

Rule 11 – Litigation and advocacy

Solicitors' Code of Conduct 2007

Professional Ethics

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Please note that a correction was made on 9 January 2008 to guidance note 20 dealing with statements to the press and contempt of court.

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Rule 11 – Litigation and advocacy

Introduction

Rule 11 imposes additional duties on you if you are a solicitor, an REL or an RFL whenever you exercise a right to conduct litigation or act as an advocate. “Court” in this rule has a wide meaning – see rule 24 (Interpretation). References to appearing or acting as an advocate apply when you are exercising rights of audience before any court, not just if you have been granted rights of audience in the higher courts. The rule only applies in a modified form to overseas practice – see 15.11.

Rule 11 – Litigation and advocacy

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) You must not construct facts supporting your client’s case or draft any documents relating to any proceedings containing:
 - (a) any contention which you do not consider to be properly arguable;
or
 - (b) any allegation of fraud unless you are instructed to do so and you have material which you reasonably believe establishes, on the face of it, a case of fraud.

11.02 Obeying court orders

You must comply with any court order requiring you or your firm to take, or refrain from taking, a particular course of action.

11.03 Contempt of court

You must not become in contempt of court.

11.04 Refusing instructions to act as advocate

- (1) You must not refuse to act as an advocate for any person on any of the following grounds:

- (a) that the nature of the case is objectionable to you or to any section of the public;
 - (b) that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public; or
 - (c) that the source of any financial support which may properly be given to the prospective client for the proceedings is unacceptable to you.
- (2) You are not required to act as an advocate:
- (a) under a conditional fee agreement; or
 - (b) if you reasonably consider that you are not being offered a proper fee having regard to:
 - (i) the circumstances of the case;
 - (ii) the nature of your practice; or
 - (iii) your experience and standing.

11.05 Appearing as an advocate

If you are appearing as an advocate:

- (a) you must not say anything which is merely scandalous or intended only to insult a witness or any other person;
- (b) you must avoid naming in open court any third party whose character would thereby be called into question, unless it is necessary for the proper conduct of the case;
- (c) you must not call into question the character of a witness you have cross-examined unless the witness has had the opportunity to answer the allegations during cross-examination; and
- (d) you must not suggest that any person is guilty of a crime, fraud or misconduct unless such allegations:
 - (i) go to a matter in issue which is material to your client's case; and
 - (ii) appear to you to be supported by reasonable grounds.

11.06 Appearing as a witness

You must not appear as an advocate at a trial or act in the litigation if it is clear that you, or anyone within your firm, will be called as a witness, unless you are satisfied that this will not prejudice your independence as an advocate, or litigator, or the interests of your client or the interests of justice.

11.07 Payments to witnesses

You must not make, or offer to make, payments to a witness dependent upon the nature of the evidence given or upon the outcome of the case.

11.08 Recordings of child witnesses' evidence

If you are acting in the defence or prosecution of an accused and you have in your possession a copy of an audio or video recording of a child witness which has been identified as having been prepared to be admitted in evidence at a criminal trial in accordance with the relevant provisions of the Criminal Justice Act 1991 or the Youth Justice and Criminal Evidence Act 1999, you must:

- (a) not make or permit any person to make a copy of the recording;
- (b) not release the recording to the accused;
- (c) not make or permit any disclosure of the recording or its contents to any person except when, in your opinion, it is necessary in the course of preparing the prosecution, defence or appeal against conviction and/or sentence;
- (d) ensure that the recording is always kept in a locked, secure container when not in use; and
- (e) return the recording when you are no longer instructed in the matter.

Guidance to rule 11 – Litigation and advocacy

General

1. If you are a solicitor you are entitled to conduct litigation in any court. You are also entitled to exercise any right of audience which solicitors had immediately before 7 December 1989, provided that your exercise of that right is in compliance with these rules. You are entitled to exercise additional rights of audience in the higher courts if you have obtained a relevant higher courts advocacy qualification under the Higher Courts Qualification Regulations 2000.
2. If you are an REL you can conduct litigation or appear as an advocate provided you are instructed in conjunction with a solicitor or barrister who is entitled to perform that service. The role of the solicitor or barrister is not to supervise you or take responsibility for your work, but to assist the court in the event of a problem arising. You can appear as an advocate in those courts and cases in which all solicitors can exercise a right of audience. Like solicitors, you are eligible to acquire extended rights of audience by obtaining one of the solicitors' higher courts qualifications.
3. If you are an RFL you do not have any rights of audience or right to conduct litigation (or the right to supervise or assume responsibility for the exercise of any such right) other than those rights which are not reserved by law to any category of persons but are open to any individual. The only exception to this is that you have litigation and advocacy rights before Asylum Support Adjudicators and the Asylum and Immigration Tribunal, but only if you do the work as a partner in an MNP, or as a member of a recognised body which is an LLP, or as a director of a recognised body which is a company. See also 12.03(5) and note 4 of the guidance to rule 12 (Framework of practice).

4. When acting for a client requiring advocacy services you should always consider whether the interests of the client would be best served by you, another lawyer from the same firm or another advocate providing these services. Factors to be taken into consideration include the nature and complexity of the case, your experience and ability, the cost of the advocacy service and the nature of your practice. See rule 2 (Client relations) and the guidance to it for fuller information on issues which you should discuss with your client when accepting instructions.
5. If you are a solicitor you are an officer of the court and you should take all reasonable steps to assist in the smooth running of the court but only in so far as this is consistent with your duties to your client. Difficulties are likely to arise, for example, where the defendant client absconds in a criminal case. If the client does fail to attend:
 - (a) in relation to your duty of confidentiality you may properly state that you are without instructions, but may not disclose information about the client's whereabouts; and
 - (b) in relation to your duty to act in the client's best interests, you may consider it appropriate to withdraw from the hearing where, having regard to the client's best interests, you believe you cannot properly represent the client. There may be cases where you would be able to proceed in the absence of your client, for example, where you may infer that the defendant expects you to continue to represent them, or where a legal point can be taken which would defeat the prosecution case.
6. You should be cautious about communicating with judges outside the courtroom, in respect of matters in which you are appearing before them, unless you are invited to do so in the presence of the solicitor or counsel for the other side or party.
7. You should not agree to stand bail for your client except in very rare circumstances. By standing bail you risk becoming too closely involved with your client's situation and this may affect your ability to act independently. It is unlawful for you, or any other person, to be party to a bargain to indemnify a surety for bail.

Attending advocates at court

8. Whenever you instruct an advocate – whether counsel or a solicitor advocate – you will need to decide whether it is in the interests of your client and the interests of justice for you, or a responsible representative of your firm, to attend the proceedings. In reaching this decision you will need to consider what is necessary for the proper conduct of the case, taking into account the nature and complexity of the case and the capacity of the client to understand the proceedings. For example, you, or your representative, should normally attend:
 - (a) where the client is charged with an offence classified pursuant to section 75(2) of the Supreme Court Act 1981 as class 1 or 2 (such as murder, manslaughter or rape);
 - (b) in cases of complex or serious fraud;

- (c) where the client may have difficulty in giving or receiving instructions or in understanding the proceedings, for example if the client is a child, has inadequate knowledge of English, or suffers from a mental illness or some other disability;
 - (d) where the client is likely to disrupt proceedings if the advocate appears alone;
 - (e) where the advocate is representing more than one party to the hearing;
 - (f) where there are a substantial number of defence documents at a trial;
 - (g) where there are a large number of witnesses in the case;
 - (h) on the day on which the client is to be sentenced, particularly where the client is likely to receive a custodial sentence; or
 - (i) where issues are likely to arise which question the client's character or your conduct of the case.
9. Where you decide that an advocate should not be attended you should inform the advocate and deliver a full and detailed brief sufficiently early for the advocate to consider the papers and to decide whether it would be appropriate for the advocate to attend alone. You should also inform the client that the advocate will be unattended and how instructions may be given.

Statements to the media

10. You should exercise your professional judgement as to whether it is appropriate to make a statement to the media about your client's case and, if you do make a statement, about its content. In making these decisions you should consider:
- (a) whether it is in the client's best interests to do so;
 - (b) whether the client has consented to this course of action; and
 - (c) the legal position and, for example whether anything you say might be in contempt of court (see 11.03 and note 20 below).

Deceiving or misleading the court – 11.01

11. Subrule 11.01 makes a distinction between deceiving the court, where knowledge is assumed, and misleading the court, which could happen inadvertently. You would not normally be guilty of misconduct if you inadvertently misled the court. However, if during the course of proceedings you become aware that you have inadvertently misled the court, you must, with your client's consent, immediately inform the court. If the client does not consent you must stop acting. Subrule 11.01 includes attempting to deceive or mislead the court.
12. You might deceive or mislead the court by, for example:
- (a) submitting inaccurate information or allowing another person to do so;

- (b) indicating agreement with information that another person puts forward which you know is false;
 - (c) calling a witness whose evidence you know is untrue;
 - (d) not immediately disclosing a document you have become aware of during the course of a case, which should have been, but was not, disclosed;
 - (e) attempting to influence a witness, when taking a statement from that witness, with regard to the contents of their statement; and
 - (f) tampering with evidence or seeking to persuade a witness to change their evidence. To avoid such allegations it would be wise, when seeking to interview a witness for the other side, to offer to interview them in the presence of the other side's representative.
13. Whilst a person may call themselves by whatever name they choose, you must (in the context of court proceedings) be satisfied that the client is not adopting a different name or date of birth to avoid previous convictions becoming known to the court, or to deceive the court in any other way.
14. If you are acting for a defendant, you need not correct information given to the court by the prosecution or any other party which you know may allow the court to make incorrect assumptions about the client or the case, provided you do not indicate agreement with that information.
15. Where a client admits to having committed perjury or having misled the court in any material matter relating to ongoing proceedings, you must not act further in those proceedings unless the client agrees to disclose the truth to the court.
16. If, either before or during the course of proceedings, the client makes statements to you which are inconsistent, this is not of itself a ground for you to stop acting. Only where it is clear that the client is attempting to put forward false evidence to the court should you stop acting. In other circumstances it would be for the court, and not for you, to assess the truth or otherwise of the client's statement.
17. There are some types of information which you are obliged to disclose to the court, whether or not it is in the best interests of the client to do so. Failure to disclose such information could amount to a breach of 11.01. For example:
- (a) The advocates on both sides must advise the court of relevant cases and statutory provisions. If one of them omits a case or provision or makes an incorrect reference to a case or provision, it is the duty of the other to draw attention to it even if it assists the opponent's case.
 - (b) Except when acting or appearing for the prosecution, if you know of facts which, or of a witness who, would assist the adversary you are not under any duty to inform the adversary, or the court, of this to the prejudice of your own client. However, if you know that a relevant document has been filed in the proceedings and is therefore notionally within the knowledge of the court, you must inform the judge of its existence.

18. You are permitted, even when acting as an advocate, to interview and take statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party. (However, see note 12(e) and (f) above.)

Obeying court orders – 11.02

19. You have a responsibility to ensure that you comply with any court order made against you. Similarly, you must advise your clients to comply with court orders made against them. If you are the recipient of a court order which you believe to be defective you must comply with it unless it is revoked by the court. If your client is the recipient of an order you believe to be defective you must discuss with the client the possibility of challenging it and explain to the client the client's obligation to comply if the order is not overturned.

Contempt of court – 11.03

20. You could, for example, become in contempt of court by making a statement to the press which is calculated to interfere with the fair trial of a case which has not been concluded.

Refusing instructions to act as advocate – 11.04

21. In addition to complying with 11.04 you must comply with rule 6 (Equality and diversity) in your dealings with clients, staff, other lawyers and third parties.
22. Subrule 11.04(2)(b) states that you may refuse to act if you are not being offered a proper fee. In the case of publicly funded matters this means that if the fee likely to be received from the Legal Services Commission is lower than your normal charging rate, you may decline to act.

Appearing as an advocate – 11.05

23. Subrule 11.05 sets out a number of issues relating to the way in which you conduct yourself in court. There may be other restrictions, such as rules of court, which affect the way a case may be presented in court and you should familiarise yourself with these.
24. It is not the intention of 11.05 to prevent you robustly defending your client's position.

Appearing as a witness – 11.06

25. The circumstances in which it will be proper for you to appear as an advocate at a trial or act in litigation when you are also a witness will be extremely rare. Factors you will need to consider include:
 - (a) the nature of the evidence you are being asked to give, its importance to the case and in particular whether it is likely to be contested or is purely formal;

- (b) whether the situation would give rise to a conflict between you or your firm and your client. For example, it would not be appropriate for you to give evidence for another party (or, in a criminal case, the prosecution); and
 - (c) how your client would be affected if, having already accepted instructions to act, you were to stop acting.
26. Provided the evidence is unlikely to be contested on a factual basis, it will normally be acceptable for you to act as an advocate if a member of your firm is to give evidence. For example, if an employee of your firm has advised a client at a police station, and is required to give evidence as to the reasons for advising the client to exercise the right to silence, it would not be improper for you to act as an advocate in the case.
27. You will need to consider your client's interests when asked to act in a matter in which there is a significant risk that you, or a member of your firm, will be called as a witness in the case. You should not accept instructions to act for a client in circumstances where you could not act if you had already been called – for example, if you had witnessed events which were material to the issue being tried. On the other hand there is always a degree of risk that events you witnessed at a police station, such as the client exercising the right to silence or an identity parade, will become an issue at the trial. However this would not normally prevent you appearing as an advocate.
28. Subrule 11.05 would not normally prevent you giving evidence at a pre-trial hearing, for example by making a witness statement which is purely concerned with procedural issues, provided your evidence is unlikely to be contested at the trial.

Payments to witnesses – 11.07

29. There is no objection to your paying reasonable expenses to witnesses and reasonable compensation for loss of time attending court.

Recording of child witnesses' evidence – 11.08

30. The Law Society recommends that you use the following form of undertaking in order to comply with 11.08:

"I/We acknowledge receipt of the recording marked 'evidence of ...'.

I/We undertake that whilst the recording is in my/our possession I/we shall:

- (a) not make or permit any other person to make a copy of the recording;
- (b) not release the recording to [name of the accused];
- (c) not make or permit any disclosure of the recording or its contents to any person except when in my/our opinion it is necessary in the course of preparing the prosecution, defence, or appeal against conviction and/or sentence;

- (d) ensure that the recording is always kept in a locked, secure container when not in use; and
 - (e) return the recording to you when I am/we are no longer instructed in the matter.”
31. Recordings should preferably be delivered to third parties by hand but where this is not possible the recording should be sent by recorded delivery. To avoid the risk of theft the contents of the package should not be apparent from the outside. If you personally collect, or a member of staff personally collects, a recording, you or they should be able to produce a proper form of identification.
 32. Although 11.08 does not specifically define “locked, secure container” a locked car cannot be considered as such and a recording should never be left unattended in a car.
 33. You may be asked to give an undertaking in the form recommended by the Home Office, which is similar to that recommended by the Law Society. As with the giving of any undertaking, you should first ensure that you can comply with its terms.