COMPLIANCE TOP TEN TOPICS FOR 2023

Jayne Willetts Solicitor Advocate and Bronwen Still Solicitor Consultant both of Jayne Willetts & Co Solicitors Limited share ten of the most significant compliance issues for the coming year. Firms need to be aware of all these hot topics to ensure that their policies, systems, and procedures will adequately deal with the current requirements and meet the planned changes.

1. ANTI-MONEY LAUNDERING COMPLIANCE

AML compliance remains the number one concern on the SRA's radar with further extensive checks carried out this year on AML compliance by firms. The SRA's annual report on this subject reveals that only 22% of firms were fully compliant. There were 51 "enforcement outcomes", 8 referrals to the Solicitors Disciplinary Tribunal and 43 internal sanctions imposed by the SRA, the latter compared to just 16 the previous year. It issued 29 fines, totalling £287,000, as well as letters of advice, rebukes, and warnings.

The main areas of non-compliance tend to remain the same. These include client and matter risk assessments not compliant or not done, a lack of adequate policies, the use of template policies and risk assessments which were not adjusted to the circumstances of the individual firm, poor due diligence on clients and a failure adequately to check the source of funds. With regard to risk assessments on case files, those that were non-compliant frequently failed to give any justification for the risk level assessed, failed to identify when enhanced due diligence was necessary and did not reflect the firm wide assessment.

These findings suggest that there is much work to be done by some firms for their COLP and MLCO. AML policies need to be checked to ensure they are up to date, the use of templates reviewed and audits conducted to ensure staff are following the correct procedures and fully understand them. The bottom line is that the SRA is under pressure from external bodies to take action so is likely to become even less tolerant to non-compliance in the future.

2. NEW SRA FINING REGIME

From 20 July 2022, the Ministry of Justice increased the SRA's maximum fining power from £2000 to £25,000 for "traditional" law firms and those who work in them. In addition, once the Economic Crime and Transparency Bill becomes law, the SRA will have unlimited fining powers for any solicitors and firms caught up in economic crime.

Other changes are that the SRA will take into account the turnover of firms and financial means of individuals when setting fines. This could mean, for example, issuing a junior lawyer and senior partner - who have committed the same misconduct - with different fine levels to take account of their financial situations.

It is also introducing a schedule of 'fixed penalties' for lower-level breaches. These penalties would mostly deal with lesser or administrative breaches – such as failures to comply with requests for information or requirements under the SRA Transparency Rules.

The inevitable consequence of the increased fining powers is that fewer cases will be referred to the independent and expert Solicitors Disciplinary Tribunal. The SRA will investigate, prosecute, and adjudicate upon its own cases. It has accepted that "higher fining powers bring with them the need for greater accountability" and that its adjudication function needs to be functionally separate and independent from the investigation process but how this is be implemented remains to be seen. With so much at stake, firms would be well advised to seek specialist advice if faced with an SRA investigation under these new powers.

3. SEXUAL MISCONDUCT, DISCRIMINATION & HARASSMENT

Alongside the increased fining powers, the SRA has decided that cases involving sexual misconduct, discrimination and harassment are to be singled out for special treatment. No longer is the seriousness of an allegation to be assessed on the evidence. An allegation involving these three areas of alleged misconduct will automatically be referred to the Solicitors Disciplinary Tribunal so that the SDT can consider imposing restrictions upon practice or suspension or strike off.

The SRA is amending its guidance to highlight that for these cases, financial penalties will only be considered in exceptional circumstances, with restrictions on practice, suspension or strike off the more appropriate sanction. The SRA is also consulting on piloting the use of victim impact statements for cases involving sexual misconduct, discrimination, or any form of harassment.

Why the SRA considers these cases to more serious per se than a case of a breach of client confidentiality or a conflict of interest may have its foundations in political and media considerations as opposed to any regulatory issues of fairness and proportionality. However, firms will be well advised to revisit all of their internal policies and procedures which could possibly touch upon this type of behaviour – such as alcohol at work events; supervision; whistleblowing; billing targets and the like.

4. HEALTHY WORKPLACES

The SRA consulted on rule changes earlier this year to bolster its approach to ensuring firms adopt measures to ensure healthy workplaces. Although the proposed changes have not yet been put into effect, it appears that they will go ahead in the near future. The SRA's underlying concern is the protection of the public who use legal services. Firms where staff are afraid to raise health or work issues and are bullied and treated badly are at risk of financial claims and reputational damage.

The changes proposed will introduce new standards into section 1 of both the Code of Conduct for Solicitors, RELs and RFLs and the Code for Firms. In essence, the new standards will require firms and individuals to treat colleagues and employees fairly and with respect and not to bully, harass or unfairly discriminate against them. Managers will be required to challenge behaviour that does not meet these standards.

The SRA has already issued guidance in February 2022 - here- which sets out steps which it expects firms to take to create a culture which enables people within the firm to thrive and perform well. Key amongst these measure is proper supervision which includes monitoring concerns about health and competence. Staff should feel confident in raising these issues and that they are supported. The guidance will be updated when the new standards come into effect. In the meantime, firms could usefully review how they engage with their staff and the steps they could take to make improvements. Plenty of material is available to assist with this, including on LawCare's website which you can read here.

5. CONTINUING COMPETENCE

The Legal Services Board continues to develop its thinking on this topic and has been involved in evidence gathering, including how other jurisdictions ensure ongoing competence of lawyers. It produced a report in July 2022 and a "Statement of Policy – ongoing competence", which sets out what it expects of regulators.

Currently the SRA, in standards 3.2 and 3.3 of the Code of Conduct for Solicitors, RELs and RFLs, requires individuals to provide a competent service and to maintain their competence. Nothing otherwise published by the SRA explains what it expects to see by way of demonstrating competence. Following the LSB's report it looks as though this may well be about to change.

In its policy statement, the LSB sets out outcomes it expects regulators to pursue. These are:

a. Set the standards of competence that authorised persons should meet at the point of authorisation and throughout their careers.

b. Regularly determine the levels of competence within the profession(s) they regulate and identify areas where competence may need to be improved.

c. Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.

d. Take suitable remedial action when standards of competence are not met by individual authorised person.

To achieve these outcomes, the LSB expects that regulators will develop core competencies to cover such things as client care, practice management, ethics, specialist competencies some lawyers should have in, for example, advocacy and competencies required for different stages of an individual's career. It also wants regulators to measure outcomes and to consider such options as reaccreditation at certain levels of an individual's career.

How the SRA is going to achieve the LSB's outcomes is no doubt currently being discussed. In the coming year and to ensure they are going in the right direction; firms should ensure that everyone has appropriate and up to date training in their areas of law and on key regulatory issues. For those with management and compliance responsibilities, the Law Society has, in 2022, introduced a new risk and compliance accreditation scheme which sits along the other accreditation schemes it runs, such as Lexcel.

6. VULNERABLE CLIENTS

The Code of Conduct requires firms to "give clients information in a way they can understand" (Standard 8.6). The SRA has frequently emphasised the need for extra care to be taken in identifying and dealing with clients who are vulnerable.

The LSB has now conducted research which highlights the need for lawyers to provide better support for vulnerable clients. The LSB's report, published in June 2022, makes some interesting points which firms could usefully reflect on. It looks first of all at what makes people "vulnerable" and points out that to an extent most members of the public when consulting a lawyer feel at a disadvantage simply because there is a knowledge imbalance. This can be exacerbated by factors such as disabilities or poor health, poor mental health, experience of domestic abuse and low literacy. Others could include age, homelessness, and poverty. These disabilities tend to have an impact emotionally and financially and to produce a feeling of loss of control over their matter or problem.

The research highlighted behaviours which enable some firms to make a significant difference to reducing vulnerability. These could easily be adopted and to an extent are fundamental in creating a successful solicitor/client relationship. They include:

• Creating a welcoming environment (putting clients at ease at the outset).

• Managing clients' expectations about roles, costs, timeframes, processes, and terms from the start and throughout their case.

• Listening to and understanding participants, their circumstances and their priorities with empathy and compassion, especially where experiences had been difficult or traumatic.

• Keeping clients informed in a timely manner, including with regard to costs.

Finally, the LSB published an infographic on the subject of vulnerable clients which could prove a very useful training tool for all fee earners dealing with members of the public whihc you can see here.

7. INCLUSION AND NEURODIVERSITY

The SRA published in October 2022 on its website various materials under the heading "Inclusive workplaces for neurodivergent lawyers". The subject of neurodiversity is quite distinct and is not new. It has, however, only recently developed more exposure and is something many people will be unaware of. It forms part of the debate about equality and inclusion. To a certain extent it is an issue that sits alongside that of developing and maintaining healthy workplaces.

So, what is neurodiversity? ADHD, Autism, Dyspraxia, Dyslexia, Dyscalculia, Dysgraphia, and Tourette's syndrome are all examples of neurodiverse conditions. People with these conditions have different ways of relating to people, thinking, processing information, and behaving. To give one example, people with autism may have difficulty with working in noisy environments, where there is no structure to their day and in some social situations. It is becoming clear that many lawyers with neurodiverse conditions are employed in firms and that there is a need to make adjustments so that they can thrive and contribute fully to the work of their firm. Firms that have a mentally healthy and supportive work environment will be well placed to do so.

There will doubtless be much more published on this subject in the next year and firms need to be aware that this is an issue they may need recognise and to make adjustments for.

8. TRANSPARENCY RULES

The LSB and SRA regard providing clearer information about lawyers, legal services and legal costs as being central to achieving the regulatory objective of improving access to justice. Between them, the Law Society and SRA provide publicly available information about the firms they regulate, the services they provide and the disciplinary record of individuals and firms. Under the Transparency Rules, firms are required to publish information about complaints handling, some regulatory information and, in relation to certain legal services, comprehensive costs information. The purpose of publishing this information is to give clients the ability to compare the services and costs that firms offer and thus to encourage them to feel confident in approaching firms for assistance with their legal matters.

As most solicitors will be aware, the SRA takes very seriously compliance with the Transparency Rules and has done several checks on firms' websites. Those not in compliance can expect to be sanctioned. It regards the rules as key to its drive to improve access to justice.

In July 2022, the SRA commissioned research through a company called Economic Insight into the extent to which firms and the public find the information that is published under the rules helpful. No doubt, the outcome of that research will be available in the near future and is likely to provide the basis for the rules to be updated and extended.

In the meantime, firms should check that they do meet the requirements of the rules, particularly with regard to the detailed information on costs and disbursements as this is where firms are often found to fall short. At the same time, it might be helpful to review whether the information is presented in a helpful and clear manner which is likely to attract prospective clients, rather than repel them.

9. LEGAL OMBUDSMAN CHANGES

Changes are being introduced by the Legal Ombudsman which will make it harder for clients to complain about the service delivered by solicitors. The changes are part of the Legal Ombudsman's drive towards reducing delays in complaints handling and improved efficiencies. Delays of up to 18 months or 2 years had become commonplace.

From 1 April 2023, complainants will have one year from the date of the complained of activity to lodge a complaint. The current time limit is six years. Firms will need to communicate this information to clients in the coming months Other changes are the dismissal of a complaint if the detriment to the complainant is not significant and cases can be thrown out if too high or complex to be proportionality investigated. Finally, complainants will not be able to add new issues to an ongoing investigation if they were already known to the complaint at the time the investigation started.

The changes are to be welcomed in order to streamline the Legal Ombudsman service for the benefit of clients and law firms alike.

10 ACCOUNTS RULES UPDATE

And finally, an update on the Accounts Rules.

The rule (Rule 3.3) against using client account as a banking facility continues to cause problems in practice for both clients and solicitors alike. Conveyancing, family, and commercial property are the areas of the law most affected.

The SRA will be publishing case studies in the New Year in order to provide further guidance for the profession. Particular problems are still being encountered by commercial property lawyers and their clients when trying to use SPVs (Special Purpose Vehicles) for substantial property developments and where the SPV does not have its own bank account. The SRA has suggested that third party managed accounts might be a solution.

In a recent SDT case (SRA v Khurram Mian SDT 12281-2021), the Tribunal found that, of thirty six inter-group company transactions, only two transactions were found to be in breach of Rule 3.3. The client was overseas and unable to access banking facilities. The two offending transactions were for salaries for golf club staff and a payment for a charity golf day. The SRA case studies on this awkward rule cannot come soon enough.

The SRA will also be consulting in the New Year on changes to Rule 2 (client money) and Rule 4 (client money must be kept separate). We await with eager anticipation as to whether there is further relaxation of the controls on client account. It will also consult on amendments to Rule 10 (operation of a client's own account) in order to iron out practical difficulties in complying with this rule.