

THE LEGAL SERVICES CONSULTATIVE PANEL

ADVICE TO THE SECRETARY OF STATE

ON AN APPLICATION BY THE LAW SOCIETY FOR APPROVAL OF:

RULE 11 – LITIGATION AND ADVOCACY

LSCP Ref: No. 7/2005
Advice given October 2006

LEGAL SERVICES CONSULTATIVE PANEL

APPLICATION BY THE LAW SOCIETY FOR APPROVAL OF RULE 11 (LITIGATION AND ADVOCACY)

ADVICE TO THE SECRETARY OF STATE

1) The Panel and publication of advice

- 1.1 The Legal Services Consultative Panel (the Panel) was established by the Access to Justice Act 1999 in January 2000.
- 1.2 The Panel has considered a reference made by the Secretary of State (referral number 7/2005) seeking its advice concerning an application from the Law Society. The application seeks approval for Rule 11 (Litigation and Advocacy).
- 1.3 The Panel's advice was given in October 2006.
- 1.4 The advice is published on behalf of the Panel by the Department for Constitutional Affairs. The complete document appears on the Department for Constitutional Affairs' website www.dca.gov.uk as well as being available in hard copy.
- 1.5 Further copies of the Panel's advice are available from the Panel Secretariat (*telephone*: Dawn Sanderson on 020 7210 8816).
- 1.6 The Panel comprises:

Lord Justice Moore-Bick (Chairman)	Mr Robert Elvin	Professor Richard Moorhead
Mr Jonathan Acton Davis QC	Mr David Glass	Mr John Randall QC
Mrs Nina Barakzai	Mr Jonathan Goldsmith	Mr John P Randall
Professor John Bell QC (Hon)	Mr John Hannam	Mr Simon Sapper
Professor Hugh Brayne	Mrs Valerie Jones	Mr Alan Street
Mr Martin Coleman	Ms Karen Mackay	Mr John Young CBE

GENERAL PRINCIPLES

2) Introduction

- 2.1 In considering and putting forward its advice on the application, the Panel has had regard to the principle central to the policy of the Courts and Legal Services Act 1990 and the Access to Justice Act 1999, namely the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice.
- 2.2 The Panel has also taken account of the five principles of good regulation identified by the Better Regulation Task Force (an independent group established in 1997 to advise the government) against which the appropriateness and effectiveness of any type of regulation should be tested, namely transparency, accountability, targeting, consistency and proportionality.
- 2.3 In addition the Panel has taken into account the message delivered by the Secretary of State in his speech on Legal Services Reform on the 21 March 2005. When setting out his intentions for reform, the Secretary of State said, "...ahead of the creation of the Legal Services Board, we will be looking closely at any rules of the professional bodies that we believe may not be operating fully in the consumers' interest". The Panel kept this in mind to ensure Rule 11 is subject to proper competition considerations and whether it will operate in the best interests of the public.

3) The Law Society's application

- 3.1 This Advice relates to an application by the Law Society to the Secretary of State dated July 2005 to amend its rule on litigation and advocacy in England and Wales. The background to this referral is that the Law Society has undertaken a substantial revision of its Guide to Professional Conduct of Solicitors (1999) (the Guide).
- 3.2 The Law Society's application is made under Section 29 of the Courts and Legal Services Act 1990 ("CLSA"). In October 2005 the Secretary of State referred the proposal to the Legal Services Consultative Panel ("the Panel") for advice in accordance with the provisions of paragraph 11(1) of Schedule 4 to the CLSA 1990 as amended. The Panel understands that a similar referral has also been sent to the Office of Fair Trading.
- 3.3 A working group was set up by the Panel to consider the rules in detail. The working group identified a number of issues on which it considered further clarification should be sought from the Law Society. The Law Society subsequently provided a response to those issues. The Panel has taken into account the issues raised by the working group and Law Society's response when formulating this advice.

4) The Proposed Amendments

Rule 11 – Litigation and Advocacy

- 4.1 The Law Society informed the Panel that this draft rule captures the fundamental requirements of chapter 21 of the Guide (litigation and advocacy).
- 4.2 The Law Society states that it considers these fundamental requirements to be that solicitors must not deceive or mislead the court (11.01), must obey court orders (11.02), must not be in contempt of court (11.03), must only refuse to act in certain circumstances (11.04), must not make improper payments to witnesses (11.06), must neither make certain statements nor allegations whilst appearing as an advocate (11.05(1)) nor appear as a witness other than in limited circumstances (11.05(2)) and must handle recordings of children's evidence in a certain manner (11.07).
- 4.3 Other issues which are dealt with as fundamental principles in Chapter 21 have been moved to the guidance to the rules – for example, statements to the media, aspects of acting for the prosecution, the defence and in civil proceedings, private communications with the judge, interviewing witnesses and how to deal with a client's perjury.
- 4.4 The Law Society states that some key provisions of Chapter 21 and its Annexes have not been reproduced in draft rule 11. These include the Advocacy Code (Annex 21A in the Guide), which was adopted when solicitors acquired higher court rights of audience. It largely reflects the Bar's code and many of its provisions mirror those that already appear elsewhere in the Guide and the draft rules. For example, provisions which deal with client care (rules 1 and 2), publicity (rule 7), supervision and management (rule 5), competence (rules 1 and 2), discrimination (rule 6) etc are dealt with in more detail elsewhere in both the Guide and the draft rules. The Law Society states that for this reason it was decided to retain only those provisions from the Advocacy Code which do not appear elsewhere in the rules or guidance. These relate to refusing instructions to act as an advocate (11.04), and appearing as an advocate (11.05).

- 4.5 Since the Advocacy Code has not been retained, Practice Rule 16A, which states that all solicitors acting as advocates must comply with the Advocacy Code, has also been removed.
- 4.6 Practice Rule 16B, which relates to choice of advocate, has also been omitted from the draft rules since it covers the same ground as that dealt with in draft rule 2.01 (1)(b) (which provides that a solicitor must refuse instructions where he or she has insufficient resources or lacks the competence to deal with the matter) but its substance is reiterated in the guidance to rule 11 (paragraph 3). This requires solicitors to consider whether the client's best interests would be best served by the solicitor, another lawyer from the same firm or another advocate providing advocacy services. Factors to be taken into consideration include the nature and complexity of the case, the solicitor's experience and ability and the nature of the practice. This is intended to prevent solicitors/firms from offering advocacy services where they are not competent to do so. The draft rule does not, however, include the Chapter 21 provision which expressly prevented solicitors from making it a condition of the retainer that litigation and advocacy services should both be provided by the solicitor's firm or agent.

5) The Panel's Observations

Statements to the Media

- 5.1 The Panel expressed concern that fundamental principles of chapter 21 of the current Guide to the Professional Conduct of Solicitors have been downgraded to the status of guidance in draft rule 11. The relationship with the media was considered as being a particularly significant issue in part due to the potential for being held in contempt of court. The Panel considered it arguable that there may be circumstances when a defence lawyer may require support in the interest of the client, but this may conflict with being in contempt of court. Although paragraph 8 of the guidance refers to rule 11.03 (contempt of court), neither it nor paragraph 18 support a substantive rule. Due to the sensitivity of any issue in the public arena, the Panel sought clarification from the Law Society as to why the guidance had been presented on a stand-alone basis.
- 5.2 In response, the Law Society stated that both paragraphs 8 and 18 of the guidance related to draft rule 11.03 which prohibits solicitors from being in contempt of court and that this should be a matter left to each solicitor's professional judgement.
- 5.3 The Panel was content with paragraph 18 of the guidance (contempt of court). It found paragraph 8 helpful. However, against the background that dealings between solicitors and the media are perceived as an issue of some sensitivity, the Panel remained concerned that there is no substantive rule for this guidance to support. The Panel considered whether these requirements should be prefaced, preferably in a rule which would then be supported by the existing guidance, with a positive requirement for solicitors to exercise their professional judgement in relation to contact with the media and to act in the best interests of their clients.
- 5.4 The Law Society considered that the relevant rules are 11.01 and 11.03 and the core duty of not bringing the profession into disrepute so it did not consider that an additional rule was required to address this point. However, the Law Society strengthened the guidance to encourage solicitors to exercise their professional judgement as to whether it is appropriate to make a statement to the media and, if they decide to make a statement, about its content. This addressed the Panel's

concerns that there should be a statement specifically in relation to advocacy and litigation matters rather than reliance on a core duty.

5.5 The Panel is satisfied with the amended guidance.

Interviewing Witnesses

5.6 The Panel expressed concern that interviewing witnesses was not covered by a substantive rule but only by paragraph 16 of the guidance. Specific areas of concern related to tampering with evidence and interviewing a witness who has given a statement to another party.

5.7. The Law Society considered that these matters were covered by rule 11.01, which prohibits deceiving or knowingly misleading the court. The Law Society suggested that greater clarity could be achieved if the reference to not tampering with evidence was moved from paragraph 16 to paragraph 10 of the guidance (as an example of what might amount to deceiving or misleading the court). The Law Society also explained that as the existing regulations governing the interviewing of a witness for the other side are permissive, the absence of any prohibitive rule would not compromise the principle.

5.8 The Panel found revised paragraphs 10 and 16 went some way towards addressing its concerns. However, it remained concerned to avoid undue influencing by the solicitor of the contents of witness statements made by or for a solicitor's own client. This was not really captured by the prohibition against "tampering with evidence", which is the only wording potentially relating to the solicitor's own side's witness statement.

5.9 The Law Society provided additional clarification to paragraph 11 of the Guidance referring to "attempting to influence a witness, when taking a statement from that witness, with regard to the contents of that statement", as an example of what might amount to deceiving or misleading the court.

5.10 The Panel is satisfied that its concerns have been addressed.

Requirement to draw the Court's attention to any Procedural Irregularity

5.11 The Panel observed that some provisions of Chapter 21 of the Law Society's Guide to Professional Conduct had been omitted from draft rule 11, and in particular that there was an omission of the solicitor's express obligation to draw the court's attention to any procedural irregularity.

5.12 The Law Society agreed to give this issue further consideration and subsequently added an additional sub-paragraph (c) to rule 11.01 (2) to confirm that a solicitor must make the court aware of any procedural irregularity which comes to his or attention.

5.13 The Panel is content with the Law Society's amendment.

Advocates being called to give Formal Evidence

- 5.14 The Panel identified two areas of concern relating to rule 11.05 (2). The first was the risk of a conflict of interest if an advocate in a case also appeared as a witness. The other was the uncertainty as to whether rule 11.05 was only intended to apply to formal evidence and, if so, what does and does not constitute formal evidence for this purpose. The Panel asked for the guidance to clarify whether rule 11.05 was only applicable to formal evidence and asked for specific examples to be given of what would not be construed as formal evidence.
- 5.15 The Law Society's response confirmed that where a conflict of interest arose between the solicitor and client, the advocate would have to stop acting in compliance with the conflict of interest rule.
- 5.16 The Law Society also confirmed that the reference to 'formal evidence' had been deliberately omitted. This followed proper consultation and was intended to give the solicitor greater flexibility when considering whether or not it was appropriate to continue acting when appearing as a witness and also to prevent abuse of an absolute rule which might be used tactically to prevent the solicitor from acting. The Law Society proposed that rule 11.05 (2) should be amended to include acting in litigation as well as advocacy and that giving evidence should be covered in a new draft rule 11.06 under the heading 'Appearing as a witness'.
- 5.17 The Panel found the revisions helpful but requested clarification on the kind of circumstances in which it was envisaged that the rule would apply and whether they arise with any frequency.
- 5.18 The Law Society replied that there was a steady trickle of enquiries, mostly from criminal practitioners, relating in many cases to incidents at police stations or arrests following such events as acid house parties. The draft rule has been reviewed by practitioners to whom it is relevant.
- 5.19 The Panel accepts the Law Society's explanations and is satisfied with revised rules 11.05 and 11.06.

Choice of Advocate

- 5.20 The Panel asked the Law Society to justify the omission of the existing requirement expressly preventing solicitors from making it a requirement of the retainer that the solicitor's firm or agent should provide both litigation and advocacy. The Panel was concerned that this could act against the interests of the client.
- 5.21 The Law Society explained that the reason for this omission was to prevent unnecessary restrictions on practice and to provide solicitors and clients with greater flexibility when negotiating the terms of a retainer. The Law Society had been unable to identify any adverse effects on consumer protection as a result of the existing requirement. The Law Society believes that clients are knowledgeable, are able to negotiate terms of retainer on a basis, which suits them, and are used to buying a package of services. The Law Society also stated that there was no such restriction prior to solicitors obtaining higher court rights of audience, that solicitors with higher rights of audience have obtained a specialist qualification, and that the omission would enable firms to offer a seamless service. The Law Society stated that rule 2 (Client Relations) of the Draft Code of Conduct contains specific requirements with regard to information as to the cost of a matter which must be given at the outset and as the matter progresses. Rule 2 also contains the

requirement to discuss the client's objectives and explain the issues involved and the options available, including whether the firm intends to offer its own advocacy services or to instruct a barrister.

- 5.22 The Law Society proposed that paragraph 3 of the guidance note to rule 11 be amended to state expressly that the cost of advocacy services is a factor which must be taken into account when considering the best interests of a client requiring advocacy services. The Law Society also proposed to amend the guidance note to rule 2 to state that if litigation is contemplated then the provision of advocacy services should be discussed at the outset.
- 5.23 The Panel considered the Law Society's response and found the revisions helpful. However, the Panel remains concerned that whilst sophisticated commercial clients are well able to look after their own interests, lay clients may not be able to exercise an effective choice either at the outset or during the case. The rule may therefore operate otherwise than in the interest of the client and could in some circumstances create a potential to be anti-competitive. Accordingly, the Panel advises that the existing rule be retained.

Requirement to provide witnesses with information about taxation procedures

- 5.24 The Panel sought clarification from the Law Society as to the reasoning behind the omission of the existing requirement to provide witnesses with information about the existence of taxation procedures.
- 5.25 The Law Society explained that this was considered unnecessary because most expert witnesses are professionals who would be able to negotiate their fees and expenses.
- 5.26 The Panel accepts the Law Society's explanation.

Requirement to appear duly robed or wearing suitable clothing

- 5.27 The Panel sought clarification from the Law Society as to the reasoning behind the omission of the existing requirement that solicitors appearing as advocates before the court must be duly robed or wearing suitable clothing.
- 5.28 The Law Society stated that it took the view that this was a matter for the court and not for the regulator.
- 5.29 The Panel accepts the Law Society's reasoning.

Advice to solicitor cautioning against solicitor standing bail for a client

- 5.30 The Panel asked the Law Society to justify the omission of the advice in the existing guidance cautioning solicitors against standing bail for clients, save in exceptional circumstances. The Panel was concerned that standing bail for a client could compromise a solicitor's independence. It also felt that the removal of the advice against standing bail for a client would place pressure on solicitors, particularly those acting in immigration and criminal law matters.

- 5.31 The Law Society explained that it had no evidence to suggest that solicitors wished to invite instructions on the basis that the solicitor would stand bail for the client. The Law Society has revised paragraph 6 of the guidance to re-instate the advice against a solicitor standing bail for a client.
- 5.32 The Panel is satisfied with the Law Society’s explanation and with the revised guidance.

Requirement to comply with ‘properly made’ Court Orders

- 5.33 The Panel noted that rule 11.02 requires a solicitor to comply with any “properly made” court order. The Panel asked the Law Society to explain what is meant in this context by a “properly made” court order and said that this might require additional guidance.
- 5.34 The Law Society said that this was intended to cover situations where the court makes a defective order or an order that it does not have power to make such as ordering the disclosure of information which is protected by legal professional privilege. The Law Society proposed to provide the Panel with concrete examples of such situations. It also proposed to revise the guidance so as to draw attention to the principle that a sealed Court Order is valid unless and until it is varied or set aside and to make it clear that solicitors must think very carefully before acting on the basis that a court order has not been properly made.
- 5.35 The Panel was not entirely satisfied with the rule or with paragraph 18 of the guidance, which suggested that a court order could be regarded as having not been properly made where the court might be thought to have made an error of law, for example, by ordering the disclosure of privileged material. The Panel remained concerned that the rule and guidance suggested that a solicitor is not bound as a matter of professional discipline to comply with an order which he or she considers that the court ought not to have made. Following further discussions, the Law Society redrafted the rule and guidance so as to require solicitors to comply with all orders of the court.
- 5.36 The Panel is content that its concerns have been addressed and is satisfied with the revised rule 11.02 and accompanying guidance.

6) Recommendations

Rule 11 – Litigation and Advocacy in England and Wales

- 6.1 The Panel has given full consideration to this application and advises that the rule should be approved, subject to the recommendations set out below.
- 6.2 The Panel recommends that the existing requirement expressly preventing solicitors from making it a requirement of the retainer that the solicitor’s firm or agent should provide both litigation and advocacy services should be retained.

7) Conclusion

- 7.1 The Panel advises the Secretary of State that the proposed rule 11 of the Law Society’s draft Code of Conduct should be approved, subject to the recommendation set out in paragraph 6.2.

Signature
Lord Justice Moore-Bick,
Chairman of the Legal Services Consultative Panel

Date