CHAPTER III

OTHER FORMS OF MISCONDUCT

In this chapter, the writer proposes to discuss some of the prohibited acts which are regarded as misconduct by the legal profession, the commonest of which are touting, advertising and undercutting. The codes of conduct that govern the profession makes it improper for members to indulge in any such activities which ordinary members of the public are quite entitled to engage. Such restrictions had been professionally acknowledged, not only by the legal profession, but by many other professions as well. The reasons for imposing such restrictions had been clearly put by Devlin J. in the case of Hughes v The Architects Registration Council,[1]

"Every profession has practices which it bars. Among the commonest of these are advertising, poaching and undercutting. These activities which are considered in the business world to be laudable examples of enterprise, so much so that their restraints are prima facie contrary to public policy, have always been considered offensive professionally."

To exhaust the specified restrictions listed in the codes of conduct would be an impossible attempt and the writer has therefore, limited it to touting, advertising and undercutting.

The general rules that control the legal profession in this country are laid out in the Rules of Practice and Etiquette, 1948, the Bar Council Rulings,[2] and the provision of the Legal Profession Act, 1976. Failure to comply with any of these rules may result in disciplinary proceedings.

(i) Touting

Touting is a direct approach of seeking business from persons

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1. (1957) 2 QB 550 at p.561
2. Insaf Vol. VIII No. 3, p. 51.

individually and it may be done by letters, phone-calls or personal visits. It is often thought in terms of approaching strangers who will thereby be induced to become clients. The rule, however, does not only prohibit deliberate touting. It expressly includes any arts "directly or indirectly procured or attempted to procure"[3] that is done for the purpose of touting.

The Malaysian provisions against touting is found in S.93(2)(e)(f)(g)(h) which generally prohibit any forms of touting calculated to attract business unfairly. Rule 10(a)(b) of the Rules of Practice and Etiquette 1948 also provide that it is unprofessional and improper conduct for a practitioner to divide or agree to divide either costs received or profits of his business with any unqualified person, whether for purposes of procuring or influencing legal business. As for its English counterparts, the Solicitors' Practice Rules, 1936, Rule 4 also has provision against

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3. S.93 (2)(f), Legal Profession Act, 1976.

touting.[4] However in the English position the provision is much more stringent. The rule insists on the regular duty of "reasonable inquiry" in advance which is aimed at the prevention of abuse of ambulance-chasing. There is the real danger of some solicitors, whether intentionally or only negligent shutting their eyes, to the danger of the public of touting in its many forms and fools often do much harm on knaves.[5] The case indicates the high standard of duty laid upon a solicitor in order to protect the public from what is popularly known as "ambulance chasing", a duty of inquiry which can only be neglected at the solicitor's peril. In that case, a

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4. Rule 4 (a) A solicitor shall not join or act with any organisation or person (not being a practising solicitor) whose business or any part of whose business is to make, support or prosecute (whether by action, or otherwise and whether by a solicitor or agent or otherwise) claims arising as a result of death or personal injury including claims under the Workmen's Compensation Acts, 1925 to 1934, or any statutory modifications or re-enactment thereof in such circumstances that such person or organisation solicits or receives any payment, gift or benefit in respect of any such claim for any client introduced to him by such person or organisation.

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

(c) It shall be the duty of a solicitor to make reasonable inquiry before accepting instructions in respect of any such claims for the purpose of ascertaining whether the acceptance of such instructions will involve a contravention of the provisions of subsections (a) or (b) of this Rule.

5. <u>In Re A Solicitor</u>, 1945, 1 All ER 445 at p.450

solicitor fell foul of one of the Rules regarding touting and was suspended for two years. Scott L.J. reasoned the provision as:-

"Touting for clients is, like advertising, fundamentally inconsistent with the interests of the public and with the honour of the profession. The function of a solicitor is to advise or to negotiate or fight for a client, but only if retained. The client may seek him but he must not seek the client. And this rule must be a reality and not evaded by the subterfuge of getting some laymen to do the touting ..... for the sake of the public, it is of utmost importance to enforce on all solicitors the high standard of duty which rests upon them to make such full inquiries as will really safeguard the poorer and more ignorant members of the public from being exploited for gain by unscrupulous men at times of their distress."[6]

In practice, the danger of touting is greatest in cases of accident claims. In order to ensure the good name of the profession, there is a great need for strict provisions regarding touting.

S.93 (2)(e) and (f) of the Legal Profession Act, 1976 generally prohibits any forms of touting. However, there are differences between both provisions. In S.93 (2)(e), it is the practitioner who provides the gratification to the tout for having found him (the practitioner) business. The section specifies the business as legal business to be done by himself or some other practitioner. An illustration of this situation is where the practitioner, in need of work, makes an agreement with some policeman through which he would be notified of cases where arrested persons are in need of legal advice. This involves touting for business from helpless and ignorant victims, thus resulting in exploitation. In subsection (2)(f), it

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6. Op cit at p. 447, 450.

appears that the advocate himself is the tout, whereby he himself becomes the ambulance-chase, to find employment for himself. This section is not confined to legal business alone. It may cover any forms of engagement so long as it keeps the practitioner employed. It also covers situations in which the practitioner receives instructions from some other persons in which he would receive considerations for his efforts. Subsection (2)(g) is a general provision where no advocate and solicitor should accept any employment through a tout.

The idea against touting lies in the fact that the professional approach of acquiring business is that it should be allowed to come without being actively sought. The restraints upon professional men are justifiable in law, for they are not only necessary in the interests of the profession but also of the public. The profession emphasises a lot on the way the practice is built up and in the process of it, skill is highly important. In contrast with the commercial world, it is undignified to solicit business. To allow touting or other similar misconducts like canvassing, advertising and undercutting will mean that practitioners are exposed to the rigours of cut-throat competitions and resort to the method of the commercial world. The legal profession is not a speculative, commercial venture. The quality of services would be affected when there is too much competition for business among the practitioners themselves. In order to attract more business, the quality of services may be reduced, for the primary object of providing services is to survive the competitions, rather than to render services to the best of the practitioners' ability. A lawyer maintains his professional status by providing services when they are sought and in the cause of doing so, earns reputation and renumeration

from his clients. If legal success is to be measured to a large extent by the services which touts are able to render, then an able lawyer who refrains from touting will be at a severe disadvantage as compared with an inexperienced lawyer who is serviced by ever active and ebullient touts. The public loses not only in terms of available professional skill but pay the middle-men's rake-off; sort of assembly-line touch. There is the ever present danger of unnecessary litigation being stirred up as a result of glorious promises of victory being made. A tout has no real interest in the outcome of the case[7].

The rule against touting stems from the fact that there is a need to maintain a close relationship within the legal profession itself. The concept of professional brotherhood and the preservation of goodwill and harmony between members are important as in this way, the public will derive more benefit by the existence of a strong and united professional organisation. This is a safeguard that the standing and repute of the profession would not be unduly prejudiced. And the rules against touting, which is embodied in the statutes are relevant to the duty of maintaining the standing of the profession and also the confidence of the public in the advice given by practitioners are preserved. Touting is regarded as disruptive, unfraternal and unethical, an activity which would inevitably undermine professional solidarity and cooperation between members of the legal profession.

(ii) Advertising

Advertising is another form of misconduct which is frowned upon by the legal profession. Advertising embraces any form of gaining

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7. James Loh: Ambulance-chasing and Contingency Fees in the Legal Profession, 1972 2 MLJ lx.

publicity and it is immaterial whether the act is done by the practitioner himself or someone else on his behalf. The exclusion of advertising is based on the idea that legal practitioners may only compete with one another in reputation for ability. There is no specific provision that governs advertising in the Legal Profession Act, 1976. However, advertising or acts done which could amount to advertising is highly discouraged as could be seen by the many rules that prohibit it. Rule (5) and (6) of the Rules of Practice and Etiquette 1948 is one such instance where the commission of certain acts would amount to advertising. These rules are further amplified by the Bar Council Rulings. Prohibitions regarding advertising also govern the English Bar.[8] Rule (1) of the Solicitors Practice Rules 1936 also provide statutory provision against advertising. In the area of advertising,[9] the prohibition that exists in England is almost similar, though differently worded and presented to what that exists in this country.

In Hughes v A.R.C.U.K.,[10] Lord Goddard C.J. emphasises the prohibition of advertisement and also states the law's view of advertising and the profession. He said,

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8. Boulton, Conduct and Etiquette at the Bar, 3rd Edition, Butterworths.

9. Rule 1 - A solicitor shall not directly or indirectly apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly.

10. (1957) 2 QB 550 at p.559.

"There are rules of conduct which all professional men must observe. Refraining from advertising, would, I think, clearly be one." The statement of principles of the conduct and etiquette of the English Bar states that "it is contrary to professional etiquette for a barrister to do or cause or allow to be done, anything with the primary motive of personal advertisement or anything calculated to suggest that it is so motivated."[11]

The rule against advertising is an expression of the belief that a practitioner should not seek work but let work come to him. However, there cannot effectively be a complete prohibition of all forms of publicity. There are rules which have been devised to regulate essential advertising and thus draw a line between publicity which is allowable. Under the Bar Council Rulings, the placing of the name of the firm outside its premises is not prohibited. However, the plate should not be ostentatious in size, form and description. Rule 7 lays down the size and positioning of the name plate, where it may be fixed, the type and size of lettering and the degree of illumination. To use an over-ostentatious name-plate is to over-describe himself and it is a general rule that the plate must be only on the premises where the profession is actually carried on. In Rule 8, the use of a multitude of designatory letters and description is discouraged. The use of MP (Member of Parliament) after names on letterhead[12] is not allowed. The initials should not be added since it would appear to be using his office as a means of professional advancement. Similarly, if he is a Justice of Peace, the initial ought not to appear, as it would be attracting business unfairly if one takes

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11. Boulton, op cit, at p.50

12. Rule 3.

advantage of opportunities afforded by holding a post or position giving contact with potential clients. Worthless degrees, like Bachelor of Science or other degrees not connected with the legal profession should also not be included.

Rule 12 governs the use of telephone directories. The profession foresees the danger that such lists could be used for attraction of business. In the legal profession the Bar Council issues the Law List of practitioners in this country. However, the Law List is not widely distributed among the public at large, not cheaply at least, and therefore, comprehensive lists giving the necessary information is not easily accessible to the public. Columns in the yellow pages for advocates and solicitors is not allowed and insertion of names in the telephone directory is only allowable if the entry does not take the form of an obvious advertisement for himself, like some unnecessary bold letters for the practitioner's name.

Advertisement of practitioners or his firm inserted in the general press is against professional ethics. However, there is a distinction between advertisement in a legal press which is confined to members of the legal profession and those in newspapers and periodicals circulated among the public. Any acts calculated to feed the press is discouraged and this includes interviews with the press. To have the practitioner's photograph appear in connection with legal subjects would be an undesirable form of publicity, and so is any mention in the lay press of the professional qualification in addition to the author's name. All these would amount to an attraction of business.

The reason behind the prohibition of advertising lies on the fact

that in competing for business as such, it would diminish the incentive to build up a practice through sheer hardwork and the development of legal skills may be hindered. It is not beneficial for the public to choose a lawyer on the basis of the impression of his advertisements and the amount of publicity he had made. Practitioners have to compete with one another in reputation for ability and this means that other forms of acquiring business is ruled out. For, if lawyers are allowed to advertise, the advantages would go, not to the best qualified, but one with the least scruples. If the choice of lawyers are made on the strength of advertisements, the public would not get the best of its services and inevitably the cost of legal services would be unduly raised to cover the costs of advertisements as well. At the same time, under-cutting would be a common feature in the profession.

(iii) Undercutting

The Rules of Practice and Etiquette, which was made under statutory authority, prohibits a solicitor from holding himself out as being prepared to do professional business at less than the prescribed scale. Rule 11 provides that no advocate and solicitor shall accept or agree to accept less than the scale fee laid down by law in respect of non-contentious business carried out by him, except where such fee exceeds $1,000 or in other cases where some special reasons exist for not so charging, in which latter case, he may accept a fee not less than three-quarters of the full scale. A practitioner should not hold himself out or allow himself to be held out, directly or indirectly as being prepared to do professional work in contentious business at less than a scale fixed

by law. "Contentious business" as defined by S.3 of the Legal Profession Act, 1976 means business done by an advocate and solicitor, in or for the purpose of proceedings begun before a court of justice, tribunal, board, commission, council, statutory body or an arbitrator. The prohibition against undercutting involves in quoting a reduced fee to one who is not an existing client as well as an existing client as in both ways, it would amount to obtaining new business unfairly.

The restriction on undercutting is of very limited effect and usually applies when a fee is deliberately reduced in order to attract a new client. Such reduction would affect the interests of the profession and the public. Modern conditions call for a uniform calculation of fees so as to maintain uniformity and professional ethics. Where undercutting is not kept at the minimum, professional standards will be left ignored in the pursuit attracting clients.

In the determination of the question of fees and its fairness in relation to the kind of work done, a body to keep a watchful eye on fee levels is needed. The Legal Profession Act, 1976 provides for such a body called the Solicitors Cost Committee.[13] The limitation of their powers of making general orders and regulating the remuneration of advocates and solicitors are only in respect of non-contentious business and the power of the Committee is discretionary.

The membership of the Solicitors Cost Committee consist of members that come from a legal background such as the Chief Justice or a Judge of the High Court, the Attorney-General or a member of the Attorney-General's chambers, the Chief Registrar or a Senior Assistant Registrar,

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13. S.113.

and four advocates and solicitors. The membership appear to consist of persons who will not be heavily affected by any level of fees, it would seem that in exercising the discretion, the interest of the public is not adequately represented. It is noticed that the seven-member Committee, four of them, which is more than half, are advocates and solicitors nominated by the Bar Council. An observer would look at the composition of members as the preservation of the interests of the practitioners since they themselves prescribe the rules as to the fees. It is undoubtedly be very expedient to have members with legal qualifications making up the Committee, but in order to have justice seen to be done, there should also be some public representation in the Committee so that there is an equilibrium of interests represented in the Committee.

Where the profession has no published scale, there is some difficulty in applying the rules against undercutting as there is no fixed measuring rod.

It is interesting to note that such elaborate provisions relating to conveyancing and non-contentious matters as existed in the present Advocates and Solicitors Ordinance 1947 is absent in the new Act. S.71(1) of the Ordinance provides that the remuneration of a practitioner in respect of business connected with sales, purchases, leases, settlements and other matters of conveyancing, and in respect of other business not being business in any suit or transacted in any court, shall be regulated as in provided in Schedules III and IV to this Ordinance. In the new Act, there is no such specific provisions and the provisions relate only to the power of making general orders prescribing and regulating the remuneration of advocates and solicitors in respect of non-contentious business by the

Solicitors Cost Committee. The power of making rules had thereby been delegated. In the Advocates and Solicitors Ordinance 1947, such scale becomes part of the Ordinance itself and it exclusively governs the rules relating to conveyancing and non-contentious business and these sections are complemented with Schedules for the calculation of such fees.

The Schedules that were first introduced in 1947 are still being applied today. Such rates have reached an outdated stage where the value of property have multiplied immensely and that conveyancing documents have become more complicated to suit the modern needs. The Schedules have, therefore, become obsolete in the modern context that something needs to be done to update it. The rates applied in 1947 were found to be inadequate and it had been found to be unrewarding to handle such non-contentious business too. Most often, the provisions have been greatly disregarded due to its obsoleteness and there had been a lack of effective enforcement. The practitioner is in a better and more advantageous position to dictate his terms to the clients, and the latter would be left with little choice but to comply.

S.113(3) of the new Act provides such powers of making general orders relating to such changes to the Solicitors Cost Committee. This would provide an expedient and convenient method of introducing scale of charges to suit the changing conditions from time to time. Such delegation of power is most appropriate since it takes such a long process of going through Parliament to amend or repeal the charges.

In view of the failure of the prevailing scale of charges to accommodate for the present day trends of non-contentious matters, it is, therefore, most desirable for the new Act to provide a more flexible and suitable scale that would answer the present needs.