



The City of London Law Society

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Response

SOLICITORS' CODE OF CONDUCT RULE 11 – LITIGATION AND ADVOCACY

1. This note is submitted on behalf of the City of London Law Society. A recent meeting of the Litigation Committee discussed concerns that have been raised regarding the provisions of Rule 11.01 of the new Solicitors' Code of Conduct (*the Code*). We are aware that concerns have also been raised by the Law Society and others. We understand that the SRA is intending to review the issue and it may therefore assist if we summarise our views.

The Issue

2. Rule 11 of the Code deals with litigation and advocacy. Rule 11.01 sets out the solicitor's duty not to deceive or mislead the court, as follows:

11.01 Deceiving or misleading the court

- (1) *You must never deceive or knowingly or recklessly mislead the court.*
- (2) *You must draw to the court's attention:*
 - (a) *relevant cases and statutory provisions;*
 - (b) *the contents of any document that has been filed in the proceedings where failure to draw it to the court's attention might result in the court being misled; and*
 - (c) *any procedural irregularity.*
3. Of course, no issue arises in relation to this general principle in paragraph (1) of the Rule. The concern that has been expressed

relates to the wording of the particular example in sub-paragraph (b) of paragraph (2). It is considered that this sub-paragraph is too wide because, while there are circumstances in which a solicitor or advocate may be required to draw matters in a document to the court's attention, consistent with the general duty not to mislead the court, in other situations it would be unreasonable to impose such a requirement on a solicitor, whether conducting litigation or acting as advocate.

Discussion

4. The problem has come to the fore because the wording of sub-paragraph (b) has been significantly amended from that in its predecessor provision in the Guide to the Professional Conduct of Solicitors. Further, the provision has been elevated to part of Code rules themselves whereas the predecessor provision appeared only as a matter of guidance.¹
5. In this respect, note that the position is different in relation to sub-paragraphs (a) and (c) of Rule 11.01(2). No issue arises in relation to those provisions and they have always been part of the principal rules.²
6. The change in the wording of sub-paragraph (b) is that it now refers to “any document” filed in proceedings, whereas the guidance paragraph in Guide referred to only to a “relevant affidavit or statement”. The reference to a document that has been “filed in the proceedings” is potentially very wide. “Filed” is defined in CPR Part 2 Rule 2.3(1) to mean simply delivery to the court office and the obligation to “file” is common throughout the CPR including, for example, applying to the trial bundle.³ Potentially, the scope of the sub-paragraph is therefore very wide. It is not clear how sub-paragraph (b) is intended to be applied to documents such as exhibits to affidavits or the trial bundle itself. Such documents can be very voluminous (for example, in a large commercial case the trial bundle can easily run to a large number of files containing many thousands or tens of thousands of pages). Read literally, the obligation imposed by sub-paragraph (b) could be very onerous. In many cases it is difficult to see why the advocate should be under a duty in the wide and unqualified terms expressed.
7. These concerns would arise even if applied only in relation to affidavits and witness statements, but the concern is amplified by the wider drafting of the new Rule. The guidance given in paragraph 17 of the accompanying notes to Rule 11.01 does not clarify the position.

¹ See the guidance in paragraph 4 under Principle 21.01 in the Guide to the Professional Conduct of Solicitors, Chapter 21, Litigation and Advocacy.

² The predecessor provision for both these paragraphs was paragraph 7.1(c) of the Code for Advocacy, with which solicitors were obliged to comply by virtue of Rule 16A of the Solicitors' Practice Rules 1990.

³ See CPR 39.5 and 39 PD3.2.

8. It is also relevant to compare the position of a barrister acting as advocate. The current Bar Code of Conduct incorporates both a general provision not to deceive or mislead the court (Bar Code paragraph 3.02) and specific provisions in equivalent terms to sub-paragraphs (a) and (c) of Rule 11.01(2): see Bar Code paragraph 7.08(c) and (d). However, the Bar Code does not contain any provision equivalent to that in sub-paragraph (b) of Rule 11.01(2). Accordingly, under the Bar Code, any obligation (where the circumstances demand it) in relation to the contents of an affidavit, witness statement or other document filed at court would arise by virtue only of the general duty not to mislead the court, not a specific provision.

Recommendation

9. While it would be possible to revert to the previous wording it is felt that this would not entirely cure the problem identified. The situations that could potentially fall within the terms of the Rule are so varied that it is not appropriate to cover the position by a prescriptive rule in this form. If it is considered that something more than the general principle is necessary, it is a matter that could be dealt with better and more flexibly by guidance notes.
10. Importantly, deleting the paragraph would also bring the approach of the Code in line with the Bar Code. It is plainly undesirable for there to be, without good reason, a substantive difference in the duties to the court owed by a barrister and a solicitor advocate in the same situation. As well as being unjustified in principle, such a difference could act to the detriment of a client instructing a solicitor advocate rather than a barrister.
11. It is therefore suggested that the preferable solution would be to delete paragraph (b) entirely, leaving the matter to be covered by the general principle. This is consistent with the SRA's proportionate and targeted approach to regulation, aimed at regulation that is appropriate to the risk posed, costs identified and minimising side effects.

About the CLLS

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership. Its 50 corporate members include some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

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