

# SUPPLEMENTARY CODE OF CONDUCT PRACTICE DIRECTION

## No. 1<sup>1</sup>

### **This Practice Direction must be read alongside the Mandatory Code of Conduct**

The right to practise in the DIFC Courts (“**the Court**”) is conditional upon observance of the Mandatory Code of Conduct (“**the Mandatory Code**”) together with any Supplementary Code of Conduct Practice Direction (“**Supplement**”) issued periodically by the Chief Justice (together “**the Code**”).

This Supplement augments **Parts B, C, E, F and G** of the Mandatory Code.

Paragraphs of the Mandatory Code augmented by this Supplement are identified in the left hand margin and prefixed with the letters “**SPD**”. Thus **SPD B-5 (i)** identifies the first Supplementary Practice Direction to paragraph 5 of **Part B** of the Mandatory Code. **SPD B-5 (ii)** identifies the second Supplementary Practice Direction to paragraph 5 of **Part B** of the Mandatory Code.

This Supplement shall have mandatory effect from the date of publication.

### **Part B - Duties Owed to the Court**

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| <b>SPD B-4</b> | (i) A Practitioner who knows of facts which would assist his opponent is not under any duty to voluntarily inform his opponent or the Court of this to the detriment of his own client.   |
| <b>SPD B-5</b> | (i) The Court must be informed of all relevant decided cases (“Decisions”) and legislative provisions of which the Practitioners appearing in the matter are aware. If one of them omits a relevant Decision or provision or makes an incorrect reference to a Decision or provision, it is the duty of the other to draw attention to it even if it assists his opponent's case.   |
| <b>SPD B-5</b> | (ii) Where, after a hearing, judgment is reserved and a relevant point of law is subsequently discovered, a Practitioner who intends to bring it to the judge's attention should inform his opponent. The other Practitioner should not oppose the introduction of a new decision which affects the authority of any decision previously cited by either party, but will be entitled to object to the introduction of any point of law that has not previously been pleaded or argued. This Rule does not apply to hearings held to consider applications properly made without notice. |
| <b>SPD B-6</b> | (i) A Practitioner who, after being engaged by a client, realises that he <sup>2</sup> is or will be in breach of <b>Part B-6</b> and/or <b>Part B-8, Part C-15, SPD-C7, SPD-C9, SPD-C15</b> or any other provision of the Mandatory Code and Supplement if he continues to act for that client, shall discharge himself from the representation of that client without prejudice to the  |

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<sup>1</sup> Revised by DRA Order No. 1 of 2017 on 29 October 2017

<sup>2</sup> All references to the masculine gender in the Code shall be read as including the feminine gender.

representation being taken over by another member of his firm to whom **Part B-6** is inapplicable. In discharging himself, the Practitioner shall take all reasonable steps to ensure that his client's interests are not in any way jeopardised.

### **Part C - Duties Owed to Clients**

- SPD C-7** (i) It is an implied term of each Practitioner's retainer that he is free to present his client's case at the trial or hearing in such a way as he considers appropriate. If the client's express instructions do not permit a Practitioner to present the case in what the Practitioner considers to be the most appropriate manner, he may withdraw from the case after seeking the approval of the Court, but without disclosing matters which are protected by the client's privilege of confidentiality.
- SPD C-7** (ii) In general, there is no duty upon a Practitioner to enquire in every case where he is instructed as to whether the client is telling the truth. However, where the client's instructions are such (whether because of their inherent implausibility or of other information coming to the Practitioner's knowledge) as should put a Practitioner on enquiry, the Practitioner must, where practicable, check the truth of what the client tells him to the extent that such statements will be relied on before the Court or in pleadings or affidavits.
- SPD C-7** (iii) If, either before or during the course of proceedings, the client makes statements to the Practitioner representing him which are inconsistent, this is not of itself a ground for the Practitioner to refuse to act further on behalf of the client. Only where it is clear that the client is attempting to put forward false evidence to the Court should the Practitioner cease to act. In other circumstances, it would be for the Court, and not the Practitioner, to assess the veracity of the client's statement.
- SPD C-7** (iv) For the avoidance of doubt, the Practitioner shall not be swayed from his or her duties to the client by any conflicts between the instructions or interests of the client and the instructions or interests of any involved Funder (as defined in Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC), unless the client has authorized the Practitioners in writing to take instructions from the Funder rather than the client.
- SPD C-8** (i) Before a Practitioner obtains the written consent of each client to act for the other client he must:
- (a) satisfy himself that it is reasonable for him to act for all the clients and that it is in the best interests of each of the clients;
  - (b) satisfy himself that the benefits to the clients of him doing so outweigh the risks, and;
  - (c) satisfy himself that, after he has explained the relevant issues and risks to the clients, those clients have a reasonable belief that they understand those issues and risks.

- SPD C-8 (ii) **SPD C-8(i)** shall also apply to any law firm to which the Practitioner belongs.
- SPD C-9 (i) A Practitioner shall not be precluded from agreeing to act in proceedings before the Court merely because to represent his client competently he will have to undertake study and research in a given field or associate himself with another Practitioner of established competence in that field. However, if the Practitioner cannot undertake the necessary study and research without undue delay and cost to the client, the Practitioner shall inform the client of the likely delay and cost in acquiring the requisite knowledge and skill and thereafter obtain the client's voluntary consent to his acting in the matter.
- SPD C-12 (i) Where a client proposes to enter into a litigation funding agreement (as defined in Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC), or is already a party to such agreement, Practitioners shall advise the client as to the effect of such agreement, if any, on the client's potential responsibility to pay legal costs and expenses as described in **Part C-12** which will remain the clients responsibility unless otherwise agreed between the client and the Third Party Funder.
- SPD C-13 (i) When entering into a fee agreement with a client, a Practitioner must explain to the client that (a) the client shall be personally responsible for payment of the Practitioner's legal fees and expenses in full, regardless of any order for costs made against the opposing party, and (b) that even if the client wins, the opposing party may not be ordered to pay the full amount of the client's own legal fees and expenses, and may not be capable of paying what has been ordered.
- SPD C-13 (ii) When entering into a fee agreement with a client, a Practitioner must inform the client in writing of the basis upon which fees for his professional services will be charged and the manner in which it is expected that those fees and disbursements, if any, shall be paid by the client.
- SPD C-13 (iii) As part of a clear and transparent fee agreement, Practitioners must not collect or receive any referral fee or benefit in kind from a Third Party Funder arising from the referral of a client to that Third Party Funder, without disclosing the collection of the benefit to the client in writing. Clients must be fully informed of any financial or other interest which the Practitioner or the law firm to which the Practitioner belongs has in referring the client to any specific third party. Furthermore, where a Practitioner decides to recommend the use of a specific third party to a client, such recommendation must be deemed by the Practitioner to be in the best interest of the client.
- SPD C-15 (i) Any knowledge acquired by a Practitioner whilst acting for a former client is confidential and cannot be disclosed without that client's consent. However, a Practitioner is under a duty to his present client to inform him of all matters which are material to his case. Consequently, a Practitioner in possession of knowledge concerning his former client

which is, or might be relevant, is put in an impossible position and so cannot act against that client.

### **Part E - General Duties**

- SPD E-17** (i) Except when making a formal application to the Court, a Practitioner must not discuss a case with a judge save in the presence of the Practitioner for the other party.
- SPD E-17** (ii) If a written communication is to be made to the judge at any time, the Practitioner should at the same time deliver a copy of it to the opposing Practitioner or to the opposing party if it is not legally represented.
- SPD E-17** (iii) A Practitioner must not make or offer to make payments to a witness which are contingent upon the nature of the evidence given or upon the outcome of a case. However:
- (a) payment of reasonable expenses and reasonable compensation for loss of time attending Court may be paid to witnesses. In the case of an expert witness, there is an implied obligation to pay a reasonable fee;
  - (b) a Practitioner, on his client's instructions, may insert advertisements for witnesses to come forward to testify as to a particular occurrence.
- SPD E-17** (iv) A Practitioner shall not interview or discuss with a witness, whom the Practitioner has called, his evidence or the evidence of the other witnesses while such witness is under cross-examination. This shall not prevent the Practitioner from communicating with his client or principal client representative (while the latter is giving evidence) for any purpose necessary for the proper management of the matter.
- SPD E-17** (v) A Practitioner may interview and take statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party to the proceedings except that, if the Practitioner is aware that the witness has been called or issued a subpoena to appear in Court by the other party to the proceedings, he shall inform the Practitioner of the other party of his intention to interview or take statements from the witness. If such awareness only occurs during the witness interview, the Practitioner shall immediately after such interview inform the Practitioner for the other party of such interview.
- SPD E-17** (vi) A Practitioner who gives a statement to the press must ensure that he does not become in contempt of Court by publishing any statement which is calculated to interfere with a fair trial of a case which has not been concluded.
- SPD E-17** (vii) A Practitioner shall not call a witness whose evidence he knows to be untrue.

- SPD E-17 (viii) A practitioner must, in any proceedings before the Court, conduct the case in a manner which maintains the fairness, integrity, efficiency and orderly conduct of those proceedings.
- SPD E-17 (ix) A Practitioner shall not engage in conduct involving dishonesty, fraud, deceit, or deliberate misrepresentation.
- SPD E-17 (x) A Practitioner shall not knowingly assist his client to disobey an order or direction of the Court.
- SPD E -17 (xi) A Practitioner must comply with any order of the Court requiring him to do or refrain from doing something; equally, a Practitioner is bound to honour his undertakings given to the Court.
- SPD E-17 (xii) When conducting proceedings in the Court a Practitioner:
- (a) shall be personally responsible for the conduct and presentation of his case and shall exercise personal judgment upon the substance and purpose of statements made and questions asked;
  - (b) shall not express his personal opinion of his client's rights or liabilities or allow his personal feelings to affect his professional assessment of the facts or the law or to affect his duty to the Court;
  - (c) shall bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal or in setting aside proceedings; or
  - (d) shall not suggest that a witness or other person is guilty of any crime, fraud or misconduct or attribute to another person the conduct of which his client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to his client's case and which appear to him to be supported by reasonable grounds.
- SPD E-17 (xiii) A Practitioner shall not contrive facts which will assist his client's case or draft any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing:
- (a) any statement of fact or contention (as the case may be) which is not supported by his client's instructions or by other reasonably credible material;
  - (b) any allegation of fraud or criminal behavior unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a *prima facie* case of fraud or criminal behaviour; or
  - (c) in the case of an affidavit or witness statement, any statement of fact other than the evidence which (in substance according to his instructions) the Practitioner reasonably believes the witness

would give if the evidence contained in the affidavit or witness statement were being given orally.

- SPD E-17 (xiv) When conducting proceedings in the Court, a Practitioner shall not by assertion in a speech make an allegation against a witness whom he had an opportunity to cross-examine unless in cross-examination he has given the witness an opportunity to answer the allegation. However, a Practitioner may make a submission concerning (a) a witness' credibility based on observations of the witness' conduct and demeanour in court as well as (b) contradictions between testimony given and/or documents authored by the witness without having put such observations to the witness for comment.
- SPD E-18 (i) The criteria for registration are set out at DRA Order No. 1 of 2016 in respect of Rights of Audience and Registration in Part II of the Academy of Law's Register of Practitioners, Registrar's Direction No. 2 of 2013 issuing and Conducting proceedings and the Academy of Law's Guidelines for Registration of Practitioners.
- SPD E-18 (ii) By acting in any matter before the Court, a Practitioner represents that to the best of his knowledge none of the matters identified at **Part G-35 (1)** apply to them. **Part G-35(1)(d)** shall not prevent a Part II registered Practitioner from undertaking advocacy so long as he does not also have charge of his client's moneys.
- SPD E-23 (i) Where it is disputed that a settlement has been concluded, the content of any settlement offers or negotiations shall be disclosed to the Court prior to judgment only with the leave of the Court.
- SPD E-23 (ii) **Note:** Practitioners are reminded that the label "Without Prejudice" attached to a communication does not necessarily confer privilege on that communication unless that communication may reasonably be considered to be a settlement offer or a step in the negotiations process.

#### **Part F - Sanctions for Breach of the Code**

- SPD F-26 Where a Practitioner agrees or disagrees to and attend the relevant training or counselling, the Academy of Law will inform the Registry in writing. The Court may consider and decide to proceed with a formal complaint under Part F-27 of the Mandatory Code if not satisfied with the steps taken by the Practitioner to address the issue.
- SPD F-34 (i) An application to the Court of Appeal shall be made using the procedure set out at **Part 8** of the Rules of the DIFC Courts ("**the Rules**"). Save where the application to the Court of Appeal is made by the Complainant, no permission to appeal shall be required.
- SPD F-34 (ii) Save with the permission of a judge of the Court or the permission of the Court of Appeal, any application to the Court of Appeal shall be made no more than 30 clear days after the reasoned decision of the Registrar is issued.

- SPD F-34 (iii) The **Part 8** claim form shall identify the defendant as “The Registrar of the DIFC Courts” and state that it is an application made pursuant to **Part F-34** of the Code to appeal a decision issued pursuant to **Part F-33(1)** of the Code. Thereafter, the claim form shall set out the grounds of appeal relied on in accordance with **Part 44** of the Rules.
- SPD F-34 (iv) Where permission to appeal is required, an application for permission shall be included in the **Part 8** claim form. Permission to appeal may be given in accordance with **Part 44.8** of the Rules.
- SPD F-34 (v) Service of the **Part 8** claim form on the defendant shall be dispensed with, as shall the need for the defendant to file an Acknowledgment of Service.
- SPD F-34 (vi) Within 14 days of the issue of a **Part 8** claim form, a judge of the Court shall issue directions for the management and determination of the application(s).
- SPD F-34 (vii) Any decision appealed against, together with any application to the Court of Appeal made pursuant to **Part F**, shall be kept confidential until the appeal has been determined.
- SPD F-34 (viii) An application to the Court of Appeal made pursuant to **Part F** shall not operate as a stay of any sanction.
- SPD F-34 (ix) On hearing an appeal, the powers of the Court of Appeal shall be as provided for at **Part 44.134** of the Rules. Reference to the Court of First Instance at **Part 44.134(1)** of the Rules shall be read as a reference to the Court acting pursuant to **Part F-33(1)** of the Code.

### **Part G - Matters Affecting Registration**

- SPD G-35(1) (i) An application made by an officer of the Court pursuant to **Part G-35(1)** shall be made using the procedure set out at **Part 8** of the Rules.
- SPD G-35(1) (ii) The **Part 8** claim form shall identify the claimant as “The Registrar of the DIFC Courts” and state that it is an application for an order pursuant to **Part G-35(1)** of the Code.
- SPD G-35(1) (iii) The **Part 8** claim form shall identify the specific order sought and be filed with any written evidence to be relied on.
- SPD G-35(1) (iv) Upon the issue of a **Part 8** claim form, a judge of the Court shall issue directions for the service, management and determination of the application.
- SPD G-35(2) (i) An application to the Court of Appeal shall be made by the filing of an appellant’s notice in accordance with **Parts 44.32** to **44.35** of the Rules. Permission to appeal shall not be required. Service of the appellant’s notice on the respondent shall be dispensed with.

- SPD **G-35(2)** (ii) Save with the permission of a judge of the Court or the permission of the Court of Appeal, any application to the Court of Appeal shall be made no more than 30 clear days after the order appealed against was issued.
- SPD **G-35(2)** (iii) Within 14 days of the filing of an appellant's notice a judge of the Court shall issue directions for the management and determination of the application, including any directions for the filing of a respondent's notice.
- SPD **G-35(2)** (iv) An application to the Court of Appeal made pursuant to **Part G** shall not operate as a stay of any order appealed against.
- SPD **G-35(2)** (v) On hearing an appeal, the powers of the Court of Appeal shall be as provided for at **Part 44.134** of the Rules. Reference to the Court of First Instance at **Part 44.134(1)** of the Rules shall be read as a reference to the Court acting pursuant to **Part G-35 (1)** of the Code.