



LawWorks

LawWorks Clinics Network Conference 2019

Regulatory issues for pro bono

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Policy Context

- Legal Services Act 2007
 - Regulatory objectives
 - Balance of market liberalisation, consumer protection, public interest and professional principles
 - Bespoke regulators and redress system, LSB oversight
- Access to Justice, Legal Aid & Pro Bono
- LawWorks “Policy Voice” – includes responding to SRA & LSB consultations etc





Pro bono & access to justice

- LAPSO & MoJ Review
- *pro bono makes an important contribution to enabling access to justice but it is not – and should not be seen as – an alternative to legal aid. Nor should it become an alternative to funding for the work of law centres and advice agencies*
- Unmet legal needs (1 in 3 have unresolved problems)
- Role of Legal Education/Training (Clinical) and pro bono as “part of being a lawyer”





Current rules

- Current rules sometimes complex and overly restrictive
- Rules not always drafted with pro bono in mind
 - *over-reliance on waivers or concessions*
- SRA guidance not always providing all the answers



1] The current approach

- **Practice Framework Rules 2011**

<https://www.sra.org.uk/solicitors/handbook/practising/content.page>

- *Part 1 sets out the types of organizations and the ways in which solicitors may practise. It contains restrictions which, according to the SRA “reflect” statutory provisions (e.g. LSA 2007 and Solicitors Act 1974) and ensure that “clients and the public have the protections provided for by statute”*



Example: volunteering outside employment

Background

- Firms raised concerns with LawWorks about solicitors volunteering in clinics *outside* their employment
- Focus: on solicitors employed by authorised bodies (i.e. private practice) and in-house



Volunteering outside employment (cont....)

- **PFR 1.1 – ‘gateway’ to legal practise**

*“1.1 You may **practise** as a **solicitor** from an office in England and Wales in the following ways only:*

*(a) as a **sole practitioner** of a **recognised sole practice**; ...*

*(c) as a **manager, employee, member or interest holder** of an **authorised body** ...*

*(d) as a ... **employee** ... of an **authorised non-SRA firm** [e.g. **trademark attorney/Bar**], ... ;*

*(e) as the **employee** of another person, business or organisation, provided that you undertake work only for your employer, or as permitted by Rule 4 (In-house practice).”*

- Both private practice and in-house solicitors who volunteer through clinics come within PFR 1.1(e) and PFR 4 (see Rule 4.16 below)
- Rule 1.1. does not prevent solicitors from practising at the same time in more than one permitted way



Volunteering outside employment (cont....)

- **PFR 4 - in-house practice**

*“4.1 If you are a **solicitor**, ... conducting **in-house practice**:*

*(a) you must not act for **clients** other than your **employer** except in the circumstances in 4.4 to 4.26 ... and where you are able to act without compromising the **Principles** or your obligations under the **SRA Code of Conduct**....”*





Volunteering outside employment (cont....)

“Law Centres, charities and other non-commercial advice services

4.16 *If you are **employed** by a law centre or advice service operated by a charitable or similar non-commercial organisation you may give advice to and otherwise act for members of the public ...*

*... (d)the organisation has indemnity cover in relation to the **legal activities** carried out by you, reasonably equivalent to that required under the SRA Indemnity Insurance Rules.”*





Summary of current rules

1) Solicitors employed by authorised bodies (e.g. law firms)

- As per PFR 1.1 and PFR 4.16, you must be an **employee** of a clinic

2) In-house solicitors

- As per PFR 1.1. and 4.16, you must be an **employee** of a clinic





SRA's interim solution

- See SRA's statement of "comfort" at:
<http://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>

*"If you are an individual solicitor with a current practising certificate .. and are either employed by an authorised body or are conducting in-house practice..., **we will not regard you as being in breach of the PFRs** if you conduct work, whether or not it includes carrying on a reserved legal activity for persons other than your employer - including for members of the public provided that: **[continued on next slide]**"*





Pro bono work and Enforcement - SRA Approach

Statement of our position regarding those working in-house or in private practice and who are also conducting voluntary work for a not-for-profit body or community-interest company

Concerns have been raised by LawWorks (the Solicitor Pro Bono Group) about restrictions on providing pro bono services through a not-for-profit body (NFPB) or community-interest company (CIC) imposed by our rules.

Specifically, Rules 1.1, 2.1 and 4 of the SRA Practice Framework Rules 2011 (PFRs) would normally apply. PFR 1.1 sets out the ways in which a solicitor can practise, including as an employee of a business or organisation, as a sole practitioner or within an authorised body.

We understand there is concern that a volunteering solicitor or a Registered European Lawyer (REL) must become an employee of the NFPB or CIC through which they are providing pro bono services, or become authorised as a sole practitioner in order to comply with Rule 1.1(e), 2.1(e) and Rule 4 of the PFRs. This is because Rule 1.1(c)(ii), (d)(ii) and 2.1(c)(ii), (d)(ii) are not wide enough to permit solicitors and RELs to provide pro bono services through an NFPB or CIC that is not their employer.

This statement is to give comfort to you if you are employed as a solicitor or an REL and want to conduct voluntary pro bono work for an NFPB or CIC outside of your normal practice without becoming an employee of the NFPB or CIC. We want to encourage those willing and able to carry out pro bono work to do so.

What you can do

If you are an individual solicitor with a current practising certificate or an REL and are either employed by an authorised body or are conducting in-house practice (as defined in the SRA Glossary 2011), we will not regard you as being in breach of the PFRs if you conduct work, whether or not it includes carrying on a reserved legal activity for persons other than your employer - including for members of the public - provided that:

1. you do the work on a pro-bono basis and neither you nor your employer receive any remuneration in any form
2. such work is delivered or conducted through an NFPB or a CIC that falls within section 23(2) of the Legal Services Act 2007 (LSA) and which is independent of your employer
3. the recipient of the advice understands that the advice is provided by the NFPB or CIC and that you are conducting the work on behalf of that body;
4. the work is covered by appropriate indemnity insurance
5. the work you conduct is the responsibility of, and you are supervised by, the NFPB or CIC in the conduct of that work

We have previously [issued guidance](#) on when an employer needs to be authorised by an approved regulator because of section 15(4) of the LSA. This is not relevant if you are not carrying out reserved legal activities as part of the pro bono work on behalf of a separate NFPB or CIC.





All change ... April 2019

- “... I want us to help address the problem of **access to justice - the widespread unmet need of the public and small businesses**. People want affordable and relevant services. It makes no sense that solicitors are banned from offering non-reserved legal services, such as legal advice, in the firms that have grown up to meet that need” (Enid Rowlands, Chair SRA Board)
- “Freeing up solicitors to provide some legal services outside of regulated firms. This change is designed to benefit the public by **allowing solicitors to work in the emerging ‘alternative’ legal market** and provide high-quality services.”





All change ... April 2019 (cont...)

- “ ... The consultation contains proposals for more flexible practice. The ways people find, access, and use legal services are changing. In response solicitors, law firms and other organisations are offering new services in more innovative ways and through new business models. **Although there are a core set of ‘reserved activities’ that can only be delivered by individuals regulated by one of the legal regulators, most legal services can be delivered outside of regulation.** That means there is also an expanding alternative legal services market, providing everything from will writing, legal services relating to social welfare, housing and employment, to advice on media law, commercial contracts and tax.”
- “And yet **our existing rulebook restricts where and how solicitors can work.** Solicitors, who are arguably best placed to deliver quality non-reserved legal services, cannot do so easily. This is because solicitors must practise through a firm authorised by one of the legal regulators whenever providing services to the public.”





All change.... April 2019

“What authorisation entitles you to do

Reserved legal activities

9.1 if you are a solicitor with a current practising certificate, or an REL, you are entitled to carry on all reserved legal activities except notarial activities.”



'Freelancing'

"Practising on your own"

10.2 If you otherwise would be, you will not be regarded as acting as a sole practitioner and you will not therefore need to be authorised as a recognised sole practice if:

(a) your practice consists entirely of carrying on activities which are not reserved legal activities; or

(b) any reserved legal activities you carry on are provided ... in circumstances in which you:

(i) have practised as a solicitor or an REL for a minimum of three years since admission or registration;

(ii) are self-employed and practise in your own name...; ...

*(iv) are **engaged directly by the client** with your fees payable directly to you..."*



Don't forget section 15 Legal Services Act 2007!

- Effect of section 15 LSA unclear –
 - *in-house sector treats as a freeze on 'reserved activities'*
 - *'reserved activities' misunderstood*



s.15 LSA (cont...)

“15 Carrying on of a reserved legal activity: employers and employees etc

(1) *This section applies for the interpretation of references in this Act to a person carrying on an activity which is a reserved legal activity.*

(2) *References to a person carrying on an activity which is a reserved legal activity include a person (“E”) who—*

(a) is an employee of a person (“P”), and

(b) carries on the activity in E's capacity as such an employee.

(3) *For the purposes of subsection (2), it is irrelevant whether P is entitled to carry on the activity.*

(4) ***P does not carry on an activity*** (“the relevant activity”) which is a reserved legal activity by virtue of E carrying it on in E's capacity as an employee of P, ***unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is part of P's business.***

(5) ***Relevant services*** are services which consist of or include the carrying on of the relevant activity by employees of P in their capacity as employees of P.”



s.15 LSA (cont...) – SRA

SRA's - Practice Framework Rules 2011

In-house practice

“Pro bono work

4.10 You may, in the course of your *practice*, conduct work on a pro bono basis for a *client* other than your employer provided:

(a) the work is covered by an indemnity reasonably equivalent to that required under the SRA Indemnity Insurance Rules;

(b) ... :

(i) no fees are charged;...

(c) you do not undertake any reserved legal activities, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is not part of your employer's business.”





s.15 (cont...) - SRA Guidance

“Are you providing reserved legal services in your capacity as an employee?”

- *In deciding whether you are providing reserved legal services in your capacity as an employee, you may wish to consider whether, for example, you are required by your employer to carry out the activities in question, are held out as carrying out the activities on behalf of the employer and/or are paid for the time spent doing them. When considering whether you are, conversely, acting independently, it may also be relevant whether you are providing the services during working hours and/or from your employer’s business premises.*
- *These factors are not exhaustive, or determinative, and the question will turn on the facts. However, for example, you are unlikely to be acting in your capacity as an employee where you are doing pro bono work with your employer's permission (but not at their request) by volunteering at a law centre outside working hours, and make it clear that you are acting independently in doing so.”*

(See SRA guidance at: <http://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Does-my-employer-need-to-be-authorised-by-an-approved-regulator-.page>)





s.15 (cont...) - SRA Guidance

“Is the provision of the services part of the business of your employer/body?”

The factors relevant to this question will necessarily overlap with those in [the above slide]. For example, you will want to consider the extent to which the employer is itself involved with the activities (for example, by requiring you to carry them out, or to hold yourself out as acting on their behalf) and factors such as when and where they are carried out. However, you may in addition wish to consider:

- a. whether your employer describes its business as including the relevant services*
- b. how regularly it provides the services, the number of employees that do so and the overall proportion of time spent on providing them*
- c. the extent to which these services complement or enhance the business of your employer*
- d. whether your employer provides management, training or supervision in relation to the provision of these services, or rewards you (directly or indirectly) for doing the work*
- e. **who provides the necessary indemnity insurance cover.***

Once again these factors are not exhaustive or determinative, and you will need to look at the circumstances in the round.”





Pro bono November 2019

- Rule 9 permits volunteering outside employment – *room for misinterpretation in light of s15 LSA?*
- Rule 10 permits practising on your own – *remains to be seen whether of practical benefit to pro bono...*
- Rule 4.10 PFR removed, leaving section 15 LSA
- *SRA guidance – desirable? Parliamentary ‘negative resolution procedure’ ...?*





That's it!

Questions

