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Why legal fees are going up

These days any story on the Solicitors Regulation Authority ("SRA") is almost guaranteed to lead to angry responses from solicitors infuriated at the constant announcements and changes to their regulatory obligations, leaving them bemused at what exactly they have to do to avoid breaking the rules. The "comments" section on the Law Society Gazette website is testament to that.

Law firms are feeling the pressure as much as anyone in this recession. This is exacerbated by the constantly increasing regulatory burden on solicitors. One of the first major initiatives taken by the SRA was to make every firm of solicitors change its letterhead and every solicitor change his or her auto-signature. It was not sufficient to say that a solicitor was "regulated" by the SRA. A solicitor had to say he or she was "authorized and regulated" by the SRA. This was an expensive and to my mind wholly unnecessary exercise. It is not clear how the public or the profession have benefited from this change.

Our firm's retainer letter now covers at least three pages and incorporates our terms of business which now run to fourteen pages. These documents are long and detailed because we attempt to address all the legal, regulatory, ethical and professional rules to which we are subject. A Law Society practice note even prescribes the font size and spacing that should be used in a firm's retainer. Solicitors are answerable not just to the SRA, but also in different respects to the Legal Ombudsman, the Legal Services Board, the Law Society and the Court. It is difficult to think of another profession that has to cope with that scale of regulation.

With effect from October 2011 the Solicitors Regulation Authority (SRA) replaced the 2007 Code of Conduct with a new 520 page Handbook. Four further versions of the Handbook were released in the twelve months to October 2012. A new edition is promised in April 2013. That is a scandal when the ability of a lawyer to practise depends on compliance in the letter and the spirit with all the rules set out in the SRA Handbook.

The basis of the SRA Handbook is "Outcomes Focused Regulation". In theory this leaves law firms to decide for themselves how to achieve desired outcomes. Outcomes Focused Regulation focuses on high level principles and outcomes which are less prescriptive than the 2007 Code of Conduct. The Handbook sets out a list of "indicative behaviors", the presence of which may indicate that the firm is acting in compliance with the principles. Sadly though, firms are given no assurances that they will be regarded by the SRA as compliant with the Handbook even if they display all the indicative behaviors, leaving firms far more uncertain than in the past about what is expected of them. At least under the 2007 Code of Conduct firms had the certainty of knowing where they stood and what they needed to do to comply with their regulatory obligations. Now they are required to read between the lines and anticipate the future. There was a real hope that the SRA would police the Handbook with a degree of common-sense; it has in fact, however, reacted disproportionately to minor breaches of the rules.

The most substantial and controversial change introduced by the Handbook is the requirement that all law firms, irrespective of size, designate a Compliance Officer for Legal Practice ("COLP") and a Compliance Officer for Finance and Administration ("COFA").

The SRA has stated that the COLP and COFA are responsible for ensuring that their firms have systems and controls in place to enable them to comply with their regulatory requirements. However in reality COLPs and COFAs are officially sanctioned snitches. They must put their regulatory duties before the interests of the firm. Their roles are broad but their primary duty is to report their own firm to the SRA if they consider the firm has committed a "material breach" of the SRA Handbook. COLPs and COFAs will need to decide what should be reported immediately to the SRA and what can be saved for the annual reporting log which they are obliged to submit. Lack of clarity may lead to over-reporting with which the SRA will inevitably find it difficult to cope. Despite repeated promises, no guidance has as yet been issued by the SRA about what might constitute a material breach of the SRA Handbook. The new roles come into force on 1 January 2013. As at 18 December 2012,

thousands of COLPs and COFAs nominated last July do not know whether they have been approved by the SRA and probably will not have sufficient time to familiarize themselves with the guidance even if it is issued by then.

More worrying is the power of the SRA to fine individual compliance officers in traditional firms up to £2,000. The Solicitors Disciplinary Tribunal can impose unlimited fines. In Alternative Business Structures, individuals can be fined up to £50 million and firms up to £250 million (the SRA has pressed for these higher limits to apply also to COLPs and COFAs in traditional partnerships).

The personal liability attached to these new roles is a huge concern for firms and compliance officers alike. Often the most suitable person for the role will be reluctant to take it on unless firms indemnify the COLP or COFA against any personal liability. In reality however, until the SRA clarifies what action it will take against a compliance officer for something they do or omit to do, it will be difficult for firms to decide how far the indemnity should go. It is unlikely that conventional Directors' and Officers' liability insurance will adequately cover these new roles; firms will have to consider taking out separate insurance cover to protect their compliance officers.

The complete lack of clarity, coupled with the uncertain nature of Outcomes Focused Regulation, the uncontrolled power of the SRA to decide whether or not a firm is compliant and a lack of information about the exercise of the SRA's policing powers makes it almost impossible for law firms to know where they stand.

The Law Society has taken an equity stake in Riliance, a company that provides support to law firms on compliance with the Outcomes Focused Regulation. Information about the size and the price paid for the stake has not been publicly disclosed. What is worrying about this development is that there is a real risk of conflict of interest. Many firms and solicitors are keen to see a reduction in the burden falling on COLPs and COFAs as well as a simplification of regulation. However a simplification of the regulatory obligations would now be directly against the commercial interests of Riliance and the Law Society, a body which is supposed to represent the interests of its solicitor members. The very existence of Riliance demonstrates that the regulatory burden on law firms has become so disproportionate that many firms do not have the resources to comply with their obligations on their own and are expected to pay for external resources.

It might be time for the Law Society to consider a new approach to regulation which is proportionate and cost-effective. Otherwise I predict that many firms will simply disappear because of the wholly disproportionate burden created by regulation.

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