



Bossing the rules: StaRs Rule 1.4: “you do not mislead anyone”

23 December 2019

What has changed?

The Solicitors’ Practice Rules 1990 (“SPR”) did not contain any express prohibition on misleading anyone; although, depending on the circumstances, such conduct was likely to have contravened the basic principles. Like today’s principles, these required solicitors not to do anything in the course of practising as a solicitor (or permit anyone to do anything on their behalf) which compromises or impairs (or is likely to compromise or impair) the good repute of the solicitor or the profession or the solicitor’s duty to the court.

Pausing there, it is interesting to note that the 1990 principles expressly recognised that they only applied to things done in the course of *practising as a solicitor*; contrast today’s regulatory climate when many recent high-profile disciplinary cases relate to conduct that is arguably outside the course of practising as a solicitor... but that is a topic for another day.

The SPR did, though, require solicitors to comply with the Law Society’s Code for Advocacy (“LSCA”), which prohibited solicitors from deceiving or knowingly or recklessly misleading the court. This rule was repeated in the Solicitors’ Code of Conduct 2007, and, as with LSCA, this only applied to solicitors conducting litigation or acting as advocates.

Inadvertently misleading the court was not a breach (although, if you discovered that you had inadvertently misled the court, you had to correct that or – if your client objected to your doing so – stop acting).

In 2011, outcomes focussed regulation replaced the 2007 Code and required solicitors to achieve the outcomes of (a) not attempting to deceive or mislead the court; and (b) not being complicit in anyone else deceiving or misleading the court. These rules were essentially a repetition of the LSCA and 2007 Code; inadvertently misleading the court was not a crime and, again, this applied only where the solicitor was conducting litigation or exercising their right of audience.

Fast forward to 25 November 2019. Solicitors are now subject to a rule which says:

“You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).”

This is a substantial change.

What is the issue?

The new rule is totally unqualified. On the face of it, no *mens rea* is required – inadvertently misleading the court

is a breach, regardless of how much care you took to try to avoid that. The words “your client [or] the court...” are meaningless as the addition of “or others” means that the effect of this rule is that you cannot mislead anyone. In addition, unlike previous iterations of this rule, it is not limited to statements made during the course of litigation; nor even in the course of practice.

Although, on the face of it, this may appear to be a sensible rule, it does have a troubling impact on the practice of litigation, for example. How does a litigator deal with a situation where they have authority to accept their opponent’s offer but – acting their client’s best interests – want to try to secure a better deal? They will have to tread very carefully to try to do so without misleading their opponent. Similarly, part of the litigator’s job is to persuade their client’s opponent and the court that their client has a strong case. Is adopting a robust position in correspondence in circumstances where the solicitor has advised the client that there are significant weaknesses with the client’s case misleading the opponent and/or the court? No answer can be found in the guidance.

Is there any guidance?

The SRA published a tranche of guidance notes on 25 November 2019 which they say they *may* have regard to when exercising their regulatory function; however, specific guidance is sparse. The most relevant guidance notes to this issue are: ‘acting with integrity’, ‘public trust and confidence’ and the SRA’s enforcement strategy.

Although the SRA states that it is unlikely to take action where someone has been misled “as a result of a simple error that the... individual has corrected as soon as they became aware of it”, they also describe a case where a firm was subject to a six-figure fine for inadvertently circulating misleading leaflets and including inaccurate information in “claim bundles”. In that case, the firm sent millions of leaflets out, so the SRA considered that the firm’s action had an impact on public confidence. The SRA say that they will not take action where a breach is minor, unlikely to be repeated and where there is no ongoing risk – or where the conduct results from a genuine mistake unless it demonstrates a “concerning lack of judgement”. However, the SRA’s guidance suggest that they consider misleading people to demonstrate a lack of integrity – something which the SRA says is the most serious type of misconduct.

Similarly with conduct outside of practice: the SRA say that the threshold for it to take action outside of practice is high, but that it expects solicitors to comply with their core ethical values (such as acting with integrity) “at all times and in all contexts”.

Solicitors are left in the uncomfortable position where the SRA *could* take disciplinary action for an inadvertent breach if it wanted to and with little specific guidance as to how to comply with the new rules. Much of the guidance issued on 25 November 2019 is vague and general in nature, which is not hugely helpful as nuance is important in this area and practitioners are likely to only be looking for guidance where the answer is not obvious.

Practical tips

It may be sensible for solicitors to take a moment to consider their practice, identify the danger areas where this rule may become relevant to them and think through a plan to ensure the rule is complied with. Some examples of situations faced by litigators are set out above.

It is also important to keep watching out for new guidance to be released and for reported cases that will give further clues to the approach that the SRA will take. A general theme arising from these new rules is that, since the SRA have so much discretion in interpreting the new, shorter rules, solicitors have little choice but to trust in their regulator to act fairly.



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