CAPE LAW SOCIETY:

Guideline – Dealing with the Public and Trust Monies

1. Trust funds should be held for a lawful purpose only.

The attorney and his trust account enjoy special privileges and protection in law, wherefore strict criteria apply to the attorney and to the monies that are received in trust. The trust fund may not be used to achieve a dishonorable purpose, e.g. money laundering, or to give undue preference to certain creditors where the client is insolvent.

2. An attorney must satisfy himself as to the origin of monies deposited and apply his mind as to the stated or probable intention of the client who deposits money into trust.

An attorney must apply his mind and whenever circumstances exist which would alert a competent practitioner that the purpose of the monies in trust or the intention of the client who deposits the funds may not be honorable, he should investigate further. Unless he can satisfy himself that the transaction is above board and honorable, the attorney should decline to receive such monies in trust. Attorneys should in particular be wary of money laundering or fraudulent schemes.

(It appears that a specific exception exists in law regarding funds received as a *bona fide* deposit for the fees of an attorney to defend a client. In such a case the attorney is entitled to assume that such funds were obtained lawfully and can be applied towards payment of his reasonable fees and disbursements. If this were not the case, no attorney would dare to defend anyone charged with drug trading, fraud or theft of money).

3. An attorney must clearly indicate whether monies are received in trust or received for investment purposes only.

When confronted with formal complaints or attempts by creditors to attach monies of a client, some attorneys claim that monies received in trust are only held for investment purposes or *vice versa.* The circumstances in each instance will indicate whether both the client and the attorney envisaged an investment practice, wherefore it is incumbent on the attorney to ensure that the documentation unequivocally states the nature of the transaction. Stated differently: in the face of claims or complaints by the client or third

parties, the attorney can expect to bear the burden of proof to disprove the perception of other parties about the nature and purpose of monies received by the attorney.

4. **When dealing at less than arm's length with his own trust account the attorney has an exceptional duty to demonstrate that all transactions are not only lawful, but are also seen to be lawful and proper.**

Insofar as a conflict of interest may arise when an attorney deals with his trust account in more than one capacity (e.g. depositing funds of a trust where he is trustee or of a company where he is a director into his trust account), the attorney must ensure that there can be no misunderstanding or uncertainty that the transactions are both proper and are handled properly. In the light of any allegation or uncertainty about such transactions, the Law Society may suspect improper conduct and to investigate accordingly.

5. **When the attorney creates a perception that he acts as an attorney when it is not the case, or *vice versa*, the attorney may be held to the perception created.**

An attorney enjoys certain privileges and the trust of the public in his professional capacity. If this position is abused (e.g. by an attorney accepting an appointment as administrator in terms of Section 65 of the Magistrate's Court Act on the strength of his position when he is in reality acting in his capacity as member of a close corporation doing administrative work), the public and Law Society will be entitled to assume that he is acting as an attorney (or not, as the case may be) and react accordingly. (I.e. estoppel is applied).

The same principle will apply where an attorney allows an employee or agent to market his services or to deal with the public on his behalf. As far as the public is concerned, they are dealing with an attorney or at least with his practice. The attorney can therefore be held liable and accountable for the actions of his agent or employee. Instances that come to mind are the ambulance tout who pressurise motor accident victims to sign a power of attorney while still sedated and in hospital, or the "business development officer" who runs a money lending scheme from the offices of the attroney.

6. The Law Society may assume that an attorney whose personal estate is sequestrated is not competent to practice as an attorney.

As protector of the interests of the public the Law Society must investigate the practice of an attorney whose estate is sequestrated. The public perception is often that such insolvency happens on account of incompetence or dishonesty. The Law Society must therefore protect the public by preventing an insolvent attorney from dealing with trust monies (i.e. practising for his own account) unless it is clear that the insolvency was not the result of incompetence or dishonesty on the part of the attorney.