

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

Solicitors' Professional Conduct

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Solicitors' Professional Conduct

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Outline (1)

- Introduction: some important **RPD** matters
- Peter Osborne
 - Context: The new edition of the Law Society's *Solicitor's Guide to Professional Conduct* (to be read with the Law Society's *In-House Guide*)
 - The rules of professional conduct (*Guide*, Chapter 1)
 - The solicitor and client relationship (*Guide*, Chapter 2)
 - The solicitor in practice (*Guide*, Chapter 9)
 - Undertakings, the solicitor and the solicitor's relationship with third parties and the LSRA (*Guide*, Chapter 6)
 - Remuneration of the solicitor (*Guide*, Chapter 10)
 - Conduct in international practice (*Guide*, Chapter 11)

Outline (2)

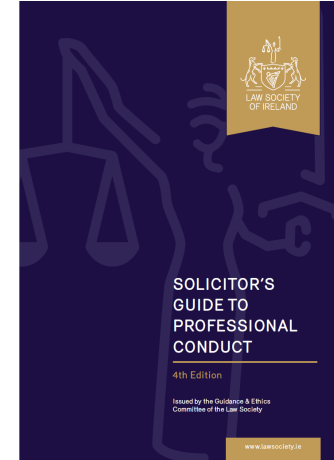
- Helen Kilroy
 - Conflicts of interest (*Guide*, Chapter 3)
 - Privilege and confidentiality between solicitor and client (*Guide*, Chapter 4)
 - The solicitor's relationship with the courts (*Guide*, Chapter 5)
 - The solicitor's relationship with barristers (*Guide*, Chapter 8)
 - The solicitor's relationship with other solicitors (*Guide*, Chapter 7)
- Q & A

Context

- The role and professional obligations of a solicitor, generally
- Our focus today:

Law Society, *Solicitor's Guide to Professional Conduct*

(4th edition, September 2022)



- Law Society: *Guide for In-House Solicitors Employed in the Corporate and Public Sectors* (2018)
- Recall also general law and regulation, *eg* lobbying legislation and EU sanctions against Russia
 - Since February 2022 it has been the policy of McCann FitzGerald LLP not to represent any Russian person or entity, and to actively withdraw from such engagements
 - Since 7 October 2022, it is a criminal offence in Ireland to provide “legal advisory services” (as defined) to a person or body established in Russia (there are exceptions and derogations)
 - Regulation (EU) No 833/2014, Article 5n(2)
 - European Union (Restrictive Measures Concerning Ukraine) (No 20) Regulations 2022

Material Changes to the Third Edition of the *Guide*

- The 4th edition of the *Guide* includes many changes to the 3rd edition but most changes are relatively immaterial (such as adding footnotes to provide references for propositions in the *Guide*)
- From the perspective of in-house counsel practising commercial law, material changes include:
 - A greater emphasis on the core values of honesty, integrity and independence
 - At many points, emphasising that the *Guide*, and expectations of professional conduct, apply equally to in-house solicitors and to solicitors who are employed by the State, as they apply to solicitors in independent practice
 - Reflecting the regulatory role of the LSRA and the requirements of the Legal Services Regulation Act 2015
 - In particular, a substantial re-working of the chapter on legal costs and charges, to reflect the requirements of the 2015 Act
 - Expanded treatment of the *Code of Conduct for European Lawyers*
 - Removal of the Revenue Commissioners-Law Society MoU on tax audits of solicitors' practices

The Rules of Professional Conduct (1)

- Special considerations for in-house counsel (a tension?):
 - Proper role of a solicitor (professional independence and objectivity, a fiduciary, an officer of the court, etc)
 - Role of in-house counsel (business objectives and goals, multi-faceted function(s), sometimes combined with non-lawyer roles, etc)
- The essential requirement for every solicitor: a fit and proper person for the profession. Two elements:
 - **Fit:** “knowledge, skill, understanding, expertise, competence and the like...”
 - **Proper:** “...Critical in this respect are matters such as honesty, integrity and trustworthiness: a person of principled standards, of honest nature and of ethical disposition; a person who understands, appreciates and takes seriously [the person’s] responsibilities to the public, to the administration of justice, to individual colleagues and to the profession as a whole.”
(*Law Society v Carroll* [2016] 1 IR 676)

The Rules of Professional Conduct (2)

- A key point: a solicitor is a fiduciary to the solicitor's client
- “...solicitors, although acting for their clients' best interests, are first and foremost officers of the court and are therefore obligated to support the administration of justice.” (Irvine P)
- Misconduct by a solicitor injures the entire profession. “[A] profession's most valuable asset is its collective reputation and the confidence which that inspires” (*Bolton v Law Society* [1994] 2 All ER 486)
- General
 - The *Guide* is not law but is relevant to assessing professional conduct
 - The *Guide* describes best practice
- “The *Guide* is relevant for all solicitors, whether in private practice or in employment in the in-house and public sector” (recall also the (2018) *In-House Guide*)



The Rules of Professional Conduct (3)

- Legal Services Regulation Act 2015: the “professional principles”
- Core values of the profession: solicitors are required to observe general core values of conduct:
 - Honesty, Integrity, Independence, Confidentiality, Avoidance of conflicts of interest
- Importance of the independence of the in-house and public sector solicitor
- **Material change**
 - Increased emphasis on the core values of honesty, integrity and independence

The Solicitor and Client Relationship (1)

- Acceptance of instructions
 - No obligation to accept any instruction
 - Provision of information in relation to fees and costs
 - Letter of engagement and terms of business
 - For both law firms and their clients: who in the client organisation is entitled to instruct the external lawyers? Obviously “the client”, but in the case of a body corporate as a client?
- Proper standard of legal services
 - Openness, frankness and honesty
 - Plain language, so far as possible
 - Keep the client informed

The Solicitor and Client Relationship (2)

- Termination of a retainer
 - Permissible where there is good cause and reasonable notice, and always in writing
 - For example, if the client's unwillingness to follow advice undermines trust within the professional relationship
- **No material change**

The Solicitor in Practice

- A solicitor (independent and in-house) is responsible for all work undertaken (and for work that is not undertaken, but which should have been!) in the solicitor's practice
- Professional indemnity insurance
 - Minimum requirement
 - Linkage to liability caps (if any)
- Accounts regulations
- Retention or destruction of files
 - A solicitor need not retain a file indefinitely
 - Document retention and destruction policies (limitation periods)
- **Material change:**
 - The *Guide* advocates destroying a file when the limitation period / contractual retention period (whichever is longer) has expired

Undertakings, Third Parties and the LSRA (1)

- Professional standard of conduct: a solicitor must be honest and courteous in all the solicitor's dealings
- Litigation – initiating letters and correspondence
 - Maintain a professional stance and don't be unnecessarily acrimonious
 - A solicitor is not merely a conduit for the client's instructions
- Undertakings
 - The same principles apply to an in-house and public sector solicitor as apply to an independent solicitor
 - An undertaking is a solemn promise by a solicitor to a third party and is, in itself (outside contract) a binding obligation
 - A solicitor is required to honour the terms of an undertaking as a matter of professional conduct, so that a breach of an undertaking is professional misconduct
 - General guidance on undertakings

Undertakings, Third Parties and the LSRA (2)

- Fees and expenses of professional and other service-providers
 - If engaged on behalf of a client, the charge is for the client but a solicitor should encourage early and full payment
- Recording conversations
 - A solicitor should not record a conversation whether in person, or over the telephone, or via a video platform without the express consent of the other party
- Administration of oaths
 - A solicitor must observe, strictly, the legal formalities to taking an oath or declaration
- **Material change:**
 - Increased emphasis on the binding nature, and the professional importance of a solicitor honouring, an undertaking, applying equally to in-house and independent solicitors

Remuneration of the Solicitor

- Information in relation to legal charges
 - Basis of charge (section 150 of the Legal Services Regulation Act 2015)
 - Nature of the fee (fixed, capped, estimated, etc)
 - Ongoing information to the client
 - Obligation to issue a bill of costs when the work is complete
- **Material change:**
 - Expanded treatment of the statutory regulation of fees and charges (especially section 150 of the 2015 Act)

Conduct in International Practice

- Professional conduct standards apply equally in cross-border practice as they do in domestic practice: the *Guide* applies to a solicitor providing services on a cross-border basis
- A solicitor should recognise all lawyers and legal practitioners as professional colleagues and act respectfully, fairly, and courteously towards them
- Unless agreed otherwise, a solicitor that instructs a lawyer in another jurisdiction, and not the client, is responsible for that lawyer's fee, but of course will be entitled to pursue the client for such fees as have been paid (if within the terms of the engagement)
- **No material change**

Conflicts of Interest (1)

- A conflict of interest can arise between solicitor and client (*Marks & Spencer Group v Freshfields* [2004] EWCA Civ 741) and two or more clients
 - It exists where a solicitor’s separate duty to act in the best interests of two or more clients in relation to the same or a related matter conflict

“Even where clients have a substantially common interest or where they are competing for the same objective, where the advice given to each party differs, a conflict may arise”.

- Conflicts between two or more clients risk breach of duty:
 - of undivided loyalty owed to each client
 - to make full disclosure to each client in a matter (as agent)
 - of confidentiality owed to each client

But that said....*“A solicitor must give careful thought to the matter to ensure that their professional obligations are discharged, that no conflict of interest arises, and/or that any identified risk is carefully considered and mitigated”.*

Conflicts of Interest (2)

- Conveyancing transactions
 - A solicitor must not act for both vendor and purchaser in a conveyancing transaction (with limited exceptions)
 - Prohibition on acting for borrower and lender in commercial conveyancing transactions
- Non-conveyancing transactions
 - Clients must give *informed* consent to a conflicted firm acting for both sides
- Conflicts may emerge between the interests of client companies and their directors
- Conflict of interest between solicitor and client
 - It is not anticipated that a solicitor in the firm would ever transact with a client
- **Material change:**
 - Increased emphasis on the judgement of the solicitor in identifying and addressing conflicts, even if they do not appear substantial

Privilege and Confidentiality between Solicitor and Client (1)

- Privilege (which is owned by a client) and the solicitor's obligation of confidentiality are different
- Privilege, types and its legal nature are **more clearly explained**
 - Legal professional privilege (LPP) applies to all lawyers (*McMahon v Irish Aviation Authority* [2016] IEHC)
 - Legal advice privilege applies to advice given when acting as a lawyer not 'a man of business' (*F&O Reit Property v Friends First* [2017] IEHC 383 contrasted with *Ochre Ridge Ltd v Cork Bonded Warehouses Ltd* [2004] IEHC 160)
 - Litigation privilege
 - **Common interest and joint privilege with other parties explained**
- Issues commonly arising in respect of privilege
 - Receipt of information intended for the other party to litigation
 - Material disclosed by mistake
- Loss or waiver of privilege **more clearly explained**
- Privilege and the in-house and public sector solicitor: except in respect of competition law, no material difference to the position of an independent *solicitor* (*AM&S v Commission* [1982] ECR 1575 and *Akzo Nobel v Commission* [2010] 5 CMLR 19)

Privilege and Confidentiality between Solicitor and Client (2)

- Solicitor's duty of Confidentiality (*Bolkiah v KPMG* [1999] 2 AC 222)
 - *Professional duty*: wider than legal privilege and applies to all communications passing between a solicitor and their client or former client, and to the existence of the relationship
 - *Contractual duty*
- Disclosure of confidential information: only by consent, court order or statutory requirement

“Any time it is necessary to deviate from the general principles, it is suggested that a solicitor document their decision-making process.”
- Confidentiality in the solicitor's office: storage of documents (including electronic documents), discretion of all personnel

“This duty of confidentiality extends not only to the solicitor's office but also to any situation whereby a file is removed from the office by a member of staff of the firm such as attending court or working away from the office.”
- **Material change:**
 - Increased detail regarding the nature and effects of privilege and the manner in which it may be lost and the obligation on a solicitor to maintain confidentiality in ‘all locations’

The Solicitor's Relationship with the Courts (1)

- General
 - Recall the status of a solicitor as an officer of the court, obligated to support the administration of justice... *“The integrity of the justice system depends on the ethical conduct of solicitors as officers of the court and their overriding duty is to the rule of law and the administration of justice. Nowhere is that more apparent than when conducting litigation”.*
 - A solicitor should promote and protect the client's best interests, by all proper and lawful means and without fear or favour
- The solicitor advocate
 - Present the case to the client's best advantage – never 'win at all costs'
 - In civil litigation, a solicitor need not disclose to the court evidence that is harmful to the client's interests, unless the omission would be deceptive
 - Heightened onus in an *ex parte* application... *“In ex parte court applications, the solicitor has a particular duty to act in good faith and to present the court with all relevant information and/or correspondence and make full disclosure in respect of the application before the court”.*

The Solicitor's Relationship with the Courts (2)

- Conflict arising during retainer: if express instructions would conflict with a duty to the court, and the client will not change those instructions, the solicitor should withdraw from the case
- Perjury by a client: the solicitor must withdraw from the case unless the client 'comes clean' to the court... *“Likewise, it is the duty of the solicitor not to knowingly allow dishonest omission by a client in discovery, statements of truth, affidavits, and disclosure.”*
- Witnesses
 - The important line between interviewing and 'coaching'
 - Assisting witnesses in the preparation of statements, affidavits, etc: it must always be the witness's evidence
- Communication with the court
 - Discretion and professional distance
 - A solicitor should not assist a client that is refusing to obey an order of a court

The Solicitor's Relationship with the Courts (3)

- Communication with the court (*cont'd*)
 - An allegation of professional negligence must be supported by an independent expert opinion (but practical *caveat* of issuing a protective writ to avoid claim becoming statute-barred)
 - Third party funding of litigation not permitted
- Statutory duty of solicitors to encourage mediation noted
- **Material changes:**
 - Increased detail regarding the role and duties of a solicitor as an officer of the court and the inherent jurisdiction of the Superior Courts to regulate the conduct of a solicitor
 - Emphasis on the solicitor's obligation of frankness in an *ex parte* application
 - Noting of the respect that should be shown to the competing commitments of medical experts when called as witnesses
 - Basis for maintaining professional negligence claim clarified

The Solicitor's Relationship with Barristers (1)

- Retention of counsel – only permissible on client instructions

“That instruction should be confirmed in writing by the solicitor to the client and by the solicitor to counsel...”

A solicitor should take care in the selection of counsel, and the choice should be made with due regard to the expertise required for the matter. The solicitor has a duty to consider whether the client's best interests would be better served if represented by a different counsel and, if so, to advise the client to that effect.

Briefing counsel does not obviate the solicitor's duty of care to the client.”

- Instructions to counsel

“It is the duty of a solicitor to brief counsel adequately, properly, and completely”.

The Solicitor's Relationship with Barristers (2)

- Information about counsel's fees

“Prior to engaging counsel, it is the duty of a solicitor to request information in writing from counsel in respect of their fees and obtain the client's agreement to engage counsel on behalf of the client”.

- No liability for counsel's fees (given that the solicitor is the client's agent)
- Relationship with counsel and accountability:

“Solicitors should always be alert to the fact that they retain and instruct counsel on behalf of the client. What counsel say to the opposition or in court is said in the solicitor's name and in the name of the client, and it should be a true and accurate representation of the facts”.

- **Material changes:**
 - Greater emphasis on solicitor's duties regarding fees, choice of counsel, thoroughness of instructions and retaining own duty to client

The Solicitor's Relationship with Other Solicitors (1)

- Professional standard of conduct
 - A solicitor should be honest in all dealings with other solicitors and act towards them with frankness and good faith, consistent with the solicitor's overriding duty to the client
 - Solicitors should promote a culture that recognises the *bona fides* of colleagues, even in situations that may be adversarial “*A solicitor should be cognisant of the tone of correspondence...*”
- Amendments to documents made by solicitor on other side
 - If an amendment is made to a draft document by a solicitor for one party, the solicitor for the other party should be alerted to the amendments(s)
- Communicating with the client of another solicitor (apart from giving a second opinion, generally impermissible)
- The same rules apply to dealing with the client of an in-house or public sector solicitor

The Solicitor's Relationship with Other Solicitors (2)

- 'Without prejudice' communications between solicitors
 - Meaning and legal effects explained
 - *Bona fide* negotiations for the settlement of disputes
- Supplying information on request to another solicitor – only on the client's instruction
- The solicitor's lien
- Transfer of files between solicitors' firms
 - Undertaking in respect of payment of costs
 - Undertakings furnished by first solicitor
 - The file belongs to the client
 - Firm may copy and retain the client's file, at the firm's cost
- **No material change**

Questions?



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