

Footnote

¹Jarrett-Kerr NC (2009) *Strategy for Law Firms – After the Legal Services Act* (Law Society Publishing), Chapter 6. In this Chapter I set out some 15 models of ABS which might be utilised by law firms or by external investors, and the strategies behind each of the models

Biography

Nick Jarrett-Kerr is a specialist adviser to law firms worldwide on issues of strategy, governance and leadership development, as well as all important business issues facing law firms as they compete in difficult market conditions. He is a founder member of the Law Society's Law Management Section. Nick is Visiting Professor to Nottingham Trent University in the Nottingham Law School, College of Business, Law and Social Sciences and is the author of a book published by the Law Society *Strategy for Law Firms – After the Legal Services Act*.

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Outcomes Focused Regulation – a New Approach to the Regulation of Legal Services

Abstract: Bronwen Still explains the provisions of the new SRA Handbook in implementing an entirely new system of outcomes focused regulation. This approach sets out to give firms much more freedom to tailor their services to individual clients, rather than the previous system of detailed regulation.

Keywords: solicitors; regulation

Introduction

On the 6 October 2011 significant changes will take place to the legal services market. From that date, new non-lawyer owned businesses (Alternative Business Structures – ABSs) will be able to be licensed by the Solicitors Regulation Authority (SRA) to provide legal services. To regulate these new businesses, and also conventional law firms, a new SRA rulebook called the SRA Handbook will come into force. It introduces the concept of Outcomes Focused Regulation (OFR) which makes the achievement of high level outcomes the focus of a firm's relationship with clients. The intention is that this will give firms much greater freedom to tailor their

services to the needs of individual clients rather than, as at present, require them to adhere to a “one size fits all” approach dictated by detailed rules.

Background to the changes

The Legal Services Act 2007

The Legal Services Act was the catalyst for change. It provides the statutory framework for ABSs and a more modern approach to regulating legal services. It sets out regulatory objectives for the first time, setting a new tone for regulators. All regulators of legal services, including the SRA, must have regard to these objectives

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in every aspect of their regulatory activities. The objectives are these:

- Protecting and promoting the public interest;
- Supporting the rules of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of legal services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining the professional principles.

The SRA decided that its regulatory requirements, particularly those dealing with the promotion of competition and protecting the consumer, needed substantial revision to bring them into line with the regulatory objectives. As a result, the Handbook introduces an outcomes focused approach to regulation to give more flexibility and allow more innovation in the provision of legal services. Charles Plant, the chairman of the SRA Board summed up the approach in this way:

“OFR amounts to a shift in emphasis from prescriptive, rigid rules to flexible, outcomes-focused requirements. ...the way the legal services market is evolving demands that regulation should focus more on the quality of clients' experience—and less on prescribing the approach that firms should take.”

The SRA Handbook

This contains all the rules and other regulatory requirements which will govern both the firm and its managers and employees. It includes all the training requirements to become a solicitor, the rules which set out how to become, and remain, an authorised firm, a new Code of Conduct and the Accounts Rules. It includes some new requirements such as the suitability test which will apply not just to those seeking to be admitted, but also to all managers, owners and compliance officers of a firm. Fundamentally, it includes a set of ten principles which lay down the behavioural requirements in relation to all aspects of practice and running a firm.

The Principles

The principles over-arch and set the tone for the entire Handbook. They apply throughout. In particular, they are intended to assist with the application of the outcomes.

The first six principles are familiar in that they form the core duties in the current Code of Conduct. They deal with fundamentals such as the need to act with integrity and independence, to observe the rule of law, to

act in the best interests of clients and to provide a good standard of service.

The following four are new and highlight the areas which the SRA views as being of key importance in running a legal services business. They require the following:

- Compliance with legal and regulatory obligations and co-operating with regulators. This signals the SRA's new risk based approach to regulation. The new regulatory objectives require that the public are properly protected and the SRA intends to collect much more information from firms to ensure they are complying with their regulatory requirements.
- Having proper governance and sound financial and risk management principles. The SRA believes that this is essential to providing a good standard of service to clients and protecting their interests.
- Encouraging equality of opportunity and respect for diversity. This emphasises the importance of firms making this part of their ethos.
- Protecting client money and assets. This is fundamental to the trust clients place in the firm they instruct.

The outcomes focused approach

This approach allows firms greater freedom to decide how they interact with their clients to give them the best possible help in achieving their objectives. It puts the emphasis much more on the quality of the clients' experience and, for some firms and individuals, this may mean an attitude change.

Until now, some firms have been able to “tick the boxes” in terms of regulatory compliance but have still failed to provide their clients with a good service experience. This has been particularly evident in relation to complaints handling, where clients have been left to struggle simply because their firm has provided no help when they are unable to understand the complaints procedure, or clearly articulate their concerns.

The rigidity of the rules-based approach has also been an irritant for firms dealing with sophisticated clients, as detailed information has had to be given to the clients in respect of each set of instructions, when the clients are well aware of the service standards to expect. The rules have also required, for example, that even small amounts of interest on client monies have to be paid even when the clients expressly do not want it.

How outcomes will be used

In the Handbook, outcomes will be used in two ways. First, each set of rules is prefaced by high level outcomes which set out the purpose of the rules. For example, the

high level outcomes which preface the Accounts Rules are these:

- Client money is safe;
- Clients and the public have confidence that client money held by firms will be safe;
- Firms are managed in such a way, and with appropriate systems and procedures in place, so as to safeguard client money;
- Client accounts are used for appropriate purposes only; and
- The SRA is aware of issues in a firm relevant to the protection of client money.

Generally, compliance with the rules will ensure the outcomes are achieved. A rules-based approach is still required with many of the provisions in the Handbook. To ensure clients are properly protected, they have to lay down precise requirements, such as the manner in which client money must be handled, or the type of insurance arrangements which must be in place.

In relation to the Code of Conduct a different approach is taken in that “outcomes” replace “rules”. This gives more flexibility, particularly in the section that deals with client care, for firms to tailor their service to the needs of the individual client.

The Code of Conduct

Outcomes and indicative behaviours

The new Code of Conduct (the Code) will be at the heart of the new OFR approach to regulation. New terminology is used in that “outcomes” replace “rules” and must be achieved. In other words, they are mandatory requirements. Similarly, the principles apply throughout the Code, with some being more applicable to one section than another. For example, acting in the best interests of clients and providing a proper standard of service are key principles in relation to the first section of the Code dealing with “You and Your Client”. The principles must also be achieved and are mandatory.

The outcomes are supported by indicative behaviours. These provide examples of how the outcomes might be achieved, but compliance with the outcomes can be demonstrated without any, or all, of the indicative behaviours being met. The indicative behaviours are, therefore, non-mandatory and are a form of guidance. There are also some additional notes which, again, are non-mandatory and are included as a guide to aid compliance.

The SRA has avoided providing extensive or directional guidance as it wants firms to concentrate on how the outcomes can be best achieved for each client. The SRA is also concerned that the indicative behaviours are seen as just that, and not requirements which have to be met to achieve the outcomes.

Client care

The flexibility which characterises the outcomes focused approach is most apparent in the “You and your client section”. This is because clients have different needs and the flexibility built into outcomes such as “You treat your clients fairly” allows, for example, sophisticated clients to be treated in a different manner to vulnerable clients who may need much more support to understand what they can expect in terms of how their matter will be handled.

Examples of the outcomes which deal with client care, costs information and complaints handling are set out below:

- You treat your clients fairly;
- You provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice;
- You have the resources, skills and procedures to carry out your clients’ instructions;
- The service you provide to clients is competent, delivered in a timely manner and takes account of your clients’ needs and circumstances;
- You only enter into fee agreements that are legal and which you consider are suitable for the client’s needs and take account of the client’s best interests;
- Clients receive the best possible information, both at the outset and when appropriate as their matter progresses, about the likely overall cost of their matter;
- Clients are informed in writing at the outset of their matter of their right to complain and how complaints can be made;
- Clients are informed in writing, both at the outset of their matter and, if appropriate, at the conclusion of your complaints procedure, of their right to complain to the Legal Ombudsman, the time frame for doing so and full details of how to contact the Legal Ombudsman;
- Clients’ complaints are dealt with promptly, fairly, openly and effectively;
- Clients are informed of their right to challenge or complain about your bill and the circumstances in which they may be liable to pay interest on an unpaid bill.

Because outcomes are fairly high level, so that firms can treat clients as individuals and respond more appropriately to their needs, they are going to have to think carefully about how they are achieved.

The indicative behaviours can be used as a guide and, in fact, some of the more “tick box” like requirements of the current rules are used as examples of how the outcomes can be achieved. For example, an indicative

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behaviour “agreeing an appropriate level of service with your client...” is likely to be something which firms will have to do with all new clients, or those who instruct them infrequently, to demonstrate that they are “treating them fairly”. However, for clients who are regular customers it is likely that this information will be familiar to them and not need to be repeated.

What is going to be important is that clients have the information they need as individuals to make decisions about all aspects of how their case is handled. They also need as much information as possible at the outset and as their case progresses of the costs involved.

More specific outcomes

Although some outcomes are high level, others are more specific. The complaints handling outcomes include a very specific requirement to notify clients at the outset and, if appropriate, at the conclusion of the complaints procedure, of their right to complain to the Legal Ombudsman. However, the more general outcomes governing complaints handling allow greater flexibility such as the outcome which requires that “clients’ complaints are dealt with promptly, fairly, openly and effectively”. It is interesting that the outcomes do not require a written complaints handling policy. Most firms will want to have one in order to be able to demonstrate how they have met the outcomes.

What will be important throughout the client care section is that the flexibility in the outcomes is underpinned by clear procedures, so that everyone within a firm is aware of how they need to deal with their clients and the sort of information that should be included in a client care letter.

Outside the client care section of the Code, some of the outcomes tend to look more specific. For example, those that require that firms do not act where there is a conflict of interests, or in breach of their duty of confidentiality, look very much like the current rules. Similarly,

those dealing with undertakings and a solicitor’s duty to the court are very specific in their requirements.

Other examples of the use of outcomes

One area where much detail has been stripped away and the outcomes are set at a high level is in relation to referral arrangements. Although the basic requirement to disclose the arrangement with the introducer and any referral fee paid remains, other detail has been removed leaving just the fundamental requirements to act in each client’s best interests and to ensure that the advice of the firm remains independent of the interests of the introducer.

Outside the Code, the only other area where a flexible outcomes focused approach is used, is in relation to the interest which is paid on a client’s money held by a firm. At present under the Accounts Rules, interest has to be paid in accordance with a table which dictates that, if a certain amount of money is held for a specified period, interest has to be paid. In the Handbook, the only requirement is that interest is paid where it is fair and reasonable that it should be paid. The amount paid must also be fair and reasonable. Firms will, however, have to adopt a written policy with regard to the payment of interest and clients will have to be informed of that policy.

Conclusion

The outcomes focused approach which has been adopted in the Handbook is new for firms and some concerns have been raised that the flexibility inevitably leads to a loss of clarity. The SRA remains convinced, however, that outcomes should ultimately lead to better service standards for clients. The proof of the pudding will be seen later this year after the Handbook comes into force on 6 October.

Biography

Until recently Bronwen Still was Head of Policy at the Solicitors Regulatory Authority and was involved in drafting the May 2010 consultation on the new Handbook. She now runs her own consultancy, Seven Hills Legal Training and Services Ltd, advising firms on regulatory compliance. Bronwen is a consultant with the Risk & Compliance Service.