

CODE OF CONDUCT

Preface

Professions are largely self-regulating. Their members are expected to observe higher ethical standards than those generally applying to other citizens.

The Institute provides an effective link between the lawyers and advocates practising in this specialist jurisdiction who make up its ordinary membership.

Practical training and educational courses in employment law practice and procedure are provided by the Institute for its lawyer and advocate members and also for its members who provide employment services but do not practice as advocates.

This Code establishes ethical standards for the ordinary members of the Institute in keeping with those contained in the New Zealand Law Society's ethical rules. It recognises the special obligations which all members necessarily incur when they provide professional services.

Every ordinary member owes it to his or her colleagues and the public to achieve and maintain high professional standards in accordance with the content and spirit of this Code.

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INTRODUCTION

The provisions of this Code are largely based on the New Zealand Law Society's ethical rules, which apply to members who are also members of the New Zealand Law Society.

The primary purposes of this Code are to provide:

- (a) guidance on ethical principles and standards to ordinary members of the Institute who are not members of the New Zealand Law Society; and
- (b) sanctions for infringements of its provisions.

The enforcement procedures and sanctions for infringements are set out in **Annex 1**.

DEFINITIONS

In this Code:

- (a) “*the Institute*” means The Employment Law Institute of New Zealand Incorporated.
- (b) “*the Executive*” means the Executive of the Institute.
- (c) “*the President*” means the President of the Institute.
- (d) “*the Secretary*” means the Secretary of the Institute.
- (e) “*ordinary member*” means an ordinary member of the Institute.
- (f) “*New Zealand Law Society*” means the New Zealand Law Society as defined in the Lawyers and Conveyancers Act 2006.
- (g) “*practitioner*” means an ordinary member.
- (h) “*Tribunal*” includes the Employment Relations Authority.

Part 1

Practitioners Rights, Duties and Responsibilities Generally

Independence of Practitioners: Conflicts of Interest

1.01 Rule

The relationship between practitioner and client is one of confidence and trust which must never be abused.

Commentary

- (1) The professional judgement of a practitioner should at all times be exercised within the bounds of the law solely for the benefit of the client and free of compromising influences and loyalties.
- (2) The practitioner should never seek an advancement of personal interest or position at the expense of a client.

1.02 Rule

A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on the one hand, and an existing or prospective client on the other hand.

Commentary

- (1) The rule is based on the premise that a person who occupies a position of trust must not permit his or her personal interests to conflict with the interests of those whom it is that person's duty to protect.
- (2) The rule is intended to protect a client in situations where the interest or position of the practitioner would or could make the practitioner's professional judgement less responsive to the interests of the client.
- (3) The existence of a personal interest of a practitioner should be disclosed to the client or prospective client irrespective of a perceived lack of conflict. The practitioner should consider carefully whether a personal interest is directly or indirectly in conflict with the interests of the client, and refuse to act if there is any such direct or indirect conflict.

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- (4) A practitioner may not enter any financial, business or property transaction with a client if there is a possibility of the fiduciary relationship between practitioner and client being open to abuse. This applies even if the practitioner does not propose to act for the client on a particular issue or matter.
- (5) It is impossible to detail all the situations which arise where a practitioner should not act or where independent representation or advice must necessarily be obtained under this rule. A personal financial commitment to a client should exclude a professional relationship. The practitioner must ensure that a client receives independent competent advice where appropriate.
- (6) This Rule will apply to any interest or dealing through the practitioner's family or relatives or any company, trust, partnership, or other body in which the practitioner has or exerts a material measure of control or influence. It will also include interests which are not personal in the strict sense but are representative in character such as directorships and trusteeships.
- (7) In the context of this Rule the word "client" has an extended meaning. It will, for example, ordinarily include any company, trust, or other body in which the client has a significant interest or exercises a material measure of control.

1.03 Rule

A practitioner shall not contemporaneously act for clients which interests conflict, or potentially conflict, without the prior consent of all such clients,

Commentary

- (1) A conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them.
- (2) A practitioner should exercise careful professional judgement to ensure that a conflict of interest does not exist and is not likely to arise.

1.04 Rule

1.04A Information communicated to a practitioner by a client, or former client, or otherwise received by a practitioner on behalf of a client, or former client, is confidential and, with certain statutory exceptions, privileged from disclosure.

Commentary

- (1) Confidentiality and privilege of client information are among the prime principles of professional practice. The practitioner must bear in mind that confidentiality and privilege belong to the client and not to the practitioner.
- (2) A client's address and any information which might indicate the client's residence or business are part of the confidential information held by a practitioner on behalf of the client. They must not be disclosed without the client's consent.
- (3) A practitioner may receive from a third party a letter addressed to the client care of the practitioner and undertake to forward it on to the client.
- (4) These Rules are subject to the law relating to privileged communications.

1.04B In most circumstances, a practitioner is bound to disclose to the client all information received by the practitioner which relates to the client's affairs.

Commentary

- (1) There are certain exceptions which include cases where:
 - (i) such disclosure is prohibited by an order of a court or other competent body;
 - (ii) the client consents to non-disclosure;
 - (iii) the practitioner has inadvertently received information which if disclosed to the client, could be hurtful or damaging;
 - (iv) on humanitarian grounds, the practitioner should exercise a discretion not to disclose the information.
- (2) A practitioner should take all reasonable steps to prevent a situation arising where confidential information is received on the basis that it is not to be disclosed to a client.

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- (3) If a practitioner receives information on a basis of confidence as against the client, then a conflict of interest may have been created. If such a situation seems to have arisen, the practitioner must advise the client of it and of the client's right to seek independent advice. It then becomes a matter of professional judgement on the part of the practitioner as to whether or not to continue to act in the particular transaction in the interests of the client.
- (4) If having so considered the matter the practitioner decides that it would be wrong to continue to act in the matter, the client must be advised accordingly. The client should be told to seek the services of another practitioner and that the first practitioner in those circumstances will not act in any way against the interests of the person who becomes the former client.

1.05 Rule

Where a practitioner becomes aware of a potential claim for negligence, the practitioner must advise the client to seek independent advice in connection with the matter and must inform the client that the practitioner can no longer act in the matter unless the client, having been independently advised, requests it.

Commentary

- (1) A practitioner who is requested to hand the relevant papers to a new practitioner instructed by the client should, as a matter of prudence, take copies of relevant papers which may be material in the practitioner's defence.
- (2) Practitioners conducting their practices via limited liability companies should make intending clients aware of the extent of the limited liability before accepting instructions to represent them.

Part 2

Conduct of Practice Generally

2.01 Rule

The name of a practitioner's firm or sole practice must not be one likely to:

- (i) be misleading as to the nature of structure of the firm or practice;**
- (ii) bring the practice of Employment Law into disrepute; or**
- (iii) be unfair to other practitioners of the public.**

Commentary

- (1) The name of a firm or practice must be consistent with the requirements of professional standing.
- (2) The name of a firm must not be misleading nor should it unfairly describe the firm or practice. It should not, for instance, give an impression to the public that the firm is multi-partnered and broadly based when in fact it is a very small firm or a sole practice.
- (3) When using a name such as "Newtown Employment Law Clinic" or "Cashmere Employment Law Service" for example, care should be taken to expressly disclaim that the firm or practice is not a public legal aid agency.

2.02 Rule

On the letterhead of a firm or practice and on all other publications or literature issued by a firm or practice, or in an advertisement of services offered by the firm or practice, neither the public nor other practitioners are to be misled about the structure of the firm or practice, or about the competence or status of any person named in such letterhead or publicity.

Commentary

- (1) If the names or principals, partners, consultant partners, consultants, or associates are shown, their status should be indicated.

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- (2) If a person whose name is included is not a principal, partner, consultant partner, consultant or associate this should be made clear by the use of appropriate descriptions of their actual status.
- (3) A firm must ensure that the public and other practitioners dealing with a principal or an employee of the firm or practice know the status of the person with whom they are dealing.
- (4) No practitioners shall hold out himself/herself or another person as a practising Solicitor where he/she/that other person does not hold a current Solicitors Practising Certificate.

Part 3

Relations: Practitioners and Clients

3.01 Rule

A practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner.

Commentary

- (1) Charges must be fair and reasonable in all circumstances, and be based on the following principles:
- (A) The charges by practitioners for all professional work shall be calculated to give a fair and reasonable return for the services rendered, having regard to the interests of both client and practitioner. Such charges shall take account of all relevant factors and in particular:
- (a) the skill, specialised knowledge, and responsibility required;
 - (b) the time and labour expended;
 - (c) the value or amount of any property or money involved;
 - (d) the importance of the matter to the client and the results achieved;
 - (e) the complexity of the matter and the difficulty or novelty of the questions involved;
 - (f) the number and importance of the documents prepared or perused;
 - (g) the urgency and circumstances in which the business is transacted ;and
 - (h) the reasonable costs of running the practitioner's practice.
- The relative importance of the factors set out above will vary according to the particular circumstances of each transaction.
- (B) A practitioner shall be at liberty to charge less than an amount calculated in accordance with the principles set out in Paragraph (A).
- (2) A practitioner may at any time request a review by the Ethics Committee of any fee charged by him/her.
- (3) A client dissatisfied about a fee who continues to express dissatisfaction with it after being given an explanation of it by the practitioner charging it, shall be entitled to request a revision of it by the Ethics Committee.

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- (4) Practitioners shall comply with a decision of the Ethics Committee following a review under either paragraphs (2) or (3) of this particular commentary.
- (5) Any agreement regarding payment by way of a contingency fee will be subject to the provisions of this Rule.
- (6) Practitioners should bear in mind the following provisions of Rule 18 of the International Code of Ethics published by the International Bar Association:
“A contract for a contingency fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the care, including the risk and uncertainty of the compensation ...”

3.02 Rule

A practitioner must not receive a reward, whether financial or otherwise, of which a client is unaware, in respect of services rendered to the client.

Commentary

- (1) Practitioners must all times observe the provisions of the Secret Commissions Act 1910 and make appropriate disclosure to a client.

Part 4

Information about Services: Dissemination

4.01 Rule

Any practitioner is at liberty to advertise the practitioner's services or the services of the practitioner's firm to the public, but should do so in a manner consistent with the maintenance of proper professional standards.

Commentary

- (1) The advertising must not be false, misleading or deceptive or likely to be so.
- (2) Advertising should not misrepresent the services or the standard of services provided by other practitioners or by the practitioner.
- (3) Advertising may indicate fields of practice in which the practitioner is prepared to practise.
- (4) Where any advertisement contains or refers to any testimonials or endorsements about the practitioner or the services offered, the practitioner must be able to show on inquiry by the Ethics Committee that such testimonials or endorsements were not provided for monetary or other reward. The genuineness and veracity of any testimonials or endorsements might be put to a test on enquiry by the Ethics Committee.

4.02 Rule

In offering services direct to members of the public other than by normal advertising channels, a practitioner must ensure that approaches to persons who are not existing clients, are made in a manner which does not bring the profession into disrepute. Approaches must be made in accordance with proper professional standards and not in a way that is intrusive, offensive, or inappropriate.

Commentary

- (1) A direct approach should not misrepresent the standard of services provided by other practitioners or firms or by the practitioner.

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- (2) The manner and frequency of such approaches, and the circumstances in which they occur may be taken into account in assessing the propriety of the practitioner's actions.

4.03 Rule

A practitioner may not, without the specific consent of a client, give any interview or make any public statement relating to the client or the affairs of the client, whether or not the client is involved in a matter of public knowledge.

Commentary

- (1) The practitioner/client privilege may not be broken without the consent of the client.
- (2) That consent is not something to be obtained by representatives of the news media, and can be given only after proper discussion between the practitioner and the client.

Part 5

Handling of Clients' Moneys

5.01 Rule

A practitioner must keep books and account in particular for moneys received and/or held for or on behalf of clients.

Commentary

- (1) It is very strongly recommended that practitioners not practising - as Solicitors should keep all moneys received from (or on behalf of) their clients in a Bank account identified as a dedicated Trust Account, or in an account used by the practitioner (with the knowledge of the practitioner's Bank) only for the retention of clients' funds.
- (2) Practitioners should be aware that clients' funds that are not lodged and retained in such accounts could be appropriated by the practitioner's Bank if the Bank takes debt recovery action against the practitioner. The client must be informed of this risk.

Part 6

Relations between Practitioners

6.01 Rule

A practitioner must promote and maintain proper standards of professionalism in relations with other practitioners.

Commentary

- (1) A practitioner shall treat professional colleagues with courtesy and fairness at all times but consistent with the overriding duty to the client.
- (2) No practitioner shall discriminate against or treat unfairly any other practitioner by reason of the colour, race, ethnic or national origin, sex, marital status or religious or ethical belief of that other practitioner.
- (3) There are many occasions when a practitioner needs to rely on information given by another practitioner. Professionalism demands that such reliance should not be misplaced. Whether the information is given in writing, or orally, or is in the form of an oral or written undertaking, the practitioner receiving the information or undertaking is entitled to be able to rely and act on it with impunity.
- (4) Wherever possible oral undertakings should be avoided in favour of written undertakings.
- (5) Practitioners should not communicate or correspond in an atmosphere of acrimony or discourtesy notwithstanding the nature of the relationship between their respective clients".
- (6) While it is not always possible to take telephone calls from another practitioner, such calls should be returned at the earliest opportunity.
- (7) It is an invasion of a person's privacy to tape a conversation without that person's consent. It is unprofessional and discourteous for one practitioner to do so in respect of another practitioner or an employee of another practitioner. If a practitioner wishes a conversation by telephone or otherwise to be taped the specific consent of the other practitioner or employee must first be obtained.

6.02 Rule

It is only in very exceptional cases that a practitioner should communicate either directly or in writing with the client of another practitioner in relation to a matter in which the practitioner is, or has previously been dealing with the other practitioner.

Commentary

- (1) A practitioner may suggest to a client that an approach by that client to the other practitioner's client might be appropriate or useful.
- (2) If a practitioner has tried unsuccessfully for a reasonable period to obtain a response from the other practitioner in the matter, then it may be appropriate for the client of that other practitioner to be approached. This action should, however, be regarded as most unusual and be used only in extreme circumstances. In any event, the action should be taken only after advice to the other practitioner of the practitioner's intention to do so.

6.03 Rule

A client has an unequivocal right to change from one practitioner to another.

Commentary

- (1) A practitioner has no proprietary interest in a client. It is permissible to inquire why a client is changing but it is not permissible to exert persuasion, influence or pressure on the client to return to the practitioner.
- (2) On a change of practitioner an authority to uplift specific documents should be acted upon without undue delay subject only to any lien that the holding practitioner may claim. It is however recognised that documents may be required for a short time for costing purposes.
- (3) Even when a practitioner does have a lien over documents the urgency of a situation may demand that as a matter of courtesy, that practitioner will make the documents available to the client's new adviser on receipt of an appropriate undertaking as to the payment of the practitioner's fee.
- (4) Efforts should be made in the interests of the former client and of the profession to facilitate the transfer of files on a change of practitioner. There could be circumstances, such as a

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revision of costs, where delays might occur which would be harmful to the client's interest unless the file was handed to the new practitioner against appropriate undertakings.

- (5) Practitioners should not retain possession of passports or work permits without the client's express permission. Even where that permission has been previously given such documents must be released to the client immediately upon the client's request. No term or stipulation imposed by the practitioner shall operate to override this requirement.

6.04 Rule

Every practitioner has a professional duty to honour an undertaking, written or oral, given in the course of legal proceedings or in the course of practice; and this rule applies whether the undertaking is given by the practitioner personally or by a partner or employee in the course of the practice.

Part 7

Employment Court and Tribunal Proceedings and Practice

7.01 Rule

In the interests of the administration of justice, the overriding duty of a practitioner involved in proceedings before the Employment Court or Tribunal is to the Court or the Tribunal. Subject to this, the practitioner has a duty to act in the best interests of the client.

Commentary

- (1) A practitioner must never deceive or mislead the Court or the Tribunal.
- (2) The practitioner must at all times be courteous to the Court or the Tribunal.
- (3) The practitioner, whilst acting in accordance with these duties, must fearlessly uphold the client's interests, without regard for personal interests or concerns.
- (4) The practitioner has an obligation when conducting a case to put all relevant authorities known to the practitioner, whether decided cases or statutory provisions, before the court - whether they support the practitioner's case or not.
- (5) If a point of law which affects the case is discovered by the practitioner some time after the hearing but before the decision has been given, the practitioner has a duty to bring it to the attention of the Court or Tribunal and to provide a copy of the reference to the practitioner acting for the other party or parties in the matter.
- (6) Subject to the interests of the client, a practitioner must in the conduct of proceedings, treat other practitioners with courtesy.
- (7) Except in cases of urgency or where an ex parte application is justified, a practitioner must not discuss the merits of a case or matter with the Judge or other presiding officer either formally or informally, without the consent of the other practitioner, and such discussion should be held only in the presence of the other practitioner unless he or she consents otherwise. In any event, natural justice demands that generally there should not be unilateral communications with the Court or Tribunal.

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- (8) Disparaging or derogatory remarks or comments are not to be made in the course of hearings before the Court or the Tribunal about another practitioner.

7.02 Rule

A practitioner must exercise care in the court and in the Tribunal about naming persons not involved in the proceeding, and must refrain particularly from making scandalous or unnecessary allegations against such persons.

Commentary

- (1) If it is necessary to name a person in a way which, if published, might damage that person's reputation or character, the court or the Tribunal should be asked to receive the name and information confidentially in writing or 'in chambers'.
- (2) A practitioner must also bear in mind the power of the court and the Tribunal to prohibit publication of a particular part of evidence given in a case where potentially damaging evidence has been given without there having been a prior application to receive it in confidence.
- (3) This rule applies equally both in hearings during the course of proceedings and 'out of court' by inclusion of statements in documents which are to be filed in the court or the Tribunal.
- (4) A practitioner should not be a party to the ruling of a pleading or other court or Tribunal document containing an allegation of fraud, dishonesty, undue influence, duress or other reprehensible conduct, unless the practitioner has first satisfied himself or herself that such allegation can be properly justified on the facts of the case. For a practitioner to allow such an allegation to be made, without the fullest investigation, could be an abuse of the protection which the law affords to the practitioner in the drawing and filing of pleadings and other court and tribunal documents. Practitioners should also bear in mind that costs can be awarded against a practitioner for unfounded allegations of fraud.
- (5) If necessary, a practitioner must test the instructions which have been given, by independent inquiry, before making such allegations.

7.03 Rule

No practitioner engaged in a proceeding has the sole right to call or discuss the case with a witness.

Commentary

- (1) If an expert witness has, to a practitioner's knowledge, been retained by the other party, the practitioner should not without the consent of the practitioner acting for the other party, approach the expert witness. To do so could possibly read the expert witness into a breach of fiduciary duty.
- (2) Subject to commentary (1) above, it is permissible for a practitioner acting for one party to interview a witness or prospective witness at any stage prior to the hearing whether or not that witness has been interviewed by the practitioner acting for the other party or called as a witness.
- (3) A practitioner who calls a witness at a hearing may discuss matters with the witness at any stage up to the commencement of cross-examination. If discussion with the witness is sought during the course of cross-examination or re-examination, this can only be permitted with the consent (for good reason) of the presiding Judge or Employment Tribunal Member and opposing counsel. This applies even during adjournments of the hearing.

7.04 Rule

A practitioner must not act as a representative or counsel and as a witness in the same matter.

Commentary

- (1) If there is any reason for a practitioner to think that he or she may be required as a witness in a matter, the practitioner should decline to act as a representative at the hearing.
- (2) The same principle applies to making an affidavit in a contentious matter where the practitioner is involved in the proceedings as a representative of a party.
- (3) If, having started to appear in the proceedings as a representative of a party, the practitioner finds it necessary to make an affidavit in respect of the matter concerned, then the practitioner must immediately retire from the position of representative, unless the Court or Tribunal, in

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the particular circumstances, directs that it is still appropriate for the practitioner to continue to act.

- (4) Even where an affidavit might appear to be in respect of a formal or non-contentious fact, it is prudent for the practitioner to have it made and sworn by some other person.
- (5) Where a practitioner, having already accepted instructions to act as a representative or a party, becomes aware that a partner or employee of the practitioner might be called as a witness for the client, the practitioner must exercise care and professional judgement in deciding whether or not to continue to act in the matter.

7.05 Rule

A practitioner appearing for a party shall not seek or agree to a consent order or settlement without the client's authority, preferably to be obtained in writing.

Commentary

- (1) Where a practitioner appearing for a party informs the Court or the Tribunal that he or she consents to an order on behalf of the party, the Court or Tribunal and the representatives of other parties are entitled to rely on that information.
- (2) The rule applies whether
 - (i) the client is present and makes no demur; or
 - (ii) the client is absent.

GUIDANCE

Complaints against Employment Relations Authority Members and Judges of the Employment Court

Where a practitioner feels that:

- (1) he or she has been unjustly censured by a Member of the Employment Relations Authority or a Judge of the Employment Court; or
- (2) that a Member of the Employment Relations Authority or a Judge of the Employment Court has acted improperly or failed to sufficiently carry out his/her judicial duties and/or responsibilities in the course of a hearing, the practitioner should report the matter to the Secretary of the Institute who should investigate the matter, and if he/she thinks fit, report it to the President. The President shall consider the matter and, if he/she agrees that the facts so warrant, the President may refer the matter to the Member or Judge either directly or through the Secretary of Labour or Justice (as appropriate), and request any comments that the Member or Judge wishes to make. The Executive may then deal with the matter as it considers fit.

ANNEX 1

Enforcement procedures and sanctions for infringements.

For the purposes of this Annexure “professional misconduct” means:

- (a) conviction of a criminal offence for which the member is liable to a sentence of imprisonment;
- (b) conduct that would reasonably be regarded by members in good standing as disgraceful or dishonourable, or that may bring the Institute or the legal or advocacy professions in to disrepute;
- (c) infringement of the Code of Conduct;
- (d) adjudication as bankrupt.

All matters of professional misconduct or infringement of the Code of Conduct shall be dealt with as follows.

1. Any complaint against a member shall be referred by the Secretary to the President who, if satisfied that further action is warranted, shall refer it to a subcommittee of the Executive that he/she forms for the purpose - consisting of three Executive members including a Chair nominated by the President.
2. That subcommittee shall inquire in to the complaint, give the member complained about an opportunity to be heard in writing, and report to the Executive with a recommendation as to what action, if any, should be taken on the complaint.
3. The Executive may:
 - (a) lay a charge of professional misconduct or infringement of the Code of Conduct; or
 - (b) direct that the parties explore the possibility of resolving the complaint by negotiation, conciliation or mediation; or
 - (c) decide to take no action on the complaint.
4. If the Executive lays a charge of professional misconduct or infringement of the Code of Conduct against a member, the Secretary shall forthwith:
 - (a) advise the member in writing of the charge with particulars;
 - (b) provide the member with copies of all documents and material relevant to the charge;
 - (c) give the member not less than 1 month’s notice of the date, time and place of the Executive meeting at which the charge will be heard;
 - (d) invite the member to provide the Executive with evidence and/or submissions at least 1 week before the hearing.

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5. At the hearing the Executive shall provide the member a full opportunity to be heard in person, or by counsel or advocate.
6. If the Executive directs that the parties explore the possibility of resolution of the complaint, the Secretary shall forthwith:
 - (a) advise the parties accordingly and inform them if resolution is not achieved within a notified time, then the matter will again be considered by the Executive on notice to the parties;
 - (b) if resolution is not achieved within the notified time, notify the parties of the date, time and place when the Executive will reconsider the matter.
7. On such reconsideration the Executive may decide to do either 3(a) or 3(b) above.
8. If the Executive decides that a member has engaged in professional misconduct or infringed the Code of Conduct it may impose one or more of the following:
 - (a) a censure or reprimand;
 - (b) order the member to apologise to the complainant;
 - (c) order the member to reduce or refund fees to the complainant;
 - (d) order the member to take advice in relation to the management of his or her practice;
 - (e) order the member to undergo practical training or education;
 - (f) order the member to pay the Institute a fine not exceeding \$3000;
 - (g) order the member to pay costs to the Institute not exceeding \$3000;
 - (h) expel the member from membership of the Institute.
9. There shall be no right of appeal from any such order.
10. The Executive shall decide whether or not to notify members of any such orders.