solicitor on the guiding principles of conduct when he comes into the profession, I think I should say to him that it is clear that only the very highest conduct is consistent with membership of this profession of ours. Your clients' interests are paramount—that seems to be clear—except that you should never do, or agree to do, anything dishonest or dishonourable, even in a client's interests or even under pressure from your best and most valuable client ; you had better lose him. Though you may be prevented by the rules affecting your client's privilege from disclosing something fraudulent, dishonest or dishonourable which you feel you ought to disclose, you should refuse to take any personal part in anything which you yourself think is dishonourable ; you should withdraw and cease to act for that client, even if he presses you to go on. So far as you possibly can, consistently with not actually letting your client down, you should be completely frank in all your dealings with the court, with your brother solicitors and with the members of the public generally.

Finally, I think I would say that where your word has been pledged, either by yourself or by a member of your staff, you should honour that word, even at financial cost to yourself, because his reputation is the greatest asset a solicitor can have, and when you damage your reputation you damage the reputation of the whole body of this very ancient and honourable profession of ours.

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