

Solicitor's regulation authority's code of conduct and ethical dilemmas



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“ Outcomes-focused regulation concentrates on providing positive outcomes which when achieved will benefit and protect clients and the public. The SRA Code of Conduct (the Code) sets out our outcomes-focused conduct requirements so that you can consider how best to achieve the right outcomes for your clients taking into account the way that your firm works and its client base. The Code is underpinned by effective, risk-based supervision and enforcement.” Introduction to the SRA Code of Conduct, Law Society Publishing, November 2016 LPC Edition

Explain how the SRA Code of Conduct is risk based and how those risks align with ethical dilemmas facing corporate firms.

In particular look at Chapter 3 and Chapter 4 of the SRA Code and consider whether corporate firms should be able to act for both parties on a transaction

if that is how they view they can best achieve the right outcome for their client.

In 1994, Lord Bingham referred to the need to maintain public trust, which required confidence that solicitors are people of “ unquestionable integrity, probity and trustworthiness.”[1]I feel this statement adequately sets the tone of this monograph which in the first part, tries to examine the way in which a risk based outlook of the SRA aligns with the ethical dilemma faced by corporate firms. In the second part, the justifications of solicitors acting for both clients in a transaction are discussed and viable options to do so within the purview of the SRA code are explored.

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SRA on its website ^[2] tries to spell out its position and expectation ' to protect the public by ensuring that solicitors meet high standard, and by acting when risks are identified.' ^[3] " SRA is outcome focused, risk based regulator."^[4]Outcome focused regulation translates into ensuring that ' providers of legal service deliver the right outcomes for the public, in line with the intent of the regulatory objectives.'^[5]Risk based regulation means that compliance risks are ' assessed in terms of their probability and impact of any harm they cause to desired outcomes, before action is taken.'^[6]This approach ensures that ' regulatory activities and resources are prioritised and applied proportionately.' ^[7] This ultimately satisfies the purpose of the Legal Services Act 2007 s1. 1-The Regulatory Objectives^[8]and s1. 3-The Professional Principles^[9].

The Solicitor's Regulation Authority's (SRA) Handbook outlines ten mandatory principles supported by mandatory outcomes and optional indicative behaviours which apply to everyone that the SRA regulates and to all aspects of practice. " Firms and practitioners must abide by these principles and use them as their starting point when faced with an ethical dilemma." ^[10] Examination of SRA Principle 8 sets out the requirements for law firm to operate in accordance with ' proper governance and sound financial and risk management principles.' ^[11] Legal Services Act 2007^[12]Part 6-Legal Complaints, manifest the approved regulators role in protecting and promoting consumers' interests, highlighting impairment risk if the law firms providing legal services fail. In a comparison of doctors and lawyers for professional misconduct, interestingly 95% of lawyers were

struck off, against 40% of doctors,[13]showing how seriously this is taken within the legal profession. This demonstrates the importance of understanding of various relevant risks in commercial firms and places leverage on the development of proactive strategies to manage and successfully mitigate the risks. Adoption of a risk based approach to regulation, compliance and ethics -SRA's main regulatory driver is thus highlighted wherein each and everyone in the firm is responsible for regulatory compliance thereby directly gaining authority to practice by the SRA, culminating in the firm's positive reputation and commercial viability. This risk based approach depends closely and critically on the methodology of risk analysis, criteria and reasons for SRA's prioritising of some risks over the others.

SRA Risk Outlook ^[14] is an annual publication published since 2013 designed to keep abreast with the dynamic nature of risk prioritisation by the SRA and gives the firms a transparent and conspicuous insight into the present indications of risk priority thinking of the regulatory body. Risks are included on the basis of how ' various external factors can undermine our core values'[15]and the Code[16]gives guidance on ' how to manage risks at work place and protect clients' interests.'[17]. " No code can foresee or address every issue or ethical dilemma which may arise. You must strive to uphold the intention of the Code as well as its letter."[18]Tracey Calvert aptly distinguishes this reconciliation between the SRA's risk focused regulations and how these align with the ethical dilemma facing corporate firms-" The SRA determines risk-if we can assume that, this means the likelihood of an

adverse incident or event happening at some point in the future-by linking it to some core reference points:

- Does the risk that has been identified have an impact on the SRA's overarching regulatory duty, which is to ensure that the regulatory objectives are put into practice?
- Does the identified risk have the potential to damage the reputation of solicitor brand?
- Does the identified risk have the potential to have adverse consequences for law firm clients?" [19]

Risk assessment requires professional objectivity for such assessment to be useful, but the pressure of 'being commercial' and a 'professional culture that emphasises putting the client first' [20] severely strains that objectivity. That sensitivity sometimes involves a negotiation between the lawyer's view of what is lawful and right, and their view of what is tolerable. "The important point is that ethical scandals usually flow from bad decisions, not bad apples." [21] Whilst minimalist solicitors [22] are motivated by just avoiding 'criminal breach and SRA sanctions' [23] an ethical solicitor "knows the right thing, does the right thing and does it for the right reason when faced with an ethical dilemma."

Continuing in the light of the ethical dilemma involving conflict of interest and confidentiality, we are going to examine 'simultaneous representation' [24] where lawyers represent opposite clients in matter, usually with the consent of parties and 'successive

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representation'[25]wherein solicitors act against former and/or existing clients.

It is prohibited by O(3. 4) [26] and O(3. 5) [27] of the SRA code ' to act in own interest and client interest conflicting situations' respectively. However O(3. 6) [28] of the SRA Code allows solicitors ' to represent clients in cases of conflict, where clients have common interests provided all clients have been explained the relevant issues and risks which clients confirm understanding', and ' the enterprise is in best interest of the clients by ensuring that the benefits outweigh the risks.' Most important is to obtain consent in writing from all parties authorising the solicitors to act on their behalf.

Case law in *Hilton v Barker*[29]suggests that solicitors should not normally act for more than one party in a transaction where interests of the parties conflict. Practically we see an ' exception in transfers of land, conveyancing transactions'[30]where solicitors acting for a purchaser is often instructed by the mortgage lender as well. This is beneficial for the purchaser who does not have to pay for another solicitor to represent the lender and get familiar with the case. ' The lender benefits as the solicitor can furnish the assurances required on the title of the property and take care of the monies involved.'[31]However, representing both parties has often resulted in unwarranted litigation against solicitors. ' More often this was brought in primarily by lenders wherein borrowers defaulted.'[32]Two cases effectively contrast this predicament. *LJ Gibson*, in the *National Home Loans Corporation* [33] case ruled that solicitors' duties towards a lender was defined solely by the instructions from the client. In this case solicitors were instructed to

certify the title and any change of circumstances since offering of the loan. They were not instructed to check the credit worthiness of the borrower and hence were exonerated. This is aptly contrasted in the Mortgage Express^[34] wherein Lord Bingham found the solicitors liable, as the instructions required them to undertake 'the normal duties of a solicitor when acting for a mortgagee'.^[35]

Provided O(3. 6)^[36]is satisfied, solicitors can also act in a prospective situation of apparent conflict, where the clients have substantially common interests in a situation of multistage bidding process, wherein the 'same solicitor may act for two or more firms in the first stage of ensuring compliance minimum bidding criteria.'^[37]There after he cannot represent the clients in competitive bidding stages. In situations where end results of clients are different, this exception is not satisfied as per IB(3. 11)-'cases involving a partner buying out interest of another partner in their joint venture or a seller transferring property to a buyer.'^[38]Adhering to O(3. 7)^[39]solicitors can 'represent multiple clients in competitive bidding in activities like due diligence but must abstain from the bidding process.'^[40]Representing 'two buyers competing for the same property'^[41]cannot be carried out as per IB(3. 13). In matters of clients competing for same objective no individual within the firm can act for more than one client unless clients agree otherwise.^[42]In case of unexpected conflicts between clients, the lawyer can act for only one client. In the United States, this has been called the 'hot potato' doctrine.^[43]Upon conflict, the lawyer must drop one client—quickly! There is little guidance on which client the lawyer should select.^[44]

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A concern is that lawyers ' do not take client confidentiality seriously enough.'[45]Lord Scott views confidentiality as a ' central pillar' of legal ethics.[46]However, IB(4. 4) requires lawyers to report any suspicions that client may be involved in money laundering[47], terrorism[48]or possession of official secrets[49].

O(4. 2) states that ' any individual advising a client makes the client aware of all information material to that retainer of which the individual has personal knowledge'. Additionally, O(4. 3) suggests that in cases of conflicts between confidentiality and disclosure, ' duty of confidentiality to the client takes precedence over duty of disclosure'. Since acting concurrently for two clients with conflicting interests would be a clear conflict of interest, SRA Code introduction to the chapter on confidentiality states that ' duty of confidentiality must be reconciled with the duty of disclosure' and is intended to include information related to past clients which is not known to the solicitor, but known to his firm. In the case of *Bolkiah* ^[50], House of Lords held that a former client had to consent to their former professional adviser acting in a matter where they held confidential information to new matter. The dawning of the fact that conflict of interest in successive representations cannot be ' avoided by information barriers raised serious concerns'.[51]

SRA Code in O(4. 4)[52]and IB(4. 5)[53]states ' not to continue for a client for whom you cannot disclose material information relating to a past client or a present client', except in very limited circumstances. Such situations are precursor to conflict of interest situations. O(4. 5)[54]requires to have effective systems and controls in place to enable you to ' identify and

mitigate risks to client confidentiality'. In Georgian American Alloys case ^[55] it was decided that courts should interfere, unless it was satisfied that there was no real risk of disclosure and it should restrain solicitor from acting for second client unless it was satisfied that all measures have been taken to ensure no disclosure would occur.

Large corporate law firms boast of having waterproof systems to protect past client confidentiality. When asked to act for a client to whom they have a duty to disclose information confidential to past clients, they erect information barrier relative to ' the size and complexity of the firm'[56]to prevent information leaking to solicitor or team dealing with present matter. ^[57] Due regard must be had to limitations of the barriers particularly ' during mergers and acquisitions'[58]or where ' solicitors transfer between firms.'^[59]Special consideration is warranted in smaller firms due to ' physical structures or layout of the firm.'^[60]

" The basic principle that a lawyer must not put himself in a position in which the client's interests conflict with the lawyer's own or those of other clients is not hard to understand. What has created the difficulty are the myriad attempts by lawyers to get around this principle and to exploit the exceptions."^[61]Lawyers often serve several masters but they cannot do so effectively if they cannot do the best for them in every situation. Redressal of the risks of information security and personal ethics and integrity are key to building reputation and confidence and trust in clients. Clients on the other hand are more flexible in conflicts preferring to trust their lawyers driven by the idea of losing the best." It is a matter of give little, take a

little.”[62]Ultimately, the risk based outlook of the SRA puts it at ‘ par with other regulatory bodies globally in other sectors like financial, health, safety, hygiene, environmental protection etc. who all in recent times have bought into the trending objective of ensuring risks to the consumers or clients are well protected, managed and mitigated.’[63]Biggest beneficiary of this notion is the client wherein the law firm is obliged to protect the client through the correct application of law.

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