LITIGATION AND THE CLIENT'S RIGHT TO MAKE AN INFORMED CHOICE

Clients cannot be expected to make decisions regarding the initiation of legal proceedings, or to choose the appropriate steps to take in the course of such proceedings, unless they have been provided with the necessary information and advised of the viability of the courses open to them. This article examines the advocate and solicitor's responsibilities in this respect in the light of recent judicial observations and the Legal Profession (Professional Conduct) Rules.

Jeffrey **PINSLER** SC
LLB (Liverpool); LLM (Cambridge); LLD (Liverpool);
Barrister (Middle Temple); Advocate & Solicitor (Singapore);
Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 This article was prompted by the judgment of the Court of Appeal in *Lock Han Chng Jonathan (Jonathan Luo Hancheng) v Goh Jessiline* ("*Jonathan Lock*"),[1] a case which involved extensive litigation in the Subordinate Courts, High Court and Court of Appeal resulting in cost liabilities out of all proportion to the sums in dispute. The author's purpose is not to comment or make any judgment on the manner of legal representation in this case,[2] but to use it as a platform for a general examination of the advocate and solicitor's responsibilities to his client regarding the latter's ability to make an informed decision as to the appropriate course of action. This concern goes to the heart of justice because ultimately it is the client's needs and goals which bring him to the law in the first place and cause him to engage an advocate and solicitor. Put another way, it is the client's interest in access to justice which is the *raison d'être* of the civil process.

II. Summary of facts and findings in *Jonathan Lock*

2 The action resulted from a road traffic accident involving a collision between the respondent's motor car and the appellant's

1 The Court of Appeal's brief grounds of decision may be found in CA No 50 of 2007. The fuller judgment is cited at [2007] SGCA 56.

2 The Court of Appeal has directed that the matter be referred to the Council of the Law Society concerning the possibility of disciplinary proceedings.

motorcycle. The appellant claimed compensation in the amount of $375 from the respondent. This was disputed and the matter went to mediation at the Primary Dispute Resolution Centre ("PDRC"). Eventually, the respondent agreed to pay $187.50 to the appellant. Costs were fixed at $1,000 and reasonable disbursements were to be taxed or agreed. Issues then arose as to whether the proper sum for disbursements should be $290.35 or $230 (a difference of $60.35) and the content of a draft order of court which had been made by the judge conducting the mediation ("the settlement judge"). The appellant's lawyer issued a writ of seizure and sale in respect of the amount which had been awarded by the court and there was further controversy concerning the costs of execution. Subsequently, an application was made to set aside the writ of seizure and sale on the basis that the judge had not made a court order but had merely recorded a settlement. This contention was rejected by the Deputy Registrar and by the District Judge on appeal. The respondent was successful in his appeal to the High Court, which concluded that the settlement judge had no power to direct the entry of a consent order or judgment, or to make other consequential orders in this capacity under the Subordinate Courts Act.[3] Applications concerning the costs incurred in the litigation continued to be made. On further appeal (by which time the appellant had replaced his lawyer), the Court of Appeal reversed the decision of the High Court and ruled that the court dispute resolution process contemplates that the terms of a court-mediated settlement would be embodied in an order of court and that the settlement judge has the power to make orders of court in connection with, and following the successful resolution of, the dispute.[4]

3 In its brief grounds of decision, which were issued prior to its formal judgment,[5] the Court of Appeal made the following observations on the escalation of costs in the course of the litigation:[6]

> This case should never have come this far. It would not, if the solicitors in this case had acted reasonably in the interests of their clients. A dispute involving a puny sum of about $60 escalated into contests of wills between two solicitors, resulting in wastage of judicial time and unnecessary expenditure in terms of court fees and disbursements which exceeded $100,000 even before the date of this hearing. We have, in fact, been shown a letter dated 13 July 2007 from the appellant's former solicitor stating that his fees up to the stage of his discharge from these proceedings are in the region of $150,000. We are troubled by this.

3 See *Lock Han Chng Jonathan v Goh Jessiline* [2007] 3 SLR 51.

4 *Lock Han Chng Jonathan v Goh Jessiline* [2007] 3 SLR 51 at [23]. The ruling is explained at [24]–[42].

5 The Court of Appeal's brief grounds of decision may be found in CA No 50 of 2007.

6 CA No 50 of 2007, at [6] and [7].

> This is an incredible case. We have not seen one like it in all our years in the law. It has brought no credit to counsel involved and the legal system as a whole. All that the appellant wanted from the defendant was $375 being $285 for the cost of repairs to his motorcycle and $90 for loss of use, for which he eventually agreed to settle at $187.50. For this, he was put at risk of having to pay a sum in excess of $100,000 in legal fees.

4 After receiving information from the appellant in the course of the proceedings, the Court of Appeal stated that it would direct the Registrar of the Supreme Court to refer this matter to the Council of the Law Society for the purpose of enquiring into whether the appellant's former lawyer had: (a) acted with the appellant's knowledge or consent in commencing enforcement proceedings in relation to the settlement; (b) acted in the best interests of the appellant in seeking to enforce the settlement agreement by way of a writ of seizure and sale; (c) kept the appellant informed or had explained to him the risks involved in taking all the steps he did in these proceedings; and (d) acted inappropriately in indicating in a letter that he would be sending a bill of costs for $150,000 to the appellant upon his discharge as counsel in the appeal.[7]

III. Advocate and solicitor's responsibility to enable his client to make an informed decision

5 An advocate and solicitor is obliged to take into account various considerations before he advises his client to initiate or defend a legal suit or (if the action has been commenced), whether to take particular steps in the course of the proceedings. Does the advice specifically meet the client's goals or needs? Are there other options which would be in the interest of the client? Take, *eg*, the situation of an employer whose highly skilled employee has decided to unilaterally cease employment in breach of contract. The employer informs his lawyer that his only concern is that the employee should return to work because the latter has a fundamental role in the business. The lawyer's priority should be to bring the parties together through negotiation or mediation rather than polarise their positions through contentiousness and litigation. Furthermore, as the employer has no interest in damages and would not generally be entitled to the remedy of specific performance (which, in any event, being an order of compulsion, may not be conducive to a comfortable future relationship), litigation would not be a viable option.

6 The advocate and solicitor must also explain the system of costs in litigation, the risk of losing a case in court, the possibility that he may not be able to enforce a potential judgment against the defendant

7 CA No 50 of 2007, at [8].

(depending on his circumstances), and the fees and disbursements which must be paid in the course of proceedings. He would have to point out that certain obligations are imposed on the client as a party to the proceedings including, *eg*, the disclosure of adverse documents and the process of cross-examination which he would have to face if he testifies. A client may not be prepared to accept the risk of publicity which may be generated by the case. He might be concerned that his action may lead to counterclaims which he would not be prepared to litigate. Where a client has good case for damages but the amount of his claim is relatively small compared to the costs which are likely to be incurred, the advocate and solicitor should explain that "litigation may not pay". And where proceedings have been commenced, the advocate and solicitor has a continuing duty to minimise the client's expenditure to all necessary steps consistent with the client's purposes. Clients may have to be informed about the emotional stress which is normally incidental to the adversarial process. These are just some examples of the circumstances the advocate and solicitor must ponder if he is to "act in the best interests of his client" pursuant to r 2(2)(*c*) of the Legal Profession (Professional Conduct) Rules ("LP(PC)R").

7 Accordingly, the advocate and solicitor has the professional responsibility to ensure that the client is able to make an informed choice in respect of how he wishes to proceed.[8] The most specific rule concerning this principle is r 40 of the LP(PC)R, which states:

> An advocate and solicitor shall in appropriate cases evaluate with a client whether the consequence of a matter justifies the expense or the risk involved.

One of the key phrases in this rule is "evaluate with a client". It connotes a process of reasoning which entails a full and frank discussion with the client for the purpose of determining what course(s) of action should be taken. The rule implies that other options must be compared so that the client may make an informed choice. It is not for advocate and solicitor to conduct the evaluation independently and then to simply convey his thoughts to the client. Both he and the client must be involved in the decision-making process. Evaluation also involves explanation when necessary to ensure that the client is fully cognisant of the advantages and disadvantages of each approach. The word "risk" is not elaborated upon in the rule but should be interpreted beyond the possibility of an adverse judgment to include any possible disadvantage or adversity which the client might have to experience. Examples of risks which may be involved have been addressed in the preceding paragraphs.

8 [2007] SGCA 56 at [46].

8 The phrase "the consequence of a matter" in r 40 is not elaborated upon. The rule literally applies to the case as a whole ("the matter") rather than specific courses of action which might be open to the client. A more effective reading, even if it is purposive, is that r 40 should also operate where the client has several alternative courses of action open to him so that a proper evaluation is undertaken before any decision is made and before the "matter" has even developed. Furthermore, "consequence" ought to be construed to include all possible results which stem from the decision. Rule 40 was considered for the first time by the Court of Appeal in *Jonathan Lock*:[9]

> Plainly, this case could not have gone this far if both counsel involved had acted reasonably in the interests of their clients. Although an advocate and solicitor has a duty to pursue his client's interest vigorously, he should only do so with the informed consent of the client, especially when pursuing the client's interest is counter-productive or results in an overall loss to the client (as was the case in these proceedings). Rule 40 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) requires an advocate and solicitor to evaluate with his client, in an appropriate case, 'whether the consequence of a matter justifies the expense or the risk involved' in going to court. If ever there was a case where the evaluation delineated in r 40 should have been carried out, the present matter was likely to have been such a case. We could not imagine any prudent party condoning the solicitors' conduct in this case if a proper risk-benefit evaluation pursuant to r 40 had been undertaken.

9 The right of the client to make an informed choice may also be gleaned from other rules of the LP(PC)R. Prior to their examination, it should be emphasised that the rules must be interpreted in a manner consistent with the duty of an advocate and solicitor "to act in the best interests of his client".[10] Furthermore, recent cases have emphasised the importance of gauging the spirit and intent of the rules. In *Wong Keng Leong Rayney v Law Society*,[11] V K Rajah J (as His Honour then was) stated: "The rules of ethics ... should not be perceived as an external and inconvenient imposition of values on the legal profession but rather as an embodiment of the moral compass and aspirations of the profession." Furthermore, "... ethical rules only delineate minimal standards and duties which solicitors must observe. There is much left unsaid that must be implicitly understood and observed with intelligent flexibility". In *Law Society of Singapore v Tan Phuay Khiang*,[12] the learned judge said: "It is also axiomatic that it is the spirit and intent, rather than just the plain letter, of the professional ethical rules that breathe life and legitimacy into the standards that are relevant in assessing whether a lawyer has

9 [2007] SGCA 56 at [46].
10 LP(PC)R, r 2(2)(*c*).
11 [2006] SGHC 179 at [84].
12 [2007] 3 SLR 477.

discharged his professional obligations."[13] His Honour also stressed that "a rigid and formalistic adherence to the codes of practice without a proper appreciation of their spirit, purport and intent may from time to time lead to ethical blindness".[14]

10 It is appropriate to commence with r 12, which states: "An advocate and solicitor shall use all reasonably available legal means consistent with the agreement pursuant to which he is retained to advance his clients' interest." Apart from being an all-encompassing provision concerning diligence and competence in practice generally, r 12 is also specifically pertinent to the client's informed choice. The advocate and solicitor must know his client's goals and needs which should be evident from "the agreement pursuant to which he is retained". A vague notion of what the client wants is not sufficient and it would be incumbent on the advocate and solicitor in such circumstances to obtain precise information. Often clients need assistance in formulating their expectations and here again the advocate and solicitor has a fundamental role in clarifying the issues. The client's purposes are the *sine qua non* of the advocate and solicitor's engagement and r 12 emphasises this by obliging him to "use all reasonably available means *consistent*[15] with the agreement". This phrase requires the advocate and solicitor's efforts to be directed by the intention of the client which is manifested by the agreement. This phrase also clearly implies that the advocate and solicitor must consider all viable options which could meet the client's objectives. Accordingly, r 12 has the effect of requiring the advocate and solicitor to evaluate all possible courses of action which the client might take.

11 The words "clients' interest" at the end of r 12 are also significant. Litigation is not intended to be a forum for massaging the ego, for impressing clients or for personal battles. An advocate and solicitor initiates legal proceedings and conducts his case in court solely because it is in his client's interest to do so. If he protracts proceedings and escalates costs for his own personal reasons, he contravenes r 12 and r 25(*a*), which states: "During the course of a retainer, an advocate and solicitor shall advance the client's interest unaffected by any interest of the advocate and solicitor." Although r 25(*a*) is normally considered in the context of a conflict between the advocate and solicitor's and client's material or financial interests, it is also pertinent to the former's motivation in the conduct of court proceedings. This raises the related principle concerning the relationship between advocates and solicitors.

12 Rule 47 of the LP(PC)R states: "An advocate and solicitor shall treat his professional colleagues with courtesy and fairness." This rule is

13 [2007] 3 SLR 477 at [100].
14 [2007] 3 SLR 477 at [120].
15 Emphasis by the author.

traditionally based on the principle that advocates and solicitors must conduct themselves and relate to each other in a manner befitting their standing as officers of the court, their duty to assist in the administration of justice[16] and to maintain the integrity of the legal profession.[17] More specifically, the rule also imports the responsibilities to act in the best interest of the client[18] and to facilitate access to justice.[19] Advocates and solicitors who become embroiled in their own personal feud or who are otherwise improperly motivated lose sight of their clients' objectives. In consequence, proceedings are unnecessarily extended, cost liabilities escalate and the client's interests are jeopardised. The client's access to justice is delayed and even obstructed.[20]

13 Various rules which govern the conduct of a case in court emphasise the importance of maintaining a proper focus consistent with the objectives of the client and the interests of the administration of justice. For example, the advocate and solicitor is required to "conduct each case in such a manner as he considers will be most advantageous to the client so long as it does not conflict with the interests of justice, public interest and professional ethics".[21] He is obliged to "use his best endeavours to avoid unnecessary adjournments, expense and waste of the court's time".[22] He must "assist the court in ensuring a speedy and efficient trial ...".[23] He is "personally responsible for the conduct and presentation of his case"[24] and must not "allow his personal feelings to affect his professional assessment of the facts or the law or to affect his duty to the court".[25] In this respect, he is prohibited from conducting his case in a manner which is "scandalous" or which is intended to "insult or annoy" any person (including the opposing counsel).[26] Therefore, a proper relationship between opposing advocates and solicitors is fundamental to their responsibilities to evaluate the positions of their respective clients so that the latter can make informed choices concerning the course of the litigation. In the same vein, advocates and solicitors must not exacerbate the enmity which might exist between their clients as a result of the dispute. Such conduct would constitute a breach of the advocate and solicitor's fundamental obligation to advance the client's best interests.[27]

16 LP(PC)R, r 2(2)(*a*).
17 LP(PC)R, r 2(2)(*b*).
18 LP(PC)R, r 2(2)(*c*).
19 LP(PC)R, r 2(2)(*d*).
20 There is also a broader impact here in that the unnecessary use of judicial time could compromise the public's access to the courts.
21 LP(PC)R, r 54.
22 LP(PC)R, r 55(*b*).
23 LP(PC)R, r 55(*c*).
24 LP(PC)R, r 60(*a*).
25 LP(PC)R, r 60(*b*).
26 LP(PC)R, r 61(*a*).
27 LP(PC)R, r 2(2)(*c*).

In *Jonathan Lock*, Chan Sek Keong CJ considered the responsibilities of counsel in court:[28]

> We would like to conclude these grounds of decision with some observations on the role of counsel in pursuing their clients' interests in a court of law where monetary claims are involved. The present case did not concern potential loss of life or liberty, physical or mental injury, injury to a person's reputation or even injury to his sense of pride. Instead, this was a case about dollars and 'sense'. There was no high principle at stake. What was involved here was a paltry sum of about $60. Yet, both counsel, instead of exercising the degree of responsibility expected of an officer of the court and advising their respective clients to settle the dispute with minimum fuss and, therefore, minimum cost, proceeded to broaden the areas of contention between their clients unnecessarily and in a highly wasteful manner.

14 As pointed out in this judgment, the issue of costs has a crucial bearing on informed choice. It has been seen that r 40 specifically requires the advocate and solicitor to evaluate with the client whether the "consequence of a matter justifies the expense or the risk" involved. The expenditure which arises from the costs of legal representation and court fees and the risk of losing a case is paralleled by the risk of having to pay the opposing party's costs in the event of an adverse judgment. A proper evaluation of the case or courses of action open to a client necessarily involves an accurate estimate of the expenditure which the client would have to incur and a consideration of his comfort level in this regard.

15 The rules concerning the information on fees and disbursements which the advocate and solicitor must give to his client are particularly detailed. In contentious matters, the advocate and solicitor must "at the outset ... and at appropriate stages thereafter, explain to the client the following: (a) that in any event the client shall be personally responsible for payment of his own solicitor and client bill of costs in full regardless of any order for costs made against the opponent; (b) that in the event the client loses, he will have to pay his opponent's costs as well as his own; and (c) that even if the client wins, his opponent may not be ordered to pay the full amount of the client's own costs and may not be capable of paying what has been ordered".[29] He also has to inform the client (whether the matter is contentious or non-contentious) of:[30]

> (a) the basis on which fees for 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;

28 [2007] SGCA 56 at [45].
29 LP(PC)R, r 36.
30 LP(PC)R, r 35.

(b) other reasonably foreseeable payments the client may have to make either to the advocate and solicitor or to a third party and the stages at which the payments are likely to be required;

(c) the estimates of the fees and other payments, which shall not vary substantially from the final amount, unless the client has been informed of the changed circumstances in writing;

(d) the fees may be subject to a limit which may be incurred without further reference and where the limit imposed on the fees is insufficient, the advocate and solicitor shall obtain the client's instructions as to whether to continue with the matter; and

(e) the approximate amount of the costs to date in every 6 months whether or not a limit has been set or deliver an interim bill in appropriate cases.

16 Needless to say that having properly advised his client concerning the potential expenditure, the advocate and solicitor must "not undertake work in such a manner as to unnecessarily or improperly escalate his costs ...".[31] Indeed, the advocate and solicitor must "keep his client reasonably informed about the progress of the client's matter" pursuant to r 17. This necessarily means that the client should be updated concerning developments in the case (unless he has given an express instruction to the contrary). However, the spirit of this rule requires the advocate and solicitor to be more than a mere supplier of information when a decision needs to be taken. Although r 17 does not expressly refer to evaluation between the advocate and solicitor and his client, it should be construed purposively to require the advocate and solicitor to explain the developments and advise the client on the way forward. For example, it would not be right for an advocate and solicitor to inform the client (the defendant) that the plaintiff has amended his pleading to include another cause of action and not discuss the amendment of the defence in response. Compliance with the letter rather than the spirit of r 17 should not absolve the advocate and solicitor.[32] Rule 20 lends some support to such a construction by requiring the advocate and solicitor "where possible [to] promptly respond to the client's telephone calls and keep appointments made with the client, unless there are good and sufficient reasons why this cannot be done". The assumption here is that there must be ongoing evaluation. Rule 21 is also pertinent because it obliges an advocate and solicitor to "explain in a clear manner, proposals of settlement, other offers or positions taken by other parties which affect the client". Although this rule is specifically concerned with negotiations with a view to settlement, it cannot be the case that explanations are not necessary in any other situation. It is submitted that r 21 is merely a facet

31 LP(PC)R, r 13.

32 See main text at n 13.

of the advocate and solicitor's general responsibility (*ie*, the underlying principle) to evaluate all aspects of his client's case.

17 The rules which have been considered often apply when an advocate and solicitor has to evaluate with his client whether the latter should appeal. An obvious issue is whether the amount of money or other matter involved in the dispute is significant enough to justify the expense and potential liability in costs of challenging the adverse judgment in a higher court. Another very recent and much publicised case, *Blenwell Agencies Pte Ltd v Tan Lee King*,[33] illustrates the dilemma. The plaintiff, an operator of car park facilities, clamped the wheel of the defendant's car. The defendant was alleged to have damaged the wheel clamp by driving away with the clamp still attached to the wheel. The plaintiff sued the defendant for damage to the clamp. The plaintiff's initial claim amounted to $600 ($500 for the damage to the clamp and $100 being the clamp removal fee).[34] The matter was referred to the Primary Dispute Resolution Centre ("PDRC") and the parties reached an agreement which required the defendant to pay the plaintiff the sum of $3,000 in full and final settlement. Subsequently, a disagreement arose concerning the signing of a joint press release drafted by the plaintiff's lawyer with the result that the parties returned to the PDRC. The matter was not resolved and eventually, the plaintiff obtained a default judgment for the sum of $3,000 and costs of $2,000. The defendant applied to set aside the judgment on the ground that there had been no default (as payment had been tendered) and on the ground that the High Court had decided in *Jonathan Lock* that the PDRC was not a court.[35] The plaintiff sought leave to appeal but this was refused by the District Court. The plaintiff then applied to the High Court for leave to appeal and failed at this level as well. After the High Court ruled that it would not hear further arguments, the plaintiff made a further application for leave to appeal to the Court of Appeal. In dismissing this application, Choo Han Teck J observed:[36]

> There should be no leave to appeal against an order refusing leave to appeal; this rule is necessary to ensure finality in matters where the legislature has deemed it fit to prevent excessive litigation. The present case is an example of such a case. The plaintiff's claim was no more than $3,000 but because of unreasonable insistence for the joint press release to be signed by the defendant, and the unwise release of the $3,000 paid to its solicitors by the defendant, the simple matter was not resolved expediently, and incurred $30,000 in legal costs instead. The plaintiff should not be allowed to advance one step further.

33 [2007] SGHC 181.
34 *The Straits Times* (13 November 2007) at p H2.
35 See above.
36 [2007] SGHC 181 at [6].

18 Although the plaintiff made a further application to the Court of Appeal for leave to appeal, it decided not to pursue the matter and obtained leave to discontinue the proceedings prior to the hearing.[37] The Court of Appeal ordered the plaintiff to pay costs on an indemnity basis as the application for leave to appeal was "misconceived" (because it was bound to fail), and its tardiness had resulted in wasted time and costs.[38] The court "urge[d] counsel to engage in serious contemplation before filing an application for leave to appeal since a failure to properly appreciate when such an application does or does not lie may result in adverse consequences in terms of costs (and not just for their clients)".[39]

19 As with *Jonathan Lock*, the *Blenwell* case serves as a platform for considering the advocate and solicitor's responsibility to properly evaluate a case with his client. The extent of the evaluation between the lawyers involved and their respective clients is not indicated. However, the fact that an initial claim for $600 eventually led to a default judgment for $3,000 and $2,000 in costs and to legal costs amounting to $30,000 (by the time of the High Court proceedings) suggests that the plaintiff may have overreached its original objective of recovering compensation (as reflected by the initial claim). The submission of the plaintiff's lawyer before the High Court that her client should be permitted to enforce the default judgment[40] because it had already paid her $30,000[41] suggests that the continuation of the case was no longer simply fuelled by the original objective but to a significant extent by the considerable costs which had already been incurred. It appears that the plot may have been lost somewhere along the line.

20 A client who has a valid cause of action and who has complied with all necessary procedures may decide to take his case through the courts even though the expense of doing so could exceed his claim.[42] The advocate and solicitor is only expected to act reasonably and sensibly in evaluating the client's position and advising what his course of action should be. In this respect, the advocate and solicitor must take reasonable care to effectively communicate his information and advice according to the needs of each particular client. As observed by Andrew Phang JA in two recent cases involving ethical breaches of duties to clients:[43]

---

37 [2008] SGCA 3.

38 [2008] SGCA 3 at [27]. The Court of Appeal observed that the plaintiff ought to have sought the respondent's consent to discontinue the proceedings "far earlier".

39 [2008] SGCA 3 at [13].

40 This was the purpose of the further appeal.

41 [2007] SGHC 181 at [5].

42 Unless he is a vexatious litigant, in which case legal proceedings may be prevented or stayed pursuant to s 74 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) or the court's inherent jurisdiction.

43 *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR 308 at [68]; *Law Society of Singapore v Vardan Vasantha Lakshmi* [2007] 1 SLR 240 at [33].

> Lawyers must convey what the precise legal situation is with limpid clarity, taking into consideration the fact that their clients may not always share the same language, intellectual or legal facility as them. The legitimacy of the law in general and of legal personnel in particular depends on this. Still less must laypersons be lulled into a false sense of security and/or into a situation of misinformation. Whenever in doubt, lawyers should clarify. They must begin from the assumption that laypersons are more likely to rely upon them than not – if only because they are professionals schooled in the law and whose calling is therefore to advise on the law in all its various aspects. They must, wherever applicable, advise laypersons to seek independent legal advice if they are unable to assist – *eg*, because of a possible conflict of interests.

IV. Concluding observations

21 It has been shown that the LP(PC)R recognises the right of the client to be properly informed and advised concerning the possible consequences of any course of action. Rule 40 refers specifically to the advocate and solicitor's responsibility to evaluate the case with the client. Although this rule is too brief to fully capture the essence and scope of this duty, the other rules which have been considered support this conclusion. To reiterate, every rule in the LP(PC)R must be interpreted in accordance with the obligations set out in r 2(2)(*a*)–(*d*). With regard to the doctrine of informed choice, all rules concerning the relationship between the advocate and solicitor and his client must, pursuant to r 2(2)(*c*), be construed to the effect that the advocate and solicitor must "act in the best interests of his client ...". As has been pointed out by the courts, the legal environment is complex and clients are utterly dependent on the information and advice provided by their lawyers.[44] Accordingly, the advocate and solicitor must advise his client as soon as possible of any risk or disadvantage which ought to be taken into account in making an informed decision as to any possible or planned course of action.

22 The doctrine of informed choice is recognised in other jurisdictions. In England, the Solicitors Regulation Authority provides in its Solicitors' Code of Conduct 2007 ("SCC") that solicitors must:

---

44 In both *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR 308 and *Law Society of Singapore v Vardan Vasantha Lakshmi* [2007] 1 SLR 240 the learned judge stated:

> To many laypersons (even highly educated ones), the law constitutes a morass of technical – even arcane – rules. Many even fear the law when the precise opposite should be the case. The law is meant to achieve justice and fairness for all. It is the objective bulwark against tyranny and oppression, anarchy and disorder. It is supposed to facilitate transactions of all kinds in a reasoned and accessible manner.

(a) identify clearly the client's objectives in relation to the work to be done for the client; (b) give the client a clear explanation of the issues involved and the options available to the client; (c) agree with the client the next steps to be taken; and (d) keep the client informed of progress, unless otherwise agreed.[45] Additionally, the solicitor must, both at the outset and, as necessary, during the course of the matter: (i) agree an appropriate level of service; (ii) explain the solicitor's responsibilities; (iii) explain the client's responsibilities; (iv) ensure that the client is given, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision; and (v) explain any limitations or conditions resulting from the solicitor's relationship with a third party (*eg*, a funder, fee sharer or introducer) which affect the steps the solicitor can take on the client's behalf.[46] There are also detailed provisions concerning information on costs.[47]

23 The American Law Institute's "Restatement of the Law (Third)": The Law Governing Lawyers ("Restatement") states that a lawyer must, *inter alia*, "... consult with a client to a reasonable extent concerning decisions to be made by the lawyer"[48] and "... explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation".[49] The Restatement also provides that "... a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, consulting with the client as required ...".[50] The American Bar Association's Model Rules of Professional Conduct ("ABA Rules") require the lawyer to, *inter alia*, reasonably consult with the client about the means by which the client's objectives are to be accomplished;[51] keep the client reasonably informed about the status of the matter;[52] promptly comply with reasonable requests for information;[53] and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[54] In the United States, the failure to adequately evaluate the risks and consequences of a course of action with a client has resulted in liability for professional negligence. For example, in *Metrick v Chatz*,[55] the lawyer concerned failed to disclose to his clients of the advantages of "Chapter 7"

45 SCC, 2.02(1)(a)–(d).
46 SCC, 2.02(2)(a)–(e).
47 SCC, 2.03.
48 Restatement, s 20(1).
49 Restatement, s 20(3).
50 Restatement, s 21(3).
51 ABA Rules, 1.4(a)(2).
52 ABA Rules, 1.4(a)(3).
53 ABA Rules, 1.4(a)(4).
54 ABA Rules, 1.4(b).
55 266 Ill App 3d 649, 639 NE 2d 198, 200 (1st Dist, 1994).

liquidation over "Chapter 11" reorganisation. The Illinois Court of Appeals stated:

> It is the duty of every attorney to inform client of the available options for alternative legal solutions, as well as, to explain foreseeable risks and benefits of each. The purpose of such a rule is to enable the client to make an informed decision as to whether the foreseeable risks of a proposed legal course of action are justified by its potential benefits when compared to other alternative courses of action. If a client suffers damage because of the happening of a foreseeable risk of which he or she was not informed, the attorney may be liable. In such a case, the attorney's liability is not predicated upon the impropriety of the chosen course of action, but rather upon the failure to inform the client sufficiently to enable him or her to voluntarily accept the risk attendant thereto.

24 For the purpose of his own protection, the advocate and solicitor would do well to heed the recent admonition of the High Court to maintain attendance notes of discussions with clients and to record advice which has been rendered so that there is a contemporaneous account of his conduct.[56]

25 At the beginning of this article, it was stated that the doctrine of informed choice goes to the heart of justice because the client's ultimate concern is that he should take the necessary steps to achieve his objectives. The advocate and solicitor's critical role in this respect must be matched by his responsibility to provide all the necessary information and advice which the client expects in order to make the correct decision.

---

56 See *Lie Hendri Rusli v Wong Tan and Molly Lim* [2004] 4 SLR 594 at [71] and *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR 477 at [82].