



Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

Pursuant to sections 94 and 95 of the Lawyers and Conveyancers Act 2006, the New Zealand Law Society, with the approval of the Minister of Justice and after consultation in accordance with section 100 of that Act, makes the following rules.

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- 1 Title**
These rules are the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- 2 Commencement**
These rules come into force on 1 August 2008.
- 3 Rules of conduct and client care for lawyers**
Every lawyer must comply with the rules of conduct and client care for lawyers set out in the Schedule.
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Schedule

Rules of conduct and client care for lawyers

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Preface

Client care and service information

Whatever legal services your lawyer is providing, he or she must—

- *act competently, in a timely way, and in accordance with instructions received and arrangements made:*
- *protect and promote your interests and act for you free from compromising influences or loyalties:*
- *discuss with you your objectives and how they should best be achieved:*
- *provide you with information about the work to be done, who will do it and the way the services will be provided:*
- *charge you a fee that is fair and reasonable and let you know how and when you will be billed:*
- *give you clear information and advice:*
- *protect your privacy and ensure appropriate confidentiality:*
- *treat you fairly, respectfully, and without discrimination:*
- *keep you informed about the work being done and advise you when it is completed:*
- *let you know how to make a complaint and deal with any complaint promptly and fairly.*

The obligations lawyers owe to clients are described in the *Rules of conduct and client care for lawyers* (the **rules**). Those obligations are subject to other overriding duties, including duties to the courts and to the justice system.

If you have any questions, please visit www.lawsociety.org.nz or call 0800 261 801.

Notes about the rules

This publication includes—

- the *Rules of conduct and client care for lawyers* made in accordance with the Lawyers and Conveyancers Act 2006 (the **Act**):
- client care and service information.

The rules are based on the fundamental obligations of lawyers set out in section 4 of the Act, namely—

- to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- to be independent in providing regulated services to clients:
- to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- to protect, subject to overriding duties as officers of the High Court and to duties under any enactment, the interests of clients.

The rules are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standards that lawyers must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and a conviction may be obtained despite the charge not being based on a breach of any specific rule, nor on a breach of some other rule or regulation made under the Act.

Orders of a disciplinary nature may be made by the Disciplinary Tribunal against a lawyer on the grounds set out in section 241 of the Act, namely where there has been a finding of misconduct, unsatisfactory conduct, negligence, or incompetence, or in certain circumstances a conviction for an offence punishable by imprisonment. If a standards committee has determined that there has been unsatisfactory conduct, the standards committee can make a variety of orders as set out in section 156 of the Act.

Misconduct and unsatisfactory conduct are defined in section 6 of the Act. Wilful or reckless contravention of the Act or of these rules or other practice rules or regulations made under the Act is misconduct under section 7(1)(a)(ii). A contravention that is not wilful or reckless is unsatisfactory conduct under section 12(c).

The complaints and disciplinary process that may be invoked in the event of a breach of these rules is set out in Part 7 of the Act and in separate rules or regulations.

These *Rules of conduct and client care for lawyers* have been made by the New Zealand Law Society and approved by the Minister of Justice in accordance with Part 6 of the Act. In particular, these are the rules required by sections 94(e), (j), and (o) and 95 and authorised by section 336 of the Act, which provide for or relate to—

- standards of conduct and client care:
- the requirement that lawyers provide clients in advance with information on the principal aspects of client service:
- the kinds of conduct for which a lawyer or former lawyer may be disciplined:
- conditional fee agreements.

The rules are binding on all lawyers and former lawyers under section 107(1) of the Act. Accordingly, they apply to all lawyers, whether they work in private practice as barristers and solicitors or as barristers sole or as in-house lawyers in the private or public sector. Some rules apply only to particular kinds of work.

To the extent appropriate, these rules define the bounds within which a lawyer may practise. Within those bounds, each lawyer needs to be guided by his or her own sense of professional responsibility. The preservation of the integrity and reputation of the profession is the responsibility of every lawyer.

Lawyers may seek guidance on the application or interpretation of these rules from the Law Society's Ethics Committee.

These rules are registered with the Registrar of Companies in accordance with section 102(1) of the Act.

Rules of conduct and client care for lawyers

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Chapter 1 Introduction

Title and commencement

- 1 These rules are the Rules of conduct and client care for lawyers.
- 1.1 These rules come into force on 1 August 2008.

Interpretation

- 1.2 In these rules, unless the context otherwise requires,—
- Act** means the Lawyers and Conveyancers Act 2006, including any amendments to that Act
- barrister sole** means a lawyer who acts only as a barrister and not as a solicitor and who is the holder of a current practising certificate authorising the lawyer to act as a barrister and not as a barrister and solicitor
- close personal relationship** includes, but is not limited to, the relationships of parents and children, siblings, spouses, civil union partners, and the relationship between persons living together as partners on a domestic basis
- court** means a court or tribunal before which a lawyer may appear
- independent advice** means advice given by a lawyer who,—
- (a) in respect of the matter on which the advice is given, has—
- (i) no conflicting interest of the type referred to in rule 5.4, 5.5, or 5.6; and
- (ii) no conflicting duty to any other client or person; and
- (b) is not a member of a practice in which any other member has a conflicting interest or duty of the type referred to in paragraph (a)

For the purposes of this rule, where a person resides or has a place of business in an overseas country, the term lawyer includes a member of the legal profession of the relevant country

informed consent means consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action

Chapter 1—*continued*

have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved

Law Society means the New Zealand Law Society

member, in relation to a practice, means and includes—

- (a) a lawyer who owns the practice either solely or with other lawyers; and
- (b) a lawyer who is a partner in the practice or is employed by the practice; and
- (c) in the case of an incorporated law practice, a lawyer who is a director, shareholder, or employee of the practice

practice means a law practice, whether conducted by 1 lawyer, a partnership of lawyers, or an incorporated law firm

public authority means any tribunal, commission, panel, board, parliamentary committee, or body, which in each case carries out a public function

real estate services means services that a lawyer or incorporated law firm provides by undertaking the work of a real estate agent

retainer means an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

- 1.3 In these rules, unless the context otherwise requires, any reference to a rule extends to and includes all of its subclauses and paragraphs.

General**1.4 Conduct for which lawyer may be disciplined**

The kinds of conduct, including criminal offences, for which a lawyer or former lawyer may be disciplined are as follows:

- (a) misconduct as defined in section 6 of the Act;
- (b) unsatisfactory conduct as defined in section 6 of the Act;
- (c) negligence or incompetence in a lawyer's professional capacity of such a degree or so frequent as to reflect on

Chapter 1—*continued*

the lawyer's fitness to practise, or as to bring the legal profession into disrepute:

- (d) conviction of an offence punishable by imprisonment where the conviction reflects on the lawyer's fitness to practise, or tends to bring the legal profession into disrepute.

1.5 Nature of rules

These are the rules required by section 94(e), (j), and (o) of the Act. They also constitute the code of professional conduct and client care required by section 95 of the Act and are the rules relating to conditional fee agreements authorised by section 336 of the Act.

1.6 Provision of information

All information that a lawyer is required to provide to a client under these rules must be provided in a manner that is clear and not misleading given the identity and capabilities of the client and the nature of the information.

1.7 Electronic provision of information

A requirement in these rules to provide a client with information is satisfied by providing the information—

- (a) in writing; or
- (b) in an acceptable electronic form.

Unless a client otherwise instructs, an electronic form is acceptable where the information is readily accessible to the client concerned and is available for subsequent reference. This rule applies whether or not a particular rule states that information is to be given in writing.

Chapter 2**Rule of law and administration of justice**

- 2 A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
 - 2.1 The overriding duty of a lawyer is as an officer of the court.
 - 2.2 A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.

Chapter 2—*continued***Proper purpose**

- 2.3 A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.¹

Assisting in fraud or crime

- 2.4 A lawyer must not advise a client to engage in conduct that the lawyer knows to be fraudulent or criminal, nor assist any person in an activity that the lawyer knows is fraudulent or criminal. A lawyer must not knowingly assist in the concealment of fraud or crime.
- 2.4.1 A lawyer may assist a client in seeking to avoid or minimise any penalty or adverse effects that flow from fraud or crime.

Certificates

- 2.5 A lawyer must not certify the truth of any matter to any person unless he or she believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.
- 2.6 If a lawyer subsequently discovers that a certificate given by the lawyer was or has become inaccurate or incomplete to a material extent, the lawyer must immediately take reasonable steps to correct the certificate.

¹ Examples of the breaches of the rule might include: issuing a statutory demand under the Companies Act 1993, knowing that (or failing to make inquiries whether) the debt is bona fide disputed; registering a caveat on a title to land knowing that (or failing to inquire whether) there is a "caveatable interest" on the part of the client to be protected; and serving documents in a way that causes unnecessary embarrassment or damage to the person's reputation, interests, or occupation.

Chapter 2—*continued***Threats**

- 2.7 A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

Reporting misconduct

- 2.8 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct must make a confidential report to the Law Society at the earliest opportunity.²
- 2.8.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.
- 2.8.2 Where a report by a lawyer to the Law Society under rule 2.8 may breach the lawyer's duty to protect confidential non-privileged information, the lawyer should also advise his or her client of the report.
- 2.9 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of unsatisfactory conduct may make a confidential report to the Law Society, in which case rule 2.8.1 will likewise apply.
- 2.10 A lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.

Unauthorised practice of law

- 2.11 If a lawyer learns that a person is committing an offence by—
- (a) providing unauthorised services in reserved areas of work; or

² A member of a panel under a "friend" system operating in various localities might receive in confidence from another lawyer information that should be reported to the Law Society. The member of the panel should, in such a circumstance, advise either disclosure by the other lawyer or that the other lawyer should take advice from the panel member on a lawyer/client basis. A member of a panel may have to consider whether the other lawyer should be advised that full lawyer/client privilege attaches to their communications from the outset.

Chapter 2—*continued*

- (b) providing unauthorised conveyancing services; or
- (c) providing legal services in breach of any of sections 21, 22, or 23 of the Act (which relate to persons, not being lawyers, engaging in misleading conduct regarding their right or qualifications to practise law)—

the lawyer must immediately report the matter to the Law Society and, unless it is contrary to the interests of the lawyer's client, refuse to deal with that person.

Chapter 3**Competence and client service**

- 3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

Respect and courtesy

- 3.1 A lawyer must at all times treat a client with respect and courtesy and must not act in a discriminatory manner in contravention of section 21 of the Human Rights Act 1993.
- 3.2 A lawyer must respond to inquiries from the client in a timely manner.
- 3.3 A lawyer must inform the client if there are any material and unexpected delays in a matter.

Provision of information

- 3.4 A lawyer must, in advance,³ provide a client with information in writing on the principal aspects of client service including the following:
- (a) the basis on which the fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client (subject to any requirement of regulation 9 or 10 of the

³ The expression “in advance” is contained in section 94(j) of the Act. Accordingly, lawyers are recommended to provide the information set out in rule 3.4 prior to commencing work under a retainer.

Chapter 3—*continued*

Lawyers and Conveyancers Act (Trust Account) Regulations 2008):

- (b) the professional indemnity arrangements of the lawyer's practice. This obligation is met if it is disclosed that the practice holds indemnity insurance that meets or exceeds any minimum standards from time to time specified by the Law Society. If a lawyer or a practice is not indemnified, this must be disclosed in writing to the client:
 - (c) the coverage provided by the Lawyers' Fidelity Fund and if the client's funds are to be held or utilised for purposes not covered by the Lawyers' Fidelity Fund, the fact that this is the case:
 - (d) the procedures in the lawyer's practice for the handling of complaints by clients, and advice on the existence and availability of the Law Society's complaints service and how the Law Society may be contacted in order to make a complaint.
- 3.5 A lawyer must, prior to undertaking significant work under a retainer, provide in writing to the client the following:
- (a) a copy of the client care and service information set out in the preface to these rules; and
 - (b) the name and status of the person or persons who will have the general carriage of, or overall responsibility for, the work; and
 - (c) any provision in the retainer that limits the extent of the lawyer's or the practice's obligation to the client or limits or excludes liability. The terms of any of those limitations must be fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances.
- 3.6 If information provided by a lawyer in terms of rule 3.4 or 3.5 becomes inaccurate in a material respect, the lawyer must ensure that the information is updated with due expedition. Rules 3.4 and 3.5 are complied with where a lawyer has previously provided a client with the information required and the information remains accurate.

Chapter 3—*continued*

- 3.7 Rules 3.4 and 3.5 do not apply—
- (a) where the lawyer is instructed by another lawyer or by a member of the legal profession in an overseas country, unless the fee information or other advice is requested by the instructing lawyer or member of the legal profession, as the case may be; or
 - (b) if it is, in the circumstances, impracticable for the lawyer to provide the information referred to in those rules; or
 - (c) if there is no reasonable likelihood that the client will understand the information because the client—
 - (i) is of a young age; or
 - (ii) is a person with a mental health issue or disability; or
 - (d) in respect of regulated services rendered by an in-house lawyer to his or her employer where the in-house lawyer is engaged under an employment agreement.

Complaints mechanisms

- 3.8 Each lawyer must ensure that the lawyer's practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice. When a lawyer owns a sole practice, the complaints procedure may include the reference of complaints to an independent lawyer for consideration. This rule does not bind a lawyer whose status in a practice is solely that of an employee.

Continuing education

- 3.9 A lawyer must undertake the continuing education and professional development necessary to ensure an adequate level of knowledge and competence in his or her fields of practice.

Retainers entered into prior to 1 August 2008

- 3.10 Rules 3.4 and 3.5 do not apply to a retainer entered into by a lawyer before 1 August 2008.

Chapter 4

Availability of lawyers to public and retainers

- 4 A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.

Refusing instructions

- 4.1 Good cause to refuse to accept instructions includes a lack of available time, the instructions falling outside the lawyer's normal field of practice, instructions that could require the lawyer to breach any professional obligation, and the unwillingness or inability of the prospective client to pay the normal fee of the lawyer concerned for the relevant work.

4.1.1 The following are not good cause to refuse to accept instructions:

- (a) any grounds of discrimination prohibited by law including those set out in section 21 of the Human Rights Act 1993;
- (b) any personal attributes of the prospective client;
- (c) the merits of the matter upon which the lawyer is consulted.

4.1.2 A lawyer who has a retainer under which he or she is to remain available to receive instructions from the client concerned is entitled to decline instructions from others that would be inconsistent with the lawyer's obligations under the retainer.

4.1.3 A lawyer who declines instructions must give reasonable assistance to the person concerned to find another lawyer.

Duty to complete retainer

- 4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless—

Chapter 4—*continued*

- (a) the lawyer is discharged from the engagement by the client; or
 - (b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or
 - (c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.
- 4.2.1 Good cause includes—
- (a) instructions that require the lawyer to breach any professional obligation:
 - (b) the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time:
 - (c) the client misleading or deceiving the lawyer in a material respect:
 - (d) the client failing to provide instructions to the lawyer in a sufficiently timely way:
 - (e) except in litigation matters, the adoption by the client against the advice of the lawyer of a course of action that the lawyer believes is highly imprudent and may be inconsistent with the lawyer's fundamental obligations.
- 4.2.2 None of the matters set out in rule 4.1.1 is good cause to terminate a retainer.
- 4.2.3 A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—
- (a) had due regard to his or her fiduciary duties to the client concerned; and
 - (b) given the client reasonable notice to enable the client to make alternative arrangements for representation.
- 4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

Chapter 4—continued**Client terminating retainer**

- 4.3 A client has a right to terminate a retainer at any time subject only to compliance with any agreed terms in the retainer as to grounds and notice for termination, which are reasonable in the circumstances of the particular case.
- 4.3.1 Termination of the retainer by the client does not affect any entitlement of the lawyer to be reimbursed for services reasonably and properly provided to the client prior to the termination of the retainer and any entitlement of the lawyer to seek damages for breach of a fixed-term retainer when it is reasonable to do so in the circumstances of the particular case.
- 4.4 A lawyer has no proprietary interest in a client and must not exert undue pressure on a client not to terminate a retainer or to re-engage the lawyer after termination of the retainer.
- 4.4.1 Subject to any statutory provisions to the contrary, upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents, records, funds, or property held on the client's behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien⁴ that the former lawyer may claim.⁵
- 4.4.2 If the matter in issue is urgent, the former lawyer who holds a lien over documents must make the documents available to the client's new lawyer on receipt of an undertaking from the new lawyer that the former lawyer's fee will be paid in priority to the fee of the new lawyer.
- 4.4.3 Where a client changes lawyers, and funds, documents, or property of the former client are the subject of an undertaking given by the former lawyer to a third party, the former lawyer may decline to release the funds,

⁴ A lien is a legal claim of a person against the property of another person that secures the payment of a debt or the fulfilment of an obligation owed by the other person.

⁵ This rule does not limit any legal rights that a client may have to copies of documents, for example under the Privacy Act 1993.

Chapter 4—*continued*

documents, or property concerned to the new lawyer or client until the former lawyer is discharged from the undertaking to the third party.

4.4.4 Subject to the former lawyer's legal right to a lien, the interests of the client must be foremost in facilitating the transfer of the client's documents and records.

4.5 Rule 4.4 and this rule do not prevent—

(a) the inclusion in a retainer of a term authorising the lawyer to retain copies of the client's documents and records; or

(b) a practice from retaining copies of the client's documents and records on termination of the retainer so long as it is reasonably considered that it will or may be necessary to refer to the documents or records for the purpose of defending any complaint or claim by the client or other proceedings against the practice.

Administration of oaths and declarations

4.6 Subject to his or her availability, a lawyer holding a practising certificate as a barrister and solicitor must administer oaths and take declarations.

4.6.1 A lawyer must not administer an oath or take a declaration in any case where the lawyer lacks or may appear to lack the necessary independence.

4.6.2 A lawyer must not administer an oath or take a declaration in any case where there is good reason for the lawyer to believe that the matters sworn or declared are false.

4.6.3 A lawyer must administer an oath or take a declaration in a manner consistent with the lawyer's professional obligations.

4.6.4 A lawyer administering an oath or taking a declaration is not responsible for the contents of the document sworn or declared and is not obliged to read it.

4.6.5 A lawyer must not request or procure any other lawyer to administer an oath or take a declaration in breach of these rules.

Chapter 5

Independence

- 5 A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

Independent judgement and advice

- 5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.
- 5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.
- 5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

Conflicting interests

- 5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.
- 5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.
- 5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.
- 5.4.3 A lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.
- 5.4.4 A lawyer who enters into any financial, business, or property transaction or relationship with a client must advise the client of the right to receive independent ad-

Chapter 5—*continued*

vice in respect of the matter and explain to the client that should a conflict of interest arise the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters. This rule 5.4.4 does not apply where—

- (a) the client and the lawyer have a close personal relationship; or
- (b) the transaction is a contract for the supply by the client of goods or services in the normal course of the client's business; or
- (c) a lawyer subscribes for or otherwise acquires shares in a listed company for which the lawyer's practice acts.

5.4.5 In this rule, a lawyer is deemed to be a party to a transaction if the transaction is between entities that are related to the lawyer by control (including a trusteeship, directorship, or the holding of a power of attorney) or ownership (including a shareholding), or between parties with whom the lawyer or client has a close personal relationship.

Conflicting business interests

5.5 A lawyer must not engage in a business or professional activity other than the practice of law where the business or professional activity would or could reasonably be expected to compromise the discharge of the lawyer's professional obligations.

5.5.1 Where a lawyer or the lawyer's practice provides, or intends to provide to clients, services other than regulated services, the services must—

- (a) be associated with the provision of regulated services; and
- (b) be provided by the lawyer or the lawyer's practice or by an entity in which the lawyer or the lawyer's practice has a controlling interest.

Chapter 5—continued**Third party conflicts of interest**

- 5.6 A lawyer must ensure that the existence of a close personal relationship with a third party does not compromise the discharge of the duties owed to a client.
- 5.6.1 A lawyer must not act if there is a conflict of interest or an appearance of a conflict of interest between a client and a third party with whom the lawyer has a close personal relationship.
- 5.6.2 Where a person with whom the lawyer has a close personal relationship has an interest in the matter being dealt with or proposed to be dealt with on behalf of the client, the existence of that close personal relationship and the nature of the interest must be disclosed to the client or prospective client irrespective of whether an actual conflict of interest exists.
- 5.6.3 A lawyer is not precluded from acting for a client solely because another lawyer in the lawyer's practice has a close personal relationship with a person whose interests conflict with the interests of the lawyer's client.
- 5.6.4 Where lawyers are in a close personal relationship with each other they must not act for different parties in a matter unless the clients of both lawyers give their informed consent to their respective lawyers acting. Where both lawyers are retained by their respective clients before the close personal relationship is established, then, in the absence of both clients' consent to their respective lawyers continuing to act, the lawyer retained later in time must cease to act.
- 5.6.5 A lawyer is not precluded from acting for a client because another lawyer in his or her practice has a close personal relationship with the lawyer acting for the opposing party.

Personal relationships

- 5.7 A lawyer must not enter into an intimate personal relationship with a client where to do so would or could be inconsistent with the trust and confidence reposed by the client.

Chapter 5—*continued*

5.7.1 A lawyer must not enter into an intimate personal relationship with a client where the lawyer is representing the client in any domestic relations matter.

Gifts

5.8 A lawyer must not accept a gift from a client if there is a possibility of the gift being or appearing to be inconsistent with the trust and confidence reposed by the client.

5.8.1 In any case where a lawyer proposes to accept a gift of a significant amount or value, the lawyer may do so only if the client has taken prior independent advice in respect of the matter.

5.8.2 This rule extends to gifts from clients to any person with whom the lawyer has a close personal relationship or to any member of the lawyer's practice.

Collateral rewards

5.9 A lawyer must not directly or indirectly offer to, or receive from, a third party any reward or inducement in respect of any advice given, referrals made, products or services purchased, or any work done for a client.⁶ This rule does not apply to arrangements under which a third party has agreed to pay or contribute to normal fees payable by a client with the knowledge and consent of that client.

Drafting instruments

5.10 A lawyer must not draft or assist in drafting a provision of a will or other instrument under which the lawyer may take a benefit other than a benefit normally attached to acting in a professional capacity in respect of the will or instrument unless, before the execution of the will or instrument, the person concerned has taken independent advice.

5.10.1 It is not a breach of this rule for a member of the lawyer's practice (other than the proposed beneficiary)

⁶ The Secret Commissions Act 1910 will apply to referral fees that are received by lawyers and not disclosed to the client.

Chapter 5—*continued*

to assist in the drafting of the will or instrument if the testator (or donor) is related by blood or marriage to the proposed beneficiary or has a close personal relationship with the proposed beneficiary.

- 5.10.2 This rule extends to the drafting of wills or other instruments under which a person with whom the lawyer has a close personal relationship, or any member of his or her practice, may benefit.

Claims against lawyer

- 5.11 When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately—
- (a) advise the client to seek independent advice; and
 - (b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.
- 5.12 A lawyer may resume acting for a former client where the matter in dispute has been resolved.

Chapter 6
Client interests

- 6 In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

Conflicting duties

- 6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.
- 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.
- 6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that

Chapter 6—*continued*

the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

- 6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.
- 6.2 Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party.
- 6.3 An information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2.

Conflicting office

- 6.4 A lawyer must not act in any matter where, by virtue of membership of a public authority by the lawyer, a member of the lawyer's practice, or a member of the lawyer's family,—
- (a) a significant risk of a conflict exists; or
 - (b) it may reasonably be concluded that the lawyer or his or her practice are able to make use of the membership to the advantage of the client; or
 - (c) the lawyer's ability to advise the client properly and independently is compromised.

Chapter 7

Disclosure and communication of information to clients

- 7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.⁷
- 7.1 A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client (not being another lawyer acting in a professional capacity) about the steps to be taken to implement the client's instructions.
- 7.2 A lawyer must promptly answer requests for information or other inquiries from the client.
- 7.3 A lawyer is not required to disclose information to the client if—
- (a) the client has given informed consent to the non-disclosure of particular information; or
 - (b) the disclosure would be likely to place at risk the health (including mental health) or safety of the client or any other person; or
 - (c) disclosure would be in breach of law or in breach of an order of the court;⁸ or
 - (d) the information relates to a proposed retainer that the lawyer has declined.

⁷ See *McKaskell v Benseman* [1989] 3 NZLR 75 in which Jeffries J at 87 said, "The fiduciary must, in dealing with those to whom he owes such an obligation, reveal fully all circumstances that might affect their affairs, and is thus under a duty of disclosure not imposed on others. For whatever reasons, and notwithstanding the perceived detrimental consequences to the plaintiffs, the solicitors still were obliged to disclose to them the letter no matter what the consequences."

⁸ An example of disclosure prohibited by law is when the lawyer makes a suspicious transaction report to the police under the Financial Transactions Reporting Act 1996. See section 20 of that Act. Disclosure is prohibited by these rules, for example, by rule 13.9.4 (which relates to the inadvertent release of privileged documents).

Chapter 7—*continued*

- 7.4 A lawyer must not agree to receive information on the basis that it will not be disclosed to his or her client unless the client has given informed consent to this.
- 7.5 An undertaking by a lawyer to a third party (whether another client or not) to keep information confidential does not relieve the lawyer of the duty to disclose that information to the client unless the client has given his or her informed consent to the undertaking.
- 7.6 When a matter is completed, the lawyer must advise the client accordingly, provide a brief summary of the work undertaken (to the extent that this has not previously been provided) and, where appropriate, identify any necessary future action by the client or the lawyer.
- 7.7 Rules 7.1 to 7.6 apply where a lawyer is instructed by another lawyer on behalf of a client of the instructing lawyer. In that event, unless otherwise requested, the lawyer should deal with and report to the instructing lawyer rather than the lay client.

Chapter 8
Confidential information

- 8 A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.⁹

Duration of duty of confidence

- 8.1 A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.

⁹ Information acquired in the course of the professional relationship that may be widely known or a matter of public record (such as the address of the client, criminal convictions, or discharged bankruptcy) will nevertheless be confidential information.

Chapter 8—continued

- 8.1.1 Following the death of a client or former client, the right to confidentiality passes to the client's personal representatives.
- 8.1.2 Where an incorporated client goes into receivership, liquidation, or voluntary administration, the duty of confidentiality owed to the corporation under the direction of the receiver, liquidator, or administrator remains but confidentiality relating to the business and affairs of shareholders and directors of the client (if the lawyer acted for those parties) remains with those individuals.

When disclosure is required

- 8.2 A lawyer must disclose confidential information where—
- (a) the information relates to the anticipated or proposed commission of a crime that is punishable by imprisonment for 3 years or more; or
 - (b) the lawyer reasonably believes that disclosure is necessary to prevent a serious risk to the health or safety of any person; or
 - (c) disclosure is required by rule 2.8; or
 - (d) disclosure is required by law, or by order of a court, or by virtue of the lawyer's duty to the court.
- 8.3 Where a lawyer discloses information under this rule, it must be only to an appropriate person and only to the extent reasonably necessary for the required purpose.

When disclosure is permitted

- 8.4 A lawyer may disclose confidential information relating to the business or affairs of a client to a third party where—
- (a) the client expressly or impliedly¹⁰ authorises the disclosure (and where the information is confidential to more

¹⁰ Where a client is legally aided, the lawyer should draw to the attention of the client the implied consent of the client that the lawyer is permitted to disclose matters to the Legal Services Agency in accordance with any funding agreement.

Chapter 8—*continued*

- than 1 client, all clients have authorised the disclosure);¹¹ or
- (b) the information relates to the anticipated commission of a crime or fraud; or
 - (c) it is necessary to protect the interests of the client in circumstances where, due to incapacity, the client is unable effectively to protect his or her own interests; or
 - (d) the lawyer reasonably believes that the lawyer's services have been used by the client to perpetrate or conceal a crime or fraud and disclosure is required to prevent, mitigate, or rectify substantial injury to the interests, property, or reputation of another person that is reasonably likely to result or has resulted from the client's commission of the crime or fraud; or
 - (e) disclosure is necessary for the lawyer to seek guidance from another lawyer in respect of a proper course of professional conduct, and in such case that other lawyer is bound to maintain the confidence of the client; or
 - (f) disclosure is necessary for the effective operation of the lawyer's practice including arranging insurance cover or collection of professional fees; or
 - (g) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the lawyer by the client.
- 8.5 Where the lawyer discloses information under this rule, it should be only to the appropriate person or entity and only to the extent reasonably necessary for the permitted purpose.
- 8.6 In rule 8.4, **client** includes a former client.
- Use of confidential information prohibited**
- 8.7 A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.

¹¹ Where the right to confidence has passed to a third party (for example, where the client has died or is in liquidation), the party to whom the right has passed may authorise disclosure.

Chapter 8—*continued*

- 8.7.1 A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's practice where—
- (a) the practice or a lawyer in the practice holds information confidential to the former client; and
 - (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
 - (c) there is a more than negligible risk of disclosure of the confidential information; and
 - (d) the fiduciary obligation owed to the former client would be undermined.
- 8.7.2 Rule 8.7.1 is not breached where there is an effective information barrier between the lawyer who holds the confidential information of the former client and the lawyer who proposes to act for the new client.
- 8.7.3 An information barrier is effective when, in all the circumstances, there is a negligible risk that the confidential information in respect of the former client will be or has been disclosed to the new client or to any lawyer acting for the new client.
- 8.7.4 Unless the lawyer is unable to contact the former client, particulars of any information barrier must be disclosed to the former client prior to the lawyer commencing to act for the new client.
- 8.7.5 For the purposes of this rule 8.7, confidential information is presumed to be held by a practice when any lawyer who is a member of the practice has been a member of another practice that held the confidential information when that lawyer was a member, unless the lawyer concerned can demonstrate that he or she is not aware of the relevant confidential information.

Other confidential information

- 8.8 A lawyer must not breach or risk breaching a duty of confidence owed by the lawyer that has arisen outside a lawyer–client relationship, whether to benefit the lawyer, a

Chapter 8—*continued*

client, or otherwise.¹² In such a case the lawyer must not act for a client against a person in respect of whom confidential information relevant to the matter in issue is held.

Chapter 9
Fees

- 9 A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

Reasonable fee factors

- 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
- (a) the time and labour expended:
 - (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
 - (c) the importance of the matter to the client and the results achieved:
 - (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
 - (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
 - (f) the complexity of the matter and the difficulty or novelty of the questions involved:
 - (g) the experience, reputation, and ability of the lawyer:
 - (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
 - (i) whether the fee is fixed or conditional (whether in litigation or otherwise):

¹² Examples of such a duty might be duties owed by company directors and officers of the Crown.

Chapter 9—*continued*

- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.

Fee agreements

- 9.2 The terms of any fee agreement between a lawyer and client must be fair and reasonable, having regard to the interests of both client and lawyer.

Fees in advance

- 9.3 A lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

Fee information and advice¹³

- 9.4 A lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.
- 9.5 Where a client may be eligible for legal aid, a lawyer must inform the client of this and whether or not the lawyer is prepared to work on legally aided matters.

Final account

- 9.6 A lawyer must render a final account to the client or person charged within a reasonable time of concluding a matter or the retainer being otherwise terminated. The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

¹³ See also rules 3.1, 3.3, and 3.4.

Chapter 9—continued**Lawyers undertaking work of real estate agents**

- 9.7 A lawyer who undertakes the work of a real estate agent must comply with the rules set out in chapter 16.

Conditional fee agreements

- 9.8 A lawyer may enter into a conditional fee agreement with a client only in the circumstances and in accordance with the requirements set out in sections 333 to 335 of the Act and in these rules.
- 9.9 Where a lawyer enters into a conditional fee agreement with a client, the lawyer must ensure that,—
- (a) before entering into the conditional fee agreement, the lawyer has informed the client of any other appropriate arrangements that may be available, including, where relevant, the possibility of legal aid; and
 - (b) the total fee charged at the conclusion of the matter is fair and reasonable in accordance with rule 9.
- 9.10 A conditional fee agreement (including an amendment or variation to a conditional fee agreement) must be in writing and must provide—
- (a) the method by which the fee is to be determined; and
 - (b) the condition or conditions that will amount to success and upon the occurrence of which the fees or any part of them will become payable; and
 - (c) whether there are any fees or expenses for which the client will be liable whether or not the client succeeds; and
 - (d) the basis upon which either party may terminate the agreement and what the liability for fees on termination will be; and
 - (e) the method by which the fee is to be determined in the event that an offer of settlement or compromise is made in respect of the matter, which the client declines to accept against the advice of the lawyer; and
 - (f) the circumstances in which the client may be liable to pay the costs of any other party to the proceedings; and

Chapter 9—*continued*

- (g) that the client may give notice cancelling the conditional fee agreement within 5 working days after it has been entered into by the client on the basis that the lawyer may charge a normal fee for any work done during that period.

Conditional fee statement

- 9.11 Upon conclusion of a matter that is the subject of a conditional fee charge, the lawyer must provide the client with an account that discloses the normal fee and also the premium.
- 9.12 Rule 9.11 applies whether the conditional fee is charged in terms of a conditional fee agreement (as defined by section 333 of the Act) or under an arrangement that is not a conditional fee agreement as so defined. In the latter case, the expression **normal fee** and **premium** have corresponding meanings to those set out in section 333 of the Act.

Fee sharing

- 9.13 The sharing of a fee between lawyers is permitted where all the lawyers concerned have provided regulated services in relation to the matter and the total fee is fair and reasonable.
- 9.14 The sharing of a fee between lawyers is permitted if the agreement to share fees is incidental to the sale of a legal practice.
- 9.15 The sharing of a fee with a patent attorney is permissible provided that it complies with rules made pursuant to section 94(h) of the Act.

Chapter 10
Professional dealings

- 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

Respect and courtesy

- 10.1 A lawyer must treat other lawyers with respect and courtesy.

Chapter 10—*continued***Communicating with another lawyer's client**

- 10.2 A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.
- 10.2.1 A lawyer may communicate directly with a person whom the lawyer knows is represented by another lawyer where the matter is urgent and it is not possible to contact that person's lawyer or an appropriate member of his or her practice. In communicating with the other lawyer's client directly, the lawyer must act fairly towards the other lawyer's client at all times and must promptly notify the other lawyer of the details of the communication.
- 10.2.2 A lawyer may communicate directly with a person if the lawyer reasonably believes that that person is no longer represented by another lawyer. In that event, the other lawyer must be notified in advance of the lawyer's intention to communicate directly with that person.
- 10.2.3 A lawyer may communicate directly with a former client who is represented by a new lawyer for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's matters to the new lawyer.
- 10.2.4 A lawyer may recommend to a client that the client make direct contact with any other party.
- 10.2.5 A lawyer may communicate directly with a person represented by another lawyer where the person consents to the communication and the other lawyer has been given reasonable notice of the intended communication. In communicating with the other lawyer's client directly, the lawyer must act fairly towards the other lawyer's client at all times.
- 10.2.6 A lawyer may communicate directly with a person represented by another lawyer where that communication is a notice or proceeding or other document that must be given to that person in order to be effective.

Chapter 10—*continued***Undertakings**

- 10.3 A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.
- 10.3.1 This rule applies whether the undertaking is given by the lawyer personally or by any other member of the lawyer's practice. This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that the lawyer is not personally responsible for its performance.
- 10.3.2 A lawyer who receives funds on terms requiring the lawyer to hold the funds in a trust account as a stakeholder must adhere strictly to those terms and disburse the funds only in accordance with them.

Payments

- 10.4 A lawyer must not—
- (a) stop a trust account cheque drawn on the trust account of the practice of which the lawyer is a member, or a bank cheque, which in either case is payable to another practice, or to a conveyancing practitioner, or to an incorporated conveyancing firm; or
 - (b) cancel, reverse, or amend an order for payment made to another practice, conveyancing practitioner, or incorporated conveyancing firm by way of electronic transfer from the trust account of the practice of which the lawyer is a member—
once the cheque or printed verification of the electronic transfer instructions has been handed or dispatched to the payee.
- 10.5 Rule 10.4 does not apply where the payment—
- (a) is induced by fraud; or
 - (b) arises from a mistake in the identity of the payee or the payee's client; or
 - (c) is made in other circumstances that are of an exceptional nature.
- 10.6 Where a lawyer stops a payment or cancels, reverses, or amends an order for payment, the lawyer must immediately advise the payee of the action that has been taken.

Chapter 10—*continued***Fees of other lawyers**

- 10.7 A lawyer who, acting in a professional capacity, instructs another lawyer, must pay the other lawyer's account promptly and in full unless agreement to the contrary is reached, or the fee is promptly disputed through proper professional channels. This rule applies to the accounts of barristers sole and foreign lawyers.
- 10.7.1 Where the instructing lawyer and the lawyer undertaking the work have agreed that the instructing lawyer's client is to be solely responsible for paying the lawyer's account then (unless agreed otherwise) the instructing lawyer must use all reasonable endeavours to ensure the client pays the account. The instructing lawyer must promptly inform the instructed lawyer if it appears that the client will be unable or unwilling to pay the account.
- 10.7.2 A lawyer with a practising certificate as a barrister and solicitor may sue for and recover from the party chargeable any fees paid or payable by the lawyer to a barrister sole for work done or to be done on the instructions of the lawyer in relation to a client's affairs, if those fees are shown as a disbursement in a bill of costs rendered by the lawyer to the party chargeable.¹⁴

Making recordings

- 10.8 A lawyer must not, in the course of his or her professional activity, make a video or sound recording of any person without first informing the person of the lawyer's intention to do so.

Chapter 11**Proper professional practice**

- 11 A lawyer's practice must be administered in a manner that ensures that the duties to the court and existing, prospective, and former clients are adhered to, and that the reputation of the legal profession is preserved.

¹⁴ This rule is necessary because a barrister sole is not entitled to sue for his or her fees: *Atkinson v Pengelly* [1995] 3 NZLR 104.

Chapter 11—continued**Misleading and deceptive conduct**

- 11.1 A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive¹⁵ anyone on any aspect of the lawyer's practice.

Direct solicitation

- 11.2 A lawyer must not directly contact a prospective client—
- (a) in a way that is intrusive, offensive, or inappropriate; or
 - (b) if the lawyer knows or should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgement in engaging a lawyer, or the lawyer is aware that the prospective client does not wish to be contacted by the lawyer.

Supervision and management

- 11.3 A lawyer in practice on his or her own account must ensure that the conduct of the practice (including separate places of business) and the conduct of employees is at all times competently supervised and managed by a lawyer who is qualified to practise on his or her own account.

Prevention of crime or fraud

- 11.4 A lawyer must take all reasonable steps to prevent any person perpetrating a crime or fraud through the lawyer's practice. This includes taking reasonable steps to ensure the security of and access to electronic systems and passwords.¹⁶

¹⁵ These words are identical to those used in the Fair Trading Act 1986 and lawyers are referred to texts and authorities on that legislation for further guidance.

¹⁶ The protection of passwords and systems will include the protection of digital certificates and associated passwords, and passwords, usernames, and personal identification numbers relating to electronic banking.

Chapter 12

Third parties

- 12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.
- 12.1 When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice.

Third party fees

- 12.2 Where a lawyer instructs a third party on behalf of a client to render services in the absence of an arrangement to the contrary, the lawyer is personally responsible for payment of the third party's fees, costs, and expenses.¹⁷

Chapter 13

Lawyers as officers of court

- 13 The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

Duty of fidelity to court

- 13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

Protection of court processes

- 13.2 A lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.
- 13.2.1 A lawyer must treat others involved in court processes with respect.
- 13.2.2 A lawyer must not discuss any case or matter before the court with any judicial officer involved in the proceeding either formally or informally outside of the rules of

¹⁷ Lawyers should be aware, and inform any third parties retained, of any constraints on payments that result from the fact that the client is legally aided.

Chapter 13—*continued*

procedure that permit matters to be raised in the absence of the other party (such as in cases of urgency or where an *ex parte* application is justified). In cases of doubt, the lawyers for other parties (or if a party is not represented, then the party concerned) should be informed of any matters being brought before the court.

13.2.3 A lawyer must not have contact with jurors before a verdict and must not initiate contact with jurors after the verdict where the contact is likely to bring the system of justice into disrepute.

13.2.4 A lawyer must not, during the conduct of a proceeding, engage in any relationship with a witness that may have the effect or appear to have the effect of interfering with the fair disposition of the proceeding.

Informed instructions

13.3 Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.¹⁸

Alternatives to litigation

13.4 A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute.

¹⁸ For example, a lawyer should never seek or agree to a consent order without the client's authority, nor should a lawyer for the defence in a criminal trial disclose, without the client's authority, the fact that the client has previous convictions or other charges pending.

Chapter 13—*continued***Independence in litigation**

- 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.
- 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
- 13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.
- 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.
- 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.
- 13.6 A lawyer or lawyers who are members of the same practice must not act in a dispute for 2 or more parties whose interests are not the same or where the lawyer or practice will be unable to ensure the discharge of any duty owed to any party to the dispute.
- 13.6.1 If, having commenced to act for more than 1 party to a dispute, it becomes apparent that the lawyer or lawyers who are members of the same practice will not be able to ensure the discharge of all duties owed to the respective parties, the lawyer or practice must cease acting for all parties immediately.¹⁹

¹⁹ A lawyer ceasing to act for a party must comply with the obligations imposed by rule 4.2.4 when terminating a retainer.

Chapter 13—*continued*

13.6.2 A lawyer or lawyers who are members of the same practice may, however, continue to act for 1 client provided that the other party, after receiving independent advice, gives informed consent at the time the dispute arises to the lawyer or practice continuing to act for the other party and no duties to the consenting party have been or will be breached.

Lawyer as witness

13.7 Where a lawyer is approached to give evidence in a court proceeding that relates to a matter in which the lawyer acted, the lawyer must not be obstructive and must, subject to the rules of privilege and the duty of confidence, provide all information relevant to the matter in issue to any party to the proceeding and to the court that the lawyer would be obliged to provide if subpoenaed as a witness.

Reputation of other parties

13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.

13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.²⁰

13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

²⁰ See further *Gazley v Wellington District Law Society* [1976] 1 NZLR 452 and *Medcalf v Mardell* [2003] 1 AC 120, [2002] 3 WLR 172, [2002] 3 All ER 721.

Chapter 13—*continued***Discovery and privilege**

- 13.9 A lawyer who acts for a party in a proceeding must, to the best of the lawyer's ability, ensure that discovery obligations are fully complied with by the lawyer's client and that the rules of privilege are adhered to. A lawyer must not continue to act if, to the lawyer's knowledge, there has been a breach of discovery obligations by the lawyer's client and the client refuses to remedy that breach.
- 13.9.1 A lawyer acting for a litigant must advise the client of the scope of the client's obligations in respect of discovery, including the continuing nature of those obligations up to and including the time of final judgment, and that discovered documents may be used only for the purposes of the litigation and not for any other purpose. The lawyer must, to the best of the lawyer's ability, ensure that the client understands and fulfils those obligations.
- 13.9.2 A lawyer must not claim privilege on behalf of a client unless there are proper grounds for doing so.
- 13.9.3 A lawyer must not, other than by application to the court, seek to obtain on behalf of a client information or documents that the lawyer knows to be privileged unless every person holding that privilege, after having been advised of the existence of the privilege and consequences of waiver, waives that privilege.
- 13.9.4 If a lawyer becomes aware that privileged information or documents have been inadvertently released in circumstances where privilege has not been waived, the lawyer must not disclose the contents of the material to a client, must inform the other lawyer (or litigant if unrepresented) of the release, and must return any documents forthwith. This rule applies despite the rules relating to disclosure contained in chapter 7.

Presenting evidence and witnesses

- 13.10 A lawyer must not adduce evidence knowing it to be false.

Chapter 13—*continued*

- 13.10.1 If a witness (not being the lawyer's client) gives material evidence in support of the lawyer's client's case that the lawyer knows to be false, the lawyer must, in the absence of a retraction, refuse to examine the witness further on that matter. If the witness is the client of the lawyer, the lawyer must, in the absence of a retraction, cease to act for that client.
- 13.10.2 A lawyer cross-examining a witness must not put any proposition to a witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information in the lawyer's possession.
- 13.10.3 A lawyer must not put questions regarding allegations against third parties to a witness when the lawyer knows that the witness does not have the necessary information or knowledge to answer questions in respect of those allegations, or where there is no justifiable foundation for the allegations.
- 13.10.4 A lawyer engaged in any proceeding does not have the sole right to call or discuss the case with a witness. A lawyer acting for one party may interview a witness or prospective witness at any stage prior to the hearing, whether or not the witness has been interviewed by the lawyer acting for the other party.²¹
- 13.10.5 A lawyer must not treat a witness or potential witness in an overbearing or misleading way and if asked must inform a witness or potential witness of his or her right to decline to be interviewed.
- 13.10.6 A lawyer must not discourage a witness or potential witness from discussing the case with the lawyer acting for the other party or otherwise obstruct access to that witness or potential witness by the lawyer acting for the other party. A lawyer is, however, entitled to inform a

²¹ Where a lawyer proposes to interview a witness for the other side, it is prudent to inform the lawyer representing the other side of this fact, especially in respect of sensitive criminal matters where it is important to take steps to avoid any suggestion of interfering with the course of justice.

Chapter 13—*continued*

witness or potential witness of the right to decline to be interviewed by the other party and of any relevant legal obligations.²²

13.10.7 A lawyer must not communicate with a witness during the course of cross-examination or re-examination of that witness or between the cross-examination and the re-examination, except where good reason exists and with the consent of either the judge or the lawyers for all other parties (or, where a party is unrepresented, the consent of that party). This applies during adjournments of the hearing.²³

13.10.8 A lawyer must not suggest to a witness or potential witness, whether expressly or impliedly, that false or misleading evidence ought to be given or that evidence should be suppressed.²⁴

13.10.9 A lawyer who retains an expert witness must take reasonable steps to ensure that the expert's independence is preserved and must advise the witness of his or her duty to the court.²⁵

13.10.10 A lawyer must take reasonable steps to ensure that the remuneration of an expert witness is not dependent upon the outcome of the litigation.

²² A lawyer is entitled to remind a potential witness of any legal obligations of confidence or privilege that may be attached to information he or she holds.

²³ A reason for such a discussion might include raising the possibility of a change of plea or a settlement when the witness is the accused or a civil litigant respectively. A lawyer may discuss matters with the witness at any stage up to the commencement of cross-examination. A witness may, however, simply volunteer information to a lawyer. *See R v Williams* CA 63/05 9 December 2005, paragraphs [69]–[73].

²⁴ A lawyer may assist a witness in preparing to give evidence by assisting in the preparation of a brief of evidence, and by pointing out gaps, inconsistencies in the evidence (with that witness's evidence or the evidence of other witnesses), the inadmissible nature of proposed evidence, or irrelevancies in evidence that the witness is proposing to give.

²⁵ Many courts and tribunals have relevant codes of conduct applicable to expert witnesses. In such a case the lawyer's duty under this rule will usually be discharged by providing the expert with the applicable code of conduct.

Chapter 13—continued

13.10.11 If an expert witness has, to a lawyer's knowledge, been retained by another party, the lawyer must not, without the prior consent of the lawyer acting for the other party, approach the expert witness.

Submissions on law

- 13.11 The duty to the court includes a duty to put all relevant and significant law known to the lawyer before the court, whether this material supports the client's case or not. Subject to the procedure required by the practice direction contained in *Practice Note* [1968] NZLR 608, this duty continues until final judgment is given in the proceeding.

Duties of prosecution lawyer

- 13.12 A prosecuting lawyer must act fairly and impartially at all times and in doing this must—
- (a) comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
 - (b) present the prosecution case fully and fairly and with professional detachment; and
 - (c) avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
 - (d) act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.

Duties of defence lawyer

- 13.13 A defence lawyer must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must—
- (a) put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion of the lawyer as to his or her client's guilt or innocence; and
 - (b) put before the court any proper defence in accordance with his or her client's instructions—
- but must not mislead the court in any way.

Chapter 13—*continued*

- 13.13.1 When taking instructions from a client, including instructions on a plea and whether or not to give evidence, a defence lawyer must ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.
- 13.13.2 If at any time before or during a defended trial a client makes a clear confession of guilt to his or her defence lawyer, the lawyer may continue to act only if the plea is changed to guilty or the lawyer—
- (a) does not put forward a case inconsistent with the confession; and
 - (b) continues to put the prosecution to proof and, if appropriate, asserts that the prosecution evidence is inadequate to justify a verdict of guilty; and
 - (c) does not raise any matter that suggests the client has an affirmative defence such as an alibi, but may proceed with a defence based on a special case such as insanity, if such a course appears in the lawyer's professional opinion to be available.
- 13.13.3 Where a defence lawyer is told by his or her client that he or she did not commit the offence, or where a defence lawyer believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, the defence lawyer may continue to represent the client, but only after warning the client of the consequences and advising the client that the lawyer can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.
- 13.13.4 A defence lawyer must not attribute to another person the offence with which his or her client is charged unless it is necessary for the conduct of the defence to do so and the allegation is justified by facts or circumstances arising out of the evidence in the case or reasonable inferences drawn from them.
- 13.13.5 A defence lawyer must not disclose a client's previous convictions without the client's authority.

Chapter 14

Barristers

- 14 The legal work of a barrister may be undertaken by a lawyer practising either as a barrister and solicitor or as a barrister sole.
- 14.1 A lawyer who holds a practising certificate as a barrister and solicitor must not hold himself or herself out as practising as a barrister sole.

Practice as barrister sole

- 14.2 A lawyer who holds a practising certificate as a barrister sole must not—
- (a) practise as a solicitor; or
 - (b) carry out the transactional aspects of conveyancing; or
 - (c) act as a general agent or attorney in respect of a client's affairs; or
 - (d) undertake the work of a real estate agent; or
 - (e) receive or hold money or other valuable property for or on behalf of another person; or
 - (f) practise in partnership or in an incorporated law firm unless the barrister sole is the only voting shareholder of the incorporated law firm.
- 14.3 A barrister sole may practise from a set of rooms or chambers and join with other barristers sole in sharing secretarial and support services for their practices, including the employment of another lawyer who holds a practising certificate as a barrister sole.

Intervention rule

- 14.4 Subject to rules 14.6, 14.7, and 14.8, a barrister sole must not accept instructions to act for another person other than from a person who holds a practising certificate as a barrister and solicitor.
- 14.5 The Law Society must review and determine whether to keep in force the intervention requirements set out in rule 14.4. In carrying out the review the Law Society must consult with the Ministry of Justice, the New Zealand Bar Association, and such other organisations, groups, or persons as the Law So-

Chapter 14—*continued*

ciety considers have an interest in the issue. The Law Society must commence the review within 18 months after the date on which these rules come into force and must proceed with the review with reasonable expedition having regard to all the circumstances.

Direct instructions

- 14.6 A barrister sole may accept instructions from a person who does not hold a practising certificate as a barrister and solicitor if the barrister sole is—
- (a) instructed to act in a judicial or quasi-judicial capacity or is instructed by a person or body acting in such a capacity; or
 - (b) appointed by the court; or
 - (c) instructed by the Law Society; or
 - (d) instructed by—
 - (i) a registered patent attorney; or
 - (ii) a member of the legal profession in an overseas country; or
 - (iii) an Official Assignee or Official Liquidator; or
 - (e) acting as a revising barrister pursuant to any enactment; or
 - (f) acting in any of the following capacities:
 - (i) in criminal proceedings where the client is legally aided;
 - (ii) as a duty solicitor;
 - (iii) providing assistance to a legal advice service operating on a non-profit basis or acting pro bono on work referred by such a service;
 - (iv) as a specialist adviser to the Legal Services Agency;
 - (v) under the police detention legal assistance scheme established under section 158C of the Legal Services Act 1991 and continued under the Legal Services Act 2000:

Chapter 14—*continued*

- (vi) in a refugee status matter pursuant to the United Nations Convention relating to the Status of Refugees, adopted on 28 July 1951:
 - (vii) representing a client under the provisions of the Mental Health (Compulsory Treatment and Assessment) Act 1992:
 - (viii) representing a prisoner in an internal disciplinary hearing:
 - (ix) moving the admission by the court of a person as a barrister and solicitor.
- 14.7 Despite rule 14.4, the Law Society may, in consultation with the Ministry of Justice and the New Zealand Bar Association, grant a specific or general dispensation authorising barristers sole, any category of barristers sole, or any individual barrister sole to accept instructions from persons other than from a person who holds a practising certificate as a barrister and solicitor. In deciding whether to grant any dispensation, the Law Society must take into account the public interest and the interests of consumers.
- 14.8 A dispensation granted by the Law Society under rule 14.7 may be subject to such terms and conditions as the Law Society considers appropriate, including any requirements in relation to the keeping of a trust account and compliance with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 made under the Act.

General

- 14.9 A barrister sole must not do anything to induce persons to suppose that the barrister sole retains a connection with any practice of which he or she was previously a member, or to suppose that there is any connection between the barrister sole and that practice or any other practice.
- 14.10 A barrister sole must not have an arrangement that restricts the complete freedom of a lawyer holding a practising certificate as a barrister and solicitor to instruct any counsel the lawyer or the client selects.

Chapter 14—*continued*

- 14.10.1 This rule does not affect the right of a barrister sole to accept a general retainer from a lawyer holding a practising certificate as a barrister and solicitor on behalf of a particular client.
- 14.11 A barrister sole must keep his or her instructing lawyer reasonably informed of the progress of the brief. A barrister sole should normally seek the consent of the instructing lawyer before interviewing the client or witnesses.
- 14.12 Correspondence between parties on matters relating to litigation should normally be carried out between the instructing barristers and solicitors.
- 14.13 A barrister sole should not normally file documents in the court, or in the course of proceedings, which show his or her rooms or chambers as the address for service. There may, however, be exceptional circumstances where it is practicable and necessary to do so. Exceptions would be where the barrister sole is not instructed by a barrister and solicitor in accordance with rule 14.6 or the barrister sole acts under a dispensation granted under rule 14.7.

Chapter 15
In-house lawyers

- 15 A lawyer may practise as an in-house lawyer.

Nature of engagement

- 15.1 An in-house lawyer is a lawyer who is engaged by a non-lawyer and who, in the course of his or her engagement, provides regulated services to the non-lawyer on a full-time or part-time basis.
- 15.1.1 An in-house lawyer may be engaged under an employment agreement or a contract for services.
- 15.1.2 A lawyer who, in the course of practising on his or her own account, enters into an ordinary retainer with a client does not thereby become an in-house lawyer.
- 15.1.3 An in-house lawyer who enters into a contract for services with a non-lawyer must be entitled to practise on

Chapter 15—*continued*

his or her own account in accordance with the provisions of the Act and must comply with the provisions of the Act and all regulations and rules under the Act relating to lawyers who practise on their own account.

15.1.4 An in-house lawyer who is engaged on a part-time basis may, subject to the terms of his or her contract, enter into a separate in-house lawyer contract with another non-lawyer on a part-time basis.

15.1.5 An in-house lawyer who is engaged on a part-time basis and who is entitled to practise on his or her own account may, subject to the terms of his or her contract, practise on his or her own account outside the hours of the engagement.

Practice as in-house lawyer

15.2 When an in-house lawyer provides regulated services to the non-lawyer by whom he or she is engaged, he or she must do so pursuant to a lawyer–client relationship.

15.2.1 An in-house lawyer must not enter into a contract that prevents or purports to prevent compliance with any of the obligations or duties imposed by the Act or the regulations and rules under the Act or that arise by virtue of the lawyer–client relationship.

15.2.2 An in-house lawyer must not accept any instruction or direction from the non-lawyer by whom he or she is engaged that would require the in-house lawyer to breach any of the obligations or duties imposed by the Act or the regulations and rules under the Act or that arise by virtue of the lawyer–client relationship.

15.2.3 Except to the extent expressly authorised by section 10 of the Act, an in-house lawyer may not provide regulated services to a client or member of the non-lawyer by whom he or she is engaged.

15.2.4 Where an in-house lawyer is engaged by a company, the in-house lawyer may provide regulated services to any other company in the same group. In this rule,

Chapter 15—*continued*

group has the same meaning as in section 2 of the Financial Reporting Act 1993.

- 15.3 An in-house lawyer must, in that capacity, comply with the provisions of the Act and these rules, apart from chapter 4 (availability of lawyers to the public) and chapter 9 (fees).
- 15.3.1 An in-house lawyer may give independent advice to the non-lawyer to whom he or she provides regulated services.
- 15.4 This rule 15 applies to a lawyer who is a member of and serves as a legal officer in—
- (a) the Armed Forces of the New Zealand Defence Forces; or
 - (b) the New Zealand Police—
- in the same manner as if the lawyer were engaged under an employment agreement.

Chapter 16
Real estate services**Notification to Law Society**

- 16 Prior to a lawyer commencing to provide real estate services on a regular or systematic basis, the lawyer must notify the Law Society in writing of the lawyer's intention to do so and the address or addresses from which the real estate services are to be provided.
- 16.1 A lawyer must notify the Law Society in writing of any change in the address or addresses from which real estate services are provided.
- 16.2 If a lawyer ceases to provide real estate services, the lawyer must give notice in writing of this to the Law Society.

Fees

- 16.3 Subject to rules 16.4 and 16.5, all fees that a lawyer charges in relation to the provision of real estate services must be set in accordance with and comply with the provisions relating to fees in chapter 9 of these rules.

Chapter 16—*continued*

- 16.4 A lawyer may, in settling a fee in relation to the provision of real estate services, take into particular account the following factors:
- (a) the importance of the matter to the client and the results achieved; and
 - (b) the degree of risk assumed by the lawyer in undertaking the work, including the amount or value of any property involved; and
 - (c) whether the fee is fixed or conditional; and
 - (d) any quote or estimate of fees given by the lawyer.
- 16.5 A lawyer may charge a fixed success-based fee for the provision of real estate services provided that the fee—
- (a) is agreed upon with the client in advance of the sale or leasing of the property involved; and
 - (b) is, in all the circumstances, fair and reasonable having regard to the interests of both the client and the lawyer.
- 16.6 Rules 16.3 to 16.5 are subject to any relevant provisions in the Real Estate Agents Act 1976 or any Act passed in substitution for that Act. While the prohibition against lawyers charging by way of commission contained in section 3(7) of the Real Estate Agents Act 1976 remains in force, no part of a lawyer's fee for the provision of real estate services should be calculated as a percentage of or be based solely on the price or rental achieved.²⁶

Prohibition against acting for another party

- 16.7 Where a lawyer provides real estate services for a prospective vendor of a property, the lawyer must not act for any purchaser or prospective purchaser in relation to the acquisition of the property concerned.

²⁶ Section 3(7) of the Real Estate Agents Act 1976, as amended by section 340 of the Lawyers and Conveyancers Act 2006, provides that where a lawyer undertakes the work of a real estate agent, then, in respect of the sale or other disposal of any land or business, the lawyer is not entitled to be remunerated for that work by commission in addition to, or instead of, the professional charges of the lawyer.

Chapter 16—*continued*

- 16.8 Where a lawyer provides real estate services for a prospective lessor of a property, the lawyer must not act for any lessee or prospective lessee in relation to the leasing of the property concerned.
- 16.9 Where the circumstances set out in rule 16.7 or 16.8 apply, no other member of the lawyer's practice may act for a purchaser, prospective purchaser, lessee, or prospective lessee, as the case may be, in relation to the acquisition or leasing of the property concerned.

Dated at Wellington this 18th day of July 2008.

The Common Seal of the New Zealand Law Society was affixed in the presence of:

[Seal]

John Marshall,
President.

C Grice,
Executive Director.

Explanatory note

This note is not part of the rules, but is intended to indicate their general effect.

These rules, which come into force on 1 August 2008, are the rules for lawyers relating to the conduct of lawyers and the obligations lawyers owe to their clients.

Issued under the authority of the Acts and Regulations Publication Act 1989.

Date of notification in *Gazette*: 24 July 2008.

These rules are administered by the Ministry of Justice.
