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6 March, 2009

Dear Margaret

Consultation on proposed amendments to Rule 3 and Rule 4

The City of London Law Society (CLLS) represents approximately 13,000 City lawyers, through corporate membership of 53 firms, including some of the largest international law firms in the world, and through individual memberships. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations and other requests for views on issues of importance to its members through its 17 specialist committees. This response to the SRA's consultation on proposed amendments to Rule 3 (conflicts of interest) and Rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007 (the "Consultation") has been considered by the CLLS's Professional Rules and Regulation Committee. The Committee comprises representatives of 12 firms (as listed in the appendix to this letter). The views expressed in this letter also reflect the views of those 12 firms individually and should be weighted accordingly.

Since it is the CLLS that has argued for the proposed changes, it will come as no surprise that it also now supports the principal proposals for change in the Consultation. Before turning to the specific questions contained in the Consultation paper, we have the following comments on the paper itself:

(A) Section 2.4 mentions the difficulty sometimes encountered by the phrase "substantially common interest" and points out that the proposed change to Rule 3 would create a means whereby this problem could be avoided in the context of work for sophisticated clients. In the final sentence, it suggests two other ways of resolving the problem. The first is by introducing "a closer definition" of "substantially common interest". We do not see this as a realistic solution since we doubt whether wording could be found which would cater with clarity for the very wide range of circumstances in which the exception would need to be considered. This is a difficulty to which the Consultation alludes in section 3.2.12 and we note that no wording has been suggested. The second proposed way forward is to remove the exception completely. In our view, this is also impractical; unless the definition of conflict in Rule 3.01(2) was also changed, it would likely end

the ability for a firm to have joint instructions in many practical circumstances since the inflexibility in the rule would mean that there would very often be a "significant risk that duties may conflict" in some respect.

(B) We accept the premise that the rules should not be more permissive than the law but we would argue that the common law is in fact less restrictive than is suggested in section 2.7 of the Consultation. Particularly there is unambiguous dicta from the Privy Council in Clark Boyce v Mouat to the effect that, as Lord Jauncey put it:

"There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather [it] is the position that he may act provided that he has obtained the informed consent of both to his acting".

Our interpretation of this case is fully supported by Hollander and Salzedo in Conflicts of Interest & Chinese Walls (third edition) at page 60. Further the House of Lords took a similar position in Prince Jefri, where Lord Millett held:

"A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interests". (emphasis added).

These dicta are entirely consistent with the nature of fiduciary duties. While these arise in equity, they may be limited by the express or implied terms of the retainer. In this regard we would refer you to the recent Citigroup case[1], which recognised the right of Citigroup to vary its fiduciary duties to its client by contract. Given the foregoing cases, we do not feel that the assertion in the penultimate sentence of section 2.7 of the Consultation is in fact reflective of the position at law.

(C) Given that the proposal for Rule 3 only relates to sophisticated clients (who would have ready access to legal advice on the issue), we feel that much of the terminology in section 3.1.2 is alarmist. A sophisticated client, precisely because it is sophisticated, will be fully conscious of its bargaining power, will not want or expect "transparency of consents" if that means revealing to a third party everything which passes between the firm and the client on the issue and will not require that it has to "agree" the detail of the measures on confidentiality (sophisticated clients will have confidence that the firm will do whatever is necessary and will ask for any details they want). We also note the suggestion that firms should draw the SRA / LCS complaint options to the attention of their sophisticated clients but would point out that this is not a requirement for firms acting for buyer and seller on conveyancing and other property transactions under the present rules (Rules 3.07-3.15). Moreover it would be wrong to disregard or denigrate the ability of sophisticated clients (who know their rights in any event) to influence the behaviour of their lawyers directly by opting to switch advisors if ethical matters (or any other aspects of the service) are not dealt with to their satisfaction.

Section 3.1.3 suggests that the bullets in 3.1.2 are the minimum requirements and, each one, proportionate. It follows from the points made above that we do not agree.

(D) We do not believe that section 3.2.5 of the Consultation is reflective of the ways in which sophisticated clients use their law firms or the way large firms (at least) operate. The idea that a firm, if acting through different teams, would somehow manipulate the service given through one team to favour a "dominant client" is fanciful. If the partner concerned did not think he/she and his/her firm could properly represent the client, he/she would not seek clearance both out of regard to the core duties in Rule 1 (which apply individually to each and every solicitor) and, at a practical level, because of the certainty of losing the disadvantaged client thereafter. Furthermore, a sophisticated client will take steps to ensure that it only retains a lawyer to act on its behalf if it can be certain of obtaining high quality and unfettered advice.

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[1] *ASIC v Citigroup Global Markets Australia Pty Ltd [2007] FCA 963*

(E) Section 3.2.6 again suggests problems which we do not accept exist. The phraseology suggests that it is normally the case that everyone in a firm is aware of what everyone else is doing and that firms might be compelled for the first time to create discrete units or "firms within a firm" with "extensive use of information barriers". As the SRA should know from its work on the FSA's voluntary code regarding the management of confidential information, this is far from the truth. Client work is generally confidential and only those with a need to know will be aware of it. Given automatic steps to maintain confidentiality, an "information barrier" will operate to some degree on every job taken on by the firm. We don't believe that any of this leads to an erosion of the firm's ability to give independent advice and (applying a risk based perspective) would invite the SRA to illustrate when a sophisticated client, having consented to its firm acting for a competing bidder, has complained that the firm has thereafter failed to give it independent advice.

(F) The duty of loyalty is one element of a firm's fiduciary duty. As noted above, the fiduciary duty may be amended by the contractual terms of the retainer. Where a client agrees that the firm may also act for another party, the firm as a whole generally will not have a "duty of loyalty", but those lawyers acting for the respective clients will of course do so. Accordingly we do not accept the premise underlying the concern expressed in the final sentence of section 3.2.6.

(G) We would query whether the point raised in section 3.2.8 should rightly come within the scope of the Consultation. To impose controls over law firms to restrict what a public company can do when this is not required by those who regulate public companies does not, in our view, fall within the regulatory objectives of the SRA (see the Legal Services Act, s28). The duties and standards of care of directors making (or more likely delegating) such decisions are regulated by the Companies Act and the common law, not the SRA. Moreover, many companies listed in England will already give consent for their lawyers in other countries (in particular in the US) to act for another party. If they can do it there, why not here?

(H) We understand that the SRA has already consulted a number of sophisticated users of legal services in relation to the proposals for Rule 3 and that this showed significant support for amending the current regime. We would encourage the SRA to share the results of this process with the profession since it seems to us that the views of relevant clients ought properly to be taken in to account.

Turning to the specific questions in part 5 of the Consultation:

1. The benefits of the change to Rule 3 are that it would give greater freedom to sophisticated clients to make informed decisions about how and on what terms they obtain legal advice, it will reduce cost, it will enable transactions to be completed more quickly, and it will make England & Wales more competitive.

2. We think the main risks are (i) that there might be a breach of an information barrier, (ii) that a client might point to the dual representation to attack the firm if it felt that it had not obtained the level of service it expected and (iii) that there could be public criticism if a high profile transaction on which a firm had a dual representation failed. Generally, we believe these risks are small, and are outweighed by the benefits of the proposal. Specifically, information barriers are used regularly (for instance in the context of the competing bidder exception) and there is no history of breaches, and sophisticated clients would not request/consent to dual representation if they were not satisfied that confidentiality would be maintained. In relation to (ii), this would be an unattractive approach for a client to take where it had fully requested/consented to the dual representation and, again, there is no history of such criticism in the context of competing bidder work. In relation to (iii), we think it very unlikely that clients would want dual representation on such a transaction, but we think the identified risk could be minimised by Guidance stating that a firm should be particularly cautious in accepting dual representation in matters which are likely to be high profile, where the advantages to the client(s) (arising, for instance from the firm's familiarity with the client's business and objectives, speed, cost saving etc) are not material in the context of the overall transaction.

Save as outlined above, we do not see any material risk arising from the four bullet points in your question.

3. Yes.

4. We agree that the mechanism for deciding which clients are 'sophisticated' should refer to the two categories mentioned; namely those with in-house teams or who have taken independent advice on the point. However we also think that it should also be possible for a client to certify on its own behalf that it falls in to this category. In this regard the SRA may wish to analyse the regime that applies to sophisticated investors under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005.

   Having a correctly formulated self certification approach will help to deal with clients who are patently sophisticated but who do not fit within the two categories above. An example would be private equity firms, who are very sophisticated users of legal services and who commonly work with a range of law firms on numerous transactions, often simultaneously. Such firms may or may not have in house legal teams but the commercial staff involved in running transactions will be extremely familiar with using lawyers and with market practice. It would seem onerous to require that such individuals should have to pay for independent advice as a condition of being able to proceed in the manner they choose.

   We also think that an individual could be a sophisticated client provided that he or she was himself/herself a lawyer (the development of a self certification regime may also have a bearing on this area).

5. That the consent is informed and in writing, and that the firm should only act, or continue to act, for both clients if it is reasonable in all the circumstances for it to do so (with, in addition, the Guidance suggested in 2 above).

6. We have made a number of comments on the Consultation as a whole in the first part of this letter. A general theme to these is that we feel that many of the concerns expressed by the SRA can be assuaged on further analysis of how large law firms operate and how they interact with sophisticated clients. We would reiterate our willingness to engage with the SRA (as we have in the past) with a view to resolving these issues.

   We have two further specific comments:

   We note (in section 3.1.2) that the proposed change to Rule 3 will not extend to matters involving litigation. It will of course be necessary to clarify the extent of this restriction in draft wording and we would urge the SRA to circulate possible drafting for the revised rules as the next stage of its engagement with the profession.

   It will be necessary to establish how the revised consent procedures under Rule 3 will interact with the present provisions relating to acting for two parties on a conveyancing (or related) transaction. Under the present Rules 3.07-3.15, particular restrictions exist regarding when a firm may represent both the buyer and seller in a transaction (for example, if each is an established client or if the firm acts from separate offices). Clearly those restrictions are not intended to be carried through to the new element of Rule 3, which deals with the consents that a firm may obtain from its sophisticated clients irrespective of the work in question or the nature of its previous relationship with the client(s). We believe that these different provisions are compatible; that is, for non-sophisticated clients a firm may act for both parties in a conveyancing related transaction subject to the existing provisions in Rules 3.07-3.15 but where *each* client is sophisticated the firm may act for both in a broader range of circumstances under the new Rule and without regard to the restrictions of Rules 3.07-3.15. However, it will be necessary to clarify this position carefully in the drafting.

7. Yes.

We hope these views are of assistance. Representatives of the Professional Rules and Regulation Committee would be happy to elaborate if that is required.

Yours sincerely

David McIntosh
Chairman
City of London Law Society

Chris Perrin
Chairman
Professional Rules & Regulation Committee

APPENDIX

PROFESSIONAL RULES & REGULATION COMMITTEE

Chris Perrin - Clifford Chance LLP (Chairman)

Raymond Cohen – Linklaters LLP

Sarah de Gay - Slaughter and May

Alistair Douglas - Travers Smith LLP

Brian Greenwood - Taylor Wessing LLP

Antoinette Jucker - Pinsent Masons LLP

Jonathan Kembery – Freshfields Bruckhaus Deringer LLP

Heather McCallum - Allen & Overy LLP

Julia Palca - Olswang

Mike Pretty - DLA Piper UK LLP

John Trotter - Lovells LLP

Claire Wilson - Herbert Smith LLP