SEPARATE BUSINESSES – A REAL GAME CHANGER

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The SRA Board has approved a significant regulatory change that could have a huge impact on firms' business models and on the manner in which legal services are delivered to the public. The change effective from 1 November relaxes the rule on the type of work firms can offer through a separate business.

It will open up huge opportunities for firms but it does carry new risks. The SRA is to issue guidance but this has not yet been published.

At present, all mainstream legal activities, described as *"prohibited separate business activities"* must be conducted through your SRA regulated firm. They include, for example, drafting wills, legal advice and the drafting of legal documents.

Come 1 November, only *"reserved legal activities"* i.e. the conduct of litigation, the exercise of a right of audience, conveyancing, probate and administration of oaths need to be conducted through your SRA regulated firm – all other legal work will be able to be provided through a separate business. It is worth reading Schedule 2 of the Legal Services Act, which defines each of the reserved legal activities, because the definition limits, for example, probate activities to preparing probate papers. Similarly, in relation to conveyancing, it is only preparing certain documents that is *"reserved"*. This means that much of the leg work relating to conveyancing and probate is not reserved and could potentially be offered through a separate business.

The benefit for many firms will be that they will be able to reduce their own operating costs and, therefore, the cost to their clients of doing certain types of work by offering it through a separate business or businesses. It will be for each individual firm to decide which options are best for their business model and client base, but now is the time to be thinking about those options.

Chapter 12 of the current SRA Code is to be replaced with a new rule that emphasises the safeguards that must be in place to ensure that clients are clear about which services are regulated and which are not. The SRA will be concerned to see complete transparency about any situation in which clients are referred to another business in which an SRA regulated firm has an interest. This usually means setting out the arrangements on the firm's website and in its terms of business.

The new rule will provide that clients must give informed consent to any or all of their business being referred to the separate business.

The proposed guidance suggests that in seeking informed consent, the client should be made aware of the following:

- There will be no right to complain to the Legal Ombudsman
- There will be no right to claim on the Compensation Fund
- The work will not be covered by compulsory PII (you may explain what insurance arrangements the separate business has in place)
- The work will not be covered by legal professional privilege
- The protections in the Accounts Rules in relation to client money will not apply.

Issues of client confidentiality also arise in transferring information from the regulated to the non-regulated business. Shared offices and shared IT systems can present a problem for the SRA as well as the extent to which marketing distinguishes between businesses within a group especially if there is common branding.

The mere fact that a separate business is doing certain aspects of a client's work does not put that work beyond the reach of the SRA. Principles 1, 2 and 6 apply outside regulated practice. Principle 1 requires you to uphold the rule of law and proper administration of justice, Principle 2, to act with integrity and Principle 6, to maintain the trust the public places in you and in the provision of legal services. Inappropriate referrals to, or poor service by, a separate business could attract sanctions because the regulated firm failed to meet these Principles in passing clients to the separate business.

The extent to which the Legal Ombudsman might feel able to exercise his jurisdiction against the regulated firm for poor service by the separate business is unclear. He has no jurisdiction over the separate business itself, but will he be able to issue sanctions against the SRA authorised firm or individuals for recommending the separate business which then provides poor service? This remains to be seen. If aspects of a client's matter are merely outsourced to the separate business that would be different in that the regulated firm would be providing the service and clearly the Legal Ombudsman would have jurisdiction.

Finally, there is the question of who could be employed in a separate business to provide its services. At present, rule 4 of the Practice Framework Rules limits solicitors employed by non-lawyers (as a separate business would be) to doing work for their employer or those associated with the employer. This would preclude solicitors from being employed in the separate business. It is understood that rule 4 is to be reviewed but there have been no consultations on any proposed changes as yet. This, therefore, remains another piece of the jigsaw to be put in place. It begs the question of the extent to which solicitors can remove their solicitor hats to participate in the separate business. Until rule 4 is amended, the only solution may be to apply to the SRA for a waiver. ■

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