

立法會

Legislative Council

LC Paper No. LS 158/00-01

**Legal Service Division Further Report on
Solicitors (Professional Indemnity) (Amendment) Rules 2001
(L.N. 162 of 2001)
Subsidiary Legislation Gazetted on 6 July 2001**

Members may recall that the Legal Service Division made a report on the subsidiary legislation relating to Solicitors (Professional Indemnity) (Amendment) Rules 2001 ("the Amendment Rules") (L.N. 162 of 2001) on 12 August 2001 (LC Paper No. LS 143/00-01). The reply from the Law Society of Hong Kong ("the Law Society") of 31 August 2001 has clarified the enquiries in our letter of 3 August 2001 about the Amendment Rules. Copies of the correspondence are annexed at **Appendix I** for Members reference. The gist of the reply is as follows.

Rule 2(b) of the Amendment Rules

Rule 2(b) of the Amendment Rules repeals the definition of "relevant date" and substitutes a new definition of "relevant date". While paragraphs (a) and (b) are modelled on the existing definition of "relevant date", a new paragraph (c) is added to extend the definition of "relevant date" to mean "where the firm has ceased the Practice at the date referred to in paragraph (a) or (b) (as may be applicable), the date when the cause of action first accrued against the firm". The Law Society explains that the purpose of adding new paragraph (c) to the definition of "relevant date" is to enable the Claims Manager to calculate and collect the deductibles set out in paragraph 2 of Schedule 3 to the Solicitors (Professional Indemnity) Rules ("the Rules") when a firm has ceased practice. In most of the claims where the firms have ceased practice, proceedings are instituted after the cessation of practice. In those circumstances, proceedings are actually instituted against the individual partners who formerly traded under the firm's name. However, a situation can arise

where a firm ceases practice after proceedings have been instituted. In such a case, difficulties may arise as to how the deductibles should be calculated. Disputes may also arise where the partners have moved to different firms or where the firm has reconstituted its partnership. The new paragraph (c) is also intended to prevent attempts by firms to reconstitute their partnership in order to avoid paying the deductibles.

Rule 4 of the Amendment Rules

Rule 4 of the Amendment Rules amends rule 9 of the Rules to substitute "Practice" with "firm". The Department of Justice confirms that the amendment is necessary to synchronize the wording in rule 9 with the wording of the definition of "indemnified" as amended in rule 2 of the Rules. Copies of the correspondence are annexed at **Appendix II**.

Rule 5 of the Amendment Rules

Rule 5 of the Amendment Rules amend rule 10(3) of the Rules by adding the reference to rule 12. Rule 10 of the Rules relates to entitlement to Indemnity. Rule 12 of the Rules provides that Indemnity shall be provided exclusively out of the Fund. The Law Society explains that rule 12 is incorporated into rule 10(3) of the Rules to cover the possibility of a former solicitor claiming Indemnity from the Law Society or the Council.

Rule 6 of the Amendment Rules

Rule 6 of the Amendment Rules amends paragraph 2(1)(a)(1) of Schedule 1 to the Rules by increasing the contributions to the fund referred to in rule 3(1) of the Rules. The Law Society explains the justification for increasing the contributions as follows.

The Solicitors Professional Indemnity Scheme ("the Scheme") has a 3-year reinsurance programme which is due to expire on 30 September 2001. In view of the substantial increase in claims payments in recent years, Hong Kong Solicitors Indemnity Fund Ltd. ("the Company") commissioned the Scheme's brokers to conduct a benchmarking exercise in April 2000. The exercise showed that based on the Scheme's historical claims data, it was likely that reinsurance premium would increase by 400% after 30 September 2001.

The Company considered several options and a members' forum was held on 15 September 2000 to discuss the options available. All members were invited to attend the forum and express their views. The option chosen was to cancel the 3-year programme and re-write a 5-year programme which allowed a gradual increase in reinsurance premium over a period of 5 years. The 5-year programme has the effect of subsidising the Scheme in early years and capping the premium for the 5 years even if situation of claims was to deteriorate in the future. There is a reduction on premium and/or a profit-sharing arrangement should claims improve during the 5 years, depending on the underwriters involved. The 5-year programme commenced on 1 October 2000.

However, the cancel and re-write programme required the Company to increase the Fund's retention for the self-insured layer from HK\$1 million to HK\$1.5 million per claim from 1 October 2001 to 30 September 2005. Based on the study and projections prepared by Watson Wyatt, actuaries, the costs of the premium and the Fund's retention over the 5 years when projected were found to have exceeded the income which the Fund could have received from members' contributions based on the existing contribution assessment formula. Therefore, the formula set out in Schedule 1 paragraph 2 of the Rules is amended. The amendments were approved by the Company, the Council of the Law Society and the Chief Justice.

The contributions based on the proposed new formula are 2.5 times the existing contributions. This represents an increase of 150%. Members were fully informed of the increase and the reasons for the increase in the forum.

The formula to calculate the basic contribution to the Fund referred to in paragraph 2(1) of Schedule 1 to the Rules has not been changed since the inception of the self-insured Scheme in 1986.

Rule 7(a)(i) of the Amendment Rules

Rule 7(a)(i) of the Amendment Rules amends paragraph 1(2) of Schedule 3 of the Rules by making it clear that the Company will not provide Indemnity to the indemnified or a former solicitor under specified circumstances. The Law Society clarifies that the exclusions of indemnity set out in paragraph 1(2) of Schedule 3 to the Rules are applicable to a former solicitor as much as

they are applicable to the indemnified. Paragraph 3 of Schedule 3 to the Rules sets out the limits of indemnity offered by the Fund. These limits will come into play after the Claims Manager is satisfied that the exclusions in paragraph 1(2) of Schedule 3 do not apply and the former solicitor is entitled to indemnity under the Scheme.

Rule 7(c) of the Amendment Rules

Rule 7(c) of the Amendment Rules amends paragraph 3 of Schedule 3 (extent of former solicitors indemnity) by adding a new subparagraph that "[in] applying rule 16 for the purpose of this paragraph, the reference to "principal" in that rule shall be taken as a reference to "former solicitor".". The Law Society explains that rule 16 of the Rules provides that it is the Principals in the firm who should be liable severally to pay to the Company sums for which indemnity is not provided. Thus employees of the Principals are not liable. Rule 16 is already applicable to former solicitors by virtue of rule 10(3) (entitlement to Indemnity) of the Rules. In the case of former solicitors, it is the former solicitor, and not the Principals of the former solicitor who is personally liable. Hence, the additional subparagraph (3) in paragraph 3 of Schedule 3 of the Rules is to specify the personal liability of the former solicitor.

Rule 7(d)(i)(A) of the Amendment Rules

Rule 7(d)(i)(A) of the Amendment Rules amends paragraph 6(1) of Schedule 3 to the Rules by changing the reference from the maximum liability of the Fund for all claims arising from the same act or omission against any "Practice or any member of that Practice or both" entitled to Indemnity to "indemnified or former solicitor or any combination of persons". The Law Society explains that the Company has taken Counsel's advice on the definition of "Practice". The Company and the Council agreed with the Counsel's advice that the acts and omissions referred to in paragraph 6 are in fact committed by the indemnified and the former solicitor and should be so stated.

Rule 7(f) of the Amendment Rules

Paragraph 9 of Schedule 3 to the Rules provides that where a claim has been made before the receipt for the contribution paid by the indemnified is

issued, the Scheme will provide indemnity to the indemnified and the indemnified should reimburse the Company of the payment made plus interest. Due to the different definitions assigned to "indemnified" and "former solicitor" under rule 2 of the Rules, the reference to "former solicitor" is added. In other words, paragraph 9 of Schedule 3 applies to a former solicitor who does not fall within the definition of "indemnified".

Rule 7(a)(ii) and (iii)(B) of the Amendment Rules

Rule 7(a)(ii) and (iii)(B) of the Amendment Rules amend paragraph 1(2)(c)(iii) and (iiia) of Schedule 3 to the Rules by replacing "the principal" with "any person who was a principal at the relevant time". The Law Society clarifies that the intention, reading together with the amendment to paragraph 1 of Schedule 3 to the Rules by adding a definition of "a person was a principal at the relevant time", is to exclude liability in respect of claims brought about by the dishonesty of a person (1) who was a principal at the time of notification of circumstances giving rise to a claim; (2) who was a principal when the claim was made; (3) who was a principal at the time of the events giving rise to a claim. But the amendments also cater for a situation where the dishonest individual was an assistant solicitor at the time of the events giving rise to the claim, but had since become a principal at the time of notification or when the claim was made.

Rule 7(b) of the Amendment Rules

Rule 7(b) of the Amendment Rules amends paragraph 2 of Schedule 3 to the Rules to provide a further deductible for those firms against which more than one claim is made in any period of three consecutive indemnity years. The Law Society explains that since the inception of the self-insured Scheme in 1986 to the 1999/2000 indemnity year, the number of claims notifications has increased by 311%, whereas the number of members carrying on practice in the profession in the same period has only increased by 245%. As for the amount of claims payments, as at 30 June 2001, the total claims payments for the indemnity year 1987/88 is HK\$13,890,879.92, whereas the amount for indemnity year 1999/2000 including reserves is HK\$98,274,069.88, an increase of 607%. Upon further clarification, the term "reserves" is the estimated amount payable in respect of any claims including the estimated legal costs. At the members' forum held on 15 September 2000, suggestions were

made by members that measures should be taken to alleviate claims, including the possibility of raising the levels of the existing deductibles, and the introduction of a penalty deductible. The Company consulted its insurance brokers and considered the penalty deductibles introduced in other jurisdictions. The Company and the Council decided that the introduction of the penalty deductibles would be a useful deterrent against firms with frequent claims.

Rule 7(e)(iii) of the Amendment Rules

Rule 7(e)(iii) of the Amendment Rules amends paragraph 8 of Schedule 3 to the Rules to change the reference from "Practice" to "firm or indemnified". The Law Society explains that the reasoning for amending paragraph 6(1) of Schedule 3 to the Rules (rule 7(d)(i)A of the Amendment Rules) also applies to the present amendment.

Encl

Prepared by

Lam Ping-man, Stephen

Assistant Legal Adviser

Legislative Council Secretariat

12 September 2001

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The Law Society of Hong Kong
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3 August 2001

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Total no. of page(s) : 2

(Attn : Miss Vivian Lee
Assistant Director
Professional Indemnity Scheme)

Dear Miss Lee,

**Solicitors (Professional Indemnity) (Amendment) Rules 2001
(L.N. 162 of 2001)**

We are scrutinising the legal and drafting aspects of the Amendment Rules. We should be grateful for your clarification of the following points.

Rule 2(b) of the Amendment Rules

It is noted that paragraphs (a) and (b) of the definition of "relevant date" are modelled on the existing definition of "relevant date" in section 2(1) of the Solicitors (Professional Indemnity) Rules (Cap. 159 sub. leg.) ("the Rules").

What is the justification for adding a new paragraph (c) to the new definition of "relevant date"?

Under the current practice, how would you handle claims against a firm which has ceased Practice?

Rule 4 of the Amendment Rules

Why is it necessary to change "Practice" to "firm" in rule 9 of the Rules?

Rule 5 of the Amendment Rules

Why is it necessary to further apply rule 12 to former solicitor as if he were an indemnified in rule 10(3) of the Rules?

Rule 6 of the Amendment Rules

What is the justification for increasing the contributions to the fund referred to in rule 3(1) of the Rules?

Rule 7(a)(i), (c), (d)(i)(A) and (f) of the Amendment Rules

Why is it necessary to add the reference "former solicitor" in paragraph 1(2), paragraph 3, paragraph 6(1) and paragraph 9 of Schedule 3 to the Rules respectively? It is noted that paragraph 3 of Schedule 3 to the Rules has already provided for extent of former Solicitors Indemnity.

Rule 7(a)(ii) and (iii)(B) of the Amendment Rules

What is the reason for substituting "the principal" by "any person who was a principal at the relevant time" in paragraph 1(2)(c)(iii) and (iiia) of Schedule 3 to the Rules?

Rule 7(b) of the Amendment Rules

What is the justification for amending paragraph 2 of Schedule 3 to provide a further deductible for those items against which more than one claim is made in any period of three consecutive indemnity years?

Rule 7(e)(iii) of the Amendment Rules

Why is it necessary to substitute "Practice" by "firm or indemnified" in paragraph 8(6) of Schedule 3 to the Rules?

It is appreciated that your reply, in English and Chinese, could reach us by 8 August 2001.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

VL/mc/PI-9C
LS/S/38/00-01

31st August 2001

Mr. Stephen Lam
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

By Fax and By Post

Dear Mr. Lam,

Re: Solicitors (Professional Indemnity) (Amendment) Rules 2001 ("the Amendment Rules")

I refer to your letter of 3rd August 2001.

I would advise as follows:-

Rule 2(b) of the Amendment Rules

The purpose of the new paragraph (c) is to enable the Claims Manager to calculate and collect the deductibles set out in Schedule 3 paragraph 2 of the Solicitors (Professional Indemnity) Rules ("the Rules") when a firm has ceased practice.

I have been advised by the Claims Manager that in most of the claims where the firms had ceased practice, proceedings were instituted after the cessation of practice. In those circumstances, proceedings were actually instituted against the individual partners who formerly traded under the firm's name. However, a situation can arise where a firm ceases practice after proceedings were instituted. In such a case, difficulties may arise as to how the deductibles should be calculated. Disputes may also arise where the partners have moved to different firms or where the firm has reconstituted its partnership.

The new paragraph (c) is also intended to prevent attempts by firms to reconstitute their partnership in order to avoid paying the deductibles.

Rule 4 of the Amendment Rules

This rule was not included in our drafting instructions to the Law Drafting Division of the Department of Justice ("DOJ"). It was added in the Amendment Rules by the DOJ. I suspect the purpose of rule 4 is to synchronize the wording in rule 9 of the Rules with the amendments to the definition of 'indemnified' in rule 2 (a) of the Amendment Rules. I suggest you clarify the purpose of the amendment introduced under this rule with DOJ (Ref: Mr. John Wong, Senior Assistant Law Draftsman, Law Drafting Division, DOJ).

Rule 5 of the Amendment Rules

Rule 12 of the Rules provides that indemnity shall be provided exclusively out of the Fund. Rule 12 is incorporated in rule 10(3) of the Rules to cover the possibility of a former solicitor claiming indemnity from the Law Society or the Council.

Please also note that the definition of 'indemnified' is different from the definition of 'former solicitor' under rule 2 of the Rules.

Rule 6 of the Amendment Rules

The Solicitors Professional Indemnity Scheme ("the Scheme") had a 3-year reinsurance programme which was due to expire on 30th September 2001. In view of the substantial increase in claims payments in recent years, Hong Kong Solicitors Indemnity Fund Ltd. ("the Company") commissioned the Scheme's brokers to conduct a benchmarking exercise in April 2000. The exercise showed that based on the Scheme's historical claims data, it was likely that reinsurance premium would increase by 400% after 30th September 2001.

The Company considered several options and a members' forum was held on 15th September 2000 to discuss the options available. All members were invited to attend the forum and express their views. The option chosen was to cancel the 3-year programme and re-write a 5-year programme which allowed a gradual increase in reinsurance premium over a period of 5 years. The 5-year programme has the effect of subsidising the Scheme in early years and capping the premium for the 5 years even if claims were to deteriorate in the future. There is a reduction on premium and/or a profit-sharing arrangement should claims improve during the 5 years, depending on the underwriters involved. The 5-year programme commenced on 1st October 2000.

However, the cancel and re-write programme required the Company to increase the Fund's retention for the self-insured layer from HK\$1 million to HK\$1.5 million per claim from 1st October 2001 to 30th September 2005. Based on the study and projections prepared by Watson Wyatt, actuaries, the costs of the premium and the Fund's retention over the 5 years when projected were found to have exceeded the income which the Fund could have received from members' contributions based on the existing contribution assessment formula. Therefore, the formula set out in Schedule 1 rule 2 of the Rules is amended. The amendments were approved by the Company, the Council of the Law Society and the Chief

Justice.

The contributions based on the proposed new formula are 2.5 times the existing contributions. This represents an increase of 150%. Members were fully informed of the increase and the reasons for the increase in the forum.

Rule 7(a)(i) of the Amendment Rules

The exclusions of indemnity set out in Schedule 3 paragraph 1(2) of the Rules are applicable to a former solicitor as much as they are applicable to the 'indemnified'.

Schedule 3 paragraph 3 of the Rules sets out the limits of indemnity offered by the Fund. These limits will come into play after the Claims Manager is satisfied that the exclusions in Schedule 3 paragraph 1(2) do not apply and the former solicitor is entitled to indemnity under the Scheme.

Rule 7(c) of the Amendment Rules

Rule 16 of the Rules provides that it is the Principals in the firm who should be liable severally to pay to the Company sums for which indemnity is not provided. Thus employees of the Principals are not liable. Rule 16 is applicable to former solicitors by virtue of rule 10(3) of the Rules. In the case of former solicitors, it is the former solicitor, and not the Principals of the former solicitor who is personally liable. Hence, the additional subparagraph (3) in Schedule 3 paragraph 3 of the Rules to specify the personal liability of the former solicitor.

Rule 7(d)(i)(A) of the Amendment Rules

The Company has taken Counsel's advice on the definition of 'Practice'. The Company and the Council agreed with Counsel's advice that the acts and omissions referred to in Schedule 3 paragraph 6 of the Rules are in fact committed by the indemnified and the former solicitor and should be so stated.

Rule 7(f) of the Amendment Rules

Schedule 3 paragraph 9 of the Rules provides that where a claim has been made before the receipt for the contribution paid by the indemnified is issued, the Scheme will provide indemnity to the indemnified and the indemnified should reimburse the Company of the payment made plus interest. Due to the different definitions assigned to 'indemnified' and 'former solicitor' under rule 2 of the Rules, the reference to 'former solicitor' is added. In other words, Schedule 3 paragraph 9 applies to a former solicitor who does not fall within the definition of 'indemnified'.

Rules 7(a)(ii) and 7(a)(iii)(B) of the Amendment Rules

Rules 7(a)(ii) and 7(a)(iii)(B) of the Amendment Rules should be read in conjunction with rule 7(a)(v) of the Amendment Rules.

The intention is to exclude liability in respect of claims brought about by the dishonesty of a person (1) who was a principal at the time of notification of circumstances giving rise to a claim; (2) who was a principal when the claim was made; (3) who was a principal at the time of the events giving rise to a claim. But the amendments also cater for a situation where the dishonest individual was an assistant solicitor at the time of the events giving rise to the claim, but had since become a principal at the time of notification or when the claim was made.

Rule 7(b) of the Amendment Rules

Since the inception of the self-insured Scheme in 1986 to the 1999/2000 indemnity year, the number of claims notifications has increased by 311%, whereas the number of members carrying on practice in the profession in the same period has only increased by 245%.

As for the amount of claims payments, as at 30th June 2001, the total claims payments for the indemnity year 1987/88 is HK\$13,890,879.92, whereas the amount for indemnity year 1999/2000 including reserves is HK\$98,274,069.88, an increase of 607%.

In the members' forum held on 15th September 2000, suggestions were made by members that measures should be taken to alleviate claims, including the possibility of raising the levels of the existing deductibles, and the introduction of a penalty deductible.

The Company consulted its insurance brokers and considered the penalty deductibles introduced in other jurisdictions.

The Company and the Council decided that the introduction of the penalty deductibles would be a useful deterrent to firms with frequent claims.

Rule 7(e)(iii) of the Amendment Rules

The same reasoning in 7(d)(i)(A) of the Amendment Rules applies to this rule.

Yours sincerely,

Vivien Lee
Assistant Director
Professional Indemnity Scheme

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5 September 2001

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(Attn : Mr John Wong
Senior Government Counsel)

Dear John,

**Solicitors (Professional Indemnity) (Amendment) Rules 2001
(L.N. 162 of 2001)**

We are scrutinizing the legal and drafting aspects of the Amendment Rules. We would be grateful for your confirmation whether the amendment to rule 9 of the Solicitors (Professional Indemnity) Rules is to synchronize the wording in rule 9 with the wording of the definition of "indemnified" as amended in rule 2.

It is appreciated that your reply in both languages could reach us by **7 September 2001**.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

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6 September 2001

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Dear Mr. Lam,

Solicitors (Professional Indemnity)(Amendment) Rules 2001
(L.N. 162 of 2001)

Thank you for your letter dated 5 September 2001 and my reply to your letter is as follows –

"The amendment to rule 9 of the Solicitors (Professional Indemnity) Rules (Cap. 159 sub. leg.) is to synchronize the wording in rule 9 with the wording of the definition of "indemnified" as amended by rule 2 of the Amendments Rules.

對《律師（專業彌償）規則》（第 159 章，附屬法例）第 9 條所作出的修訂，目的是使第 9 條中的用詞，與經修訂規則第 2 條修訂的"獲彌償保障者"定義的用詞一致。"

Yours sincerely,

(John WONG)
Senior Government Counsel

c.c. The Law Society of Hong Kong
(Attn.: Ms. Heidi Chu

Assistant Director, Regulation and Guidance) 2845 0387