WILL THE GRASS BE GREENER?

WOULD YOU MOVE FROM PRIVATE PRACTICE TO PROVIDING LEGAL SERVICES TO THE PUBLIC IN-HOUSE?

New employment opportunities will open up for solicitors with the SRA Standards & Regulations are introduced on 25 November as solicitors can be employed by unregulated organisations to provide legal services to the public. There may be tempting offers for those fed up with private practice and the responsibilities of running a regulated firm. However, this may not be quite as simple and risk free as it seems. What the change entails and the possible pitfalls are examined here writes Bronwen Still, Consultant Solicitor Jayne Willetts & Co.

Important questions for those contemplating this new form of in-house practice are - what work will they be able to undertake, what rules are they subject to and what should govern their relationship with their unregulated employer?

In terms of the work they will be able to do, the Legal Services Act will prevent them from providing reserved legal activities to the public. This is an important restriction which carries criminal sanctions if not observed. To offer reserved work, the employer would need to be licensed as an ABS. However, all non-reserved work such as will writing, preparing legal documents and giving legal advice could be dealt with by solicitors for the public.

As this work will be done with a solicitor hat on, any solicitor employed in these new roles will need to have a practising certificate. They will also be subject, as an individual, to SRA regulation, in particular, the new SRA Code of Conduct for Solicitors, RELs and RFLs ("the Individuals' Code"). Their employer will not, however, be subject to the new Code for Firms or any other SRA regulation which will result in some loss of regulatory protections for the clients and may create some tensions in the employer/employee relationship. The employer is in effect regulation-free.

For the new in-house solicitor, there will be certain things they need to be particularly aware of. The starting point is the Individuals' Code which describes the standards expected of all individuals providing legal services. It deals, amongst other important issues, with the client relationship generally and adds some obligations and restrictions specifically relevant to in-house practice. There are also obligations set out in the Transparency Rules requiring certain information to be given to clients. Standard 8 in the Code is particularly relevant in that it applies to those "providing services to the public or a section of the public" regardless of whether this is in a regulated or unregulated environment. Standard 8.6 sets out the general requirements about giving information to clients. This must be done in a way they understand and enable them to make informed decisions about the services they need, how their matter will be handled and the options available to them.

Standards 8.2 – 8.5 cover complaints handling which applies equally to those working in-house and providing legal services to the public. As with private practice, in-house solicitors must give clients information about their complaints handling arrangements including information about their right to make a complaint to the Legal Ombudsman.

Standards 8.10 and 8.11 are important to in-house practice as they flag up the need to be clear to clients about what regulatory protections apply. Standard 8.10 says solicitors must ensure that clients understand whether and how the services they are to receive are regulated. In particular, this must include:

"(a) explaining which activities will be carried out by you, as an authorised person;
(b) explaining which services provided by you, your business or employer and any separate business are regulated by an approved regulator; and
(c) ensuring that you do not represent any business or employer which is not authorised by the SRA, including any separate business, as being regulated by the SRA".

Ensuring that clients understand how the services they are to receive are regulated places a heavy burden on those employed in-house. They will need to explain clearly to their clients, some of whom may be vulnerable or have a poor understanding of English, that whilst they as individuals are SRA regulated the firm is not. The obvious way to make this clear is on the employer's website, particularly on any section dealing with the company's legal services, and in the terms of business issued to the client.

However, if there is any doubt about the client's ability to read or understand this information, it might be necessary to explain it in person and record that this has been done.

Where two or more different services are being provided by the employer to the client, one of the most difficult aspects of 8.10 might be making clear exactly which work falls into the "legal services" category and is, therefore, regulated, and which falls outside the regulated net. This may need some careful delineation in a client care letter.

8.11 goes one step further and states that "you ensure that clients understand the regulatory protections available to them". Again, this is going to need to be explained quite clearly in the company's terms of business or even in person. Clients will need to be told that, although the individual solicitor acting for them, or supervising their legal work, is regulated and obliged to meet certain regulatory obligations, the company is not and that this has some loss of protection. The exact losses which must be explained are these.

- Client money cannot be held by the solicitor (this is prohibited by standard 4.3 of the Code for individuals) and must, therefore, be held outside a solicitor's client account;

- There is no access to the SRA Compensation Fund. This is information which must be provided to meet rule 4.3(b) of the Transparency Rules.

- Indemnity insurance is not available under the minimum terms and conditions required by the SRA Indemnity Rules. If there is alternative indemnity insurance cover, this must be explained. This requirement is to be found in rule 4.3(a) of the Transparency Rules.

The two Transparency Rules requirements will inevitably necessitate some explanation of the purpose of the compensation fund and the minimum terms and conditions under the Indemnity Rules for clients to understand what it is that they are to lose.

To assist those employed in-house and providing legal services to the public, the SRA has issued guidance which can be found on its website at – https://www.sra.org.uk/solicitors/guidance/ethics-guidance/unregulated-organsiations---giving-information-to-clients/

It has also issued guidance for employers of in-house solicitors. This can be found at: https://www.sra.org.uk/solicitors/guidance/ethics-guidance/unregulated-organisations---for-employers-of-sra-regulated-lawyers/

Ideally, any prospective employee solicitor should direct their employer to this guidance when negotiating their contract of employment.

It is early days and impossible to predict all the different types of employed practice that will open up for solicitors. However, with any offer of employment, it would be sensible for the solicitor concerned to do some proper background checks on their prospective employer, to be clear about the services they will be providing and who they will be responsible for supervising and to get assurances, preferably in the contract of employment, that there will be no restrictions placed on their ability to fulfil their regulatory compliance obligations.

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