PROFESSIONAL PRACTICES ALLIANCE SEMINAR REPORT

"Dealing with Rogue Partners and Partner Misconduct: Legal, Regulatory, Disciplinary and Best Practice issues for Firms and their Partners"

6 November 2014

A. INTRODUCTION

1. "Even in the best run law firms things can go wrong; that does not necessarily mean that…the firm is badly run": this was a statement made by one of the panellists at the Professional Practices Alliance interactive breakfast seminar on Thursday 6 November 2014. The panel included John Machell QC of Serle Court, Jenny McKeown of Maurice Turnor Gardner LLP and Jayne Willetts of Jayne Willetts & Co, and was chaired by Clare Murray of CM Murray LLP.

2. Firms need to be prepared should a rogue partner emerge from the shadows; this seminar addressed how firms might deal with the potential risk of partner misconduct, from a legal, regulatory, disciplinary and best practice perspectives.

3. This report summarises some of the key issues that came out of the seminar. The contents of this report are for general information purposes only and are not intended to be legal advice. Specialist advice should be taken in relation to specific circumstances.

B. PRACTICAL HANDLING- THE INVESTIGATION STAGE

4. The panel covered a range of issues relating to the investigation of potential partner misconduct, including: who should investigate the alleged misconduct, understanding the remit of the investigation, whether the partner can be suspended and how to proceed where criminal allegations are involved.

Internal Investigators

5. It was noted that firms may choose to use one or more internal investigators to investigate potential partner misconduct: this approach has a number of potential advantages including that it will help keep details of confidential partnership issues within the firm; and an investigator from within the firm will have a better understanding of the prevailing culture and dynamics within the partnership.

6. On the other hand, an internal investigator, particularly if it is a partner in the firm, may risk political allegiances and canvassing coming into play, potentially making the process less objective. One suggested option was that a respected ex-partner could be appointed to investigate, as they would contribute internal knowledge of the business, with independence.

7. If firms use internal investigators it was recommended that from a regulatory point of view, they should avoid using the COLP or HR for that purpose, if possible, as their distance and independence may be valuable later on. For example the COLP is likely to be called upon later to act as the independent

decision-maker on whether or not to actually report the matter to the SRA (see more on this below).

External Investigators

8. External investigators may be able to offer technical expertise (e.g. IT or accounting) which would be particularly useful where the alleged misconduct is complex. They should ideally have experience with professional partnership matters and understand the dynamic and cultural issues in such firms.

9. As any external investigator is likely to access confidential client information in the course of their investigation, it would be prudent (where possible) to redact the clients' names in the documents provided to the investigator. It is also advisable to seek to include a provision in client letters of engagement which allows the firm to disclose the client's confidential information to relevant third parties for regulatory and related issues, to include any third party investigator. The external investigators' terms of employment should include express confidentiality obligations.

Remit of Investigation

10. One aspect common to both internal and external investigators is that they must understand the remit of their task and the issues to be investigated; this is important to avoid the process turning into a "monster" where matters and the investigation itself escalate far beyond the issues originally identified.

11. The investigation needs to be carefully managed; the investigator will need to consider the evidence that each individual can usefully give. Associates and junior staff should only be interviewed as witnesses where this is absolutely necessary, as otherwise it may in practice undermine the relevant partner's position going forward (and ability to return to work) for the issues to be widely known amongst more junior members of his or her team.

Suspension

12. Most firms will have general rights of suspension provisions in their partnership deed, and it is advisable to have this; indeed some professional indemnity insurance providers will require such provisions so that, from a risk management point of view, it enables the firm to remove a partner from the office and from their functions (for example if partner is a signatory to cheques and has been accused of fraud).

Criminal Allegations

13. If the allegation against the partner amounts to a criminal offence, there is no general rule that a firm must stop its internal investigation and disciplinary process to allow for criminal proceedings to conclude. The firm can still go through their own process while a criminal investigation is proceeding. It was noted that even if, on the advice of their lawyer, the partner refuses to respond to the firm's allegations until the criminal matter is resolved, that should not of itself prevent an investigation being undertaken by the firm. The firm might approach the matter as they would an individual who is on long-term sick leave and who asserts an inability to attend the disciplinary meeting due to their sickness: the firm may decide that it needs to proceed based on the information

available to it. However, if the firm does decide to suspend their internal process whilst criminal proceedings are ongoing, the SRA may still need to be made aware of the allegations.

C. PRACTICAL HANDLING – PROCEDURAL FAIRNESS

14. Firms will need to have regard to the principles of procedural fairness when carrying out investigations and making decisions in partner misconduct cases. This will be a requirement regardless of whether the LLP agreement provides for an obligation of good faith between members. It was observed that, even though the court in *F&C Alternative Investments (Holdings) Limited v Francois Barthelemy (1) Anthony Culligan (2)*[1] held that, unlike traditional partnerships, members of LLPs do not necessarily owe each other obligations of good faith, the preferred view is that the validity of the exercise of a power (that affects the rights and obligations of another) depends (inter alia) on the power being exercised in good faith by decision-makers.

15. Carrying out a procedurally fair investigation in good faith would require: telling the partner in advance what the charges are; using a robust process for finding the actual facts; (by analogy with the pensions/trusts context), taking into account all relevant facts and excluding all irrelevant facts; and giving the partner an opportunity to respond with written and oral representations. However, it was commented that rights of appeal may not be a requirement, and may in practice simply be window dressing.

1 [2011] EWHC 1731 (Ch).

16. Exercising decision-making powers in good faith would entail using those powers for the purpose for which they were granted and in a way that the decision-makers believe to be in the best interests of the LLP as a whole. Whether decision-making powers have been exercised in good faith is to be determined (primarily) by a subjective test: the focus is on what the decision-maker thought and it is not for the court or arbitrator to impose their decision for that of the decision-maker. However, firms should be cautious as this is not carte blanche for a decision-maker to do what they want. There will (usually at least) be an objective fall-back requirement; so if the decision to suspend, reduce profit share or expel was capricious or irrational, the public law test of Wednesbury reasonableness may be applied to challenge it. This is a high hurdle and it appears that it would be difficult in practice for a partner to show that the decision was not made in good faith.

17. Additionally, as most partners will want to challenge an unfavourable decision, it is usually advisable that firms ensure that they give reasons for their decisions: properly setting out the factual inquiry relevant to the decision and then stating their view with reasons. This may also place the firm in a better position to show that their decision was not unlawful discrimination or on grounds of the LLP member having made a protective disclosure.

18. There was much discussion around how firms could ensure that they met their procedural obligations, particularly when a large pool of partners might be collectively responsible for making the decision. Partners should, if possible, be provided with the facts in the misconduct allegations in a summary document, preferably before the partners (or any delegated committee) meeting, and they

should be reminded that they should have regard to that and no extraneous information when casting their vote. It was suggested that firms might record the comments made in the meetings (a recording/transcript – whilst bearing in mind that the record will be disclosable in any legal proceedings). Additionally or alternatively, if it is a small partnership, the firm may wish to produce a document which captures the views expressed at the meeting and the decision-making.

19. There was a discussion about canvassing of partners to seek to ensure a particular outcome for the vote – the feeling was that firms cannot stop partners from canvassing others prior to the decision-meeting but partners should be reminded that if they email people before or after the meeting, those communications could be disclosable.

20. It was suggested that for ease and (subject to the partnership or LLP agreement giving the partnership the right to delegate this) the disciplinary decision and sanctions could be (and often are) devolved to a smaller decision-making committee.

Legal Advice for the Firm

21. It may be necessary to take legal advice when partner misconduct is being investigated; in which case it will be important to clearly establish who the client is for the purposes of obtaining it. If the client is the firm, then as the default LLP Regulations[2] give every partner the right to request information concerning the firm, then potentially any partner could ask for a copy of what would otherwise be legally privileged advice (including the suspected rogue partner), particularly

[2] Limited Liability Partnerships Regulations 2001 (S.I. 2001/1090).

if partnership monies have been used for that purpose. It was noted that increasingly some lawyers advise the suspected partner to ask to see such advice as a matter of course.

22. It was suggested that one potential way to avoid having to disclose the advice, would be for the LLP agreement to allow for a devolved committee of partners to take the advice and to keep it confidential, and to have the right to share it with only such of the partners as it considers appropriate in the circumstances.

23. Another option is for one or more members of management of the firm to take the advice jointly in their individual capacities (and to pay for it themselves) so that such advice remains confidential to them and privileged. The logistics of the individuals financing those costs while the accused partner remains a member of the firm were discussed. The cost to the individual members of management would be recovered from the firm as and when the matter is concluded with the accused partner. However some firms assist in the meantime by providing those individual members of senior management with a loan from the LLP for this and related management expense purposes.

Confidentiality

24. If the partner is exculpated or the disciplinary does not result in expulsion, the firm will need to ensure that they allow the individual a way back into the office. Depending on how the matter was handled many other people in the firm may be aware of what went on. Between partners in the firm, there is no right for the matter to be kept confidential. However partners would have a duty to keep the matter from leaking externally.

D. THE REGULATORY STAGE

25. When contemplating reporting the partner misconduct to the SRA it is important for firms to give thought to how and when they should report; some of the issues that should be considered are explored below.

Protecting the firm/clients

26. Before reporting to the SRA it is important to consider whether remedial action is needed. For example protecting clients' interests if the alleged conduct might affect them; updating internal procedures as a result of what was discovered; obtaining external PR advice; instituting spot checks (as a sudden change in procedure is more likely to unearth processes that are being exploited).

Written Report to the SRA

27. Firms must ensure that a report to the SRA is thorough, factual and fair; it should not include any subjective comment, for example the COLP of a firm should not state that in his opinion the partner under investigation should never be allowed to practise as an equity partner in the future. The firm's role is simply to report to the SRA with evidence. It is for the SRA to investigate and reach its own conclusions. Of course the firm can expound on the allegations being levelled against the partner, e.g. stating that they have been misleading clients, but it is not necessary for the firm itself to go further to conclude that there has therefore been a breach of Principle "X" or Outcome "Y" in the SRA Handbook.

28. The report should deal with any remedial action taken by the firm. It should avoid claiming that the firm knew nothing about how the misconduct could have

arisen, as the SRA will want to know about the supervisory mechanisms in place and it would not look good to suggest that the misconduct went undetected because there were none.

29. The final report should be in a sufficient form to allow for it to be copied to the offending party.

Timing

30. The SRA test requires that misconduct be reported "as soon as reasonably practicable", but that does not necessarily require firms to report conduct as soon as it is discovered. Firms should consider all the circumstances first; it may be prudent to report at an early stage if, for example, there is clear evidence that money has been stolen. However in other cases (given the SRA's emphasis on self-regulation for firms) it would be perfectly acceptable to start looking at what went wrong and putting remedial steps in place first before reporting. Indeed firms should be very careful to avoid prematurely reporting on their suspicions to prevent the risk of being in breach of their duties to the partner concerned.

31. One option is to submit an interim report without giving the name of the individual and tell the SRA that there will be a full follow-up report at a later date. Ultimately, it should be remembered that although the SRA have become more approachable over the last 2-3 years, firms should still remain on their guard in dealings with the SRA.

E. CONCLUSION

32. Often when a partner is suspected of misconduct, it can be tempting for a firm to either down-play its concerns or alternatively to attempt to quickly rid itself of the problem partner with little regard to their legal, disciplinary and regulatory obligations. However the overall consensus from the panel was that partnerships were going in a new direction and going forward firms would have to ensure they have pro-active policies and processes to combat potential issues which in many ways mirror their existing employee policies and procedures.

33. Firms will now be expected to have a more even-handed approach to handling alleged partner misconduct, ensuring that they have due regard to procedural fairness and preserving the reputation of all parties. This approach, combined with partner policies and procedures, is also likely to place the firm in a stronger position to defend against high value unlawful discrimination and whistleblowing detriment claims by the aggrieved partners.

34. Finally if partner misconduct issues do arise, firms should remember to follow up and learn from the mistakes, taking steps to rectify the problems, and implementing adequate partner training and monitoring systems to avoid repeat incidents in the future.

Panellist Details:

John Machell QC,
Serle Court
DD: 0207 400 7120
Mobile: 07775 503778
JMachell@serlecourt.co.uk
www.serlecourt.co.uk

Jenny McKeown
Maurice Turnor Gardner LLP
DD: +44 (0) 207 786 8718
Mobile: +44 (0) 7786 543 624
Switchboard: +44 (0)20 7786 8710
Jenny.McKeown@mtgllp.com
www.mauriceturnorgardner.com

Jayne Willetts
Solicitor Advocate
Jayne Willetts & Co
Telephone: 01562 888 492
jayne@jaynewilletts.co.uk
www.jaynewilletts.co.uk

Clare Murray
CM Murray LLP
DD + 44 (0)20 7718 0100
Switchboard +44 (0)207 718 0090
M/ + 44 (0)7957 383 079
clare.murray@cm-murray.com
www.cm-murray.com

Session Reporter:

Wonu Sanda
CM Murray LLP
November 2014

NB The contents of this report are for general information purposes only and are not intended to be legal advice. Specialist advice should be taken in relation to specific circumstances.