



The Law Society

Criminal Procedure Rules: impact on solicitors' duties to the client

Practice note

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solicitors

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Status of this practice note

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Introduction

The Court of Appeal in *R v K* has recently underlined the importance of the Criminal Procedure Rules 2005, making it clear that the rules:

'impose duties and burdens on all the participants in a criminal trial, including the judge, and the preparation and conduct of criminal trials is dependent on, and subject to, these rules...'¹

The purpose of this practice note is to provide assistance to the profession in seeking to define the extent of these duties and burdens, and to identify and address the ethical problems that are likely to arise from their imposition. It will examine the following:

1. The solicitor's duty to the court.
2. The solicitor, the client and the court – 'a divided loyalty'.
3. The Criminal Procedure Rules ('CPR').
4. The approach of the court towards solicitors under CPR.

¹ [2006] EWCA Crim 724 at paragraph 6, [2006] 2 All ER (Note) 552

1. The solicitor's duty to the court

Solicitors are officers of the court and have therefore always owed duties to the court. The introduction of the CPR has 'effected a sea change in the way in which cases should be conducted'² by imposing extra duties and burdens upon the criminal practitioner. The rules define with precision the full extent, not only of the duties already owed to the court by solicitors involved in the preparation and conduct of criminal trials, but also those now imposed by the CPR.

The nature of those obligations was described by the House of Lords in *Arthur J.S. Hall and Co. v Simons (AP)*.³ Lord Hope's comments, whilst specifically referring to advocates, are of wider application:

'..it is necessary to appreciate the extent of that duty and the extent to which the efficiency of our systems of criminal justice depends on it. The advocate's duty to the court is not just that he must not mislead the court, that he must ensure that the facts are presented fairly and that he must draw the attention of the court to the relevant authorities even if they are against him. **It extends to the whole way in which the client's case is presented, so that time is not wasted and the court is able to focus on the issues as efficiently and economically as possible.**'⁴ (emphasis added)

The Solicitors' Code of Conduct

The recently issued Solicitor's Code of Conduct effectively mirrors the earlier professional rules governing the solicitor's duty to the court.⁵ Of particular relevance is the following rule:

Rule 11 – Litigation and advocacy

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.

The relevant guidance, entitled 'Obeying Court Orders 11.02', states:

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.

The general guidance to Rule 11 also indicates, in paragraph 5:

² Per Thomas LJ in *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795 at paragraph 24

³ [2000] UKHL 38, [2002] 1 AC 615

⁴ Per Lord Hope at page 715

⁵ The new Solicitor's Code of Conduct entered force on 1 July 2007.

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 insofar as this is consistent with your duties to your client.

2. The solicitor, the client and the court: 'A divided loyalty'⁶

Dual duties

The role of the solicitor when acting on behalf of a client who is actually or potentially the subject of criminal proceedings can be a complex one. As a lawyer the solicitor owes professional duties to his or her client, as well as - as one of its officers - to the court. On occasions these various duties may conflict with each other.

Whilst the court is entitled to expect the solicitor to act towards it with integrity, neither misleading nor deceiving it, the court should not demand that the solicitor in so acting should breach professional duties owed by the solicitor towards his or her client(s). Indeed, as explained below, the solicitor's proper discharge of the duty to their client should not cause him or her to be accused of being in breach of their duty to the court.⁷

The solicitor's core duties

The core duties of a solicitor set the standards that will meet the needs of both clients and society. In balancing their allegiance to the rule of law and the proper administration of justice on the one hand, and working in partnership with a client on the other, criminal solicitors must have in mind the core duties which are set out in Rule 1 of the Solicitors' Code of Conduct:

Rule 1 – Core duties

1.01 Justice and the rule of law

You must uphold the rule of law and the proper administration of justice.

1.02 Integrity

You must act with integrity.

1.03 Independence

You must not allow your independence to be compromised.

1.04 Best interests of clients

You must act in the best interests of each client.

⁶ See Lord Hoffmann in *Arthur J.S. Hall and Co. v Simons (AP)* [2000] UKHL 38, [2002] 1 AC 615 at page 686

⁷ See *Medcalf v Mardell* [2002] UKHL 27 and [2003] 1 AC 120 per Lord Hobhouse at paragraph 55.

1.05 Standard of service

You must provide a good standard of service to your clients.

1.06 Public confidence

You must not behave in a way that is likely to diminish the trust the public places in you or the profession.

Two specific professional obligations require comment. They are the duty to maintain client confidentiality, and the need to avoid a conflict of interest between clients.

Confidentiality

A solicitor is under a professional and legal obligation to keep the affairs of clients confidential and to ensure that all members of his or her staff do likewise.⁸ This duty of confidence is fundamental to the fiduciary relationship that exists between solicitor and client. It extends to all matters divulged to a solicitor by a client, or on his or her behalf, from whatever source. The provisions for dealing with the protection of clients' confidential information are set out in Rule 4 of the new Solicitor's Code of Conduct.

Confidentiality and legal professional privilege

Certain confidential communications, however, can never be revealed without the consent of the client; they are privileged against disclosure. This protection is called legal professional privilege ('LPP').

What communications are privileged?

Not everything that lawyers have a duty to keep confidential is privileged. Only those confidential communications falling under either of the two heads of privilege – 'advice privilege' or 'litigation privilege' – are protected by LPP.

Advice privilege

Communications between a lawyer (acting in his or her capacity as a lawyer) and a client are privileged if they are **confidential** and **for the purpose of seeking legal advice from a lawyer or providing legal advice to a client**.

Merely because a client is speaking or writing to his or her solicitor does not make that communication privileged – it is only those communications between the solicitor and the client relating to the matter in which the solicitor has been instructed for the purpose of obtaining legal advice that will be privileged. Such communications do not need to 'contain advice on matters of law and construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.'⁹

Litigation privilege

Under this head the following are privileged:-

⁸ At the time of writing, Practice Rule 16E of the Solicitors' Practice (Confidentiality and Disclosure) Amendment Rule 2004, in effect since April 2006, applies. From 1 July 2007, when the new Solicitors' Code of Conduct comes into effect, this will become Rule 4.01.

⁹ Per Lord Carswell in *Three Rivers District Council v Governor of the Bank of England (No 6)* [2004] UKHL 48, at paragraph 111, and [2005] 1AC 610 at page 680.

Confidential communications made, **after litigation has started, or is ‘reasonably in prospect’**, between:

- a lawyer and a client
- a lawyer and an agent (whether or not that agent is a lawyer). or
- a lawyer, or his or her client, and a third party

for the **sole or dominant purpose** of litigation, whether:

- for seeking or giving advice in relation to it, or
- for obtaining evidence to be used in it, or
- for obtaining information leading to obtaining such evidence

The importance of the solicitor’s role in the criminal justice system was emphasised by the House of Lords when considering the nature and extent of LPP. In *R v Derby Magistrates’ Court ex parte B* Lord Taylor of Gosforth CJ said:

‘The principle which runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.’¹⁰

In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* Lord Hoffmann describes LPP as:

‘...a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may be afterwards disclosed and used to his prejudice.’¹¹

Conflict of interest

Rule 3 of the new Conduct Rules sets out clearly the provisions for dealing with conflicts of interest. Detailed guidance with specific regard to criminal practitioners is included in the Guidance to Rule 3, which was drafted by the Law Society after close consultation with the Department for Constitutional Affairs and the Legal Services Commission.¹² This guidance recognises the need to balance the solicitor’s duty to the proper administration of justice carefully with his or her duty towards the client, and sets out how to avoid conflicts from arising.

¹⁰ [1996] AC 487 at page 507

¹¹ [2002] UKHL 21 at paragraph 7, and [2003] 1 AC 563 at page 606

¹² See Guidance to Rule 3 – Conflict, Co-defendants, paragraph 24 – 36. This was also published by the Law Society in the Criminal Practitioners’ Newsletter, no 61, July 2005.

How can a solicitor's professional duties to his client conflict with his duty to the court?

A few examples may serve to illustrate the point:

1. If a conflict of interest arises during criminal proceedings between two or more clients represented by the same solicitor, the solicitor must withdraw from one or more clients. This is bound to cause inconvenience to the court and to other parties with consequent financial loss (normally to the legal aid fund).
2. A solicitor may hold factual information (for instance the name and address of a possible witness) which is of crucial importance to a party to the proceedings. When requested, or served with a witness summons, to produce this information the solicitor declines to do so.¹³
3. Professionally proper advice may be given by a solicitor at a police interview which may later be viewed by a court, in changed circumstances, as 'unhelpful', 'obstructive' or 'ill advised'.¹⁴

Whilst, understandably, the court when confronted with one of these problems, may consider itself entitled to an explanation, and frustrated by its absence, in the majority of cases, the court should understand that the solicitor's duty of confidentiality to his or her client absolutely forbids the provision of reasons, because the information sought by the court will be privileged. At most, the solicitor can only inform the court that his or her professional duties prevent their continuing to act and/or providing the information sought. As was recently underlined by Lord Justice Rose in *R v G & B*:

'We think it right, both in principle and pragmatically, that whether a solicitor or barrister can properly continue to act is a matter for him or her, not the court, although of course the court can properly make observations on the matter. ... Absent exceptional circumstances, such as an obvious attempt by a defendant to abuse the system by repeated applications, we think it is unlikely that, if leading counsel tells a judge that he is embarrassed to continue acting, the judge will not permit a change of representation'.¹⁵

¹³ In *R v Derby Magistrates' ex parte B* (1996) AC 487 Lord Nicholls of Birkenhead said, at page 510, 'subject to recognised exceptions, communications seeking professional legal advice, whether or not in connection with pending court proceedings, are absolutely and permanently privileged from disclosure even though, in consequence, the communications will not be available in court proceedings in which they might be important evidence'.

¹⁴ See PACE Code C paragraph 6D.

¹⁵ [2004] EWCA Crim 1368, and [2004] 2 Cr App R 37

3. The Criminal Procedure Rules

In the *Chorley Justices* case Lord Justice Thomas said:

'In April 2005 the Criminal Procedure Rules came into effect. By 15th April they were in force. They have effected a sea change in the way in which cases should be conducted....The rules make clear that the overriding objective is that criminal cases be dealt with justly; that includes acquitting the innocent and convicting the guilty, dealing with the prosecution and defence fairly, respecting the interests of witnesses, dealing with the case efficiently and expeditiously, and also, of great importance, dealing with the case in a way that takes into account the gravity of the offence, the complexity of what is in issue, the severity of the consequences to the defendant and others affected and the needs of other cases. Rule 1.2 imposes upon the duty of participants in a criminal case to prepare and conduct the case in accordance with the overriding objective, to comply with the rules and, importantly, to inform the court and all parties of any significant failure, whether or not the participant is responsible for that failure, to take any procedural step required by the rules.

'Rule 3.2 imposes upon the court a duty to further that overriding objective by actively managing the case.'¹⁶

What do the CPR say?

1.1 The overriding objective:

- (1) The overriding objective of this new code is that criminal cases be dealt with justly.
- (2) Dealing with a criminal case justly includes-
 - (a) acquitting the innocent and convicting the guilty;
 - (b) dealing with the prosecution and the defence fairly;
 - (c) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
 - (d) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
 - (e) dealing with the case efficiently and expeditiously;
 - (f) ensuring that appropriate information is available to the court when bail and sentence are considered; and
 - (g) dealing with the case in ways that take into account -
 - (i) the gravity of the offence alleged,

¹⁶ *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795 at paragraph 24

- (ii) the complexity of what is in issue,
- (iii) the severity of the consequences for the defendant and others affected, and
- (iv) the needs of other cases.

1.2 The duty of the participants in a criminal case:

- (1) Each participant, in the conduct of each case, must –
 - (a) prepare and conduct the case in accordance with the overriding objectives;
 - (b) comply with these Rules, practice directions and directions made by the court; and
 - (c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.

Keeping the court informed whilst protecting the client's rights

It is essential to appreciate that the purpose of Rule 1.2 (1) (c) is to enable the court to control the preparation process and avoid ineffective and wasted hearings. When something goes wrong because of a failure of a defendant to co-operate with his or her solicitors the court should be aware of this and if the solicitor fails to keep the court informed, he or she risks breaching their duty to the court under the provisions of the Rules.

'Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by every means. They also owe a duty to the court and the administration of justice. ... Sometimes the performance of these duties to the court may annoy the client.'¹⁷

The concept of the solicitor apparently putting the court's interests above those of the client has caused many solicitors to question where their duty lies. The answer is to be found in Rule 1.1(2) (c) which indicates that one of the requirements of the overriding objective is 'to recognise the rights of a defendant, particularly those under Article 6 of the ECHR European Convention on Human Rights'.

The relevant rights of a defendant in this context are:

- the presumption of innocence
- the right to silence and privilege against self-incrimination

¹⁷ *Arthur J S Hall & Co. v Simons* [2000] UKHL 38, and [2002] 1 AC 615 per Lord Hoffmann at page 686

- the ‘fundamental human right’¹⁸ to legal professional privilege

This is explicitly explained in the note of the Lord Chief Justice to the Rules where it is stated:

‘The presumption of innocence and a robust adversarial process are essential features of the English legal tradition and of the defendant’s right to a fair trial. The overriding objective acknowledges those rights. It must not be read as detracting from a defendant’s right to silence or from the confidentiality properly attaching to what passes between a lawyer and his client.’

The last of these rights means that a court cannot ask a solicitor to reveal what a defendant has told him or her if it is privileged, unless the defendant consents. Rather, he or she has a duty to the client not to reveal it.

However solicitors **can** clearly be required by the CPR, or by a direction of the court made under its case management duties arising from the CPR, to provide information that will enable the court process to proceed efficiently and expeditiously, but only if in so doing none of the defendant’s rights listed above, is encroached upon.

Informing the client

*R v K*¹⁹ makes it clear that the CPR impose duties and burdens upon solicitors in a criminal trial and that their preparation for and conduct of criminal trials is dependent upon and subject to the CPR.

It is important that clients should be made aware of these duties and the Law Society would advise solicitors to explain to their clients at the outset, and also in the terms of business/retainer letter, that whilst privileged communications can never be divulged to the court without the client’s authority, solicitors are under a duty to provide information to the court which is not privileged and which enables the court to further the overriding objective by actively managing the case.

Informing the court

Therefore, if a solicitor is aware of any significant failure (whether or not the defendant is responsible for that failure) to take any procedural step required by the CPR or any practice direction or any direction of the court, it is neither a breach of the defendant’s right to silence, nor legal professional privilege, for the solicitor to reveal that he or she has been unable to comply with the court’s order.

It would not involve a breach of legal professional privilege for the court to ask the defendant or his or her lawyer to reveal whether instructions have been given, for the purpose of allowing the court to ensure that the case is ready to proceed.²⁰ It would be a breach, of course, for the court to ask what has been said between them.

¹⁸ As per Lord Hoffmann in *Morgan Grenfell*, above

¹⁹ [2006] EWCA Crim 724 at paragraph 6, [2006] 2 All ER (Note) 552

²⁰ See *R v Cowan* [1996] 1 Cr App R 1 at page 9. The Court of Appeal ruled that for counsel to be asked by the trial judge (in accordance with paragraph 3 of the *Practice Direction (Crown Court: Defendant’s Evidence)* [1995] 2 Cr App R 192) if he had advised the defendant concerning adverse inferences in the event of him not giving evidence, did not breach privilege as it did not concern anything confidential.

Courts should be aware that there are difficulties in asking a solicitor to confirm any more than this, for example, whether or not the solicitor has prepared a proof of evidence.

Particular difficulties will arise if a client changes his or her instructions in circumstances where it is proper for the solicitor to continue acting.²¹ If the change in instructions will cause delay, whilst the solicitor must inform the court of the likelihood of delay, privilege will prevent disclosure of the reason for it.²²

Identifying the issues in a case

Both before the coming into force of the CPR, in *R v Gleeson*²³ and since, in the *Chorley Justices* case,²⁴ the Court of Appeal and the Divisional Court have emphasised the duty upon practitioners to identify the real issues in a case early. It has been held that to do so does not offend the right of silence nor the privilege against self-incrimination (*Gleeson*); if a defendant refuses to do so, he can derive no advantage from this, nor 'attempt an ambush at trial':

'The duty of the court is to see that justice is done. That does not involve allowing people to escape on technical points or by attempting, as happened here, an ambush. It involves the courts in looking at the real justice of the case and seeing whether the rules have been complied with by "cards being put on the table" at the outset and the issues being clearly identified.'²⁵

Defence witnesses

Can a court order the defence solicitor or the defendant to disclose of the identity and other details of non-alibi defence witnesses?

Sections 6C and 11 of the Criminal Procedure and Investigations Act 1996 (as amended by s 35 Criminal Justice Act 2003) which specifically require disclosure by the accused to the court and prosecution of defence witness details, at the risk of adverse comment and inference, have yet to be brought into force.

In *R (on the application of Kelly) v Warley Magistrates Court (the Law Society intervening)*²⁶ Lord Justice Laws stated:

²¹ Of course if the change of instructions is such that the solicitor has to withdraw, privilege will prevent him or her disclosing the reasons.

²² If the change of instructions identifies fresh issues in the case, then of course the solicitor has an obligation under the CPR to identify **these** to the court - see below.

²³ [2003] EWCA Crim 3357 at paragraph 36, (2004) Cr App R 29

²⁴ *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795. See also *Malcolm v DPP* [2007] EWHC 363 (Admin)

²⁵ Per Thomas LJ in *Chorley Justices* at paragraph 27

²⁶ [2007] EWHC 1836

‘... it is clear that litigation privilege attaches to the identity and other details of witnesses intended to be called in adversarial litigation, civil or criminal, whether or not their identity is the fruit of legal advice.’²⁷

The Court emphasised the need for a litigant to be able protect the confidentiality of the material he or she, or his or her lawyer, prepares for the presentation of a case, and this need for protection is the rationale for advice and litigation privilege.

‘If there were no confidentiality such as both rights protect, and every litigant were liable to disclose the building blocks of his case stage by stage as they were developed, the scope for witnesses being discouraged, false points being taken, and the truth being distorted would surely be very greatly increased.’²⁸

The Court held the CPR had no authority to allow a court to override LPP unless the main legislation containing the CPR's **vires** conferred such authority expressly or by necessary implication. The relevant provision, s.69 of the Courts Act 2003, contained nothing of the kind and therefore a court had no power to make an order for a defendant to reveal the identity and/or other details of witnesses he or she intends to call.

Sanctions for non-compliance

In reaching its decision in *Kelly*, the Court was influenced by the nature of the original direction for disclosure of defence witness details and the open ended form of the relevant CP Rule. The absence of any sanction for failure to comply with the case management order for disclosure rendered the original order to disclose an **unconditional** order which, as such, infringed LPP.

If the Rules had contained provisions which set conditions upon the right to call live evidence, the privilege attaching to the material would be unaffected. The Court by making such an order would merely be making it a condition of a party's ability to call live evidence at trial, that prior notice of such evidence be provided. It would not mean that the party could be compelled to disclose LPP material – only if he or she wanted to use such material as falls within the order as evidence would the party be required as a precondition to disclose it in advance.

As a consequence of the decision in *Kelly*, the CPR have been amended.²⁹ As the Explanatory Note to the new Rule explains:

‘7.3 Part 3 of the Criminal Procedure Rules 2005 sets out the general duties and powers of the court, and the duties of the parties, relevant to the pre-trial preparation of a criminal case; and the rules in that Part set out the specific powers that the court may exercise for that purpose. However, the rules in that Part of the Criminal Procedure Rules 2005 contained no sanctions for a party's failure to comply with a procedure rule or with a case management direction made by the court. The court's powers to make a costs order in consequence of such a failure, to adjourn the case or, in some

²⁷ paragraph 20

²⁸ paragraph 22

²⁹ *The Criminal Procedure (Amendment No 3) Rules 2007, SI 2007/3662*

circumstances, to exclude evidence or to draw adverse inferences from the late introduction of an issue or evidence, are powers that are conferred by other legislation and under some other procedure rules.’

7.4 In the case of *R (Kelly) v Warley Magistrates’ Court* [2007] EWHC 1836 (Admin), the Administrative Court considered rules 3.5 and 3.10 of the Criminal Procedure Rules and held that the absence of any appropriate sanction within Part 3 rendered ineffectual the case management direction that was in issue in that case. Having considered that judgment, the Rule Committee has decided to amend rules 3.5 and 3.10, and the note to rule 3.5, to make the court’s powers to impose sanctions explicit... .’

The substituted Rule 3.10 provides:

‘3.10 In order to manage a trial or (in the Crown Court) an appeal:

(a) the court must establish, with the active assistance of the parties, what disputed issues they intend to explore; and

(b) the court may require a party to identify:

- (i) which witnesses that party wants to give oral evidence,
- (ii) the order in which that party wants those witnesses to give their evidence,
- (iii) whether that party requires an order compelling the attendance of a witness,
- (iv) what arrangements are desirable to facilitate the giving of evidence by a witness,
- (v) what arrangements are desirable to facilitate the participation of any other person, including the defendant,
- (vi) what written evidence that party intends to introduce,
- (vii) what other material, if any, that person intends to make available to the court in the presentation of the case,
- (viii) whether that party intends to raise any point of law that could affect the conduct of the trial or appeal, and
- (ix) what timetable that party proposes and expects to follow.’

A new case management power has been added as Rule 3.5(6):

‘(6) If a party fails to comply with a rule or a direction, the court may:

- (a) fix, postpone, bring forward, extend, cancel or adjourn a hearing;
- (b) exercise its powers to make a costs order; and
- (c) impose such other sanction as may be appropriate.’

The note to the new Rule 3.5 has also been expanded as follows:

‘At the end of the note after rule 3.5 (The court’s case management powers), insert:

“See also rule 3.10.

The court may make a costs order under:

(a) section 19 of the Prosecution of Offences Act 1985, where the court decides that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party;

(b) section 19A of that Act, where the court decides that a party has incurred costs as a result of an improper, unreasonable or negligent act or omission on the part of a legal representative;

(c) section 19B of that Act, where the court decides that there has been serious misconduct by a person who is not a party.

Under some other legislation, including Parts 24, 34 and 35 of these Rules, if a party fails to comply with a rule or a direction then in some circumstances:

(a) the court may refuse to allow that party to introduce evidence;
(b) evidence that that party wants to introduce may not be admissible;
(c) the court may draw adverse inferences from the late introduction of an issue or evidence.

See also:

section 81(1) of the Police and Criminal Evidence Act 1984 and section 20(3) of the Criminal Procedure and Investigations Act 1996 (advance disclosure of expert evidence);

section 11(5) of the Criminal Procedure and Investigations Act 1996 (faults in disclosure by accused);
section 132(5) of the Criminal Justice Act 2003 (failure to give notice of hearsay evidence).” ’

The new Rules apply in cases in which the defendant is charged on or after 7 April 2008.

What is the effect of the new rules? By virtue of the sanctions now available to it in the new Rule 3.5(6), a court which makes an order for disclosure under the substituted Rule 3.10, does not in so doing infringe LPP. Such an order merely sets conditions on the right to call live evidence.

Practitioners should therefore be aware that if an order has been made for prior disclosure relating to any of the categories set out in Rule 3.10, in the event that they wish to call live evidence, **they must give serious consideration to the consequences of a failure to comply with the order before calling that evidence**. Such failure could result in the court exercising its power to make a costs order,³⁰ for instance, if an adjournment is necessary for the prosecution to run criminal record checks on the witness. Other sanctions are also available, including the power to draw adverse inferences.

³⁰ See part 4 of this Practice Note for the principles to be applied

Whilst the court also has the power to exclude evidence, the Administrative Court in *Kelly* emphasised the need for sanctions to be 'proportionate' and 'no more than might reasonably be required for the proper working of such a regulation.' Mitting J stated 'I am inclined to think that the imposition of an effective sanction, such as a prohibition on relying on the evidence of a witness not previously identified, would require primary legislation'.³¹

Certificates of Readiness

Certificates of Readiness can and do cause problems. Questions such as 'have all necessary steps been taken to have the case ready for trial?', 'what remains to be done?', or 'is anything preventing the case being ready on time?' may bring to light the fact that the solicitor will not be ready for trial because of the defendant's fault; the fact of this state of unreadiness offends none of the defendant's rights, as set out above. It is suggested that any embarrassment to the solicitor's relationship with the client can be avoided by explicitly explaining to the client the duty of the solicitor to the court in such circumstances. This can be done in the initial terms of business, which should be clearly set out in writing and accepted by the client at the start of the retainer.

However, solicitors must carefully consider questions such as 'Is the defendant in contact with his solicitors and confirmed that he will attend his trial?' Whilst the first part of the question is not objectionable, the second part could involve the disclosure of a privileged communication.

Non-attendance at trial

If a client tells the solicitor that he or she is not going to attend the trial, the solicitor is placed in an invidious position as far as the solicitor's duty to the court is concerned, for such information, in all likelihood, will be privileged; in which event the solicitor cannot waive the client's privilege, and nor can the court order him or her to do so.

The general guidance to Rule 11 indicates, in paragraph 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 insofar 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

³¹ paragraph 37

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.

A solicitor should therefore be careful to ensure that he or she advises the client in writing in the initial terms of business/retainer letter (and repeats such advice should it become apparent that the client is, or may be, contemplating non-attendance) that not only is the client under a legal duty to attend the trial, but in the event that without good reason he or she does not attend:

- he or she will commit an offence, and
- can be tried in their absence, and
- if convicted, the Court of Appeal may be slow to allow an appeal

4. The approach of the court towards solicitors under the CPR

In managing the case in accordance with the overriding objective, the court has a duty to deal with the defence 'fairly'.³² Fairness in this context is to be viewed by reference to the reasoning of Lord Hobhouse in *Medcalf v Mardell*:

'It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.

'It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. ... Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.'³³

Whilst these comments refer specifically to advocates in the criminal process, they were considered to have equal application to the 'instructing solicitor' by the Court of

³² See CPR 1.1(2)(b)

³³ [2002] UKHL 27 paragraphs 51 and 52, [2003] 1 AC 120 at page 141

Appeal when Lord Hobhouse's reasoning was recently adopted by the Court in relation to solicitors in the context of the court's wasted costs jurisdiction:

'The role of the independent professional advocate in the administration of justice must be borne in mind and also the need not to undermine it by illegitimate pressures.'³⁴

Withdrawing from a case

If a solicitor has to withdraw from a case, the court should be cautious in pressing the solicitor to explain the reasons for this, for to give such an explanation would require him or her to disclose privileged communications with their client. In *R v G & B* Lord Justice Rose said:

'...it is for counsel and solicitors, not the court, to make that decision in the light of all the circumstances known to them, some of which may not, for reasons of legal privilege or otherwise, be known to the court'.³⁵

Requiring a solicitor to attend court

Similarly the court should be slow to order a solicitor to attend court to answer its questions, particularly if these can be adequately answered by letter. The Law Society is concerned at the practice apparently adopted by some courts which, after notification by a defence solicitor of a failure to take a procedural step required by the CPR, have 'ordered' the solicitor or a partner of the firm to attend court in person (expressly unpaid) to explain the reason for the failure. The Law Society considers such an approach to be unfair; not only is it extremely doubtful that the court actually has power to make such an 'order', the financial cost of complying for instance, by cancelling other appointments, could far exceed that of a wasted costs order, for which the Court of Appeal has set strict guidelines to ensure fairness to the solicitor.³⁶ The preferred approach should be for the solicitor to explain to the court in writing, as fully as his or her duty of confidentiality permits, the reason for the failure, and in the event that the court is not satisfied, it should then consider invoking its wasted costs powers.

In *R (on the application of Howe) v South Durham Magistrates' Court*³⁷ a witness summons was issued against a solicitor with a view to proving through him the identity of a defendant, charged with driving disqualified, for whom he acted, and for whom he had previously acted in the proceedings in which the defendant had been disqualified. Whilst in the specific circumstances the Court indicated that the justices were right to issue the witness summonses, Lord Justice Rose expressed the Court's concern that witness summonses should only be served on solicitors as a 'last resort'. Having referred to the speech of Lord Taylor of Gosforth in *R v Derby*

³⁴ Per Pill LJ in *Re: Mr Harry Boodhoo, Solicitor* [2007] EWCA Crim 14 at paragraph 49

³⁵ see paragraph 19 of *R v G & B* [2004] 2 Cr App R 37, [2004] EWCA Crim 1368

³⁶ See below

³⁷ [2004] EWHC 362 (Admin), [2005] RTR 4

Magistrates' Court ex parte B (quoted above) on the fundamental importance of legal professional privilege to the administration of justice, Lord Justice Rose stated:

'More widely, outside the scope of legal professional privilege, **the maintenance of confidence between lawyer and client is of central importance in our administration of justice.** It is therefore important for prosecuting authorities and Justices³⁸ to note that applications for a summons to serve on a lawyer, with a view to proving the identity of a defendant for whom he or she previously acted, should not become a matter of routine in relation to offences of driving while disqualified, or indeed any other offence.

On the contrary, such a course should, in my judgment, be the route of last resort to be followed only when no other reasonably practicable means of proving identity exists.'³⁹ (Emphasis added.)

Whilst these comments specifically refer to the service of a witness summons with a view to proving identity, they are, in the view of the Law Society, of wider application; for a solicitor to be served with a witness summons to explain a perceived failure to comply with the CPR is highly likely to strike at the 'maintenance of confidence between lawyer and client' which Rose LJ considered to be of such central importance in the administration of justice.

Questioning a solicitor

On the rare occasions that it is considered appropriate for the court to put questions to a solicitor in court, adopting the comments of Lord Justice Rose that the 'maintenance of confidence between lawyer and client is of central importance in our administration of justice', the Law Society would hope that when questioning a solicitor, courts should decide at an early stage whether a wasted costs order is contemplated. If it is contemplated, then the wasted costs procedures set out below should be adopted from thereon.

In summary:

- It is ultimately a matter for the solicitor, not the court, to decide whether he or she can properly continue to act.
- A solicitor cannot be ordered by the court to divulge privileged communications with a client.
- If the court wishes a solicitor to attend before it in the course of a trial, the issue of a witness summons should be the route of last resort, and only in circumstances in which he or she is required to provide material evidence and the court is of the opinion that he or she will not voluntarily attend as a witness.
- If the court is considering making criticism of a solicitor, that solicitor should be invited to attend court and the wasted costs procedures adopted.

³⁸ The Law Society is aware of no reason why this should not also apply to judges in the Crown Court.

³⁹ at paragraphs 41 and 42

Wasted Costs Orders (WCO)

When a court is considering making a WCO it should follow the guidance set out in the provisions of the *Practice Direction (Costs: Criminal Proceedings)*.⁴⁰ Practitioners should familiarise themselves with these provisions. Of particular importance are the following requirements:

- The court must formulate carefully and concisely the complaint and grounds upon which a WCO may be sought.
- The court should allow the solicitor to make representations. The solicitor should formally be told clearly what he or she is said to have done wrong and invited to comment.
- The solicitor alleged to be at fault should be given sufficient notice of a complaint made against him or her, and given a proper opportunity to respond to it.
- The court should make full allowance for the possible difficulty caused by client confidentiality/legal professional privilege for a legal representative in answering criticism.
- Where a legal representative is precluded by legal professional privilege from giving a full answer to any criticism, a court should not make such criticism unless, proceeding with extreme care, it is satisfied that there was nothing that the representative could say, if permitted, to answer the criticism and that it was in all of the circumstances fair to make such criticism.
- The court must be satisfied that there has been an improper, unreasonable or negligent act or omission **and** that, as a result, costs have been incurred by a party. A mere mistake is not sufficient to justify an order - there must be a more serious error. The primary object is not to punish but to compensate.
- The principles of the court's WCO jurisdiction (especially in relation to the solicitor's duties when a client fails to attend trial) have recently been reviewed by the Court of Appeal (Criminal Division) in *Re: Mr Harry Boodhoo, Solicitor*,⁴¹ and practitioners are encouraged to read the Court's judgment.

⁴⁰ [2004] 2 All ER 1070, Part VIII.1: Costs against Legal Representatives

⁴¹ [2007] EWCA Crim 14

Keeping the Law Society informed

The Law Society is aware of the difficulties that are being faced by practitioners whilst the CPR 'bed down'. Different practices are apparently being adopted at different courts. If solicitors encounter problems they are encouraged to bring these to the attention of the Law Society (phone 0207 242 1222) in the hope that a consistent approach can be achieved for all those on whom the burdens and duties imposed by the CPR fall.