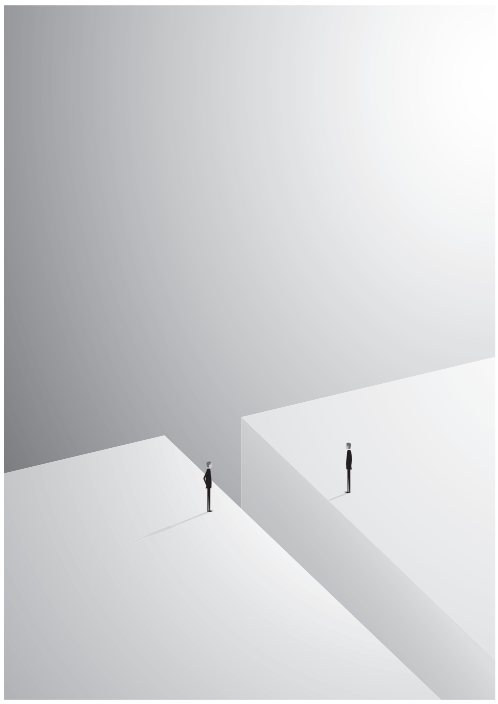
The Law Society

# Legal Compliance Bulletin

Issue 52 November 2017



## About this newsletter

*Legal Compliance Bulletin* is published six times per year. The aim of the publication is to provide up-to-date, very practical information on all those issues covering legal compliance and regulation for solicitors, barristers and practice managers.

## Ethics and compliance: worlds apart?

*Mena Ruparel*

Why is there a yawning gap in our understanding of these concepts?

Read more on page 4

## Another new SRA Handbook: good news, bad news or no news?

*Bronwen Still*

The SRA has firmed up its proposals for the next incarnation of the Handbook: the watchwords are 'flexibility' and 'public protection'.

Read more on page 7

## Matter risk system: 11 years of evidence

*Peter Bennett*

How a simple system can drastically lower your professional indemnity premiums.

Read more on page 10



## Also in this issue...

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# News in brief

## Law Society practice notes

The Law Society has issued a number of new and updated practice notes, available at **www.lawsociety.org.uk/support-services/advice**. Note that from 1 June 2017 the majority of practice notes will be accessible only to those with a My Law Society profile. Signing up is free and simple to do.

### Criminal Finances Act 2017

The new Criminal Finances Act 2017 came into force on 30 September 2017. This note provides guidance on the corporate offence of failure to prevent the criminal facilitation of tax evasion. The new regime brings a risk of criminal liability to solicitors firms, not just for their employees' actions, but for the actions of others with whom they are associated.

### Closing down your practice: regulatory requirements

This updated practice note outlines the regulatory requirements for solicitors to consider when closing down their practice.

## VAT on online property searches

The Law Society is reviewing the practice note on VAT on disbursements following a recent first-tier tribunal decision, which assessed a firm as liable to pay VAT on search fees charged by a third-party search agency. For details, see **www.lawsociety.org.uk/news/stories/vat-on-online-property-searches**.

## Anti-money laundering guidance update

The Legal Sector Affinity Group, which includes the Law Society, has published its draft Legal Sector Anti-Money Laundering Guidance, which takes into account the changes brought about by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The guidance applies to solicitors and replaces the previous anti-money laundering practice note. For details, see **www.lawsociety.org.uk/Policy-campaigns/Articles/draft-anti-money-laundering-guidance**.

## SQE approved by the SRA

The SRA has approved the regulations which bring into force the Solicitors Qualifying Examination (SQE) while 'making changes to bolster assurances around qualifying work experience'. The new regime, which will commence in 2020, requires trainees to pass a two-part exam and undertake two years of work experience at no more than four separate firms, educational institutions or other organisations. The SRA originally suggested final sign-off might be completed by a solicitor or compliance officer from any organisation – even if they did not have first-hand experience of a candidate's competency. Following concerns about the work experience component, the regulator said it had tightened rules on who can sign off work experience. These will require a solicitor outside the organisation to have direct experience of the candidate's work, including undertaking a review of their work. They must also receive feedback from the person supervising the candidate's work; with the compliance officer for legal practice or solicitor to confirm that no issues arose during the period of work experience that raise a question as to the candidate's character and suitability to be admitted as a solicitor.

## GDPR guidance

A new report commissioned by IT provider CenturyLink has found that 75 per cent of law firms are still unprepared for the EU General Data Protection Regulation (GDPR) which comes into force next May, potentially opening them up to large penalties. The Law Society has launched a resources and support website on the forthcoming changes to data protection. See **www.lawsociety.org.uk/support-services/practice-management/gdpr-preparation/gdpr-resources-and-support**.

## Publicising prices online

In 2017, the Legal Services Consumer Panel found that just over one in four potential clients compares legal service providers online (see **www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/How_consumers_are_choosing_Final_2017.pdf**). As

well as information about expertise and legal qualifications, clients want as much clarity as possible about fees – how much the service they need will cost and exactly what that cost covers (and what it does not). Publishing clear, concise information about your prices will make this process easier for potential clients. See the latest advice article and a link to the Law Society's price and transparency toolkit at **www.lawsociety.org.uk/support-services/advice/articles/should-you-publicise-your-prices-online**.

## SRA consultations – 'Looking to the future'

On 27 September 2017, the SRA published two consultations as part of its 'Looking to the future' work: a second consultation on its ongoing Handbook reform, 'Looking to the future: phase two of our Handbook reform', and a separate consultation on price and service transparency, 'Looking to the future: better information. more choice'. The deadline for responses to both consultations is 20 December 2017. For more information, see **www.lawsociety.org.uk/news/stories/sra-consultations**.

## Changes to the solicitor rulebook

Proposals for sweeping changes to the solicitor rulebook would create a wild-west marketplace for legal services, the Law Society has said, as the Solicitors Regulation Authority (SRA) opens two consultations. For details, see **www.lawsociety.org.uk/news/press-releases/the-new-wild-west-uneven-legal-playing-field-recipe-for-consumer-confusion** and the article by Bronwen Still on page 7 of this issue.

## European Insurance Distribution Directive

The SRA is looking for views on its proposals to deal with the European Insurance Distribution Directive when it comes into force next year. The directive means that firms carrying on insurance distribution activities will need to change the way they work from 23 February 2018. The SRA is now consulting on the best way for firms to meet the new requirements. Replacing the Insurance Mediation Directive, the new directive aims to strengthen protections in place for clients, such as improving the information they receive. The consultation, which runs until Monday 20 November 2017, can be found at **www.sra.org.uk/sra/consultations/insurance-distribution-directive.page**.

## Standard of proof applied by the SDT: your views needed

The Solicitors Disciplinary Tribunal (SDT) adjudicates on alleged serious breaches of rules and regulations. As part of a wider consultation later this year, the SDT is expected to review the standard of proof it applies. For details, see **www.lawsociety.org.uk/news/stories/standard-of-proof-applied-by-the-sdt-your-views-needed**.

## LSB regulatory performance assessment consultation: Law Society response

The Law Society has responded to the Legal Services Board (LSB) consultation on a simplification and revision of its approach to assessing the performance of frontline regulators. For details, see **www.lawsociety.org.uk/policy-campaigns/consultation-responses/lsb-regulatory-performance-assessment-consultation-law-society-response**.

## Notification requirements under the Counter Terrorism Act 2008

Part 4 of the Counter Terrorism Act 2008 sets out detailed travel notification requirements for those over the age of 16 who are convicted of certain terrorism offences. For an explanation of these , see **http://communities.lawsociety.org.uk/advocacy/practical-guidance/notification-requirements-under-the-counter-terrorism-act-2008/5062312.article**.

## SRA Handbook

The nineteenth version of the Handbook was published on 1 October 2017, and all the changes in this version came into effect on that date. Amendments have been made to the SRA Minimum Terms and Conditions of Professional Indemnity Insurance (Appendix 1 to the SRA Indemnity Insurance Rules 2013) to remove a barrier to firms who wish to leave SRA regulation and switch to another approved regulator. The effect of the amendment is to remove the obligation on such firms to have run-off cover for claims arising from work done while the insured firm was under SRA regulation. However, it only applies if the firm's new regulator is a signatory to a protocol on terms agreed by the SRA which relates to switching between approved regulators.

## Does my employer need to be authorised by an approved regulator?

The SRA has produced guidance on how s.15 of the Legal Services Act 2007 applies to various organisations that do not operate in the same way as traditional law firms. For details, see **www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Does-my-employer-need-to-be-authorised-by-an-approved-regulator-.page**.

## Parliamentary brief: Financial Guidance and Claims Bill

The Law Society has welcomed the objective of the Financial Guidance and Claims Bill to tackle some of the unscrupulous behaviours of claims management companies (CMCs). It has provided further suggestions on how the government and the Lords scrutinising the bill can tackle current CMC practices. For details, see **www.lawsociety.org.uk/policy-campaigns/public-affairs/news-and-events/parliamentary-brief-financial-guidance-and-claims-bill**.

## SARs

The National Crime Agency has issued guidance for money laundering reporting officers when seeking consent – now referred properly to as a defence – if submitting a suspicious activity report (SAR). For details, see **www.nationalcrimeagency.gov.uk/publications/713-requesting-a-defence-under-poca-tact/file**.

**Lawyerline**

Lawyerline is the Law Society's dedicated helpline for client care and complaints handling issues. If you have any questions about complaints handling please telephone Lawyerline on weekdays between 9am and 5pm on **020 7320 5720**.

# Ethics and compliance: worlds apart?

*Mena Ruparel*

**In practice, the issue of compliance can easily be confused with the issue of ethics, but with the advent of the competence statement solicitors need to put ethics at the heart of their learning and development**

I have picked up publications at the Law Society library that purport to be about legal ethics only to discover that they are wholly compliance-focused. Many legal ethics books look in great detail into the competing ethical theories and philosophies. It is understandably difficult for the busy practitioner to digest these tomes quickly.

It isn't surprising then that so many people mistake compliance for ethics as there is an inevitable crossover between the two areas. There are many issues that are governed solely by the individual solicitor's ethics and not by rules contained within the Code of Conduct or principles. Those are the areas that practitioners need to pay close attention to in the coming months and this is the focus of my recent co-authored book, *How to Be an Ethical Solicitor: Putting the Principles into Practice*.

## Training

When the Solicitors Regulation Authority (SRA) introduced the statement of solicitor competence in March 2015, it was no accident that Section A sets out what was required from a solicitor in respect of ethics, professionalism and judgement. These are foundational characteristics of being a legal professional. It is important that solicitors introduce ethics at the heart of their learning and development and overall competence. Solicitors are required to be able to recognise ethical issues and exercise effective judgement in addressing them (A1 (1)). They should also understand and apply the ethical concepts which govern their role and behaviour as a solicitor.

In any area of law, one can only maintain competence by undertaking a form of learning and development activity. For some, effective training may not require anything more than reading this article; for others, it will be more effective for them to attend a seminar or read a book. For all practitioners, it is important to reflect on one's decision-making and learn from one's mistakes. Ignoring this core competence is not likely to satisfy the SRA that one's ethical competency is at the correct level.

Members of the public and the profession will be surprised to note that the Qualifying Law Degree does not require students to complete a mandatory ethics module, although some universities do teach ethics as an option within the law degree. The Legal Practice Course (LPC) includes legal ethics as a pervasive subject, but this is not taught in any great detail. The Bar Vocational Course has, in the last two years, introduced ethics as a distinct subject.

The focus is generally more on compliance than ethics at the LPC stage. This means that it is possible for a person to qualify as a solicitor with only a basic understanding of what it means to practise law ethically, which is what is required in the statement of solicitor competence. A survey carried out in 2016 showed that 25 per cent of those who responded had never taken any form of ethics training. Many practitioners take the view that they don't need any ethics training – those practitioners may fall foul of the SRA if their training records were ever audited, if they don't fall foul of the Solicitors Disciplinary Tribunal (SDT) first.

Following recent seminars that I have delivered on ethical decision-making, delegates have told me that for weeks afterwards they had been more aware of the daily ethical decisions they made both in and out of practice. Discussing the ethical dimensions of practice makes us acutely aware of them. This mindful practice can only enhance the value we offer to our clients and make us better professionals.

## A question of trust: regulatory objectives

The SRA started to place a great deal of emphasis on the issue of ethics in 2016 when it ran a campaign called 'A Question of Trust'. In that campaign, it canvassed thousands of views from solicitors and the public about the values and standards expected from legal professionals. The findings make interesting reading. The SRA has stated its intention of using those findings to 'refine our approach to how we judge the seriousness of offences and what action we take'. The issue of ethics is going to continue to be central to the new regulatory structure, which is likely to be introduced in 2018.

The SRA started to move away from a system of rules-based regulation in 2007 when it moved towards outcomes-focused regulation (OFR). From an ethical viewpoint, rules-based regulation can produce ethically perverse results. Strict adherence to such a system requires numerous rules to be drafted and interpreted simply – as we note in the book: 'the more corrupt the state, the more numerous the laws' (Tacitus).

It is not possible to draft a rule to regulate every type of behaviour, so the future of legal regulation is moving further into the more flexible OFR regime. This regime places the mandatory principles at the heart of regulation, albeit a slightly different version to the current principles. Regulation concentrates on the right outcomes for the client and not the regulation of specific actions by the solicitor. Those solicitors who qualified before 2007 when OFR was introduced are likely to be more comfortable with the system of rules-based regulation (as that is the regime that they qualified into) than they are with OFR. All solicitors now need to think more about what they are trying to achieve for their clients in order to meet the mandatory outcomes – this leaves a lot of space to think about individual ethical considerations.

The current Code of Conduct sets out that the Principles should always be used as a 'starting point when faced with an ethical dilemma'. As can be seen above, many practitioners will

have no notion of how to progress ethical thinking beyond this, due either to lack of training or the mistaken belief that they somehow know the right answer without the need for any analysis of the possible alternative options.

Principle 2 states that every solicitor should act with integrity. This calls for solicitors either to have intrinsically virtuous characters or to develop the ability to make thoughtful, ethical decisions. The published decisions of the SDT demonstrate that, on occasion, virtuous solicitors act without integrity and are rightly disciplined for those transgressions. It is simplistic to believe that those solicitors who are sanctioned are 'bad' – they are often 'good' people who have made bad decisions.

## SRA warning notice

On 24 August 2017, the SRA issued a warning notice which highlights an area in which solicitors are not making appropriate ethical decisions. The SRA will have regard to the warning notice when exercising its regulatory functions. It behoves all solicitors and those who work in an SRA-regulated entity to give serious consideration to its content.

The notice concerns the way in which solicitors communicate with other people by email and via social media both inside and outside of practice.

As we note in the book, social media portals are regularly used by firms and those who work for law firms in both professional and personal capacities. Due to the informal and fast-paced way in which they are set up, it is easy for regulated people to get carried away with online discussions or comments which can fall foul of the regulator. This is more likely to happen on social media platforms, as these are virtual and accessed in the solicitor's own time and space. It can be easy to forget that solicitors are regulated equally at 11pm online as at 3pm in the office or at court.

The SRA cites examples of such behaviour:

- using language which is intended to shock or threaten; and
- making offensive or abusive comments to another firm or about that firm, its client, or to individuals who are unrepresented.

Importantly, these are behaviours that are not regulated by specific rules. They are OFR areas which require the solicitor to contemplate the principles and his or her own ethics:

- Principle 2: a solicitor is required to act with integrity – this principle can be interpreted in many ways and requires careful consideration which can be missing in the social media sphere.
- Principle 6: the requirement to behave in such a way that solicitors maintain the trust that the public places in the provision of legal services.
- Principle 1: the requirement to uphold the rule of law and the proper administration of justice.

These Principles are all ethics-based rather than rules-based.

By way of example, in August 2017 the SDT dealt with a case where a Muslim solicitor publicly communicated anti-Semitic and/or offensive posts from his personal Facebook account. The solicitor had been admitted for 10 years before the incidents occurred, qualifying under the 2005 rules-based regulatory system.

A member of the public had complained to the SRA about the comment and had warned the solicitor that a report would be made. Having received a warning, the solicitor did not withdraw the comment or apologise which he perhaps should have done, on a proper reflection of what he had written. Instead, he replied: 'Don't read my comments if you don't like them.'

The following year he posted further offensive posts and the SRA received complaints about them. Anyone reading those posts would have been able to see that the person posting them was a senior solicitor and the name of the firm was visible. When the SRA wrote to the solicitor he agreed that upon reflection the posts were offensive and he apologised for them. He did not agree that the posts were anti-Semitic.

The solicitor asserted that the comments were made in his personal capacity and not in connection with his role as a solicitor. Principles 2 and 6 apply to a solicitor's behaviour whether in or out of practice. The matter was referred to the SDT and the solicitor gave evidence that it had not crossed his mind that as a solicitor he should not be writing those comments. This is where some training in ethical thinking could have given the solicitor pause for thought. Before he posted any comments, offensive or otherwise, he should have analysed the impact on the general public, the possibility that the regulator could be involved and the impact on his career.

The solicitor gave evidence that he had not thought whether any comments he made would be publicly available or the implications of that. He was also of the view that he had the right to freedom of speech, even if some people were offended by his views. The SDT stated that 'freedom of speech is not an unqualified right'.

As professionals, solicitors are held to a higher standard than others and this particular solicitor should have taken that into account at the time. The SDT does not seek to restrict anyone's right to free speech, but the solicitor had stepped over the line by advocating violence and, by doing so, had acted without integrity.

*'For the Respondent, a solicitor, to communicate deeply unattractive views publicly (whatever his private thoughts) demonstrated a clear lack of integrity. It was incumbent to keep his extreme views to himself rather than express them in a public forum.'*

The solicitor was fined £25,000 and suspended from practice as a solicitor for 12 months. He was also ordered to pay the costs of the application in the sum of £9,595.

The warning notice followed the release of this decision of the SDT and clarifies the views of the SRA about these types of communications and internal email communications.

Ethical thinking can be instilled by using examples such as the case above. In our book, we use many real-life SDT examples to demonstrate where other solicitors have made mistakes and what can be learned from them. The SRA has ethics training materials on its website that can be downloaded for in-house purposes, and the Law Society has an ethics portal that is accessible on its practice development centre.

Ignore the issue of ethics training at your peril.

**Mena Ruparel** *is the co-author of* How to Be an Ethical Solicitor, *published by Bath Publishing. The book can be purchased at a 20 per cent discount using the code* **mrrb20** *at* **www.menaruparel.com/ethics**.

# The SQE: will it bring higher standards?

*Melissa Hardee*

**The Solicitors Regulation Authority (SRA) announced on 25 April 2017 that it had decided to proceed with the introduction of a centralised Solicitors Qualifying Examination (SQE) at the point of qualification for intending solicitors**

This decision followed two consultations on the proposals of the SRA and widespread opposition expressed in responses to both the consultations across the range of stakeholders.

The SRA's stated intention is that the SQE 'will replace the current system of qualification', its *raison d'être* being that the current system (Qualifying Law Degree (QLD)/Graduate Diploma in Law (GDL) + Legal Practice Course (LPC) + Period of Recognised Training (PRT)) does not ensure that 'qualifying solicitors are all meeting the same, consistent high standards'. Further, the SRA Board reportedly supports 'the development of more routes into the profession', including 'earn as you learn' pathways and 'widening access'. The SRA's justification for choosing a centralised assessment is 'to ensure that all aspiring solicitors, no matter what institution they attended or pathway they took, are assessed against the same high standard of competence': a simple proposition, which, on its face, would seem incontrovertible. However, this simple proposition will involve the wholesale dismantling of the current education and training framework for qualification as a solicitor.

What is being proposed is that the future requirements for qualification as a solicitor will consist of the following elements.

- Successfully passing both Parts 1 and 2 of the SQE (Part 1 being a knowledge test using computer-based testing and Part 2 being an applied skills test. Although the skills of legal writing and legal drafting would be assessed in Part 2, the SRA is now also considering assessing advocacy skills in Part 1 as well).
- A degree or equivalent (or equivalent experience, 'equivalent' meaning equivalent to FHEQ Level 6) – in any case, no requirement for QLD specifically or its current equivalents of the GDL and the CILEx Chartered Legal Executive qualification. Study of law in any academic sense will not be a requirement. Nor will the LPC or Professional Skills Course be required, although, rather illogically, the SRA anticipates that candidates for the SQE will need to do preparatory courses in order to be able to pass both parts of the SQE, even if a candidate has a law degree.
- A two-year period of work experience under supervision of a solicitor or in an entity regulated by the SRA, to be called Qualifying Work Experience – not a training contract and with no specific requirements for what supervision entails, or for training.
- And satisfactory character and suitability, which will be required at the point of admission.

One might be excused for thinking this looks somewhat similar to what we have now – just without regulation, prescription or quality assurance.

When is it likely to happen? The SRA has said that the earliest the SQE will be introduced is September 2020, which it believes is 'doable', but it recognises this may slip.

## Concerns remain about the SQE across the range of stakeholders

Since the announcement in April, the SRA has consulted on new Admission Regulations for admission as a solicitor, and is currently consulting on the proposed transitional arrangements as part of the SRA's Looking to the Future: Phase Two of our Handbook Reforms Consultation, the deadline for responses being 20 December 2017. The SRA is talking about 'a lengthy transitional period' of some 11 years with candidates who start on the existing pathway entitled to complete that pathway. This would mean that candidates who had commenced a QLD, GDL or LPC, or a PRT (previously the training contract) prior to the introduction of the SQE would be able to complete that route to qualification if they chose to do so. Or they could undertake the SQE in order to qualify. In other words, law schools and employers could potentially be running parallel systems for a considerable time.

Meanwhile, the SRA is in the process of selecting the assessment provider for the new SQE, with the appointment expected in 2018. Somewhat controversially, the SRA has indicated that it would permit the assessment provider also to deliver preparatory courses for the SQE, subject to certain safeguards. However, this is still something that it would not permit for the Qualified Lawyers' Transfer Test even without safeguards, because of conflicts of interest.

Although the SRA has made its decision, concerns remain about the SQE across the range of stakeholders: will it work, is it needed, and is the SRA justified in dismantling the current qualification framework, which many believe delivers? A case of 'if it ain't broke, don't break it'. However, on form so far, the SRA looks like it will march on, regardless of these concerns.

**Melissa Hardee** *is the author of the* Legal Training Handbook *and the recently published companion publication,* Legal Training Toolkit, *both available from Law Society Publishing.*

# Another new SRA Handbook: good news, bad news or no news?

*Bronwen Still*

**The Solicitors Regulation Authority (SRA) set out plans in 2016 to revise the entire Handbook. This is taking place in two stages**

The first revision stage was a consultation which took place last year with the results being published in June 2017. This covered:

- the principles;
- the Code of Conduct;
- the Accounts Rules; and
- a proposal to enable solicitors to be employed by non-lawyers to provide non-reserved legal services to the public.

Stage two is now underway with a second consultation being published on 27 September covering other areas of the Handbook.

The resulting changes that will form the new Handbook will not be effective until the autumn of 2018, at the earliest, so firms will at least have the opportunity to reflect on what is to come and to integrate this into future business plans.

This article will highlight the SRA's direction of travel; the changes that are known; what they will mean in practical terms; and what firms need to be thinking about now.

A second article, to be published in the next Bulletin, willl look at the proposed changes to the rest of the Handbook set out in the second consultation.

## What is the SRA's game plan?

The SRA has established a section of its website called 'Looking to the future: flexibility and public protection' in which it sets out its regulatory plans and what it wants to achieve. It can be accessed at **www.sra.org.uk/sra/policy/future/looking-future.page**.

There are various threads that run through the SRA's thinking. The main ones are less prescription, more flexibility, greater innovation in the delivery of legal services and more emphasis on firms and individuals developing their own ethical compass in dealing with problems. Fundamentally, the SRA is continuing to pare back the rules to higher levels of generality to provide firms with maximum flexibility in the way they can practise while trying to ensure adequate public protections: not an easy line to walk.

The concern for most firms is going to be how to use this increased flexibility and, within the broader parameters, what is acceptable and what is not. In theory, it should be possible to apply the principles and decide what behaviour, for example, is 'acting with independence'. In practice, however, this is very difficult to apply to some of the complex situations firms can be faced with relating to issues such as referral arrangements and potential conflicts of interest.

The SRA has promised toolkits to help firms apply the rules and principles to the more complex situations they may face. These are to be published before the new Handbook goes live and promise to focus on case studies and examples of situations that firms are likely to encounter. To a certain extent, it is a case of what goes around, comes around. *The Guide to the Professional Conduct of Solicitors* (1974), which had a long shelf life, was very short on rules (just six practice rules and some accounts rules), but lengthy in terms of narrative on achieving high ethical standards and how this was to be accomplished in various situations. The complexity of practice and the competitive environment in which firms now have to survive is, of course, completely different, but the bedrock remains the same. To an extent, the SRA is returning to this bedrock with its emphasis on the principles.

What is likely to be of comfort to some firms is that the overall focus in the new Handbook is on deregulation and there is no obvious need in the new rules for changed systems and procedures. In particular, the SRA stepped back from the brink, abandoning plans to introduce a new definition of 'client money' which would have required some radical changes to firms' accounting systems.

## The published changes

There are draft rules appended to the SRA's response to the results of the first consultation covering the Principles, Code and Accounts Rules. The SRA has made clear that these are more or less in final form, but may need some further tweaking to align them with the rules in the rest of the Handbook, which are currently subject to consultation.

## The real game changer

There is, however, one major change which has been confirmed. This change will allow solicitors, as employees of entities that are not regulated by a legal services regulator, to provide non-reserved legal services to the public. At present, this is very much restricted by rules 1 and 4 of the Practice Framework Rules which allow in-house solicitors to act only for their employers and those closely associated with their employers. There are very limited exceptions, the largest being solicitors employed by law centres, charities and non-commercial advice centres – which under the Legal Services Act 2007 (LSA) are called 'special bodies' – who can act for the public.

The result of this change will be to allow solicitors to be employed, as such, by any entity or individual so as to provide legal services – such as will-writing or general legal advice – to the public, provided it is non-reserved work. (Reserved legal activities are limited to certain conveyancing and probate activities, litigation and advocacy, notarial services and swearing oaths.)

This was by far the most controversial proposal in the SRA's consultation and was strongly opposed by, among many others, the Law Society. The SRA's intention in allowing this relaxation is to promote wider competition for legal services and to make

them more accessible by both individuals and small businesses. This ties in with the regulatory objective in the LSA of improving access to justice. The SRA also argues that it is illogical that, while the law allows non-reserved legal services to be provided through many different, and often unregulated, organisations (such as will-writing companies and consumer organisations), the rules currently deny the public the opportunity to receive help through such organisations from those best qualified to give it: namely, solicitors.

There are many public protection issues raised by this relaxation and these were flagged up in the consultation responses. The SRA acknowledges that there will need to be a huge public information exercise to try and explain the risks that accompany this new form of legal practice. These risks will include the loss of many protections that usually accompany solicitor advice – such as client money protections, the Compensation Fund, and indemnity insurance cover that meets the requirements of the Indemnity Rules. There is also the possibility of unscrupulous employers taking on solicitors, possibly newly qualified, who have been finding it hard to get work and using them to give a veneer of respectability to an unethical business. How these risks will be dealt with has yet to be revealed.

The relaxation will also undoubtedly increase competition for firms and the decision for many will be whether to set up a separate business which is not SRA-regulated through which to provide their non-reserved legal services.

At present, firms tend to use separate businesses only to provide very specific services which would not generally be considered to be legal services such as estate agency and financial services. The benefits to firms of offering more mainstream legal services through a separate business could include a significant reduction in their annual regulation costs which are based on turnover. Other benefits would include placing more work outside SRA scrutiny. The extent to which the SRA would try to regulate separate businesses through controls on the regulated firm is, at present, something of a guessing game.

## The principles

The principles have been reduced in number from 10 to six, largely because of one of the SRA's stated aims to reduce duplication in the Handbook. Those removed are principles 5 (proper standard of service), 7 (dealings with regulators), 8 (proper governance and risk principles) and 10 (protecting client money and assets). All are dealt with to a greater or lesser extent elsewhere in the Handbook, mostly in the Codes of Conduct and the Accounts Rules.

The remaining principles have been tweaked slightly. For example, the new Principle 4 (previously 2) will now require individuals to act with 'honesty and integrity' rather than just 'integrity', and new Principle 2 (previously 6) talks about upholding 'public trust' and 'public confidence' in the solicitors' profession and the provision of legal services provided by authorised persons.

There is nothing overtly to worry about in these changes, but solicitors do need to be aware of the fact that the SRA is increasingly applying the principles very widely to cover many different situations in disciplinary proceedings. They can apply on their own and also in conjunction with the rules, but they should never be overlooked when the detail of day-to-day conduct problems is being considered.

## The Codes of Conduct

These look very different, the first major change being that there will now be two Codes. The SRA has tried to separate out into one Code how individuals should behave in the context of practice from what is expected of firms, which is set out in the other. Although there is a lot of similarity between the two, the latter self-evidently focuses more on management issues governing how the firm should be run and the need for policies, systems and procedures.

The next obvious change is that the Codes have been pared back and become much more high level. The Code for individuals has been reduced to seven pages and the Code for firms to six pages. The Codes also look very different in that the material has been re-ordered. So initially the task which faces the reader is to discover where different obligations have gone – and even if they still exist. For those who want to discover exactly what has happened to every outcome in the current Code of Conduct, the SRA has produced a 50-page table which tracks all the changes and is accessible at **www.sra.org.uk/sra/consultations/code-conduct-consultation.page#download** (go to downloadable documents, supporting closed documents, Annex 7). However, the table is very complicated to follow and it is probably better if firms just concentrate on becoming familiar with the new Codes.

The Code for individuals is broken down into the following sections:

1. maintaining trust and acting fairly;
2. dispute resolution and proceedings before courts, tribunals and inquiries;
3. service and competence;
4. client money and assets;
5. referrals, introductions and separate businesses;
6. conflict, confidentiality and disclosure;
7. co-operation and accountability; and
8. providing services to the public or a section of the public, covering –
   a. client identification; and
   b. complaints handling.

The provisions in section 8 have been flagged to make it clear that they do not apply to in-house solicitors who provide services for their employer and related bodies. They will, on the other hand, apply in future to employed solicitors providing non-reserved legal work to the public who work for entities that are not regulated law firms.

The Code for firms incorporates most of the above sections in identical or modified form and adds a section on 'Compliance and business systems', a section making managers jointly and severally responsible for compliance with the Code, and a section on the responsibilities of compliance officers for finance and administration (COFAs) and compliance officers for legal practice that has been largely lifted from rule 8.5 of the Authorisation Rules.

A casualty of the paring back process is that the indicative behaviours (IBs) have gone in their entirety. The view taken by the SRA is that these were tended to be viewed as essential requirements for demonstrating compliance and this has restricted the flexibility provided by the outcomes. In short, the SRA believes that firms and individuals should think more for themselves about ethical compliance and look less for prompts. In

place of the IBs, as mentioned above, toolkits and guidance (based around case studies) to deal with specific issues are promised. What these will cover is not yet clear, but the SRA does concede that firms have asked for guidance on 'real and complex issues', such as conflicts and the use of information barriers.

Another change is that the term 'outcomes' has been dropped and replaced with 'standards' to describe the obligations. It seems that the SRA wants to make clear that the obligations in the new Codes are a little more hard-edged than the old outcomes. The drafting bears this out. For example, the current outcome that you must 'not attempt to knowingly or recklessly mislead the court' is reduced to 'you do not mislead or attempt to mislead ... the court'.

One area that does remain largely unaltered is the section dealing with conflicts of interest and the duties of confidentiality and disclosure. The definition of conflict remains the same. This is helpful as it is an area which is closely aligned with the common law and is one of the most difficult issues to deal with in practice.

The new draft Codes are prefaced by a statement that reminds firms that they must comply with relevant legislation such as the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the anti-money laundering and counter-terrorist financing regulations. Unlike the current Code, there is no standard requiring compliance with any specific law.

Finally, in the draft Codes annexed to last year's consultation, the SRA omitted any prohibition on cold-calling. This was evidently a mistake, not a relaxation, and the SRA has been at pains to point out that the prohibition on cold-calling will remain in the new draft Codes.

## The Accounts Rules

The headline-grabbing proposal in last year's consultation was a new definition of 'client money', which would have excluded from the definition money held on account of costs generally. Had this been adopted, this money could have been placed, on receipt, directly into office account. The Law Society and many other respondents to the consultation were vehemently opposed to this proposed change, largely on the grounds of the perceived risks for clients and the Compensation Fund and also the expense that would have been forced on all firms in changing their procedures. As a result, the SRA has decided not to go ahead with this proposal.

Otherwise, the SRA's regulatory mission to remove prescription and duplication is very much in evidence. It states that the new rules are more proportionate – focusing on the key objective of keeping client money safe, rather than prescribing how firms should run their accounts. The new draft rules are, in summary, very concise indeed.

The result is also that the SRA will expect firms to use their professional judgement much more as to what is appropriate in terms of, for example, timescales for actions such as paying in cheques or transferring funds where mixed payments are received. Instead of fixed timescales, the requirement now is that all such actions should be undertaken 'promptly'.

This may sound sensible, but it leaves open the risk that in places the rules tend to be so general and high level that firms could adopt accounting practices that the SRA would regard as unacceptable. With this in mind, therefore, the SRA has, again, promised that a toolkit will be published before the rules take effect to help firms understand what compliance looks like and what certain general terms such as 'fair' and 'prompt' might allow.

The good news for practitioners is that if they continue to use the systems and procedures that they currently operate they will be compliant with the new rules.

**What has changed?**

- The rules comprise just seven pages. They have been compressed into four short parts, these being:
  - general, which deals with application;
  - client money and client accounts – what is client money and how it must be handled, including systems and controls;
  - dealings with other money belonging to clients and third-party managed accounts; and
  - accountants' reports and retention of accounting records.
- Where the only client money held by firms is that for outstanding professional disbursements and fees that they have an obligation to discharge (e.g. experts' fees), there is an exemption from the requirement that this money must be paid into client account. However, clients must be told in advance where and how the money will be held. For firms that only hold this type of client money, this will remove the need to obtain an accountant's report.
- The section dealing with payments to legal aid practitioners has gone. In its place, there is an exemption to the requirement that fees and disbursements must be paid into a client account for payments made by the Legal Aid Authority, which is in fact very much in line with the current rule 19. This does preclude the need, however, for unpaid disbursements to be transferred to a client account.
- The reference to the COFA being jointly liable with the managers has been removed, as the COFA's responsibilities will be covered in the new Code of Conduct for firms and are limited to taking 'all reasonable steps to ensure compliance with the Accounts Rules by the firm and its managers and employees'. This is in line with the COFA's obligations currently set out in the SRA Authorisation Rules.
- 'Cease to hold' accountants' reports which are currently required within six months of a firm closing will no longer be required unless expressly requested by the SRA.
- There is no requirement to have a policy on interest as currently required by rule 22. Firms will instead have to pay a fair sum in respect of interest, although this requirement can be varied by agreement and with the clients' informed consent.
- The SRA is working on proposals for firms to be able to use third-party managed accounts.

Areas that have not changed include the need to carry out three-way reconciliations every five weeks, the requirement not to hold client money where there is no underlying transaction, and the need to account promptly to clients at the end of their matters.

Although the rules are unlikely to take effect until autumn 2018 at the earliest, it is probably worthwhile for COFAs and key accounts staff to become familiar with them now to decide what changes, if any, could be advantageous to their firm in the future.

See w**ww.sra.org.uk/sra/consultations/accounts-rules-review.page#download**. The draft rules are appended as a downloadable document.

**Bronwen Still** *is a director at Infolegal* **www.infolegal.co.uk**.

# Matter risk system: 11 years of evidence

*Peter Bennett*

**How can a very simple system be effective in managing not only professional indemnity risk, but also the many other regulatory and reputational risks around client work? The evidence from one firm is clear**

## The evidence

In 2006 I developed a simple but extremely useful matter-level risk management system which is now used by all of our fee earners (including for non-legal services) at our firm on every new matter.

It takes between two to three minutes for the fee earner to use and has gained the highest level of immediate fee-earner compliance. It is now undertaken 100 per cent of the time – a level of take-up with which I am extremely pleased.

With respect to impact, the system had an immediate, long-lasting and dramatic effect by reducing the number of reported professional liability incidents and, more importantly, professional indemnity (PI) claims. That led to a dramatic reduction in our PI annual premium costs. We have saved Bates Wells Braithwaite (BWB) £6 million since 2006 and over £1 million in 2016 alone when PI premiums went down by a further 35 per cent.

Figure 1 shows what we would have paid had we kept our 2006 premium rating and compares that with our actual payments while Figure 2 shows the impact the new matter-level risk management system had on PI claims needing cash reserves/pay-outs.

Our matter-level risk management system can be applied to any professional services firm in any jurisdiction. In fact it has grown to be an effective means of managing all the main areas of risk (and compliance) and has developed into a bottom-up management information system of unique power.

## The eureka moment

The risk management system was conceived in a 'eureka' moment in 2006. Our PI premiums were very high and getting higher, with a spate of recent large claims.

The first PI renewal after my arrival as chief operating officer (COO) was difficult and expensive. That spurred me to read the solicitors' reports prepared for the PI underwriters on every claim the firm had suffered for 15 years. The reports are detailed – about 10 pages each – and are factual and unbiased. I suspect I may have been the only COO in any law firm who has spent long hours reading these reports in detail!

As I read each one, a clear pattern began to emerge of universal high-level common risk factors. After reading all 15 years of reports, I realised that the risk factors established in my mind after examination of the first 50 per cent had not changed by the time I had finished reading them all.

## Creating the system

The simple multiple choice question screen – originally 10, now 20 multiple choice questions – isolates the 5 per cent of matters that need real management focus. Just as importantly, it identifies the 95 per cent of matters that are routine and low risk that can be dealt with by a light regulatory and management regime.

I was surprised that after nearly 40,000 BWB risk assessments over a 10-year period, danger and high-risk matters for general PI risk accounted for only 3 per cent of BWB cases. Carefully managing those 3 per cent was the difference between insurers paying out £3 million over eight years before we introduced matter-level risk assessment, or paying out nothing in the 10 years since the introduction of matter risk assessment.

A proportionate grading system escalates a matter up the risk management system. At first this was purely driven by a single risk score: one-partner signature; two-partner signature; email notification prompting a discussion on how risk was going to be managed with the risk manager; and inclusion in the management board risk report. Later, a significant number of single answers would produce a specific and targeted response: for example, we ask for an estimate of the total potential liability of a matter and offer a range with the final option being 'over

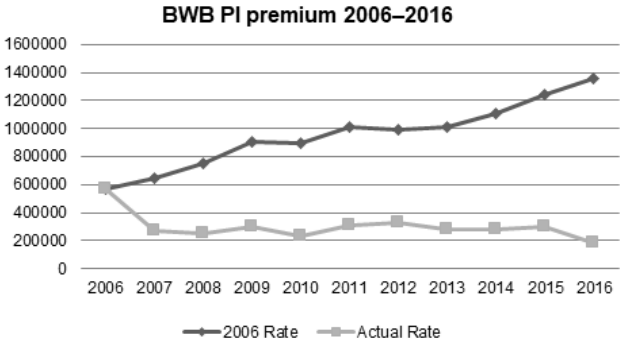


*Figure 1*

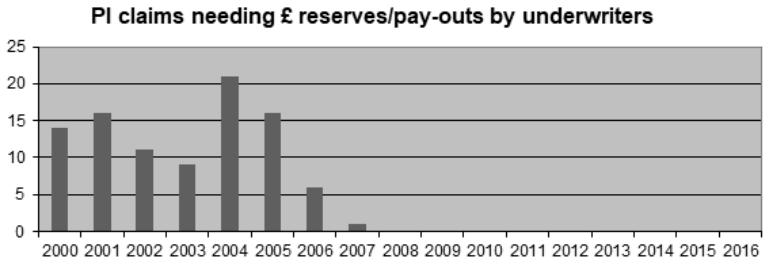


*Figure 2*

£75 million', which is our current PI cover limit. That option is regularly triggered and brings an immediate case close-down.

## Expanding the scope

In the past three years, we have further expanded the scope of the matter risk assessment to cover:

- anti-money laundering risk;
- reputational risk;
- personal sensitive data;
- market sensitive data;
- newsworthy data;
- potential and managed conflict;
- own interest conflict;
- managing the exceptionally large case (fees over £100,000);
- PI liability over £10 million;
- political lobbying activity; and
- financial crime.

All of these are extremely complex areas of risk that are traditionally hard to manage. In each category, once a high risk is identified, a complex set of targeted actions is automatically generated.

**It is the educative power of the risk system that creates the change in attitudes**

Take reputational risk: we proactively prevent any potential brand damage that may come from taking on new clients or matters. The risk management system does not take the decision, but it does isolate the 1 per cent of matters/clients which must be reviewed by our reputational risk group before fee earners are allowed to proceed. Undertaking an in-depth matter risk assessment pre-empts failure and protects the firm's reputation.

## Lawyers do not lie: lawyers will not sign an untrue document

The power of the system is that, if great care is taken with the question, you will get a true answer. A good example is when we introduced a question on personal sensitive data. We asked partners to sign that they were following a '20-point data security plan' if they had answered that the matter being risk-assessed contained 'personal sensitive data as defined under the Data Protection Act'.

In several departments we had uproar as 70 or 80 per cent of all matters required the partner declaration that the department was following the 20-point plan, which included among other things, locking paper files away and only taking them out of the office in a locked container. We were even asked to water down the question. However, once the partners and lawyers began to discuss the fact that the loss of such files would require reporting to the Office of the information Commissioner and it would be a material breach for the Solicitors Regulation Authority (SRA), they realised the importance of both identifying high-risk files and protecting them. That 20-point plan had always been known about, but the new risk management system suddenly made it a reality, and compliance with our systems increased dramatically.

It is the educative power of the risk system that creates the change in attitudes that has transformed risk within BWB and would do so in any firm that used all aspects of the system.

## The second eureka moment

I later had a second eureka moment – a realisation that the matter risk assessment was in effect creating a unique 'barcode' for every matter our partners and fee earners handled.

Individual scores are permanently attached to a matter and become the equivalent of a product barcode. Once there, it can be read and differently weighted for an infinite number of management, risk and reporting purposes.

Each PI, money laundering, data, conflict and reputational risk assessment weights (or ignores) each number of the barcode in a different way to create its own risk result and consequent risk actions.

The list of 'danger' matters in each category of risk becomes our firm's core risk register – excellent evidence of risk management for the SRA.

## Impact on the firm

We have come a long way since we first adopted risk management strategically. Risk management is now a default discipline at BWB. In fact, it has transformed our culture: unlike previously, and in most traditional law firms, individual partners no longer have the authority to override firm policies. More importantly, partners do not want to supersede policies anymore – the system provides evidence and irrefutable information based on business rationale analysis.

Since implementing our risk management system, we have been able to concentrate all of our efforts on identifying and managing the 5 per cent of genuinely high-risk matters. Taken together, the system forces risk management into the day-to-day culture of partners, risk managers and the management board.

After any incident we review whether the risk assessment questions correctly identified the risk and whether the questions needed adapting. No changes were made for the first five years. However, in the last five years we have slowly adapted the questions and weighting for PI risk and added new questions relating to other regulatory risk factors.

Ten years' experience has led to a reduction in the weighting given to the pure size of a transaction and an increase in the questions and weighting given to fee earners operating, intentionally or otherwise, outside their areas of competence.

Adding any new question to the risk questionnaire immediately reveals a whole range of risks that were previously hidden. The risk management system pushes those risks into the knowledge of the central firm management where they can then be managed appropriately.

## Lessons for all firms?

From the very beginning, I knew that lawyers acting outside their area of responsibility were an important risk factor. Many of the changes that we have introduced following incident reviews have aimed to identify different circumstances that tempt lawyers to act beyond their areas of expertise.

We started with a simple 1–5 rated question, where 1 was core expertise and 5 was no expertise. We reinforced that with a

question asking how many similar transactions they had experienced in the last two years.

Our reviews added: 'Is this a service which we promote on our website?' That has picked up lawyers who are about to provide advice that no one in the organisation is experienced to provide, let alone themselves or their superviser.

The next questions concerned whether there was 'any personal involvement' from anyone in the firm.

Then came a question of whether the fees would total over £100,000, including counsel fees? A lawyer may have technical competence on the area of law, but that does not equate to experience of large case management. Ensuring lawyers (or any other professional services providers) do not act outside their areas of expertise is the best way of ensuring you avoid PI claims. At the beginning of this article, I said that the PI claim was one end of a spectrum. A lawyer who operates outside their area of competence is the other and will also lead to a badly executed and managed case that leads to cost over-runs, late delivery, fee disputes, complaints and, above all, a damaged professional reputation.

### Risk, the bar code and artificial intelligence

With every matter barcoded as it enters our system – with part of that barcoding being the lawyer, with a similar approach to risk assessing/barcoding each client – we are building up the 'big data' on which artificial intelligence (AI) can work.

We already compare risk scores with estimates and can send a 'too low an estimate for this level of risk' message, and we have an estimator tool that loads the price for high-risk matters. We could relate the reply to the question 'How busy are you?' back to the estimate; thus, if this fee earner is already at maximum capacity we can either switch the work or (if this fee earner is the only person with the correct expertise) increase the estimate for this scarce fee-earner resource.

Most systems look backwards at events already completed – and that is their limitation. BWB's matter risk assessment acts at the very beginning of the legal process and allows action to be taken to manage potential problems before they occur. At a recent Managing Partner Forum meeting on AI, a maths and engineering specialist linked to Hitachi trains said that in the physical engineering world the big impact of AI is within 'preventative maintenance' – using AI to calculate when a system will break down and fix it before it does. We can do the same in law. Or, I should say, that is what BWB has done over the last 11 years and the system is increasingly effective and is now heading deeper into using aspects of AI.

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# Risk registers: back to basics

*Pearl Moses*

**How you can make your risk assessments more holistic in order to manage uncertainty?**

### What is a risk register?

If you don't already know, a risk register is simply a tool (commonly used in business generally) in which all the potential risks to a firm are identified and assessed according to priority. This monitoring and assessment takes place within a timeframe in order to mitigate those key risks.

It is good practice to record your regulatory risks, or your most serious risks, in a risk register, as the Solicitors Regulation Authority (SRA) takes the view that firms demonstrating a responsible approach will be supported, making the need for enforcement action less likely.

### Regulatory requirements

Risk registers form part of an existing knowledge base around the measurement and management of risk. From a regulatory perspective, risk registers became more prominent after the SRA introduced outcomes-focused regulation (OFR) with the SRA Handbook 2011. This risk-based approach emphasised the need for firms to manage their own risk, not through adherence to strict rules, but to general principles, outcomes and behaviours.

There is no strict obligation to have a risk register, but the SRA Code of Conduct, Chapter 7, outcome 7.3, requires that:

*'... you identify, monitor and manage risks to compliance with all the Principles, rules and outcomes and other requirements of the Handbook, if applicable to you, and take steps to address issues identified'.*

However, it would require several complex and connected documents to achieve the same desired outcome that a risk register would.

### The advantages of a risk register

A risk register can be used as a tool to identify, assess and manage risk to acceptable levels. Actions can then be taken to reduce the probability and potential impact of specific risks. Of all the areas of compliance that the SRA requires you to address, risk management is the least tangible. To avoid spending more time on it than you can afford, you need a well-constructed register that can:

- improve your internal risk management processes;
- heighten risk awareness across the firm;
- prioritise the identification of risks and the mitigation of them;

- operate as a useful management tool for making any strategic decisions for the firm as a whole;
- provide support for the compliance officers for legal practice (COLPs) and finance and administration (COFAs) by ensuring systems are in place to meet the particular obligations of those roles;
- reduce your professional indemnity insurance costs; and
- meet the obligations of the SRA.

However, a risk register should not be a 'tick-box' exercise. It is important that it is regarded both as a 'living' document in the firm's overall risk strategy and a proactive framework for continuously analysing and managing any shifting threats and challenges.

## Strategic planning

In order to capture the diversity of risk, a register should incorporate as many areas of the business as possible. It is a good idea to have a project team made up of heads of practice who will commit to taking ongoing responsibility on the risks facing their area of the business and for reviewing and updating the register in their respective area. This will have the added advantage of embedding risk thinking in all aspects of the organisation.

That said, there are different types of risk, and it would require several complex and connected documents to achieve the same desired outcome that a comprehensive risk register would.

## Types of risk

The first (and probably most important step) is to establish the strategic, operational and regulatory risks faced by your practice.

- **strategic risk** – includes events and their consequences that could affect the viability or success of your practice (these are often triggered by external factors such as the economy or disasters such as flooding, terrorist attack and such like);
- **operational risk** – those events and their consequences that arise from day-to-day business activities such as inefficient procedures or a lack of policies that might expose your practice to the risk of complaints and indemnity claims; and
- **regulatory risk** – events and their consequences that arise as a result of failure to adhere to current or new regulatory and legislative requirements such as SRA Handbook changes, new anti-money laundering regulations or changes to the data protection rules.

There can be some overlap here – some operational risks can become strategic risks if action is not taken to address them. For example, inconsistent client care could have regulatory as well as business implications.

## Process and methodology

The advantage of a risk-based approach is that it creates an holistic understanding of the level and nature of risks and consequent priorities in addressing or mitigating them. With the capture of proper risk information you should have all the detail about the type, frequency, level, impact and cause of the risks in one place.

There are three basic steps:

1. identify the risk – the objective here is to create a comprehensive list of risks and events that might have an effect on your business objectives;
2. analyse and evaluate the risk – to understand the nature and severity of the risk and the consequent priorities in addressing/mitigating them (including various treatment options); and
3. monitor and review the risk – it is important that risks are measured and that action plans are reassessed regularly to ensure progress is made; this includes capturing new and emerging risk on a regular basis.

## Compiling a register

There are various categorisation and structuring tools you can use to formulate your register, but at the very least you want to outline the event, its potential consequences, the level of impact and the level of risk priority. The risk register should be relevant to your business so you should try to use categories that best suit your firm. This could be according to geography, department or business function.

There are sample risk registers available – the SRA has recently compiled a Risk Index that sets out categories against which it will assess the risk profile of firms. The SRA has said it does not expect firms to base their risk registers on its own index, but it does recommend that firms are at least familiar with the categories. Similarly, the *Lexcel Risk Management Toolkit*, fourth edition (Law Society 2017) contains template risk registers to assist firms.

## Scoring and prioritising risk

In terms of assessing the risk, a risk matrix or map can be helpful. Typically, risks are scored to assess:

1. likelihood of risk – scoring could be categorised as 1 (very low, i.e. an event that could possibly occur in rare cases), through to 5 (very high, i.e. an event that will almost certainly occur in most circumstances);
2. risk impact – scoring values tend to be 1 (insignificant, i.e. slight disruption to business), through to 5 (very serious, i.e. extremely damaging either financially or reputationally); and
3. prioritisation – scoring here could apply the traffic-light system to denote priorities such as green for low risk, amber for medium risk, and red for high risk.

## Monitoring the register

To meet the challenge of continuous monitoring and updating the COLP should ensure that any changes feed into the firm's overall compliance plan and that there is buy-in from the strategic leadership within the organisation.

The challenge is to keep the register under review and to regularly capture any new and emerging risks. Any risks that do emerge need to be measured and action plans should be reassessed on a regular basis to ensure that targets are met.

Useful tips for successful monitoring include:

1. ensure that you capture new and emerging risk by keeping up to date – the SRA's Risk Outlook is a useful guide to identifying high-risk issues;
2. it is important that someone owns the risk register (usually the COLP) and co-ordinates all the key players in the organisation to feed into it;
3. make sure the risk register has profile within the firm – it should be on the agenda at management meetings and have the buy-in of the most senior people in the organisation;

4. it pays to involve different departments as well as support staff in contributing to the register – different areas of the business will face different risks; and
5. used properly, the risk register can be a tool not just for monitoring risk, but can reveal strategic opportunities for the firm that might not otherwise be apparent.

### Practical tips

In compiling a comprehensive risk register, take care with the following:

1. be precise – vague descriptions of risk could make the risk incapable of measurement – outline the risks as clearly as possible;
2. take care not to look at risk in silos when preparing a risk register – look at risk assessment across the firm and not just within one function (for example, technology); and
3. ensure you have the right people with the necessary skills to resource the project internally.

Compiling a comprehensive risk register is a lengthy process with a heavy administrative burden, but once it is up and running it can become an invaluable tool.

**Pearl Moses** *is the head of risk and compliance at the Law Society. The Law Society's Risk and Compliance Service offers a subscription member service as well as bespoke advisory solutions for legal businesses.*

# Ethical exits?

*Tracey Calvert*

**What if one or more fee earners decides to leave a firm? Or what if a firm has to be closed down? These events need to be handled with ethical issues in mind**

We hear a lot about law firm management these days with the need for proper governance and appropriate risk management. It is clear that this management requirement extends far beyond dealing with daily challenges and should also include planning for the 'what-if' scenarios. So, what if one or more fee earners decide to leave the firm. Or what if we decide to close the firm down? How these events are handled is of great interest to the regulator, which would expect to see the correct compliance and ethical response.

So, what happens if a fee earner – legally qualified or not – hands in their notice? What are the compliance and ethical repercussions? Luckily, in the UK, this decision normally requires the outgoing individual to serve a period of notice. However, this is not the norm in many other jurisdictions where a fee earner could announce his or her intention to leave and lawfully leave on the same day. At least, in England and Wales, we usually have some breathing space with which to plan for the change ahead.

The ethical starting point will always be the client's best interests with the default position that clients have a legal contract with the law firm and not the individual fee earner (again, not always the case in other parts of the world). This means that a fee earner can neither assume that they can take a client with them, nor can they tell the client during their notice period about where they will be going except upon a client's specific request for such information. The firm's position will be to explain that the fee earner is leaving and to update client care information as to who will take future responsibility for the client's matter and/or supervision of their matter. It is best practice to do this during the notice period.

The concept that the client is in a contractual relationship with the firm triggers a need to protect confidential information. Again, confidentiality is owed to the client by the firm and systems must be designed to protect information from being disclosed except with the client's permission or where such disclosure is legally required.

The departing fee earner will be required to keep all matters confidential (again, unless disclosure is with the client's permission or to meet a legal requirement). In practice, individuals must consider this responsibility on a daily basis both throughout their career and beyond. All information acquired in respect of a client or former client is subject to this duty and an individual can therefore be exposed to disciplinary action for breach. This overriding duty must be factored into all future decisions about whether it is ethical to act for another client to whom a duty of disclosure is required; so every day the fee earner must evaluate and be confident that there is not a conflict between the everlasting duty of confidentiality and this duty of disclosure.

## The ethical starting point will always be the client's best interests

How does the firm manage risks of improper use of confidential information? Should consideration be given to removing access to confidential materials, case management systems and other computer-based records during the notice period? Get this wrong and management may not only be thinking about breaches of ethical duties, but also the risk that data legislation has been breached. With this in mind, and as a more general comment, should firms allow fee earners and other staff access to all databases, or should access be restricted to what is strictly necessary to fulfil employment duties and duties to clients?

Often a fee earner will be subject to restrictive covenants designed to prevent him or her from acting for clients of the firm. This may prevent the individual from approaching clients after they have left the firm (not necessarily unethical) and may be a discussion that should be had during the notice period. It is perhaps worth making the point that, while enforcement of a contractual term would be a matter for the courts, from a regulatory perspective the client's best interests must always be borne in mind.

What if we are not talking about one individual leaving the firm, but the departure of a whole team or department? This is not so unusual these days and clearly the larger the move, the more likely it is that the team will want to bring a client base to its new home. Again, this requires careful management on both the part of the managers of the original firm and the team that is leaving.

**This management requirement extends far beyond dealing with daily challenges and should also include planning for the 'what-if' scenarios**

In these circumstances, it is not only necessary to discuss the client care, confidentiality and contractual issues already covered. This also needs to be viewed as a resource issue. In other words, does a larger-scale change mean that the firm no longer has the competence to provide a proper standard of service to the clients? Who will be left to act for the firm's clients? Can their matters be adequately supervised? The firm should consider whether it needs to facilitate a move of client files on the basis that it is no longer able to provide an adequate service.

The departure of a team, with its collective fee-generating capacity, may also have a significant impact on the financial viability of the firm. The Solicitors Regulation Authority (SRA) requires evidence that such considerations are factored into the firm's risk strategies. If a conclusion is reached that the firm is no longer viable, then this fact must be notified to the SRA (a specific outcome in the SRA Code of Conduct) and steps must be taken to consider how the firm should restructure or even whether it must close down.

Closure of a practice, whether this is by agreement or because of a risk-crystallising event, should never be a total surprise to the firm's owners. The SRA expects there to be an orderly transition (such as through a merger or purchase by another firm), or orderly wind-down and closure. There should be transparency of action and, again, a consideration of the clients' best interests. In other words, the SRA wants to be forewarned and it wants to be assured that no clients are put at risk because of the method of closure. Some regulatory, ethical and risk question to bear in mind are:

- Have the firm's insurers been notified?
- Is it necessary to make arrangements for professional indemnity insurance (PII) run-off cover (i.e. on closure without a successor practice in place)?
- Have all current clients been notified and will there be a scheme in place to arrange transfer of current matters, either to a successor practice or upon client instructions?
- In fact, and with the preference for pre-planning, is there a decision not to take on new matters after a certain date and how is this communicated?
- Have all former clients who may have an interest in the decision been notified?
- Has work commenced to deal with balances on client account, including sums held because of undertakings and retentions, etc?
- Have preparations begun to produce final accounts?
- Have all relevant third parties been notified?
- Have suitable arrangements been made to keep data and archived files safe and secure?
- What decisions must be made and communicated to staff, such as in respect of redundancy notification and pay, etc?

Both the SRA and the Law Society provide guidance to support solicitors facing the ethical and other dilemmas arising from the circumstances mentioned in this article. For example, the SRA has guidance on 'Protecting and maintaining client confidentiality' that gives pointers to dealing with high-risk scenarios such as merger and acquisition discussions, and the Law Society has produced a practice note on closing down your practice and regulatory requirements, and others on subsidiary but related topics such as file retention and professional indemnity insurance.

Not everyone wants to plan for the worst-case scenarios, or even sometimes for forced changes, yet this is a regulatory expectation of the managers and the owners of authorised firms. It is prudent to include such topics in your risk discussions.

**Tracey Calvert** *is a compliance consultant at Oakalls Consultancy Ltd* ***tcalvert@oakallsconsultancy.co.uk***.

# Events

## Anti-money laundering and financial crime conference 2017

**Date:** 22 November 2017
**Time:** 8.30am–5.30pm
**Venue:** Etc Venues, 155 Bishopsgate, Liverpool Street, London EC2M 3YD
**Cost:** from £250
**SRA competence:** A2

Speakers from the profession, government, supervisory and law enforcement agencies will explain the current areas of high risk and the latest criminal methodologies they are aiming to tackle. Interactive breakout sessions will give delegates the opportunity to find out about the implications of topical issues for their businesses.

## MLRO networking groups

**Dates and venues:** see box
**Cost:** Free
**SRA competency:** A2

The Law Society is running a series of free money laundering reporting officer (MLRO) regional networking groups. There have been major changes in financial crime and anti-money laundering (AML) compliance over the past year, and further changes lie ahead. These seminars are designed to keep MLROs up to date with the latest trends and developments while facilitating discussions between local law practices about the challenges of AML compliance and enabling the sharing of good practice.

## Risk and Compliance Annual Conference 2018

**Date:** 16 March 2018
**Venue:** Victoria Park Plaza

The Risk and Compliance Service is delighted to announce its Annual Risk and Compliance Conference. The conference will examine the current compliance issues affecting firms and legal departments and features a mix of plenary sessions and a choice of concurrent workshops that will help you achieve best practice in compliance.

Early booking fees apply before 16 February 2018.

For more information about all the above events call 020 7316 5700 or email **events@lawsociety.org.uk**.

## Westminster Legal Policy Forum: quality assurance and standards in legal services – professional competence, advocacy standards and consumer protection

**Date:** 29 November 2017
**Venue:** Sixty One Whitehall, London SW1A 2ET

With a focus on the priorities for ensuring quality and upholding standards in the legal sector this seminar looks at:

- quality assurance and standards across the legal profession;
- professional standards, continuing competence and options for regulating advocacy;
- improving consumer protections and outcomes – latest on price transparency and redress;
- the future for complaints procedures; and
- next steps for the implementation of the recommendations within the Competition and Markets Authority's legal services market study – including transparency for consumers through greater availability of information on pricing, quality of services, redress and competitor firms.

To book call 01344 864796 or email: **delegate.relations@forumsupport.co.uk**.

## Dates for your diary

**MLRO networking groups**
29 November 2017 – Nottingham
30 November 2017 – Newcastle
7 December 2017 – Manchester
11 December 2017 – Exeter
12 December 2017 – London

For information on pricing and registration, contact Law Society events: email **events@lawsociety.org.uk** or telephone 020 7316 5700.

## Next issue

The next issue will be published in January. Some of the topics covered will include:

- Price transparency: the new proposals
- Criminal finances and tax evasion
- SRA's phase two: key changes
- What to expect in compliance in 2018
- Supervision cases: the latest


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