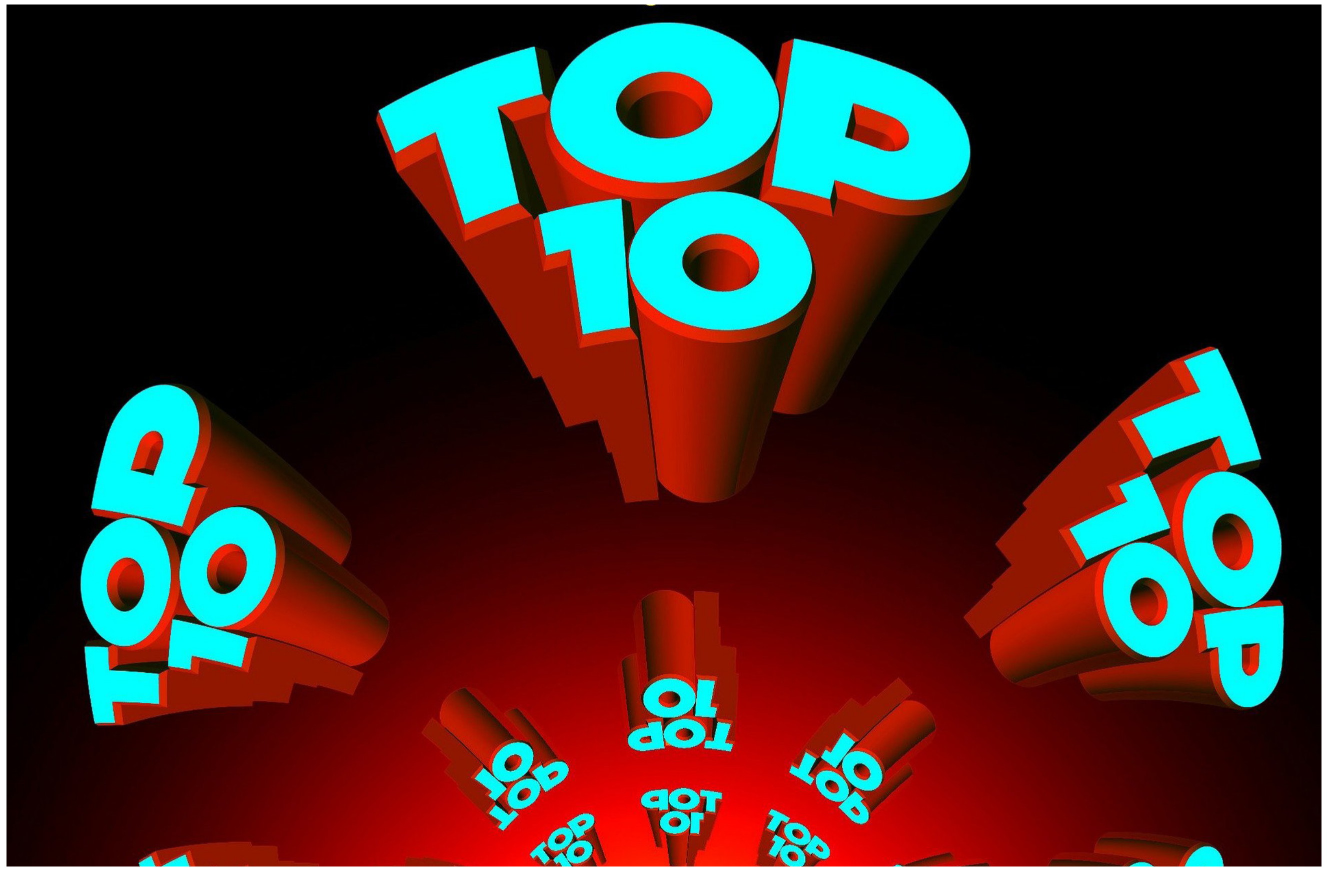


# COMPLIANCE TOP TEN FOR 2021

WRITTEN BY JAYNE WILLETTS, SOLICITOR ADVOCATE, JAYNE WILLETTS & CO SOLICITORS.

**What does 2021 have in store for us? With so much to choose from, here are ten of the significant compliance issues for the New Year.**

### 1. SUPERVISION

Effective supervision prevents unhappy staff and prevents negligence claims. During the pandemic, supervision has become more important than ever and more difficult to implement. Working on a kitchen table in a small flat for months on end is not conducive to a sense of well-being. It is also not conducive to high service standards – see later. Supervisors cannot solve every problem but keeping in very regular contact provides a fighting chance of averting either a personal or professional problem. One of my senior partners used to "manage by walking about". You cannot beat walking the floors and chatting to members of the firm but that option is not open to us at present. Smaller teams for supervision purposes during the pandemic provide more time for personal contact as well as working in teams on particular transactions or cases if that can be achieved. Until we are back in the office and returning to some semblance of normality, supervision both personal and technical is the most important objective for the first six months of 2021.

### 2. ANTI-MONEY LAUNDERING PROCEDURES

A recurrent headache for the profession is the implementation of anti-money laundering procedures. The SRA as an AML supervisor is monitored by the Office for Professional Body AML Supervision and has during the last 12 months been redoubling its efforts to ensure compliance by those it regulates. Vendor fraud is seen as a real threat by the SRA with the risk of infiltration of firms by collaborators making use of forged or stolen documents. Rigorous checks on new staff and on client identities in all cases is essential. 2021 may be just the time for a review of internal procedures and refresher training. Increasing staff awareness by the sharing of practical examples and experiences is always worthwhile. Fee earners and staff need to put aside their usual trusting nature and switch on their suspicious antennae. And do not forget the wider definition of "tax adviser" which may affect specialist family law and employment firms in particular. Those affected need to reregister with the SRA by 10 January 2021.

### 3. CYBER SECURITY

As criminals develop ever more ingenious cyber scams, it can be difficult to keep up especially if you are of different generation technologically speaking. The SRA reports that £2.5m was stolen from law firms by cyber criminals in the first half of 2020. The patience and pockets of the profession's insurers will not be inexhaustible so more self-help is required. The latest SRA guidance published in November 2019 and guidance on the National Cyber Security Centre website both provide a very useful aide-memoire for a New Year spring clean on this important area of concern. But nothing trumps a sense of alertness on the part of your staff. As with AML, (and road safety), if in doubt stop and think before advancing.

### 4. REPORTING CONCERNS TO THE SRA

Juliet Oliver SRA General Counsel at the SRA Compliance conference in November 2020 cautioned firms not to report every concern unless they genuinely believed it to be a breach of the rules. She said that the SRA did not want to encourage "defensive reporting". I am afraid that ship has already sailed. The current duties to report, especially the new Rules 7.8 (Code for Individuals) and Rule 3.10 (Code for Firms) which provide for "bringing matters to the attention of the SRA in order that it may investigate", achieve the very objective that Ms Oliver is seeking to prevent. The rules lead inevitably to over-reporting by firms for fear of sanction for failing to report. In addition, the rules are being used extensively as a tactic in litigation and/or partnership and employment disputes. Threats to report to the SRA are being relied upon in a way that was not intended. Reports to the SRA are also becoming more complex and therefore more time consuming to investigate. The SRA needs to issue detailed guidance on what it does and does not require of firms and to deal robustly with firms who use the reporting regime as a litigation tactic. Until then the SRA will continue to be overloaded with reports and the problem continues.

### 5. OPPRESSIVE BEHAVIOUR - CIVIL PROCEDURE RULES

Litigators will be aware of the new costs sanction rule introduced on 1 October 2020 and contained within CPR Practice Direction 3E Section G which provides that "Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate". Whilst any costs sanction will be directed against the client in the first instance, the steps taken in the litigation which preceded the claim of oppressive behaviour will no doubt have been taken upon the advice of the solicitors on the record. Whilst there has not, as yet, have been any guidance or authorities on this recent rule, it is anticipated that the use of this provision will go hand in hand with a report to the SRA of misconduct. It may also be linked to allegations under the current Codes of Conduct such as "only making assertions or submissions which are properly arguable" (Rule 2.4) and "wasting court time" (Rule 2.6). Litigators need to add this to their long list of professional obligations to consider when advising their clients.

### 6. SERVICE STANDARDS

With so much attention focused on headline grabbing issues such as cyber-attacks and sexual misconduct it can be easy to overlook the perennial issues which continue to trip up many firms – basic service standards. Standard 4 of the Code of Conduct for Firms sets out what the SRA expects which is "that the service you provide to clients is competent and delivered in a timely manner…" The SRA now extracts from the annual report provided to it by firms, details of first tier complaints and how firms resolve them. These are published on the SRA's website on its risk page. The same issues recur – delay, failure to advise, failure to keep clients informed and excessive costs. The Legal Ombudsman repeatedly reports these failings. A good New Year's resolution may be to set time aside to start looking in more depth at complaints you have received and to use the information to improve client care – and reduce the time and cost of investigating complaints.

### 7. CLIENT CONFIDENTIALITY

As everyone knows, this is a fundamental duty owed to clients. When the SRA receives an application from a new firm wishing to be authorised, one of its key concerns is what consideration has been given to protecting confidential information where there is to be remote working, shared office space, or shared staff or data with, for example a connected business. Covid and enforced home working in the last year has been difficult for many firms, particularly because of the concerns around enormous amounts of confidential information which has had to be held outside the office environment. Two things flow from this. Was your firms contingency plan robust enough and did it cover sufficiently this tricky issue of confidentiality? How was information held on laptops and mobiles protected and was it adequate? As the dust settles, it might be a good time to review this.

### 8. FREELANCE SOLICITORS

There has been a gradual take up of this new form of practice and this is likely to increase as those who face redundancy following the covid lockdown look for opportunities to continue their career as solicitors. For those considering this option, there are a number of issues to take on board. The main issue is that of whether reserved legal activities are to be provided. If they are, there is a much tougher regulatory regime which will apply. Amongst other requirements, you must have adequate indemnity insurance, have practised as a solicitor for at least 3 years, must not employ any staff and cannot provide your services through a company. For those only providing non-reserved activities, it is much more of a "no holds barred" regime. You can employ staff, do not have to have practised for 3 years and there is no requirement to have indemnity insurance – though it would be extremely foolish not to have adequate cover. Both forms of practice cannot be undertaken until the SRA has been notified on the correct form and both require compliance with the Code of Conduct for individuals. Will this form of practice appeal in 2021?

### 9. THIRD PARTY MANAGED ACCOUNTS (TPMAS)

These are governed by rule 11 of the Accounts Rules. They operate as escrow accounts and money from clients to be disbursed on their behalf is held by the TPMA provider, which must be an authorised payment institution and FCA regulated. Money held for clients by a TPMA is not client money and, for firms that use them exclusively rather than a client account, one cost saving is that no contribution to the Compensation Fund is required. Also, there are obvious financial benefits in not needing to keep client account records and obtain an accountant's report. As not holding client money reduces the risk of default, it is also something which insurers are beginning to take account of. There may, therefore, be beneficial savings to be gained by using a TPMA. Set against that, however, is the cost of using the TPMA. Most make a monthly charge plus a transaction fee. There is undoubtedly an element of "horses for courses" in deciding whether to use a TPMA for client money but it might be worth further investigation for some firms.

### 10. REGISTERED EUROPEAN LAWYERS (RELS) POST BREXIT

And last, but not least, the status of all RELs changed when the UK's EU transitional period ended at the end of 2020. Guidance issued by the SRA in December 2020 makes clear that on 1 January 2021 the classification of REL ceases (with the exception of Swiss lawyers) and all those who are RELs will be re-classified as Registered Foreign Lawyers (RFLs). This will have an effect on the reserved legal activities that RELs can undertake, other than under the supervision of a solicitor or authorised person. RELs, but not RFLs, were able to be authorised as sole practitioners and how the position of those who already work as such will be affected is not yet clear. It is understood that the SRA's rules and regulations are in the process of being re-drafted to reflect that and other changes. Affected firms and individuals will need to keep an eye on SRA announcements and rule revisions.

infolegal
law firm compliance advice and training

Jayne is also a director of Infolegal Ltd www.infolegal.co.uk which provides compliance services to law firms