HIDDEN DANGER

The SRA's new handbook may be leaner but the move towards more outcomes-based regulation could bring further uncertainty for solicitors and confusion for the public. Jean-Yves Gilg reports

Shorter and leaner, the new SRA handbook has been heralded as a radical departure from prescriptive regulation, freeing lawyers to deliver services in innovative ways and shoring up the solicitor brand while providing greater access to justice.

In truth the newly entitled SRA Standards and Regulations, which is expected to come into force early this summer, merely follows the path opened by its predecessor towards further outcomes-based regulation. This is regulation for grown-ups; or so the SRA likes to imply.

With greater liberalisation of the legal services market and the variety of ways in which services are expected to be delivered, the regulator needed to move away from the traditional approach.

But however grown-up this new handbook may be, there are already whispers that this latest version conceals ominous developments for both solicitors and the public.

SUCCINCT AND UNCERTAIN

Few will mourn the disappearance of indicative behaviours, which tended to be regarded on a par with the rules they complemented. The more a firm departed from the expected behaviour, the more challenging the move was to justify.

However this leaves a gap, which is expected to be filled by further guidance between April and July this year. Even then there are concerns that despite the newfound clarity and succinctness of the rules, they could create uncertainty.

"The more you go to broader principles, the less certain it becomes from a practitioner's point of view what they have to do", says Michael Stacey, senior associate at Russell-Cooke.

"That's probably an inevitable consequence of the market becoming so diverse that it's not possible to spell out in any detail what a magic circle firm should be doing in its practice context compared with a small high-street firm doing consumer-facing law. And there are new ways of practising, such as technology-driven models. It's not possible to codify all of the behaviours that are expected."

There is a more worrying concern however that the guidance that will accompany the new rules could be construed as having retrospective effect. It's happened before, according to Frank Maher, partner at Legal Risk, who recalls the SRA trying to give retrospective effect to amended guidance on provisions in the 2007 code of conduct on independence.

Maher says after the amendment was made the SRA started scrutinising not just firm's advice to clients but also their loans and funding arrangements. "The SRA started disciplining solicitors, claiming the guidance merely clarified what the rule had always meant. So there's a danger with guidance that it evolves, and that for this reason it can also be difficult to ensure you have an audit trail."

One need look no further than the recent case of *SRA v Howell-Jones* for an example of a firm that seemingly followed the rules diligently, telling its client about a possible conflict. It nevertheless ended up with a £5,000 fine under a regulatory settlement with the SRA and was ordered to pay the regulator's £26,850 tribunal costs. "They thought about the issue, notified their insurers, told the client what they'd done; I'm not convinced they did have a conflict", says Maher.

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mistake. It says you cannot act if you've got a conflict, and it says if you've made a mistake you must tell the client, but it doesn't also say 'and you cannot act for the client' if you made a mistake. These are the sorts of examples where people make a value judgement; others make a different judgement that's imposed retrospectively. That's what we may see more of."

It's a concern shared by Jayne Willetts, of specialist regulatory practice Jayne Willetts & Co, who says the simplification will involve greater reliance on the professional judgement of individuals in the firms – managers and compliance officers – in a way they wouldn't have to had the rules been more detailed.

"Just because a document is simple doesn't mean it's any easier to implement the rules. The simpler the handbook, the greater the scope for the SRA to interpret the rules in the way it considers the profession should be behaving. It's up to the SRA to interpret the rules as they see fit", she says.

Although under the existing rules lawyers have become more educated about identifying potential issues and documenting the steps they take to address them, the new handbook will require even greater vigilance. What should already be good practice will now become critical.

Willetts urges lawyers to turn to independent advice in challenging cases. "That would demonstrate that you properly recognised there was a difficult ethical decision to be reached and that you took steps to consider it not only in house but you took external independent advice in reaching you decision."

As always, such decisions will be down to individual interpretation, making it essential that law firms have trained their people to recognise a possible issue and that there is a difficult decision to be made. "Conflict of interests is a classic example but firms should also be on the look out for innovative business ideas, unusual transactions – these are the kinds of situations where they need to be on red alert," Willetts adds.

WHO'S CONDUCT

Similarly, splitting the old code of conduct into two, one for individual solicitors and one for firms, is a logical move that could have helped tackle some of the thorniest issues in relation to responsibility for misconduct. How do you figure out who should be responsible for a failure to identify conflict, or for the mishandling of client money, or, for harassment, especially in the post #MeToo context? Sadly, the new handbook brings no further clarification.

According to Stacey where the balance lies between firm and individual culpability, and whether a firm can be liable for misconduct by an individual even without some systemic failing, remains unresolved. "The general trend is for firms to become larger and be run on a more corporate basis, so issues to do with the firm will come to the fore more", he says.

"In smaller firms, with say three partners or so, you may previously have been able to say you weren't aware of misconduct, now you need to make it your business to know what's going on; whereas, in firms with 10s or 100s of partners, it's just not realistic to expect every partner to know what's going on all the time. They just don't have the visibility. So splitting into two codes won't resolve the question of where the balance lies between firm and individual culpability."

Another rationale behind the introduction of a specific code for individual solicitors is that solicitors operating on their own should not be bound by the same rules as those applicable to firms.

Enter the new 'freelance' solicitor who, provided they have the minimum three years of experience, will be allowed to practise on their own without having to register as a sole practitioner. While this could be a welcome move, current practice is already ahead of the new rules, with solicitors working as locums or in dispersed law firms.

Plus, there would still be a requirement to have appropriate professional insurance in place – although not necessarily at the minimum required for sole practitioners. Consequently, Iain Miller, a partner at Kingsley Napley, says: "it's not entirely clear what would be attractive compared with the current locum position".

CONFUSION AND DAMAGE

More radical is the new rule allowing solicitors to work in non SRA-regulated organisations. It has been met with almost universal disapproval, mainly because it introduces a new layer of regulatory uncertainty. At present, clients have two reasonably clear choices: instruct a solicitor who comes with a regulatory protection framework including insurance, access to the Legal Ombudsman and access to the compensation fund, or instruct an unregulated provider who may not have insurance or regulatory protec-

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tion, other than perhaps being a member of a self-regulatory scheme such as some will writers.

"What you're going to rely on in the future is the consumer appreciating the distinction between a solicitor working in a regulated firm and one working in an unregulated firm, and appreciating the difference in terms of regulatory protections", says Stacey. "That's a retrograde step".

Maher shares the same concern. What the SRA regards as widening opportunities for solicitors, he thinks could legitimise unscrupulous businesses. "Your letterhead can say XYZ Law and the letter will be signed by 'John Smith, solicitor', which is all true", he says. "Only people who understand the meaning of 'Authorised and regulated by the SRA' will know the difference".

The new rule stems from one of the SRA's regulatory objectives to provide access to justice. However, Willetts also believes the move is "a backward step". "The fact there may be a solicitor popping up in a firm that is not regulated, say a will-writing company, will give the public reassurance that this firm is regulated as a traditional law firm; it is disingenuous to go down this route", she argues.

There are, however, restrictions on solicitors operating under this new model. Those working out of unregulated businesses will not be allowed to offer reserved activities or handle client money. The watchdog has also issued a new digital badge, which SRA-regulated firms will initially be encouraged to use on their website as evidence of their status. The badge, which will automatically link to a firm's entry on the SRA's register, will be mandatory later this year.

"Displaying the badge will help you differentiate yourself from unregulated providers," the SRA says. But many are still to be convinced. "The SRA has tried to assuage these concerns by producing a digital badge but that involves a member of the public, a lay person – probably the most vulnerable persons – knowing the difference between a digital badge and not having a digital badge. It just creates more confusion for the public and just damages the profession's reputation overall", argues Willetts.

Still, the new model could also allow a law firm to take advantage of the 'solicitor' brand by, for instance, hiving off its non-reserved practice into a separate unregulated business. "This may be attractive to particular types of firms that do a very limited amount of reserved work," says Miller, who adds: "it's unlikely to be adopted widely."

Because there will be no minimum insurance terms, there might be savings to be made in relation to the cost of regulation, but Miller says that "these could be offset by the increased regulatory complication of ensuring that the right work is done by the right firm".

Maher is equally unconvinced that there are any significant savings to be made, but for different reasons. "Insurers aren't going to reduce your premiums because you've got rid of a load of work, because they're covering you based on what you've already done. Plus, you have to have some insurance to cover your practice, even if it's not the SRA minimum terms. In fact, because professional indemnity insurance is a mature market, you would probably end up paying more."

Maher's greatest concern, however, is the potential for unscrupulous behaviour. "You already get struck-off solicitors effectively running litigation practices," he confides. "All they need to do is to get the client to sign the papers and address the post to their business. That is the sort of opportunity the new rule will offer."

TAKING RESPONSIBILITY

The underlying message in the new handbook is one the SRA has been sending since it released the current handbook; that individuals and firms should take responsibility for their competence and misconduct. The trouble with this approach, lawyers say, is that they only find out after the event. Of course the sensible approach for all concerned now is to review their current processes and practices against the new rules, and assess whether these are compliant.

But compliance in the traditional sense is only one aspect. One area in which solicitors and firms will need to be particularly vigilant is ethics. Training will almost inevitably be undertaken as the first step to demonstrate that the issue is being taken seriously. "It can't be a box-ticking exercise, it has to be meaningful," warns Miller.

Neither the SRA nor the SDT has shown any particular sympathy for those accidentally falling foul of the rules and that's unlikely to change under the new regime, so lawyers will have to evolve yet further and adopt a new mindset. But that should go for the SRA too, because what is ultimately at stake here is the future of the profession, including its regulator. SJ

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