

Code of Conduct 2018

Editorial

Following on from the 1968, 1980 and 1992 codes of conduct, the text of the new code of conduct was adopted in 2018. A review of the 1992 code of conduct was called for, given the passage of time, the major amendments to the Dutch Act on Advocates in 2015 and the changes that have occurred in advocates' practice. For that reason, the general council set up a Code of Conduct Review Committee, which was tasked with seeing to what extent the 1992 code of conduct needed to be revised. The Committee was led by J.D. Loorbach (Rotterdam, chair) and also comprised C. A. Alberdingk Thijm (Amsterdam), H.J. de Groot (Groningen), M. de Rijke (The Hague), Professor J.E. Soeharno (Amsterdam), J.S. Spijkerman (The Hague), E.A. van Win (Leiden) and Dr. R. Sanders (The Hague, secretary).

In mid-2017 the Committee issued a draft code of conduct, which the general council gave to the Bar, stakeholders and a few specific fora, such as the Advisory Board and the Local Bar Presidents' Consultative Panel. The responses received were assessed and processed by the Committee. The draft was then submitted to the general council before being given to the Board of Representatives; they also added a number of comments, which were incorporated into the final text. The idea behind this procedure was to come up with a code of conduct that would reflect the opinions held at the Bar in 2018.

On 14 February 2018 the general council adopted the 2018 Code of Conduct. It was noted at the time that Bar opinions can evolve, for example as a result of societal developments or case law. For that reason, the general council opted for what it called 'living' notes, i.e. notes that can be amended at a later date in the event of a change in thinking.

One important driver of the review of the code of conduct was the codification of the core values in Section 10a(1) of the Act on Advocates. This article provides:

'In the interest of proper administration of justice, the advocate ensures his client receives legal protection. To that end, the advocate is, in the exercise of his profession:

- a) independent towards his client, third parties and the cases in which he acts in this capacity;
- b) partial to looking after the legitimate interests of his client;
- c) competent and able to rely on sufficient knowledge and skills;
- d) ethical and refrains from any acts or omissions that do not befit a respectable advocate; and
- e) a person of trust and observes professional secrecy within the limits set by law and justice.'

What did not change in 2015 was the statutory disciplinary standard. Under Section 46 of the Act on Advocates, advocates are subject to disciplinary proceedings in respect of any acts or omissions contrary to the due care they ought to exercise as advocates towards those whose interests they look after or ought to look after in that capacity, in respect of breaches of the provisions under or pursuant to the Act on Advocates and the Dutch Money Laundering and Terrorist Financing (Prevention) Act (Wet ter voorkoming van witwassen en financiering terrorisme), the bye-laws of the Netherlands Bar and in respect of any acts or omissions that do not befit a respectable advocate.

It is important to emphasise that the advocate's oath, core values, statutory disciplinary standard and this code of conduct will take precedence over other codes of conduct, guidelines and best practices used in practice. Advocates can therefore not be bound by any such other codes of conduct if doing so conflicts with the contents of the advocate's oath, core values, statutory disciplinary standard and this code of conduct.

Advocates will be partial to looking after the legitimate interests of the client. As a result, the advocate – as an academically qualified legal expert – is a special mediator between the litigant and the court. This is seen particularly in procedural practice. However, the advocate is also a special mediator

between the litigant and the law. This is particularly apparent in advisory practice. Seen in this light, the advocate is 'the guide in the jungle of the law'. In this code of conduct, we have aligned with procedural practice in particular in terms of the language used. However, the code of conduct also applies to advisory practice, unless expressly provided otherwise.

The protection of the confidentiality of information exchanged between the litigant wishing to discuss his legal position and the advocate is essential under the rule of law. The advocate must also be able to provide the litigant with advice. This advice may precede litigation, but good administration of justice also requires access to the law without legal action. The litigant must be able to turn to advocates for advice on his legal position without obstruction. The provision of legal advice is thus an essential element of legal assistance and is part of the advocate's specific duties.

Since the entry into force of the Dutch Legal Profession (Supervision and Position) Act in 2015, the Local Bar President has been the supervisory official within the meaning of Section 5:11 of the General Administrative Law Act. As part of his enforcement activities, the Local Bar President can submit any objectionable acts or omissions to the disciplinary court or, in certain instances, impose a fine or periodic penalty payment.

The Local Bar President also provides information and mediates in disputes between advocates. Any advocate who is experiencing a conflict of duties, or having difficulty with determining his attitude, or wanting an explanation of this code of conduct, can therefore ask his Local Bar President for advice. In some instances, this code of conduct stipulates that this advice must be sought.

Where in this code of conduct 'he' or 'his' is used, this should also be read as 'she' or 'her'.

We would refer you to the contents of the Introduction below and the code of conduct itself, with the accompanying notes.

The general council, 14 February 2018

INTRODUCTION

Nature of the Code of Conduct

'This code of conduct expresses the standards generally accepted among advocates, which they ought to observe in the exercise of their profession. They are not rules on disciplinary proceedings applicable to advocates.' This is the first line of the Introduction to the Code of Conduct 1992, and this 'description of its nature' has stood the test of time better than some of the rules of conduct themselves. Even after the review of the code of conduct that has now been performed, these rules remain an elaboration of the legal standard of respectability. Now, as ever, this can be found in Section 46 of the Act on Advocates, but it is now also part of the core values referred to in Section 10a of that Act, in particular integrity.

The following quote from the 1992 introduction is likewise still valid: '(This code of conduct) will not be binding in the sense in which the rules laid down in the bye-laws of the Netherlands Bar are binding. They are meant as guidelines to advocates in the exercise of their profession. While they may also serve as guidelines to the disciplinary courts, they will not be binding upon them, as the disciplinary court (hof van discipline, "HvD") has often ruled.'

The purpose of publishing this code of conduct is to flesh out the requirements that may be imposed on the effective performance of duties by a 'respectable advocate'. Failure of an advocate to comply with these rules may lead to disciplinary measures; however, a respectable advocate will above all make it a point of honour to act, to the best of his ability, professionally and according to all statutory and law of conduct criteria, so it is not just about staying out of the disciplinary courts. The profession of advocate is one that is characterised by ethics and, by today's standards, an advocate also needs to be driven by what we call 'aspirational morality'. The code of conduct is set in that positive key, with a stronger societal orientation than before. That entails the individual advocate striving for respectability not only for himself – and his client – but also for the regard and quality of the profession. And the profession as such must be driven by the realisation that respectable practice and appropriate disciplinary rules of conduct are instrumental and necessary to allow the consumers of legal services, clients, other parties concerned and other stakeholders to trust that the service provision and the other, associated, conduct of an advocate is of a satisfactory quality and integrity.

Section 10a of the Act on Advocates provides that the task of the advocate is to ensure the legal protection of his client and that that role (specific and client-focused) is assigned to him in the legal system as well 'in the interest of proper administration of justice'. The advocate's contribution to that proper administration of justice is thus to help promote it by 'sticking to the task', serving the common interest of a proper administration of justice solely by fulfilling that role of partiality, with the restrictions that are imposed on it in the common interest. Those restrictions are, inter alia, integrated into the core values and the standards of respectability. Put briefly, a partial, honourable and independent advocate is expected to do everything in the client's interest, within the bounds of what is permitted, and to never lose sight of his professional responsibility. This code of conduct is intended to be a guide for advocates, treading the fine line between the remit of optimum representation of interests and the area that is off-limits.

The review process

The 'reviewed' code of conduct now being presented by the general council is the result of a broad study within and beyond the legal profession by the Code of Conduct Review Committee. The consultation after publication of the first draft contributed significantly to the final result and also to its 'reception' within the profession.

The amendments were prompted, in particular, by changes in thinking within (and also beyond) the profession, for example with regard to confidential communication between colleagues, changes at a statutory level, trends in disciplinary case law, international orientation and technological developments.

The changes at statutory level relate, in particular, to the revision of the Act on Advocates (inclusion of the core values and the codification of professional secrecy). The entry of the burden of substantiation and the obligation to provide exhibits into the Dutch Code of Civil Procedure was an important factor in the review of confidential communication among colleagues.

The introduction of the comprehensive and coherent Legal Profession Bye-Law (Verordening op de advocatuur, Voda) meant that a number of provisions at code of conduct level could be deleted. Several rules were left out, because in the Committee's view they were outmoded provisions on protecting colleagues (the advocate as summoned witness, the advocate as creditor under private law).

Disciplinary proceedings are increasingly focusing on the material substance of the advocate's performance, or the compliance with his contractual obligations as a contractor. That has been translated into the reviewed code of conduct; see for example the much tighter opening rule and rules 12 et seq.

The European dimension has also been considered; there must not be a needless drifting away from the rules of the CCBE (Council of Bars and Law Societies of Europe) and it needs to be made clear when our rules of conduct apply, territorially and functionally, and when they do not. In parts, the Committee also looked at neighbouring countries.

Various sections of the legal profession have also been calling for the inclusion of rules and standards that their (and only their) particular small group of the legal profession requires. Those requests have not been followed up because it is preferable for all the rules of conduct to have the nature of generally applicable standards, independent of the advocate's remit and including all conventional work of advocates. Thus the rules of conduct, like the core values, demonstrate the common foundation of the legal profession.

The subjects that have been tackled in the most practical terms are the introductory provision (rule of conduct 1), making or receiving payment for securing cases, professional secrecy, confidential communication, fair play in legal and other matters (submission of documents, examining of witnesses) and accountability towards the President (which is detailed below). The new rules have also been grouped into four chapters, which refer to the various relational circles with which the advocate comes into contact in the exercise of his profession.

The nature of the code of conduct does not generally call for a transitional regime; advocates may be expected to appropriate these rules from the moment of publication and, from that moment on, to adapt their conduct to the new rules. The situation is different when it comes to the rule of conduct regarding confidential communication with the advocate of the opposing party. Here, the Committee's view is that any communication between advocates that took place up to the publication of the revised rules will remain confidential and that, in cases where the communication took place under the regime of confidentiality, the communication that takes place after publication will also remain unchanged, unless otherwise agreed.

THE ROLE OF THE ADVOCATE IN SOCIETY

Rule 1 Professional duties

1. In view of his special position in the legal system, the advocate is bound to respectable professional practice.
2. This duty applies towards his client, the other parties involved in the administration of justice and in his profession, and has its basis in the interest of a proper administration of justice.
3. In all his dealings the advocate will be led by the core values of his profession and will heed the statutory obligations and bye-laws written for him, the content of his oath or affirmation and the obligations arising from the relationship with his client.
4. The advocate should conduct himself in such a way that neither the trust in the legal profession nor his own professional performance is harmed.

Notes

This rule is intended to make the entire scope of the statutory standard of respectability and its *raison d'être* visible at a glance: a good, reliable and decent legal profession is a social value and every advocate should contribute to it in practice.

According to Section 46 of the Act on Advocates 'any acts or omissions that do not befit a respectable advocate' are liable to disciplinary action. Respectability is now also referred to in law as an elaboration of the core value of integrity (Section 10a of the Act on Advocates). The law uses negatively drafted wording. The code of conduct stipulates that the instruction of respectability must (also) be interpreted as a positive conclusion of a qualitative obligation – accepted when choosing the profession – that relates to all core values. The law restricts itself to only establishing disciplinary culpability in the event of derogation from this standard (and a breach of integrity) and that does not sufficiently represent the widely shared view in the profession that respectable professional practice is both an individual and a collective responsibility. So it is not just about whether a legal rule commands or prohibits something, but whether the advocate is acting according to those professional standards (ruling of the disciplinary court (HvD)) 11 July 2016, no. 160081, ECLI:NL:TAHVD:2016:138).

This introductory rule of conduct also expresses the idea that the standard of respectability not only relates to the advocate in the relationship with his client. As a member of a profession that is specially positioned by law the advocate must also contribute in a more general sense to the quality and integrity of his profession.

Rule 2 Independence, partiality, no commission

1. In the exercise of his profession the advocate will avoid the risk of his independence being put in jeopardy.
2. The interest of the client, and no other interest, will determine the way in which the advocate handles his cases.
3. The advocate may not grant or receive remuneration for securing engagements, unless he can demonstrate that he is not acting contrary to the core values and that the interest of the litigant is the only deciding factor.

Notes

The first paragraph emphasises the core value of independence. The advocate must always ensure that, with respect to his client, the other party, third-party financiers (for example the Netherlands

Legal Aid Board, legal expenses insurers or commercial litigation financiers), intermediaries in the acquisition of contracts, and the government, he possesses the independence to properly advise and represent in court. A conflict of interests may jeopardise the desired independence, certainly if this means that the advocate also becomes a party. This might include management positions at a client or close personal or family ties. Borrowing money from or lending money to a client, for whom the advocate is handling affairs, also affects the required independence of the advocate (HvD 10 April 2015, no. 7280, ECLI:NL:TAHVD:2015:115). In his relationship with third-party financiers the advocate also needs to be aware of conditions that threaten his independence. The circumstances of the case

must always be decisive. That also applies to the answer to the question of whether a colleague is free to act as advocate if the case arises.

The second paragraph contains the overarching rule for the relationship between advocate and client, which is further detailed in rules 12-19: the advocate must be partial and must only allow himself to be led by the interest of the client. In specific terms this concerns a professional judgement by the advocate, notably regarding the way in which the case can be handled on good grounds and in good faith.

In the third paragraph a rule of conduct is given to protect the core values, in particular independence, partiality and integrity (cf. Section 10a(1) of the Act on Advocates). This rule has its origin in the advocate's particular role in the legal system. Advocates are awarded monopoly in lawsuits, the advocate acts as a 'filter', he must exercise far-reaching confidentiality and he must also refuse cases that he 'does not in good conscience believe to be justified'. Because of this special role and responsibility, earning money by referring engagements or paying to secure them is not compatible with the core values.

However, with a view to the effective bringing together of supply and demand of legal services, for example via intermediary websites, it is possible under certain conditions that engagements may be referred or secured for remuneration. This is the case if, as a result, the protected position of the litigant (free choice of advocate) is not eroded, no conflict of financial interests arises (conflict with, inter alia, independence), third parties do not acquire any interest in the outcome of the case (conflict with, inter alia, partiality, conflict of interests), and the client has insight into what is happening with his case (conflict with, inter alia, integrity); cf. also HvD 7 September 2018, no. 180030D, ECLI:NL:TAHVD:2018:178. These possibilities are made clear with the rule's clause after 'unless'. A few principles are given below, which may serve as guides when assessing remuneration. If in doubt, advocates can submit individual cases to the Bar President. Ultimately, however, the opinion of the disciplinary court is decisive.

Transparency regarding the referral

Firstly what is relevant is whether the litigant knows what is happening with his case, how the referral has gone and what remuneration has been paid/received. The advocate is expected to be transparent towards the litigant about both the fact of referral and his expertise in respect of the substance of the case. As a result, the litigant knows that his case has been referred and he can check whether he has a suitable advocate for his case. In addition, the litigant must be able to see which party made the referral and that the referral is to an advocate. The litigant must also be able to see if the referral has been made to another (legal) counsellor, to avoid misdirection/confusion.

Referral to suitable advocate

Secondly, the way in which the referral is made is relevant. When looking for the most suitable advocate, one should be guided by the expertise of the advocate in connection with the type of case. The criteria on which the selection is made (for example expertise, location, hourly rates, and referral fee) must be clear and transparent, and the criterion of expertise must therefore be the primary criterion for the referral. The advocate can demonstrate that other criteria are secondary, for example by using standard rates that apply to any (affiliated) advocate and by matching his expertise to the type of case. The advocate will then determine whether he has the expertise to take on the case and make a proposal to the (potential) client, on the basis of which the client can make his choice. In addition, the link must be established for each individual case. The referral of groups of cases increases the risk that the most suitable advocate will not be found for each case and independence and partiality will be compromised. If a selection of affiliated advocates is shown, this must be made fully clear to the litigant. These circumstances might otherwise hamper his free choice of advocate. Ultimately, the litigant chooses his advocate. One should bear in mind that there should be the possibility, despite a payment for the referral, of the litigant not engaging the advocate. The referral is therefore a suggestion and not a mandatory recommendation.

Transparency regarding remuneration and amount and type

Thirdly, it is important that the advocate is transparent about the level of the fee paid or received. That means that the client knows about the payment and, during the case, can monitor whether the advocate is allowing the interest of the client to be the guide or is allowing his own personal interest in earning the fee to take precedence. The remuneration must be a reasonable amount in connection with the value of the engagement. Reasonable remuneration is an amount that does not impede an effective handling of the case. All of this depends on the type of case, the interest in bringing proceedings and the potential turnover that the advocate receives via the engagement. A small remuneration has less effect on independence than a high remuneration, and a fixed amount has less effect on independence and partiality than a percentage of the (potential) turnover. The same applies for a fixed subscription rate, again provided it is a reasonable level. The advocate can demonstrate that the core values are not being breached by being transparent about the amount and type of remuneration, so that the client can form an opinion about – among other things – the independent and partial service provided by the advocate.

Again, when it comes to the above considerations/pointers and to whether the exception applies, the circumstances of the case will always be decisive. It is therefore the responsibility of the advocate to make judgements and keep these transparent. When it comes to the scope of the third paragraph of this rule of conduct, we note that this rule also applies vis-à-vis the litigant who is not (yet) his client.

This rule is, of course, separate from the frequently occurring practice whereby an advocate secures engagements without remuneration. Primarily, these may include referrals from and to other advocates (possibly via a 'flex pool'), business contacts, insurers, litigation financiers, banks, trust offices or intermediaries for pitches. In addition, this rule of conduct and, in particular, the exception clause, are separate from European cross-border cases. For those, Article 5.4 of the CCBE Code of Conduct applies. Finally, this rule of conduct is separate from the rules on collaboration in the Legal Profession Bye-Law. Under Article 5.4 of the Legal Profession Bye-Law it is not permissible to share the expense and risk or control with parties that are not advocates, practising legal entities, group practices or admitted liberal professions.

Rule 3 Professional secrecy

1. By law, the advocate is obliged to observe professional secrecy; thus, the advocate must remain silent about specifics of cases handled by him, the identity of his client and the nature and scope of the client's interests.
2. The advocate will take appropriate measures to maintain professional secrecy and communication with the client or third parties, in particular where it relates to the choice of means of communication, data processing and data storage used by the advocate, and the level of security of those means.
3. In derogation of paragraph 1, the advocate is free to disclose confidentially obtained information if each of the following three conditions is met:
 - a) insofar as a correct performance of the task assigned to him justifies it;
 - b) insofar as the client has no objection to it, when asked; and
 - c) insofar as this is commensurate with good professional practice.
4. The duty of professional secrecy will not extend so far that the advocate is held back from bringing a defence in proceedings brought against him by the person to whom he has a duty of professional secrecy. The advocate will consider that he must not unnecessarily or disproportionately harm the interests of the person to whom he has a duty of professional secrecy.
5. If the advocate has undertaken to observe professional secrecy, or if it arises from the nature of his relationship with any opposing party or third party, he will also observe professional secrecy vis-à-vis his client.
6. When disclosing information to third parties regarding a case he is currently handling or was handling, the advocate will also consider other legitimate interests aside from those of the client. The advocate will not disclose any information without the client's consent.

Notes

With the amendment to the Act on Advocates on 1 January 2015, the professional secrecy to be exercised by the advocate was included as a core value in Section 11a, and the duty of professional secrecy was also codified. In the light of that development, the central standard of rule 6 (former) (the actual professional duty of professional secrecy) is laid down at the level of the law. The statutory provisions have also adopted from rule of conduct 6 (former) that the duty of professional secrecy extends to the advocate's associates and staff and that this duty will also continue after termination of the professional practice.

In the amended rule relating to professional secrecy, additional rules have now been included with regard to the essence of the duty of professional secrecy (Section 10a of the Act on Advocates mentions the boundaries set by law that the advocate must observe in respect of that professional secrecy). The first paragraph of the new rule makes the matter covered by the duty of professional secrecy explicit.

The order of the paragraphs of this rule of conduct has been amended slightly compared to rule 6 (former). The rationale behind this is that the elaboration of the substance of the duty of professional secrecy is described first (paragraphs 1 and 2). After that come the exceptions to the duty of professional secrecy (paragraphs 3 and 4), and finally the rules on exercising professional secrecy in relation to third parties (paragraphs 5 and 6).

The starting point is the confidentiality of the communication between advocate and client. In such situations the deciding factor is whether the information in this instance has been 'entrusted to him in his capacity as advocate'. Furthermore, it is not up to third parties to determine whether an exception applies. In the event of any dispute, it is up to the Bar President or the (disciplinary) courts to rule whether the advocate has justifiably invoked his legal professional privilege and whether or not that invocation can be honoured.

This also applies in those situations where an advocate is involved in that capacity without a successful invocation of his legal professional privilege being possible, for example because the information was not 'entrusted' to the advocate 'in that capacity'. Without claiming to give an exhaustive account, this includes:

- 'copying in' an advocate in the cc line of an e-mail with no other aim than to make the e-mail contents subject to professional secrecy;
- allowing an advocate to participate in a discussion with the sole aim of making what is tabled during the discussion confidential.

The duty of professional secrecy (and thereby the legal professional privilege) does not extend to the 'corpora et instrumenta delicti'. Where seizure without permission can already take place when it comes to letters and documents that are the object of the criminal offence or have served in its commission, in very exceptional circumstances that consent is also not necessary if the seizure has a further purpose and is directed at letters and documents that may serve to bring the truth to light (see inter alia Supreme Court judgments (Hoge Raad, HR) 2 March 2010, NJ 2010/604, HR 23 October 2015, ECLI:NL:HR:2015:3076 and HR 28 June 2016, ECLI:NL:HR:2016:1343).

The advocate's legal professional privilege is not absolute. This is because 'very exceptional circumstances [may] occur in which the interest that the truth come to light – including the truth about matters, knowledge of which per se is entrusted to the person with legal professional privilege – must take precedence over legal professional privilege' (see inter alia Supreme Court judgments HR 14 October 1986, NJ 1987/490 and HR 30 November 1999, NJ 2002/438).

In this rule it is maintained that the advocate, as confidential information holder, bears the responsibility for assessing whether it is in the client's interests to divulge information with the client's consent, for example via the media. That assessment involves the engagement given to the advocate being performed in the correct way, but also means that divulging it is of compelling interest to the case. This also applies if the advocate wishes to disseminate information via the media. Even if the

client absolves the advocate from his duty of professional secrecy, the advocate retains his own responsibility. The criteria in paragraph 3 are to be interpreted as cumulative criteria.

The advocate is also free, to a certain extent, to use confidential information if the client has lodged a complaint against him. After all, in disciplinary proceedings the advocate also has the elementary defence rights under Article 6 ECHR. In such an instance it may be that details that in principle fall under the duty of professional secrecy are made known to third parties, such as the disciplinary court (or other court) and the Bar President. Any advocate who uses confidential information that is necessary for his own defence is not, in principle, breaching professional secrecy.

Nevertheless, the use of confidential information requires a careful weighing up of interests by the advocate, even if interests of parties other than the complainant are also at stake. Paragraph 5 of this rule provides that the advocate will also observe the confidentiality agreed with an opposing party towards his own client. The same applies if this confidentiality arises from the nature of the relationship with a third party, such as information that has come from a confidential doctor (vertrouwensarts).

Technological developments have led to the correspondence between advocate and client not only being conducted over the telephone and in writing, but also often via e-mail or in another digital format. Increasingly, client files are also being stored digitally, even physically away from the office. As such, this development brings no change in the object of the duty of professional secrecy. The advocate must pay heed to the risks that may be associated with the choice of certain forms of communication or data storage. Not every form of breach of confidential information can be prevented. However, the advocate may be expected to take due care when opting for a specific medium and the level of security.

The advocate will also have to comply with the General Data Protection Regulation (GDPR). This European Regulation, which came into effect on 25 May 2018, provides inter alia that anybody processing personal data must take appropriate technical and organisational measures to secure this data. In particular, this will apply to (personal) data that the advocate obtains and stores as part of the service to his clients.

Lastly, the provision regarding the disclosure of information to third parties about a case that is being or has been handled by the advocate (former rule 10(1)) will be added to the new rule of conduct regarding professional secrecy.

Rule 4 Openness about listening in, watching and recording

1. If an advocate actively allows a client or a third party to listen in or watch by telephone or via any other means of communication, he must give notice of this in advance. The same applies in the case of the recording of the content of that communication on an image or sound carrier.
2. If a conversation with another advocate is recorded with that advocate's consent on an image or sound carrier or otherwise, then rule 26 will apply by analogy.

Notes

The advocate is duty-bound to give advance notice that he intends to record a (telephone) conversation. It is important to those with whom the advocate is conducting a telephone conversation to know whether or not the conversation is being recorded. If the advocate mentions this in advance, whomever he is going to have the conversation with can give their approval or decide not to conduct the conversation. This also applies when it comes to automated recordings. In the (telephone) conversation, the advocate may ask questions, or facts may come up, to which the other party gives a direct answer, but with respect to which he later comes to the conclusion that the answers were not entirely correct. Furthermore, there is the possibility that the other party will be caught out by this approach (disciplinary board at HvD 3 September 2007, advocates gazette (Advocatenblad) 2008, p. 806).

The fact of an advocate, for example, seeking confirmation of verbal communications previously given to him by the opposing party, which may involve an interest of his clients, will not constitute a circumstance that justifies a breach of the rule (HvD 3 September 2007, advocates gazette (Advocatenblad) 2008, p. 806).

In connection with this rule it is conceivable that someone will be listening in on the advocate's side without the advocate meaning for this person to have anything to do with the conversation at all. This might include a fellow advocate with whom he shares an office, who unavoidably hears one side of the conversation. However, in that case this cannot be considered actively listening in. However, if a colleague is intentionally present during the conversation, such as a trainee for training purposes, the advocate must inform the other participant(s) in the conversation of this. A situation in which others unintentionally listen in on an advocate's conversation may also occur in a public space, for example on public transport. Clearly, in such a case the advocate needs to exercise caution when conducting a (telephone) conversation in those surroundings since rule of conduct 3 (professional secrecy) is also compromised here. Image and sound carriers are understood to be any and all options for storing images and sound (including future options). Making notes is not covered by this rule.

Rule 5 Amicable solution

The advocate should keep in mind that an amicable solution is often preferable to a lawsuit.

Notes

The advocate acts as the client's guide in finding a solution, whilst at the same time being the gatekeeper to judicial proceedings. In general, the interests of the client are better served by de-escalation and a quick and fair solution. Although where possible and in the interests of the client an advocate must consider dispute resolution by means of an out-of-court settlement, rule 5 contains no absolute obligation to do so; it is about an advocate making sufficient commitment to bringing about a solution between parties. An opposing party cannot, therefore, require an advocate to attempt to seek an amicable solution in every situation. This is at the discretion of the advocate and his client. If they feel that an amicable solution is not attainable, the advocate cannot be obliged by the opposing party or by the code of conduct to seek one (Presiding Judge of the disciplinary board (Raad van Discipline, "RvD") The Hague 24 April 2014, ECLI:NL:TADRSGR:2014:96). If they are not able to reach a solution and the client wishes to bring proceedings, the advocate is entirely justified in meeting the wishes of his client (RvD 's-Hertogenbosch 26 August 2013, ECLI:NL:TADRSH:2013:42).

In addition to seeking a settlement himself, the advocate can also recommend that his client solve the dispute in another way, for example by means of mediation. However, the advocate is also the expert when it comes to answering the question of whether the interest of the client is served by proceedings or whether alternatives may lead to a better solution for the client. The Committee is aware of the emergence of mediation as an alternative for legal proceedings in dispute resolution. An advocate can be expected to discuss with his client what approach might lead to the best solution to the dispute and he can also be expected to record this.

Rule 6 Effectiveness

1. The advocate will strive to handle the case effectively and will also make sure that no unnecessary costs are incurred at the expense of an opposing party or other parties concerned.
2. Before taking legal measures, and in particular measures of enforcement, the advocate is obliged to notify the opposing party or – if they are being assisted by an advocate, their advocate – of his intention, except where, exceptionally, a special interest of the client obviously does not allow for it. In principle, he must therefore give a reasonable time for consultation. Where reasonably possible, he will consult on the time scale for handling a case.

Notes

Given the role of the advocate set out in rule 1, he is expected to be fully committed to his client's interests when functioning in that capacity, but he should not lose sight of other legitimate interests in the process. That responsibility brings with it a certain degree of policy, tact, professional distance and, where necessary, restraint where the defence of the client's interests affects the position and the

rights of others. The advocate may not, therefore, needlessly and inadmissibly infringe the interests of the opposing party or others.

An effective handling of the case serves the common interest and pertains to the social costs of legal procedures – the costs associated with a dispute for the client, opposing party and ‘others involved’ (such as third-party financiers like legal expenses insurers and the Netherlands Legal Aid Board). One shouldn’t only consider money in that regard. For example, the disciplinary court (HvD) considered that special care needs to be exercised in cases where children are involved (HvD 13 September 2013, no.6672, ECLI:NL:TAHVD:2013:234).

The second paragraph also serves a common interest, namely that unnecessary enforcements are prevented and no unnecessary proceedings are brought and also that – if proceedings are unavoidable – the opposing party must be given the opportunity to duly defend themselves in court (RvD Amsterdam 10 March 2015, case 14-260A). So, spontaneous summoning, enforcement measures or applying for bankruptcy are in principle subject to disciplinary proceedings (HvD 19 December 2016, ECLI:NL:TAHVD: 2016:245).

It is established disciplinary case law that an advocate enjoys a great degree of freedom to promote the interests of his client as he sees fit and that this freedom may not be restricted in favour of an opposing party. However, this freedom is not unlimited. The advocate may not unnecessarily and impermissibly damage the legitimate interests of others. For example, he must refrain from grounds that in themselves are regarded as inadmissible or which, without notably serving to benefit his client, cause disproportionate disadvantage to the other party (HvD 20 May 2016, ECLI:NL:TAHVD:2016:135). This rule is specified in more detail in rules of conduct 7 and 8: the advocate may not express himself in a needlessly offensive manner or put forward facts which he knows or may reasonably know to be contrary to the truth.

It is in the interests of good professional practice that the conflict situation in which the advocate often finds himself does not lead to unnecessary prejudice or suffering on the part of the parties involved in that conflict or of third parties. Furthermore, it is in the common interest that enforcement proceedings are not needlessly brought. An opposing party that is not being assisted by an advocate must in principle be given a deadline for consultation too. However, it may be that the interests of the client call for an incisive approach, for example because giving a deadline for consultation may lead to effective recourse no longer being possible. In that case, the advocate should be given the opportunity to weigh up whether, without this deadline being given, he will attach property before judgment or take measures for enforcement of a judgment.

Attaching property before judgment falls outside the scope of this rule of conduct, because in that case the advocate must have his hands free to take measures of a temporary nature quickly, in order to look after the interests of his client, without having to announce this to the opposing party (HvD 17 September 2012, ECLI:NL:TAHVD:2012:YA3488). In paragraph 2 this is made clear by indicating that there is an exception: in cases where, exceptionally, a particular interest of the client is obviously inconsistent with this. The exception therefore primarily refers to the taking of precautionary measures.

Rule 7 No inappropriate remarks

The advocate will avoid being needlessly offensive when expressing himself.

Notes

See also the notes to rule 6. The concept ‘needlessly offensive’ indicates the restrictions the advocate needs to consider when making any remarks. In other respects, according to established case law, advocates enjoy freedom of speech, although the special nature of the judicial appeal does mean that their behaviour in public must be discreet, honest and decent (ECHR 30 November 2006, NJ 2007/368, Veraart).

These restrictions generally apply to remarks made in the context of professional practice, for example towards one’s own client, the opposing party and other advocates. The mere fact that the views of an

advocate's client do not please the opposing party does not yet mean that the advocate has overstepped the boundaries of the freedom vested in him by the opposing party in his capacity as an advocate.

With regard to the former rule 31, the words 'orally or in writing' have been left out. The respectability of expression pertains to any form thereof, whether orally or in writing or as gestures or the sending of messages (whether in agreement or not). The disciplinary court will be able to decide, on a case-by-case basis, whether a specific remark should be regarded as needlessly offensive.

By virtue of the oath or affirmation made by the advocate, he, in particular, also owes the judicial authorities respect. In principle, expressing criticism of the courts is not inadmissible, but the disciplinary court (HvD) does emphasise that the integrity of the courts must also be protected against slanderous attacks (ECHR 26 November 2013). Furthermore, courts are vulnerable because their ability to parry attacks upon their integrity is limited. Particular examples are in camera secrecy and the lack of authority to give further details of judgments (HvD 17 October 2016, no. 160001, ECLI:NL:TAHVVD:2016:182).

Rule 8 No incorrect information

The advocate must refrain in legal and other matters from providing factual information that he knows, or at least should know, to be incorrect.

Notes

See also the notes to rule 6. With regard to the opposing party, the established measure is that a large degree of freedom is vested in the opposing party's advocate to represent his client's interests in a manner he sees fit, but that this freedom can be restricted, inter alia, if the advocate postulates facts that he knows or may reasonably know to be contrary to the truth. With regard to this restriction, it must also be borne in mind that the advocate needs to represent the interests of his client based on the evidence that his client gives him and that in general he may assume the correctness of that evidence and is only obliged to verify its correctness in exceptional cases.

This rule is only infringed if an advocate discloses factual information that he knows, or at least ought to know, to be incorrect. That is not the case if it transpires that the advocate has assumed the correctness of his client's statements and he has had no reason to doubt them. The way in which the statements are subsequently presented is up to the advocate, albeit that this must be done within the boundaries of the code of conduct (RvD The Hague 12 May 2014, ECLI:NL:TADRSGR:2014:146).

The disciplinary court has ruled that, in a proper administration of justice, the public interest prevents an advocate knowingly depriving a court of information that the advocate knows, or ought to know, to be significant to the exercise of the court's judgment (HvD 5 June 2009, advocates gazette (Advocatenblad) 20 August 2010).

All of this is connected to the duty of truth that has applied in civil procedural law since 2002, as referred to in Article 21 of the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, "DCCP") and the duty of substantiation and duty to furnish evidence as referred to in Article 111(3) DCCP. Under Article 21 DCCP parties are, after all, obliged to put forward the facts relevant to the decision fully and truthfully. If this obligation is not complied with, the court can draw whatever conclusion it deems appropriate.

By furnishing the civil court with incorrect information (and also by wilfully concealing a fact that is relevant for the requested decision), a party breaches its obligation under Article 21 DCCP to put forward a fact that is relevant for the requested decision fully and truthfully, whereby the advocate is then also acting contrary to rule 6 (formerly rule 30).

In criminal proceedings this obligation is subtler, in view of the nemo tenetur principle. The right of the accused to remain silent, the duty of professional secrecy and the advocate's associated legal professional privilege may lead – in criminal proceedings – to an advocate refraining from furnishing

any information that may incriminate his client. The basic premise, however, remains that an advocate may not tell any untruths. In the interests of his client the advocate may, of course, submit that his client is adopting a particular position (as regards his guilt or innocence), or submit that the facts of the charge have not been legally and convincingly proved.

The term 'court' will be understood to refer to both the individual office of 'judge' and the court itself. This terminology is not intended to limit the applicability of this rule (and other rules of conduct where reference is made to the court) to just the national courts. The rule also applies to proceedings before the disciplinary court or an arbitration board.

Rule 9 Disclosure of capacity of advocate

1. The advocate must ensure that no misunderstanding can arise vis-à-vis his client and his contacts with third parties regarding the capacity in which he is acting in a given situation.
2. Even when he is not acting in the capacity of advocate he must behave in such a way that trust in the legal profession is not harmed.

Notes

The Act on Advocates does not contain any explicit description of the substance of the profession of advocate. Apart from the traditional duties such as providing legal advice and assisting litigants in legal cases, advocates also carry out other activities. Given that, in any case, the core values colour the essence of the professional practice of the legal profession, ancillary activities that do not fully fit in with the core values will be regarded as being done in a capacity other than that of advocate. This may include acting as a trustee or mediator. These activities generally show some interconnectedness with legal practice, but for both examples the core value of partiality does not apply.

The advocate must provide clarity to the public about the capacity in which he is acting. For example, an advocate carrying out an examination of the facts for his client, which are designed for external use, will always make it clear to those concerned whether he is doing that as the advocate for that client or in another capacity.

The circumstance of an advocate being permanently registered with the Bar does not alter the fact that the person in question may act in another capacity (professionally or otherwise). According to established disciplinary case law, acting in another capacity, for example as Bar President, trustee or mediator, does not mean that the advocate is no longer subject to disciplinary law. If the advocate behaves in such a way as to harm the trust in the legal profession when carrying out that task, it will generally be an act or omission contrary to the conduct befitting a respectable advocate, and disciplinary action can be taken against him.

This basic premise leads to the following two rules of conduct. Firstly, the advocate also needs to conduct himself, outside his own practice of the legal profession, in such a way as not to harm the trust in the legal profession. Again, according to established disciplinary case law, this rule also extends to private conduct. A complaint about any private conduct of an advocate will always be admissible, but will only be (fully) assessed in relation to the measures referred to in Section 46 of the Act on Advocates if there are enough links with practice; in other instances, the limited standard of whether the conduct of the advocate should be deemed absolutely unacceptable in the light of his professional performance is applied (HvD 6 December 2013, no. 6752, ECLI:NL:TAHVD:2013:336).

If, in a given situation, the advocate is acting in a different capacity and third parties do not or will not understand that immediately, it is down to the advocate to be proactive in providing clarity on the matter. For example, an advocate who is also a trustee or mediator will always have to clearly indicate that he is acting as advocate or as trustee or mediator.

Rule 10 Compatibility of activities

The exercise of the profession of advocate is incompatible with any other activity that compromises the core values of the legal profession or trust in the legal profession.

Notes

In principle, there are no ethical objections to the performance of duties in another capacity. Some time ago now the disciplinary court (HvD) ruled that it is not unlawful for an advocate, alongside his practice in that capacity, to put his skill and experience to productive use in other fields of economic activity (HvD 11 December 1961, no. 113, advocates gazette (Advocatenblad) 1962, p. 110). That area is not entirely without limits. When deciding whether ancillary activities, where applicable, are compatible with the legal profession, both the core values and public trust in the legal profession play an important role too. For example, an ancillary activity that jeopardises the independence of an advocate is an incompatible activity. Moreover, any activity with which the profession of advocate is incompatible under the Act on Advocates should lead to a request for disbarment (see Section 8c(1) of the Act on Advocates).

Rule 11 Cross-border activities within Europe

When carrying out cross-border activities within the European Union and the European economic area the advocate must take due regard of the CCBE Code of Conduct for European Advocates.

Notes

Based on this rule (formerly rule 39) the Code of Conduct for European Advocates is being incorporated into the Dutch Code of Conduct. This Code of Conduct, which was adopted by the CCBE (the Council of Bars and Law Societies of Europe) in 1988, applies to a) all the advocate's professional contacts with advocates from other states that fall within the scope of the two sectoral 'advocates' directives' and b) to his professional activities in a Member State other than his own, whether or not the advocate is physically present in that Member State (Article 1.5 Code of Conduct).

The two sectoral Directives (77/249/EEC and 98/5/EC) govern, respectively, the jurisdiction for an advocate to act occasionally in another European state and the jurisdiction to establish himself under his original professional title. The scope of the Directives is not limited to the territory of the European Union, but also operates in the other countries of the European Economic Area (Liechtenstein, Norway and Iceland) and in Switzerland.

The Code of Conduct applies to cross-border activities. A description of that concept is provided in Article 1.5 of the Code of Conduct and the accompanying Notes. The rules of the Code are only directly applicable to work by advocates within the EU, the other countries of the EEA and Switzerland, and advocates from the associated and acting members of the CCBE. In the Notes the definition of cross-border activities would, for example, include communication in state A between an advocate of state A and an advocate of state B, even on a matter of law internal to state A; it would exclude communication between advocates of state A in state A of a matter arising in state B, provided that none of their professional activities take place in state B; it would include any activities of advocates of state A in state B, even if only in the form of communications sent from state A to state B. The latter would imply that involvement of an opposing party across the border makes the Code applicable. But that also presumes that that opposing party is not being assisted by an advocate and there may be doubt as to whether that applicability also has relevance.

Given the nature of the CCBE, an association under Belgian law of which the Netherlands Bar is a member on a voluntary basis, the Code of Conduct is not, by its nature, a collection of binding rules. As a result, the same applies for the Code of Conduct as it does for the Dutch code of conduct: that in a test against Section 46 of the Act on Advocates the Dutch disciplinary court is not bound by the rules laid down therein, but that – partly in view of the open nature of the legal standard – those rules may in fact be relevant to it (directly or by analogy). Whether the action is subject to disciplinary rules depends on the actual circumstances and will be assessed by the disciplinary court on a case-by-case basis.

THE ADVOCATE IN RELATION TO THE CLIENT

Rule 12 Due care

The advocate will handle the cases assigned to him with due care and in doing so will always keep in mind the special nature of the relationship between advocate and client.

Notes

The rules of conduct that relate specifically to the (contractual) relationship between advocate and client have been combined in rule 12 et seq. As a result, those rules that underline the fact that the agreement to perform services between advocate and client is of a special nature, just as the advocate-client relationship is a special relationship, have become more structured.

The advocate will also have to comply with the General Data Protection Regulation (GDPR). Acting with due care therefore also implies that the advocate will take appropriate technical and organisational measures to secure personal data. In particular, this will apply to (personal) data that the advocate obtains and stores as part of the service to his clients.

Rule 13 Performance of engagement

1. The advocate will personally perform the engagement assigned to him. The advocate may, in consultation with his client, derogate from this basic premise; he is also permitted, in consultation with his client, to engage other advocates and support staff if necessary.
2. The advocate may only allow associates of his who are not advocates to handle cases independently if he has ensured that they are competent to do so and he has demarcated the area in which they may do so. The advocate remains responsible vis-à-vis his client for the performance of the engagement.
3. The provisions of paragraph 2 will also apply if the advocate engages another advocate or support staff.

Notes

When drafting the 1992 Code of Conduct there may still have been room for doubt about the nature of the legal relationship between advocate and client. Nowadays it is generally accepted that the advocate and his client will draw up an agreement to perform services within the meaning of Title 7 of Book 7 of the Dutch Civil Code (Burgerlijk Wetboek, "DCC").

In fulfilling his societal role of legal assistance provider the advocate is therefore also a contractor in the civil law sense. This basic premise has also been expressly acknowledged since 2013 in what has now become established disciplinary case law. The disciplinary court tests the quality of the service provision to the full extent, but in its assessment it takes into account the freedom that the advocate needs to have with regard to the way in which he handles a case and the choices he may face in doing so. The freedom that the advocate has with regard to the way in which he handles a case and the choices he may face are not unlimited, but are restricted by the requirements that may be imposed on the advocate as contractor in the performance of that engagement and which entail that his work must satisfy what counts as professional standard within his profession. That professional standard assumes acting with the care that may be expected of a reasonably competent and reasonably acting advocate under the circumstances (HvD 20 September 2013, no. 6747, ECLI:NL:TAHVD:2013:260).

Conversely, the client as principal also has to deal with a contractor whose duties are enshrined in a public-law framework with, inter alia, core values and who needs to act with due regard for the professional standard. The disciplinary court (HvD) has not described in so many words what that professional standard entails, but points to the fact that the work of the advocate needs to comply with what counts as professional standard within his profession. That way, the code of conduct influences the way in which the agreement to perform services must be implemented. Article 7:400(2) DCC also offers the scope, in a civil-law sense, to determine that there has been a derogation from the statutory provisions by that which arises from the law, the content or nature of the agreement to perform services, or from another legal act, or habit.

In parts, the code of conduct aligns with the provisions of the Dutch Civil Code, in parts it gives a specification or detail of those statutory provisions. The proposed series of rules of conduct concern, in succession:

- the required duty of care and the principle of personal performance of the engagement (cf. Article 7:401 and Article 7:404 DCC);
- the obligation to provide information to the client/principal (cf. Article 7:403(1) DCC);
- being dominus litis and the withdrawal from the engagement in the event of irreconcilable difference of opinion (cf. Article 7:402 and Article 7:408(2) DCC);
- the right to remuneration and the requirement that it be reasonable (cf. Article 7:405 DCC);
- the making of accounts and discharges of, inter alia, disbursements (cf. Article 7:403(2) and Article 7:406(2) DCC).

Personal performance within the boundaries of the Dutch Civil Code is not aimed at limiting the possibility of engaging staff, automated systems, robots, and so on. However, consultation with the client will be needed for this. This also applies if the advocate makes use of a 'flexible workforce'. These are advocates who are not employed by the law firm on a permanent basis, but are engaged on a flexible basis. In that instance, consultation with the client is needed, so that it is clear with whom the client is entering into an agreement to perform services and also who is doing the work and where the client can lodge a complaint in the event of an attributable failure to comply with the obligation.

An advocate does not only vouch for the quality of the staff engaged by him (or other advocates working on a case under his ultimate responsibility); in accordance with the core value of expertise he is also obliged to assist his client personally with an appropriate level of knowledge. Because the profession of advocate calls for more than just legal expertise, the advocate's competence in the broad sense must be maintained. The advocate is personally responsible for the required quality level, which he can maintain by, for example, taking part in peer supervision or peer review.

Paragraphs 2 and 3 state that the advocate remains responsible to his client for the performance of the engagements, even if another advocate or support staff are engaged. This provision assumes that the representing advocate independently calls in the help of support staff or another advocate, without the client's intervention. Of course, the other advocate or the support staff have their own – independent – responsibility. However, where there is an attributable failing, one must avoid the client being sent from pillar to post, as the saying goes. This does not alter the fact that it may be the client himself that engages the support staff or another advocate or that arrangements regarding that responsibility are made with the client prior to the engagement.

Rule 14 Responsibility for performance of engagement

1. The advocate bears full responsibility for the performance of the engagement. The advocate cannot evade this responsibility by referring to the engagement received from his client. He may not, however, take any action against the obvious will of the client.
2. If there is a difference of opinion between the advocate and his client over the way in which the engagement is to be performed and this dispute cannot be resolved by mutual agreement, the advocate must withdraw.
3. If the advocate decides to withdraw from the engagement given to him, he must do so carefully and ensure that his client is disadvantaged as little as possible.

Notes

This rule reflects the fact that the advocate, as is traditionally described, acts as 'dominus litis'. This rule is linked to the core value of independence, which he must exercise vis-à-vis his own client as well. When handling a case, the advocate takes the lead and, based on his own responsibility, must determine the approach that will best serve the interests of his client.

However, the advocate must make it clear to his client how he wishes to go about the work and what he is, and is not, prepared to do. Moreover, in general, action is only subject to disciplinary proceedings if the advocate, in handling the case, obviously acts and advises wrongly and the

interests of the client are or may be harmed as a result (RvD Amsterdam 18 May 2011, ECLI:NL:TADRAMS:2011:YA1665).

When handling the case, the advocate takes the lead and a great deal of freedom is vested in him to promote the interests of his client in the manner that he deems appropriate. That policy freedom, stemming from the disciplinary case law referred to above, is limited by the requirements that must be imposed on the advocate as contractor in the performance of that engagement, which mean that his work must comply with the professional standard within his profession.

Without prejudice to the above and pursuant to Article 7:402(1) DCC, the relationship between the advocate as contractor and the client as principal means that the advocate is, in principle, obliged to follow his client's instructions. If the advocate deems the execution of an instruction from his client incompatible with the responsibility he has for his own actions, and this difference of opinion cannot be resolved by mutual agreement, then the advocate cannot impose his own will, but must withdraw from the case, according to Article 7:402(2) DCC) and the corresponding rule of conduct (HvD 15 July 2013, no. 6577, ECLI:NL:TAHVD:2013:175).

The advocate cannot be obliged to accept or continue with an engagement. What he must do is ensure that the client does not experience any harm (procedural or otherwise) (RvD Amsterdam 20 March 2012, advocates gazette (Advocatenblad) March 2013, p. 47).

An advocate must avoid – otherwise his action will be subject to disciplinary proceedings – putting himself in the position whereby there is no other route open to him than withdrawing from the proceedings at an inopportune moment for the complainant, for example because he was in a peremptory position (see HvD 21 January 2013, no. 5752, ECLI:NL:TAHVD:2013:82).

The special nature of the relationship between advocate and client implies not only circumspection and clarity on termination of the engagement relationship; the duty of professional secrecy continues after termination of the service.

The execution of the engagement is adapted to the implementation of the agreement to perform services. The principal will often be the same party as the client. However, this won't always be the case. An example of this is the insurer who acts as principal and the insured who must be defined as client. If principal and client are not one and the same party, tensions may arise between the interests of both parties. For example if the insured has no cover under the insurance, or has committed fraud. The advocate would do well to make it clear beforehand what he will do if such tensions arise. Any such agreement will not affect the possibility that the advocate, despite this prior agreement, will have to withdraw from handling the case for both parties.

Rule 15 Conflict of interests

1. Given his obligation to the core values of partiality and professional secrecy in particular, the advocate is not permitted, except in the cases mentioned in paragraphs 3 and 4:
 - a) to act simultaneously for more than one party in proceedings in which these parties have a conflicting interest;
 - b) to act against a client or former client.
2. The advocate aims to prevent the situation referred to in paragraph 1 from occurring. If that circumstance nevertheless arises or is likely to develop as a result, the advocate must be alert to that development and withdraw from the case completely, and at his own volition. Any advocate who has thus withdrawn as advocate of one or more parties will be unable to get involved in that same matter subsequently, even on behalf of other parties.
3. The advocate may derogate from the obligation in paragraph 1 only if each of the following three conditions has been met:
 - a) the interests to be entrusted to the advocate do not relate to the same case in respect of which the former or existing client was or is being assisted by the advocate, are not linked to it and nor is such a link likely in future;

- b) the advocate does not have confidential information from his former or existing client, or case-related information or information relating to the former or existing client, which may reasonably be relevant in the handling of the case against this former or existing client; and
 - c) there is no evidence of reasonable objection on the part of the former or existing client.
4. Apart from the instance referred to in paragraph 3 the advocate may derogate from the provisions of paragraph 1 if the party who has contacted the advocate asking him to represent his interests and the former or existing client against whom action is to be taken by virtue of their disclosed information agree in advance and that agreement has been duly concluded between sufficiently equivalent parties.
 5. An advocate is free to put it to a new or existing client that, in the engagement offered by this client, their interests are being represented against a former or existing client and that the engagement can only be accepted if that former or existing client agrees to it. After obtaining agreement from the new client, the advocate will be allowed to communicate with that former or existing client. However, the advocate will not conduct any such discussion if the nature of the specific relationship with the existing client or specific circumstances of the case dictate otherwise.
 6. Where the term 'advocate' has been used in this rule, this will also be understood to mean the group practice of which he is a member.

Notes

This rule does not prevent an advocate from acting for two or more clients in the same case, assuming there is no conflict of interests, nor any significant risk that such conflict may arise. For example, it has already been permitted in practice for some time for the same advocate to serve the common interest of married couples in a divorce (see HvD 2 December 1991, no. 1991). Because conflicting interests also exist more or less by definition alongside the common interest of parties, the advocate must exercise great caution, here especially. It is established case law that for an advocate acting as sole advocate for two parties in divorce proceedings there is a serious duty of care, which requires, inter alia, that the advocate properly inform both parties about their margins and possibilities and that he ensures that both parties understand the arrangement to be made (see inter alia HvD 23 November 2015, no. 7449, ECLI:NL:TAHVD:2015:299).

The advocate's main task is therefore to give advice and assistance to individual clients or groups of clients whose interests run parallel. In looking after their interests, he represents a party position. Therefore this does not alter the fact that the advocate can act as 'family advocate'. For example, he can represent the interests of the children. In that case, the interests of the children must run parallel. The second paragraph prescribes the general rule that, where there is a conflict of interests, an advocate will not handle the case or will withdraw from that case. In that instance, the advocate will no longer be allowed to act for the former parties involved in the case. If a conflict of interests arises between two clients of the same advocate and it cannot be immediately reconciled, the advocate will no longer be able to act for either client. Any advocate acting for several clients in a case or related cases is well advised to point out the rule and lay this down in the letter of engagement. If the advocate withdraws for a reason other than a conflict of interests, he may continue to assist the other party, but in general he will not be able to act against the party whose interests he is no longer representing.

Where there is any doubt, the advocate is often better off not acting in the case in question. If so wished, the advice of the Bar President may be sought, although this is not binding and does not affect the advocate's responsibility under disciplinary law. The advocate's own responsibility takes precedence over the wishes of the client. The impression that the advocate is guilty of a conflict of interests to the detriment of the client must also be avoided at all times.

The advocate must pay heed to the fact that, potentially, a conflicting interest may also arise in the future, with the consequence being that the advocate cannot provide the assistance required or that he withdraws from the case. The nature of the relationship between the client and the advocate alone may mean that it is not advisable for the advocate or a colleague to act against that client, even if it is not about the same issue.

The core values of professional secrecy and partiality also dictate the rule that a law firm will not act against its own clients or former clients, unless the parties, provided they are well-informed, consent to a derogation from that rule.

These exceptions are partly justified by the interest of free choice of advocate, certainly when it comes to a close relationship and the advocate has been properly introduced to his (regular) client's affairs: a client should not be kept from the advocate of his choice too readily.

This rule concerns the case where a new client presents itself. This rule contains the generally accepted standard within the profession that an advocate is not permitted to act against his own (former) client or that of his colleagues (whether or not they are advocates), except in special circumstances. Acting also means acting in an advisory capacity. The provision does not apply to any advocate bringing a claim against his client for non-payment of his fee note.

The client must be able to fully trust that details relating to his case, his person or his company, which the client makes available to the advocate or his colleague, will not be used against him at any time. This relates to confidential information, i.e. information that is not public in nature and therefore cannot automatically be obtained without the client's knowledge.

The advocate's enquiries into whether he is free to act against a client or former client extends to all members of his firm or group practice, for example the civil-law notary, tax advisor or patent attorney.

Rule 16 Duty to provide information

1. The advocate must inform his client of important information, facts and agreements. To avoid any misunderstanding, uncertainty or dispute, he must confirm important information and agreements to his client in writing.
2. Any advocate who has a reasonable suspicion or perceives that he has fallen short in representing the interests of his client is obliged to notify his client of that immediately and, if necessary, advise him to seek independent advice.
3. The advocate will also handle financial matters with integrity and care and accurately account for these to his client.

Notes

An advocate is obliged to confirm in writing the engagement assigned to him, as well as the applicable terms and conditions. More generally, he is obliged to inform his client of important information, facts and agreements. An advocate must adequately and promptly inform and warn his client about the chances and risks and the cost of his representation, and provide clarity. The advocate must confirm all of this to the client in writing. The background to this is that lack of clarity and misunderstandings about what has been agreed between advocate and client must be avoided as far as possible. In special cases this rule is also elaborated in rule 18(3), which obliges the advocate, if the client waives legal aid, to put this in writing. 'In writing' will also be understood to mean digital media, such as e-mail. If there is a data breach, for example as referred to in the GDPR, the advocate may also be obliged to inform any clients or third parties who are affected by that breach.

Careful provision of legal assistance requires that the advocate disclose to the client serious failings in that provision to any extent and any straightforward errors. If these have taken on – or threaten to take on – forms that would polarise the interests of the advocate and the client, the advocate will have to advise the client to seek independent advice. That may be the case, for example, if the client suffers – or threatens to suffer – serious disadvantage as a result of shortcomings on the part of the advocate. This might include seeking advice from another advocate, for example. That does not alter the fact that it is also possible that the entire case will have to be taken over by another advocate if handling the case with due regard for the core values no longer proves possible.

Professional indemnity policies contain provisions to the effect that incidents that may lead to claims for damages must be reported directly to the insurer. Compliance with rule 16(2) will not affect the

possibility for the advocate to coordinate the policy in the matter in question with the insurer in advance.

Particularly in financial matters, advocates have a duty of care. The disciplinary court (HvD) has repeatedly made it clear that financial integrity is an integral part of the core value of integrity. If an advocate accepts an engagement, he must discuss the financial implications thereof with the client and give an insight into the way in which and the frequency with which he will issue his fee notes. The advocate can be expected to bear in mind the financial consequences of handling a case not only for his own client. As a rule, the way in which the case develops also has consequences for the opposing party or for third parties financing the case for the client or being responsible for it. This may include legal aid on the basis of assignment or because the client is not insured for legal expenses (see also rule 18).

Rule 17 Fees

1. When drawing up his fee note the advocate should charge a reasonable fee given the circumstances.
2. The advocate will ensure that when accepting the engagement, clear arrangements are made regarding his fee, the on-charging of costs, and the issuing of the fee note.
3. As soon as the advocate foresees that the fee note will be considerably higher than the estimate originally given to the client, he will notify the client of this fact.
4. The advocate will set his fee note out in such a way that the client can establish simply how much is being charged in fees, disbursements and VAT and the extent to which disbursements are offset. In principle, the advocate will periodically issue a clearly itemised fee note, quoting his rate and time spent or any other agreed basis.
5. If the client lodges an objection to the fee note, then the advocate is obliged to refer the client to the applicable office complaints mechanism and the other options for resolving the dispute.
6. Where the advocate has claims against his client that have not yet been established by a court, he will not attach any property before judgment and will not apply for bankruptcy, other than after consultation with the Bar President.
7. Only after consultation with the Bar President will the advocate make an attachment against himself or his firm's client monies foundation.

Notes

The advocate must charge a reasonable fee and also be transparent in advance about his fee, the costs and the issue of the fee note. As a result the advocate will often have to give an estimate of the expected time spent and the total amount in costs (fee). Naturally, there may be cases where such an estimate is not possible, but an advocate cannot dispense with a reasonable estimate with the aim of circumventing the duty to provide information embodied in paragraph 3. Transparency also means that the rate, any other potential basis agreed for determining the fee, VAT and the frequency of fee note issue are made clear to the client.

Two developments have led to the amendment of the financial rules (of conduct) compared to the 1992 Code of Conduct. The first is that the ban on 'no cure no pay' and 'quota pars litis' has now been included at the level of the Legal Profession Bye-Law and therefore no longer has to be laid down at the level of the code of conduct. That does not alter the fact that the disguised arrangement of any such agreement may still lack respectability.

In disciplinary case law it has been provided for some time now that it is allowed to make an invoice arrangement where – in the event of no positive result – a claim is made based on a low hourly rate, but in the event of a positive result a higher rate will apply (see inter alia HvD 9 February 1998, advocates gazette (Advocatenblad) 19 March 1999). There is therefore no substantial objection to an agreement whereby the increase in the low rate in the event of achieving a positive result is related to a percentage of the value of that positive result, provided the low rate only covers costs and provides for a modest salary for the advocate.

This form of permitted performance-related pay must be distinguished from cases in which an advocate wishes to handle a case entirely free of charge ('pro bono') for reasons best known to him. The second development is that the budgetary procedure embodied in the Dutch Civil Cases Fees Act (Wet tarieven in burgerlijke zaken) has ceased to be, and therefore a dispute over an advocate's fee note in principle needs to be handled just like any other claim, unless the advocate and client have agreed that any dispute that arises over the fee note will be settled by an independent third body (such as the Legal Profession Complaints Board). With this in mind, paragraph 5 includes the instruction to the advocate to refer his client – if the latter lodges an objection to the submitted fee note – to the applicable office complaints mechanism and the possibilities open under the agreement to perform services to resolve a potential dispute (binding recommendation, arbitration or access to the ordinary courts).

Rule 18 Legal aid

1. Unless an advocate has good grounds to assume that his client is not eligible for publicly funded legal aid, he is obliged to discuss with his client, before accepting the engagement and subsequently whenever there is reason to do so, whether there are terms to try to secure publicly funded legal aid.
2. The advocate will not stipulate or receive any compensation from the client, in any form, for his work on handling a case to which he has been assigned, apart from personal contributions, disbursements and legal costs according to the applicable rules.
3. If the client is possibly eligible for publicly funded legal aid and nevertheless chooses not to make use of this, the advocate must put this in writing.

Notes

Paragraph 1 provides that the advocate bears a responsibility when inquiring whether the client is eligible for publicly funded legal aid. The advocate will do this before accepting the engagement, but also subsequently if there is reason to do so. After all, it is possible that a situation may change or that there are developments that have an effect on the possibility of a client's being eligible for publicly funded legal aid. This is a reason for the advocate to inquire again whether the client is eligible for publicly funded legal aid and this will need to be discussed.

Paragraph 3 of this rule is an elaboration of the advocate's general duty of care to put essential agreements with his client in writing. The advocate has the obligation to draw a client's attention to the fact that he may be eligible for legal aid. In complying with this obligation, the advocate will have to exercise a great deal of care. The standard for that care is that the advocate will explicitly and clearly point out to a client who may be eligible for legal aid but waives it, that he is waiving the right to legal aid. Furthermore, the advocate will have to clearly ascertain that the client knows and understands which right he is thereby giving up. Therefore, the advocate has a duty to verify whether the client does actually wish to waive his right to legal aid and to make sure he is aware of the consequences of doing so and can afford these (see inter alia RvD Amsterdam 1 September 2009, ECLI:NL:TADRAMS:2009:YA0100).

For the sake of completeness, it is noted that making an arrangement with the client that his case will be handled on a payment basis first and on an assignment basis thereafter (or vice versa) is also not permitted (see HvD 1 December 2014, ECLI:NL:TAHVD:2014:370).

Rule 19 Security and payment of fee note

1. The advocate is not permitted to accept security other than a monetary advance for the payment of his fee note, except in special circumstances and then only after consultation with the Bar President.
2. The advocate is also not permitted to accept payment of his fee note other than in money, except in special circumstances and then only after consultation with the Bar President.
3. If a client challenges all or part of a fee note but objects to offsetting the amount against any funds he is entitled to, the advocate must, after having consulted with the Bar President, deposit such funds with the Bar President up to the amount challenged. The advocate will use his best efforts to ensure the beneficiary of these funds is identified as soon as possible.

Notes

The advocate is permitted to ask the client for an advance on the fee note, provided it is in monetary form. Disciplinary case law reveals that, inter alia, the acceptance of cars (RvD Arnhem 19 August 2013, ECLI:NL:TADRARN:2013:55) or thoroughbred horses (HvD 15 May 2009, ECLI:NL:TAHVD:2009:YA0535) is not permitted without consulting the Bar President. A mortgage from the client (or a third party) in favour of the advocate (RvD Amsterdam 2 December 2014, ECLI:NL:TADRAMS:2014:320) or an assignment of claims of the client against third parties (HvD 14 April 2015, ECLI:NL:TAHVD:2015:134) will also not be permitted as forms of security for the payment of the fee note, without consultation with the Bar President.

The rule of paragraph 3 leaves the possibility of offsetting open, if the client has no objection. It also emerges from the contractual relationship with the client that the advocate must check with him whether he has any objection to offsetting. This rule refers, in general, to offsetting of funds to which the client is entitled and, as such, aligns with the provision of Article 6.19(4) of the Legal Profession Bye-Law. Offsetting of an outstanding invoice with funds received into the pooled account is only possible if the client has given his express consent to this (cf. Article 6.19(5) of the Legal Profession Bye-Law).

THE ADVOCATE IN RELATION TO OTHER PARTIES CONCERNED IN THE ADMINISTRATION OF JUSTICE

Rule 20 Due process

1. If the advocate proceeds with the submission of documents, he must, when determining the timing of the submission, take into account the legitimate interests of the opposing party with a claim to the provision of those documents.
2. In proceedings, the advocate will avoid the court taking cognisance of opinions or information of which the opposing party has not been able to take proper cognisance in a timely manner during the hearing.
3. If the advocate uses written arguments at the session and submits them to the court, he will simultaneously provide the opposing party's advocate with a copy of the written arguments.

Notes

This rule embodies the general principle that in defended proceedings, in which the litigation is carried out at the cutting edge, an advocate may not attempt to draw unjustified advantage from his opposing party. The advocate must not lose sight of the fact that in all these proceedings (civil law, criminal law, administrative law or other) the principle of fair play applies.

An elaboration of that principle was laid down in the former rule 14(1), which states that in timing the submission of documents to the court to whose judgment the case is submitted, the advocate will consider that the opposing party should be allowed adequate time to prepare a response with care. However, the principle of fair play has a broader scope and can, under certain circumstances, also entail an obligation to send the opposing party, who is not being assisted by an advocate, a copy of documents that are being sent to the court (see RvD Amsterdam 28 February 2017, ECLI:NL:TADRAMS:2017:48).

Moreover, the rule articulated in paragraph 1 only applies to those parties involved in the proceedings who have a claim, in the existing system, to obtaining court documents. Under rules of procedure, there is increasingly less emphasis on arguing a case. In administrative procedural law there is hardly any scope left within the framework of the 'new handling of cases' for more than a brief verbal explanation. Insofar as arguing a case before a judicial body is permitted, the advocate must give not only the members of the court but also the opposing party's advocate a copy of his written arguments. The aim of this is to prevent the advocate giving the court certain information in a disguised manner via his written arguments, which is therefore not known to the opposing party. For that same reason the advocate must be transparent about leaving out certain information while addressing the court, even though it is included in the written arguments. In the first place, this rule relates to the actions vis-

à-vis the advocate representing the opposing party. However, the advocate is also free to give a copy of the written arguments to a legal representative who is not an advocate.

In criminal law there is no advocate on the part of the 'opposing party': here, the advocate is appearing versus the public prosecutor in a defended action. 'Opposing party' here will not be understood as a reference to the Public Prosecution Service (OM).

Rule 21 Notices to the court

1. In pending proceedings, unless he is acting with the opposing party's advocate, the advocate is not permitted to address the court, or the body to whose judgment the case is submitted, unless he does so in writing with simultaneous forwarding of a copy of the notice to the opposing party's advocate and with enough time for that advocate to have sufficient opportunity to respond to the notice.
2. No separate notice to the opposing party's advocate is required, if the notice to the court is made available to the opposing party's advocate at the same time, via a technical facility.
3. Once judgment has been passed, the advocate may not address the court without the opposing party's consent.

Notes

Digital litigation in civil procedural law and administrative procedural law as a result of the Quality and Innovation programme (KEI) means that the law and the procedural rules may require advocates to upload their court documents in a digital environment, so that the relevant court document is also available to the opposing party's advocate. In that case, compliance with the duty to provide information to the opposing party and their advocate is assured.

According to the disciplinary court, approaching the court after judgment has been passed, with a request to amend/supplement the record of the plea hearing, is permissible. In principle, the opposing party's consent is not necessary for this. However, submission of new arguments is not permitted (so-called post-pleading) (HvD 30 May 2016, no. 150165, ECLI:NL:TAHVD:2016:96).

Paragraph 3 states that the advocate is not allowed to address the court once it has been asked to pass judgment, without the consent of the opposing party. This is a reference to the court that heard the case. 'The court' is also understood to be the body referred to in paragraph 1, to whose judgment the case is submitted.

This rule relates primarily to civil and administrative law proceedings. In criminal law, there is no advocate for the opposing party. The public prosecutor is not the opposing party.

Rule 22 Witnesses

1. The advocate will adopt a careful approach in his communication with witnesses and will not do anything that might lead to unauthorised influence of witnesses.
2. If the advocate calls witnesses or experts, he must be responsible for the payments and fees they are entitled to, unless he makes an explicit reservation.

Notes

Rule 16 of the 1992 Code of Conduct prohibits any contact by an advocate with a witness who had been summoned by the opposing party; that was specified again in paragraph 2 of that rule of conduct, for criminal law practice. The rule did not contain any instructions for the respectable dealing with witnesses as such. According to current thinking, this rule constitutes a breach of the principle of due process and, in particular, equality of arms, and should therefore be deleted.

The introduction of this general rule of conduct means there is no longer a need to have an extra paragraph refining the matter of dealing with witnesses within the context of one's own client. After all, the general principle laid down in this rule of conduct already provides scope for consultation with 'one's own witnesses' (who may or may not have been summoned by an opposing party) and contains the warning to be careful.

At the same time, it is advisable to stipulate that in contacts with witnesses the advocate must exercise great caution, and, in particular, steer well clear of unduly influencing witnesses. This rule of conduct will have no effect on the general criminalisation of the deliberate influencing of witnesses (Article 285a Dutch Penal Code).

In order to align with general criminalisation it is stated that undue influence is not permitted. After all, every conversation is already a form of influence, but not undue per se. It is clear that one is not allowed to 'put words in witnesses' mouths'. A witness must state truthfully and may not be influenced or hindered in doing so.

An advocate must avoid a situation arising whereby – before the witness is interviewed – the statement he is about to make can be influenced by the acts or omissions of an advocate, such as when he allows the witness to be present at a meeting between himself and his client regarding the upcoming witness interview. By allowing the presence of a witness in the meeting with his client, an advocate may therefore be committing an act that is subject to disciplinary proceedings (HvD 31 March 2000, advocates gazette (Advocatenblad) 2000, p. 971).

In criminal cases the question of a 'restrained' attitude in the approach to one's own witnesses is not realistic: it is necessary, and in practice also expected, that advocates will talk with potential witnesses first about what they have or have not observed, before making any request to question those witnesses, or to have them questioned.

Paragraph 2 does not apply to criminal law practice. That is because the term 'summon' does not apply, it is about 'having someone summoned' (see for example, Article 263 of the Dutch Code of Criminal Procedure).

Rule 23 Acting as dispute adjudicator

1. Any advocate who fulfils a role with a tribunal that is responsible for case law or settling disputes in another way will refrain from any involvement in a case in which he works, has worked or will be involved in that role.
2. An advocate who is part of a group practice is not free to get involved in a case that has been or is being judged by a tribunal in which an advocate in the same group practice or other colleague fulfils a role, if they are or will be involved in the tribunal hearing.

Notes

This rule is linked to the general order to avoid conflicts of interest. In proceedings before the district court, for example, the situation must be avoided whereby two colleagues take part in the hearing, one as an advocate, the other as member of the court.

Where the advocate as a member of the court does not withdraw from hearing the case in such a situation (for example having been excused), he is therefore acting in a different capacity, to which the relevant disciplinary ruling applies.

The term 'group practice' aligns with the term referred to in Article 5.3 of the Legal Profession Bye-Law. This concerns those with whom the advocate practises within the same firm. In principle, these are: trainee advocates, junior advocates, fellow advocates and practitioners of another liberal profession, practising either in employment or self-employment.

THE ADVOCATE IN RELATION TO HIS PROFESSION

Rule 24 Mutual relationships

In the interest of the litigants and the legal profession in general, advocates aim for a mutual relationship based on courtesy and trust.

Notes

Advocates must be able to trust each other, for the purpose of good professional practice. That is served by a mutual relationship between advocates based on trust and courtesy. For that reason, advocates must refrain from doing anything that could damage their mutual relationship. In their business dealings, advocates should refrain from making remarks that, in common parlance, could be offensive or hurtful.

In the opinion of the disciplinary court the rules of conduct also serve to maintain a mutual relationship within the profession that is based on courtesy and trust. This contributes to good professional practice. On the other hand, that professional practice requires that the party interest to be served is not subordinated to it. After all, partiality is a core value of the legal profession. For that reason, where there is possible tension between a good collegial relationship and the party interest, the advocate must always carefully weigh up the two sides, with the circumstances of the case to be handled playing a part. In addition to the required collegiality, the freedom to act – and to do so with partiality – that the advocate enjoys is also restricted by the principles of due process. These also apply to acting in a professional capacity in law (HvD 16 August 2013, no. 6626, ECLI:NL:TAHVD:2013:194).

Courtesy and trust also imply that the advocate takes the other advocate into account when determining the timing of the submission of documents in legal proceedings and equality of arms when giving information to the court. For that, see also rule 20 and the Notes to that rule. Another reference to courtesy and trust is that an advocate strives to act effectively in the proceedings and must ensure that no unnecessary costs are incurred to the detriment of the opposing party or others involved (rule 6) and that the advocate should not make needlessly offensive remarks (rule 7).

Rule 25 Direct contact with (opposing) party

1. The advocate will not contact a party on a matter in respect of which they know this party to be receiving the assistance of an advocate, other than by the agency of the advocate in question, unless the latter gives them permission to contact that party directly. The same will apply when the party referred to contacts them directly.
2. In derogation of the provisions of paragraph 1, an advocate serving legal notice may do so to the opposing party directly, provided that a copy is simultaneously forwarded to that party's advocate and on condition that the communication to a party remain limited to serving of legal notice. If the advocate can also achieve the intended legal effect by only sending his letter to the party's advocate, the aforementioned exception does not apply.

Notes

The aim of this rule (formerly rule 18) is to maintain the balance between parties in a legal dispute. The object of the rule is to avoid the advocate of an opposing party overwhelming a party in a dispute without assistance from his own advocate (RvD Amsterdam 2 May 2014, ECLI:NL:TADRAMS:2014:113). For a justification of an exception to this, a legally acceptable reason is required not to serve the advocate, for example because otherwise the intended legal effect cannot be achieved (HvD 5 July 2010, 5679, ECLI:NL:TAHVD:2010:YA1174).

An exception to this rule is only acceptable if it relates to service which, in order to achieve the intended legal effect, cannot be done other than directly to the other party. If the advocate can also achieve the intended legal effect by only sending his letter to the advocate, this exception will not apply (RvD Arnhem-Leeuwarden 26 May 2014, ECLI:NL:TADRARL:2014:149).

The content of a letter that one advocate sends to the client of the other advocate within the scope offered by the exception must remain limited to the permitted serving of legal notice and whatever is

directly required for this. Expansion of the content of any such letter amounts to a circumvention of the ban laid down in this rule.

Rule 26 Confidential disclosures

1. Without prejudice to the provisions of rule 27, an advocate who wishes to disclose information to another advocate, which he wishes to see treated in confidentiality, must make this desire clearly known before sending the first of these disclosures.
2. If the addressee chooses not to assign these disclosures a confidential nature, he must notify the sender of this immediately and demonstrably.
3. No legal claim to confidential disclosures within the meaning of paragraph 1 may be made, unless the interests of the client specifically call for it, but then not without prior consultation with the opposing party's advocate.
4. If this consultation fails to offer a solution, the advice of the Bar President must be sought before the aforementioned legal claim can be made.

Notes

Compared to the 1992 Code of Conduct the rule on 'collegial correspondence' – as it was named at the time – has changed. The old rule meant that a client being assisted by an advocate appeared to be at a disadvantage, given that other providers of legal assistance did not need to adhere to that rule. Furthermore, and as a result of the changes in civil procedural law, the maintenance of the confidentiality of 'collegial correspondence' appears to be relative.

No longer is it merely the official capacity of the sender and recipient of the communications that is a deciding factor for the confidentiality of the exchanged disclosures. The advantage of the current approach is that it creates a level playing field with respect to the communications with providers of legal assistance who are not advocates, albeit that any such agreement on the part of the recipient cannot be enforced through disciplinary law.

The new rule is based on rule 5.3 of the CCBE Code of Conduct for European advocates. The basic premise is that an advocate wishing to send a letter or comparable form of communication to another advocate with the intention that it must remain confidential between the advocates, the sending advocate must inquire in advance whether the desired confidential letter/communication can be accepted on that basis. In that case, the advocate needs to clearly mention his wish for confidentiality in advance. The recipient of such expressed wish can confirm or refuse the confidentiality of the communications. If the communication has already been received, the recipient must immediately return this to the sender without taking note of, divulging, or referring to the contents in any way. As was the case in the past, a legal claim cannot be made to communications between advocates made in that way, which are confidential (formerly 'collegial') in nature. The possibility of exception, in the interest of the client of an advocate who has received the communication, still exists. In that instance, too, the advocate will have to consult with the sender in advance. If this is unsuccessful, then the advice of the Bar President must be sought.

Being unable to make a legal claim to the confidential communications does not mean, per se, that the communications cannot be shared with the advocate's own client. The advocate will have to weigh this up carefully.

Rule 27 Settlement negotiations

As regards the content of settlement negotiations conducted between advocates, nothing can be disclosed to the court or body to whose judgment the case is submitted, without the consent of the advocate of the opposing party.

Notes

Unlike in rule 26, the arguments in favour of enforcing a categorical ban on the disclosure of contents of settlement negotiations conducted between advocates weigh more heavily than those in favour of abolishing it. Again, other providers of legal assistance do not need to adhere to this rule, but

advocates must be able to speak freely among themselves in order to be able to try to reach a solution to the dispute.

The content of settlement negotiations may not be disclosed to the court. The rule does not, therefore, relate to cases where a party unconditionally offers to pay what it acknowledges it owes and maintains this offer during proceedings. After all, invoking this cannot give the wrong impression. And it is appropriate for this to be disclosed, because that way, for example, unjustified cost awards can be avoided.

Furthermore, the ban on disclosure to the court only refers to the content of settlement negotiations. The mere fact that settlement negotiations have been held (but not succeeded) may be communicated to the court, for example so that the court can form an opinion on the point of a settlement conference. Furthermore, the fact that settlement negotiations have been held, and that one party says that a settlement exists and the other party denies it, can be disclosed. The content of those settlement negotiations, however, must not be disclosed to the court. Naturally, the normal rules of evidence then apply for consensus.

This rule explicitly relates to settlement negotiations. Other cases where advocates exchange views on behalf of their mutual clients or otherwise negotiate (for example in the event of a merger or takeover) are governed by rule 26. After all, settlement negotiations relate to the solving of a judicial dispute. In that regard rule 27 constitutes a 'lex specialis' for those elements within the correspondence between advocates that must be perceived as settlement negotiations.

Moreover, the client can be present during settlement negotiations. The client is not bound by this rule of conduct, so the client can disclose the content of the settlement negotiations to the court. It is advisable to provide clarity on this point beforehand.

Rule 28 Taking over clients

1. An advocate will refrain in principle from initiatives to make another advocate's client, in an ongoing case, his own. If an advocate gets a request to take over the handling of a case that is already being dealt with by another advocate, then these advocates will discuss it between them with the aim of duly informing the subsequent advocate about the state of the case.
2. If the other advocate's fee note has not been paid and he is invoking the right of retention, then he is nonetheless obliged to give the file to the next advocate at the client's request under conditions to be set by the Bar President.

Notes

In 1992 the Bitter Committee removed from the Code of Conduct the rule that forbade the 'poaching' of clients from another advocate. The Bitter Committee's reason for doing so was that such conduct was already covered by rule of conduct 17 (the 'mutual relationships [of] courtesy and trust'). Over the past few years, particularly in criminal law practice, there has again been a lot of to-do about the 'recruitment' of clients, particularly in relation to detainees. Rule 28 intends to provide clarity on the question of what should and should not be understood by the term 'recruitment'.

In principle, counsel is not free to meddle in the relationship between an accused and his counsel. The rules for a free choice of advocate are not intended to facilitate breaches of an existing legal relationship between an advocate and his client (HvD 17 December 2012, no. 6338, ECLI:NL:TAHVD:2012:YA4469).

Trying to acquire another advocate's clients of one's own volition, whether or not through payment, slander or libel of the representing counsel, improper pressure or spurious motives (also known as 'recruitment'), is not permitted and is contrary to conduct befitting a good advocate.

It is important to distinguish those cases from the situation in which an advocate is served in connection with a (possible) takeover. In those cases, there is no 'recruitment' within the meaning of paragraph 1 of this rule of conduct.

In the event of a takeover of criminal proceedings of a detained litigant, this must be done – as is the case with the takeover of other cases – carefully and not improperly. So, generally speaking, the advocate that takes over the handling of the case may be required to have a proper consultation beforehand with the advocate whose case he wishes to take over. That consultation means that advocates actually exchange information and views. Furthermore, the advocate whose cases are taken over retains the opportunity to find out from his client whether it is actually his wish to engage another advocate (see, inter alia, RvD Amsterdam 15 July 2014, ECLI:NL:TADRAMS:2014:185). It is the acquiring advocate's own responsibility to actually consult with the other advocate before taking over the handling of a case. The situation may differ if compelling circumstances mean that the acquiring advocate is not in a position to actually discuss it beforehand.

This rule of conduct does not alter the fact that another advocate can give a second opinion. In that case the request is not to take over the handling of the case, but a takeover may well be the result. In those cases, too, this rule of conduct applies.

Rule 29 Cooperation with Bar President's investigation

In the event of a disciplinary investigation, a request from the Bar President for information associated with a possible disciplinary investigation, or a request for cooperation under Section 5:20 of the General Administrative Law Act, the advocate in question is obliged to immediately provide the Bar President with all the requested information, without being able to rely on his duty of professional secrecy, except in special circumstances.

Notes

As a consequence of the change in the Act on Advocates as at 1 January 2015, the Bar President has acquired the position of statutory supervisor. His acting as such is framed by the provisions relating to the exercise of supervision in Title 5.2 of the General Administrative Law Act. Before that, the Bar President carried out the checks assigned to him, but this form of supervision did not bear the character of the supervision provided for in the General Administrative Law Act.

With that, disciplinary proceedings and the supervision to be exercised over the advocates have each taken on a more independent significance. Disciplinary proceedings are regulated by their own procedural rules in the Act on Advocates. The duty of an advocate to cooperate with a disciplinary investigation by the Bar President at the latter's request therefore stems from the fact that he is a member of the profession. As such, it befits a respectable advocate to lend his cooperation to the investigation of the complaint.

The Bar President's supervisory role is provided for in Section 45a of the Act on Advocates. The exercise of the supervision by the Bar President is also subject to the relevant provisions of the General Administrative Law Act, more particularly Title 5.2 (Sections 5:11 to 5:20). It also emerges from the General Administrative Law Act that the advocate should give the President, within the reasonable deadline set by him, all assistance that he can reasonably demand in the exercise of his powers.