In-House Counsel Masterclass

Tuesday 22 November 2016

@mhclawyers
Welcome

Declan Black
Managing Partner
Mason Hayes & Curran
Trends in Complaints against In-House Counsel

Gerard Kelly
Partner
Mason Hayes & Curran
• 9,647 practising certificates at 9 June 2016
Practising status in Ireland 2016

- Law Firms: 72%
- Corporate: 15%
- State: 3%
- Other: 10%
In-house counsel trend in Ireland
Solicitors’ profession in the UK

- 138,905 practising solicitors at September 2016
Practising status in the UK

- Annual Statistics Report 2015

- Private practice: 78.4%
- In-house: 21.6%
Regulatory requirements in Ireland

- The Compendium
  - Solicitors Acts 1954 to 2011
  - Legal Services Ombudsman Act 2009
- Solicitors Accounts Regulations
- Guide to Good Professional Conduct for Solicitors in Ireland
- Legal Services Regulation Act 2015
**UK Regulatory Requirements**

- Solicitors Regulatory Authority (SRA) Handbook
  - Legal Services Act 2007
  - SRA Principles 2011
    - Mandatory principles regulating the conduct of solicitors and their employees
  - SRA Code of Conduct 2011
    - Certain outcomes applicable to in-house solicitors
Snapshot of SRA Principles

Act in best interests of each client

Uphold rule of law

Act with integrity

Independence must not be compromised

Uphold proper administration of justice

Provide proper standard of service
Disciplinary action and in-house counsel

- Extremely limited cases of in-house counsel being disciplined:
  - Do not provide services to the public
  - Rarely handle client money
  - Employers deal with inappropriate behaviour or incompetence through their own disciplinary procedure
Complaints procedure in the UK

• Complaints in relation to service are dealt with by the Legal Ombudsman.

• Complaints in relation to behaviour that indicates serious risk to the public are a matter for the SRA

• The Ombudsman may refer complaints to the SRA on foot of the Memorandum of Understanding
• Solicitor had affair with £550k beneficiary of client’s will

• Anthony Reese Whitwell
  • Failing to disclose to his client that he was engaged in a personal relationship with a beneficiary of her will.
  • Struck off and ordered to pay £56,500 costs
'Moment of madness' solicitors struck off after appeal

Andrew William Shaw and Craig Stephen Turnbull

- Allowed misleading information to be provided to a court to help their client secure a freezing order against a litigant.
- Struck off and ordered to pay £24,000 and £12,000 in costs respectively.
In-house counsel experience

- Alastair Brett (2013)
- Legal director of The Times newspaper
  - Recklessly allowed a witness statement to be served in support of its defence which created a misleading impression
  - Knowingly allowed the court to proceed on the basis of an incorrect assumption as to the facts.
- Appeal UK High Court
- Suspended from practice for 6 months
In-house counsel experience

- Jude Darrel Godson – March 2015
  - Struck off for causing cheques to be drawn upon the account of his employer in favour of himself and providing information to the SRA in connection with an application for a practising certificate which was untrue

- Anna Rachel Goodwin – January 2016
  - Suspended for 18 months for claiming in a job application to have received a 2:1 degree
New Zealand

- 160 complaints from 2006 to 2013
- Nearly a third were against public sector employed lawyers;
- 15-20 were not against in-house lawyers, but against former law firm employees who are currently practising as in-house lawyers;
- As many as 35 or 40 were about in-house counsel who were acting in court proceedings, and where the complaint was brought by the opposing party or their lawyers;
- About a dozen were complaints against in-house counsel for actions taken in their private or personal capacities, such as neighbourhood disputes.
New Zealand

- Common complaints themes:
  - role confusion arising from acting as lawyer for too many entities and not clarifying own role
  - in-house counsel creating the impression he/she was acting for a third party
  - in-house counsel acting as liquidators and confusion about the role caused to third parties
  - in-house counsel acting for someone other than the employer
Australia

- South Australia – Legal profession conduct commissioner
- Most common complaints in 2015:
  - Overcharging
  - Inappropriate behaviour
  - Poor handling
  - Lack of communication
  - Delay
- <1% against corporate practitioners
- >3% against government employees
Australia

- Australian High Court; *Shafron v ASIC*
  - General counsel and company secretary
  - Breach of duty for not advising, or obtaining advice for the company in relation to the disclosure of certain information to the Australian Stock Exchange
  - External solicitors' retainer did not extend to advising on that question.
  - *It is not possible to sever Mr Shafron's responsibilities into watertight compartments, one marked "Company Secretary" and the other marked "General Counsel".*
Irish Approach
Complaints in Ireland

• Inadequate service

• Excessive Fees

• Misconduct
Potential actions by the Law Society

• Reject the complaint
• Investigate the complaint
• Issue a reprimand
• Alternatively:
  • Refer a complaint to the Complaints and Client Relations Committee
  • Refer an allegation of misconduct to the Disciplinary Tribunal
Inadequate services

• Section 8(1) Solicitors (Amendment) Act 1994: “Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, alleging that the legal services provided or purported to have been provided by that solicitor in connection with any matter in which he or his firm has been instructed by the client were inadequate in any material respect and were not of the quality that could reasonably be expected of him as a solicitors or a firm of solicitors…”
**Excessive fees**

- Section 9(1) Solicitors (Amendment) Act 1994: “Where the Society receive a complaint from a client of a solicitor, or from any person on behalf of such client, that a solicitor has issued a bill of costs that is excessive, in respect of legal services provided or purported to have been provided by that solicitor …”
**Misconduct**

- Disciplinary Tribunal

- Section 7(1) Solicitors (Amendment) Act 1960 (as amended):
  Inquiry by the disciplinary tribunal into the conduct of a solicitor on the grounds of alleged misconduct

  - “An application by *a person*…or by the Society for an inquiry into the conduct of a solicitor on the *ground of alleged misconduct* shall…be made to and heard by the Disciplinary Tribunal.”
## Nature of complaints

<table>
<thead>
<tr>
<th>Nature of complaint</th>
<th>No. in 2016 to date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allegations of excessive fees</td>
<td>80</td>
</tr>
<tr>
<td>Allegation of inadequate professional services</td>
<td>307</td>
</tr>
<tr>
<td>Allegations of Misconduct</td>
<td>1129</td>
</tr>
</tbody>
</table>
Gender breakdown: 2016 to date

- 1516 admissible complaints in 2016 to date
Geographical breakdown: 2016 to date
Excessive fees: 2006 to date

Complaints relating to excessive fees

- 06/07
- 07/08
- 08/09
- 09/10
- 10/11
- 11/12
- 12/13
- 13/14
- 14/15
- 15/16
Misconduct

• Delay
• Failure to communicate
• Failure to hand over
• Failure to account
• Undertakings
• Conflict of Interest
• Dishonesty or deception
• Advertising
• Counsel’s fees
**Misconduct: 2006 to date**

Complaints relating to misconduct

![Graph showing complaints relating to misconduct from 2006 to date]
Name and shame

• Check a solicitors record on the Law Society website

• Keith Finnan, Mayo
  • Failing to apply for a practising certificate in a timely manner
  • Censured and order to pay €1,000

• Owen Swaine, Galway
  • Not providing a complete file to the applicant’s new solicitors
  • Censured and ordered to pay €3,000
Sanctions

- Suspension / Strike-off
- Section 60 Solicitors Act 1954 – restriction on employment of person struck off the roll or suspended
  - S60(2) “The Society may grant permission…for such period and subject to such conditions as they think fit, or may refuse to grant such permission.”
In-house in Ireland - Take some examples

• Averments in an Affidavit by an In-house counsel acting in a case against an external solicitor.

• In-house counsel runs a contentious process on employer’s behalf, settlement reached, taxed costs in default of agreement, invoice submitted for more than twice external solicitors costs.
**Appeal**

- A complainant who is dissatisfied with manner in which their complaint was dealt with by the Law Society may refer the matter to the Independent Adjudicator of the Law Society.

- A complainant may appeal a decision of the Committee to the High Court or apply to the Disciplinary Tribunal where a complaint in relation to misconduct is rejected by the Law Society.

- A decision of the Disciplinary Tribunal can be appealed to the High Court within 21 days.
Part 6 Legal Services Regulation Act 2015 – Complaints

Section 50 (1) (c) of the 2015 Act – Misconduct includes:

“where occurring otherwise than in connection with the provision of legal services, would justify a finding that the legal practitioner concerned is not a fit and proper person to engage in the provision of legal services”
Thank you

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Managing Legal Risks: The Role of In-House Counsel

Aideen O’Reilly
Head of Legal
National Asset Management Agency
Legal Services Regulation Act 2015

Paul Egan
Partner
Mason Hayes & Curran
The Law Society of Ireland
Principal Regulatory Committees

- Regulation of Practice Committee
- Complaints and Client Relations Committee
- Education Committee
- Professional Indemnity Insurance Committee
- Reporting of Money Laundering Committee
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The Law Society of Ireland
CCRC agenda
CCRC meetings and decisions

• 6 – 7 ordinary meetings per division (3):
  • 4 lay members, 3 solicitors
  • Resolve complaint
  • Determinations and referrals to SDT
• 1 practising certificate meeting:
  • Conditions on practising certificate
• 1 plenary meeting of all divisions
  • Policy
New regime under 2015 Act

• Broader definition of “misconduct”

• 3-tier structure remains, but different channels for complaints:
  • Complaints made to the Legal Services Regulatory Authority:
    • inadequate and excessive costs complaints to LSRA, with appeal to Review Committee
    • misconduct complaints to Complaints (“Divisional”) Committee
    • 27 members working in divisions of 3
  • Referral to the Legal Practitioners Disciplinary Tribunal
  • Referral or appeal to the High Court

• Time limit for service and costs complaints reduced from 5 to 3 years

• No equivalent of current public right of direct application to SDT
**Complaints procedure**

- Complaint to LSRA
  - Preliminary review for admissibility, attempt at resolution
- Decision
  - on inadequate service or excessive fees – LSRA,
    - appeal to Review Committee, High Court
  - on misconduct, by Divisional Committee, possible referral to LPDT
    - appeal to High Court
- LSRA directions for inadequate service
  - rectify error
  - take action at cost of no more than €3,000
  - transfer documents
  - pay up to €3,000 to client
- LSRA directions for excessive fees
  - waive or refund fees
Divisional Committee directions for misconduct

- perform the legal service (or have it performed)
- participate in a professional competence scheme
- waive or refund fees
- take other action as Committee specifies
- comply with undertaking
- amend or withdraw an advertisement
- pay up to €5,000 to client
- pay up to €5,000 to LSRA towards LSRA costs
- pay up to a further €2,500 to LSRA in case of failure to communicate in a timely manner
**Sanctions available to Tribunal**

- Advice, admonishment or censure
- Directions:
  - participate in a professional competence scheme
  - waive or refund fees
  - complete the legal service, rectify the error
  - take other action as Tribunal specifies
  - transfer documents
  - pay up to €15,000 to client
  - pay Tribunal’s costs
  - pay up to €15,000 into Compensation Fund
- Imposition of conditions on practising certificate
Timeframe for commencement of new regime

- 2017?
Thank you

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Legislative History of the Legal Services Regulation Act 2015

Ken Murphy
Director General
The Law Society of Ireland
Q&A
Date for your diary

In-House Counsel Masterclass on GDPR

Tuesday 31 January 7.30am
Thank you