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Introduction

The Solicitors' Code of Conduct ("the Code"), which was brought into effect by the Solicitors Regulation Authority ("SRA") on 1 July 2007, has made some important changes to the way in which solicitors' services are delivered. Charity legacy officers should therefore be aware of the main rules contained in the Code, which replace most of the provisions contained in the Guide to the Professional

Conduct of Solicitors ("the Guide").

The SRA is the new body responsible for setting and maintaining professional standards amongst the solicitors' profession (this job previously having been performed by the Law Society's Professional Ethics Unit). The reason for the SRA introducing the Code, which has been under discussion for nearly 8 years, is to deliver a shorter, more accessible, more understandable set of regulatory rules and, in so doing, to deliver something which consumers and the profession have been demanding for a long time, as the Guide was cumbersome and had become out of date with modern business practice.

Focus of article

This article will begin by introducing the concept of "Core Duties" set out in Rule 1 of the Code. It will then go on to provide a summary of some of the main provisions/ changes, in so far as these may affect charity legacy officers, and will conclude with details of the sanctions which solicitors could face if they fail to comply with the Code.

The "Core Duties"

Rule 1 sets out the "Core Duties" with which all solicitors are expected to comply (both in their professional and private lives) and underpins the whole of the Code.

Rule 1 provides that all solicitors must:-

- Uphold the rule of law and the proper administration of justice;
- Act with integrity;
- Not allow their independence to be compromised;
- Act in the best interests of each client;
- Provide a good standard of service to their clients; and
- Not behave in a way that is likely to diminish the trust the public places in them or the profession.

Where two or more core duties come into conflict, public interest must determine which takes precedence, particularly the public interest in the administration of justice.²

The Main Changes

The Code contains 25 rules (compliance with which is mandatory) and also provides guidance upon the rules (being expressions of best practice). Rules 1 – 11 are likely to be the most relevant for charity legacy officers, as these govern practitioners' relationships with clients, the courts and third parties and it is within these rules that the main changes can be found. Whilst this article will consider some of the main changes, for full details of all of the new rules, reference should be made to the Code itself, which can be found on the SRA website (www.sra.org.uk).

Rule 2 - Client Relations

Rule 2 governs "client relations" and will therefore be of particular importance to charity legacy officers, in ascertaining the level of service which they can expect to receive from solicitors, when outsourcing work. The Rule is designed to help both solicitors and their clients to understand each other's expectations and responsibilities. Of particular relevance is Rule 2.02, dealing with client care.

This provides that a solicitor must (i) identify clearly the client's objectives in relation to the work to be done; (ii) give the client a clear explanation of the issues involved and the options available to the client; (iii) agree with the client the next steps to be taken; and (iv) keep the client informed of progress, unless otherwise agreed (numbers added for convenience).

Rule 2.02 goes on to state that the solicitor must, both at the outset of a case and, as necessary, during the course of the matter, agree with the client an appropriate level of service; explain the solicitor's responsibilities; explain the client's responsibilities; 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 explain any limitations or conditions resulting from the solicitor's relationship with a third party (e.g a funder, fee sharer or introducer) which affects the steps which the solicitor can take on the client's behalf. (If, however, the solicitor can show that in the circumstances it was inappropriate to meet some or all of these requirements, then he will not be in breach of the Rule).

Also of particular importance is Rule 2.03, which states that a solicitor must give his client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses; and Rule 2.05, which deals with complaints handling and encourages solicitors to deal with complaints efficiently and openly.

Charity legacy officers should therefore expect to be kept regularly updated as to costs and to be given full details of a firm's complaints procedure, at the outset of a matter. Charities can insist upon this, by virtue of Rule 2.

Rules 3 & 4 – Conflicts and Confidentiality

New rules relating to conflicts of interest and the duties of confidentiality and disclosure came into effect in April 2006 and became Rules 16D and 16E of the Solicitors' Practice Rules 1990. These rules have been preserved in the Code and have been re-numbered Rules 3 and 4. Since they were brought into effect by statutory instrument, they can now be enforced by the courts as rules of law, whereas previously a breach of these rules only gave rise to the option of a complaint to the Law Society.

Under the new Rule 3, a solicitor is prohibited from acting where the solicitor or his firm owes separate duties to act in the best interests of two or more clients, in relation to the same or "related" matters and those duties conflict, or there is a significant risk that they may conflict. (If two matters concern the same asset or liability, then they are "related", although there also needs to be a reasonable degree of relationship for a conflict to arise).

Rule 3 defines "conflict" for the first time, as either a conflict between the solicitor's own interests and that of one of his clients; or a conflict between the interests of two different clients. There are two exceptions to the conflicts rule:-3

(i) The "common interest" exception – this applies where the parties have a substantially common interest in relation to a matter or part of a matter and all clients give their informed consent to the firm acting.

(ii) The "commercial" exception – this applies where the clients are competing for the same asset and if one client attains that asset it will become unattainable to the other client. There must be no other conflict, or significant risk of conflict, between the interests of the clients in relation to that matter; the clients must provide their informed consent in writing to the firm acting; and, subject to any agreement to the contrary, no one solicitor may act, or supervise the work, for more than one client.

In each of these cases, it must be reasonable in all the circumstances for the solicitor to act for all of the clients in question. The criteria against which reasonableness will be judged is: "whether one client is at risk of prejudice because of the lack of separate representation".

The new Rule 4 specifies that a solicitor and their firm must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by the client (or former client).

As with the old rule, solicitors are under a duty to disclose to a client all information which is "material" to that client's matter, irrespective of its origin (and the guidance notes suggest this must be information which might reasonably be expected to affect the client's decision-making in a significant way). However, in contrast to the old rules, a solicitor is only now under a duty to disclose information of which he/ she is personally aware (as opposed, for example, to material information known to another member of his/ her firm).

Where the duties of confidentiality and disclosure conflict, Rule 4 makes it clear that the solicitor's duty of confidentiality will prevail. The case of *Hilton –v- Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651 also provides authority for the position that a solicitor cannot endanger client confidentiality by acting for someone else to whom he owes a duty of disclosure.

There are two main exceptions which may allow a solicitor to continue acting in a situation where the duties of confidentiality and disclosure conflict, namely (i) where the client agrees to a lesser duty of disclosure; and (ii) if the problem is the personal knowledge of the solicitor, where the client agrees to the matter being passed to another fee earner in the firm who is not in possession of the confidential information. However, in practice these exceptions will apply mainly to corporate situations.

Rule 5 – Business Management

There are 3 main limbs to the new Rule 5, which of all the new rules seems to be the one of most concern to practitioners (it applies to both private practice firms and in-house practices):-

(i) Principals and members and directors of a firm are obliged to ensure that suitable arrangements are in place for the supervision and management of the firm as a whole and to provide, in particular, for the control of undertakings; the identification of conflicts of interest; the management of risk; and the training of staff to a level of competence appropriate to their level of work;

(ii) Minimum requirements are specified for being qualified to supervise (at least one principal in a firm (and in certain types of in-house practice, for example, law centres) will have to be “qualified to supervise”, which means they will have to have been entitled to practise as a lawyer for 36 months in the last 10 years and have attended or participated in any course(s), or programme(s) of learning, on management skills, for a minimum of 12 hours); and (iii) Minimum standards are laid down relating to the supervision of clients' matters (systems must be put in place for supervising the quality of work undertaken for clients. Those appointed to undertake supervision must be “suitably experienced and competent”, but there is no longer a requirement that such person must be a solicitor).⁴

Charities can therefore expect the work carried out by their solicitor to be supervised by an experienced and competent principal in the firm, which should help to ensure that a high quality of service is delivered.

Rule 6 – Equality and Diversity

The new Rule 6 now covers discrimination, as well as equality, and clarifies the provisions relating to disability discrimination. The Rule provides that solicitors must not discriminate on any of the grounds of sex, race, racial group, sexual orientation, religion or belief, age or

disability. Solicitors must make a reasonable adjustment to ensure that members of staff or clients who are disabled are not disadvantaged compared to those who are not disabled.

Under Rule 6, firms are required to adopt and implement an Equality and Diversity policy and, in contrast to the old practice Rule 7 (which said that firms would be deemed to have adopted a standard policy which was attached to the Rule), firms are now required to develop a policy themselves. Firms therefore have to think about the areas the policy should address, including the way firms deal with clients. The firm must ensure that all members of the firm are aware of the policy and act in compliance with it.

Rule 7 - Publicity

The new Rule 7 is almost identical to the old publicity rules, but the new Rule is clearer and the guidance notes provide clarification on topics such as the use of websites and emails.

The guidance notes to Rule 7 state that, if solicitors publicise that they will donate all, or a percentage, of their fees in respect of certain matters to charity, it would be misleading not to do so. The same applies if a solicitor agrees to pay to a charity fees received by way of costs from his client's opponent or other third party where the solicitor is acting under a conditional fee agreement.

Rule 8 - Fee sharing

Following on from Rule 7, Rule 8 (dealing with fee sharing) includes provisions relating to fee sharing with charities and permits solicitors to share fees with a charity. The Rule applies to charitable giving where the solicitor has agreed with his client or a charity that he will share all or some of his fees in respect of a particular matter or matters with a charity. As above, this will include situations where the solicitor uses a conditional fee agreement and agrees to pay to a charity fees which he receives by way of costs from his client's opponent or other third party.

Rule 11 – Advocacy and Litigation

The old rules relating to advocacy and litigation were contained in the “Advocacy Code”. The new Rule 11 replaces the Advocacy Code and substitutes much more concise provisions, although the new Rule retains the majority of provisions relating to solicitors appearing as advocates, which now sit alongside the fundamental duties of litigators.

The new Rule contains just 8 provisions encapsulating the fundamental duties of those acting as litigators. These are the duties with which charities can expect their solicitors to comply, in relation to any litigation:-

- Not to mislead/ deceive the court;
- Not to construct facts or draft documents believed to be untrue or without merit;
- To comply with court orders;

- Not to unreasonably refuse instructions to act;
- To treat witnesses with respect and take care with advancing allegations of crime, fraud and misconduct;
- Not to act if a conflict or prejudice is likely;
- Not to pay witnesses; and
- To keep recorded evidence from children safe and secure.⁵

Rules 12 & 13 – In-House Practice

Under the old Guide, in-house solicitors were governed by the same general principles of conduct as solicitors in private practice. This position is preserved under the new rules. In-house solicitors are subject to the provisions of the new Rule 12 (which sets out the types of business through which solicitors may and may not practise) and introduces a new Rule 13, which replaces the old Employed Solicitors Code 1990. For details of Rule 13, relating specifically to in-house solicitors, reference should be made to the Code.

Rule 15 – Practice from Overseas Offices

Rule 15 sets out the requirements for overseas offices and explains, in relation to each of the other rules, whether it applies to overseas practices, and whether there are any exceptions, additions or alternative provisions.

As with the old Guide, solicitors operating a practice overseas must comply with the requirements of the CCBE Code (“Council of the Bars and Law Societies of Europe’s Code of Conduct for European lawyers”) in their European cross-border practice. Rule 16 sets out the requirements of the CCBE Code, ensuring there is no conflict between this and the new Code of Conduct. Lawyers in Scotland and Northern Ireland are classified as “foreign lawyers”. Therefore, the new Rule 15, which prescribes a more relaxed version of the rules for “overseas practice”, applies to practice in Scotland or Northern Ireland.

Rule 20 – Requirements of Practice

Rule 20 sets out the circumstances in which a solicitor must hold a current practising certificate, the type of work solicitors are allowed to undertake, and the obligations imposed on solicitors to cooperate with, and provide information to, the SRA and the new Legal Complaints Service (“LCS”). Legacy officers should note that the SRA deals with all regulatory and professional conduct issues, whereas the LCS deals with complaints from consumers about standards of service (other than those which concern matters of professional conduct).

Sanctions for non-compliance

So, what sanctions can charities expect solicitors to face, if they fail to comply with the Code? These are essentially the same as they were under the old Guide. A solicitor who breaches the Code can be:-

- Fined;
- Suspended from practice;
- Subject to conditions imposed on his/ her practising certificate;
- Struck off;
- Subject to an IPS award issued against him/her by the LCS (this might require the solicitor to pay compensation to a client, or to reduce his/ her bill of costs, if the standard of service provided falls below acceptable levels).

Conclusion

There are a number of important changes contained in the Code, the most significant of which are discussed above. However, the rules set out in the new Code largely reflect the provisions in the old Guide; the main difference is that the rules are now expressed more succinctly (the Code is 200 pages long, whereas the old Guide extended to 900 pages) and relevant provisions are grouped together.

Legacy officers should therefore find the new rules much easier to navigate, as and when they have cause to refer to them. 6

Sources of information used for this article

- The Code of Conduct 2007;
- The Guide to the Professional Conduct of Solicitors;
- LNTV DVD Programme 1270 and accompanying Professional Development Notes;
- LNTV DVD Programme 1300 and accompanying Professional Development Notes.

Contact details

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