The City of London Law Society

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Margaret Hope
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Dear Margaret

Re: SRA consultation "The architecture of change: the SRA's new Handbook"

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. 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 on issues of importance to its members through its 17 specialist committees. This response in respect of the SRA consultation "The architecture of change: the SRA's new Handbook" has been prepared by the CLLS Professional Rules and Regulation Committee (the "PR&RC"). The PR&RC is made up of a number of solicitors from twelve City of London firms who have specialist experience in the area of the regulation of the profession. The CLLS Litigation Committee has also contributed to part of this submission.

This submission is divided into two parts:

The first part sets out the CLLS's answers (where applicable) to the specific questions contained in Annex L of the consultation paper.

The Second part provides a more specific, in depth commentary on the various sections of the Draft SRA Code of Conduct (the "new Code"), namely:

a. The four sections of the new Code (as set out in Annex C of the consultation paper):
    1. You and your client (Annex A of this document)
    2. You and your business (Annex B of this document)
    3. You and your regulator (Annex C of this document)
    4. You and others (Annex D of this document)

b. A detailed commentary on the provisions of the Solicitors' Code of Conduct 2007 (the "current Code") and new Code as they relate to overseas practice (see Annex E of this document).

As you know, in addition, the CLLS separately submitted (on 10 August 2010) its comments in respect of conflicts of interests models. A copy of this response can be accessed at http://www.citysolicitors.org.uk/FileServer.aspx?oID=837&lID=0. The CLLS has not provided comments on the other parts of the new Handbook but may provide further comments in due course.

Answers to specific questions contained in Annex L of the consultation paper

1. Do you agree with our overall approach to implementing ABSs?

We do agree in principle with your overall approach to implementing ABSs. Your overall objective of protection of the public and improving standards means that the same standards should be expected whether legal services are being delivered by an ABS or solicitors' firms practising in the traditional partnership model.

However, we are concerned that a level-playing field approach between ABSs and traditional firms is introduced in a risk-based proportionate way which does not unnecessarily impose additional compliance and regulatory burdens on types of firms where there is no need to do so in order to meet the regulatory objectives. So, for example, the requirements relating to how firms are properly managed, in order to meet mandatory Principles 5 and 8, might need to be satisfied very differently by an ABS which is managed and controlled by non-lawyers than by more traditional law firms with satisfactory governance and management arrangements to suit its type of firm and business. It should not, in our view, be necessary, say, to require all firms to appoint a CoLP and CoFA (which would impose additional regulatory responsibilities on individuals which may cut across current satisfactory governance arrangements) just because there is a different regulatory requirement within an ABS with a multi-disciplinary practice and/or non-lawyer management, ownership and control.

2. Do you agree with the new Handbook structure?

We do agree with the proposed new Handbook structure. It will be useful to have all of the regulatory requirements in one integrated document.

We believe that the profession will expect to see some core mandatory principles, rather than a document which operates entirely by identifying expected outcomes. We therefore welcome the list of 10 pervasive principles, subject to comments on these below. We can see, as you say in paragraph 25, that it has been a challenge to determine which elements of the Handbook should primarily be expressed as rules, and which should be totally outcome-focused. We also have comments on the way in which some matters have been dealt with as "Outcomes" when they seem to us really to have been formulated as rules (especially when stated as negative obligations) and some which are really descriptions of behaviours which would more appropriately be addressed as Indicative Behaviours relating to a more general objective-focussed mandatory outcome. The result is to produce a Handbook which contains a hotch potch combination of different sorts of provisions – Principles, Outcomes, Indicative Behaviours, Guidance and separate sets of Rules – the differentiation between some of which will not be straightforward. However, subject to this and the points made below which we hope can be addressed as a drafting matter over the coming months, we believe that the right balance has broadly been achieved and we are supportive of the general structure.

3. Do you agree with the new Principles and our approach to applying them across the Handbook?

We broadly agree with the ten mandatory Principles, and that they should apply to all firms and individuals, although we do have some concerns about extra-territorial application (discussed below). It is right to have such Principles as a starting point when faced with an ethical dilemma. Our view is that in principle the four new Principles that you have added are appropriate. (These relate to the relationship with the Regulator, the effective management of firms, preventing discrimination and protecting client money and assets.) However, we do have a few concerns on the detailed drafting which we think need to be addressed:

- It needs to be clear that Principle 4 (acting in the best interests of each client) only relates to the matters on which each client has instructed the lawyer/firm, otherwise there would be a concern that firms could not litigate against an existing client (or perhaps even a former or prospective client, unless the definition of "client" is changed as suggested below) even where the Conflicts and Confidentiality provisions would allow this.

- Principle 8 appears to be drawn too broadly (particularly with regard to the requirement to run a business "in accordance with proper governance" in requiring each individual to carry out his/her role effectively even if not involved in any way with firm management responsibilities (see comments regarding Chapter 1 ("Client care") in Section 1 ("You and your client") below)). Is it really intended to make poor performance by individuals doing their day-to-day jobs a breach of these Principles? We would suggest just deleting the words "effectively and" in order to restrict Principle 8 to business management matters.

- Whilst it is clearly desirable to reflect the importance of equality and diversity in the regulatory regime, we do have some concerns about the apparent scope of Principle 9. The current Code (6.03) requires each firm to have an appropriate policy for preventing discrimination and harassment and promoting equality and diversity and to "take all reasonable steps" to make sure that it is complied with. Under the new Code (as well as there being specific outcomes which mirror much of Rule 6), a firm will have a categorical duty (on a par with its duty to uphold the rule of law) to run its business in a way that promotes equality and diversity. Furthermore, we are concerned that Principle 9 is much too onerous in that it requires each individual to "promote" equality and diversity in carrying out his/her role. This goes much further than current Rule 6 in requiring principals/managers etc. to adopt and implement an appropriate policy for promoting equality and diversity. We understand the objectives behind raising the equality/diversity issue to the level of a mandatory Principle. However, we fear that a wide-ranging positive obligation to promote equality and diversity, especially when applied to complex multinational organisations operating in jurisdictions where there are many more obstacles to making progress on increasing equality/diversity than in the UK, will be problematic. There are also concerns as to whether disgruntled employees or applicants for roles will make use of such a Principle even where the firm in question has complied fully with the law. We would suggest replacing the word "promotes" with "supports" or perhaps "facilitates increased".

Furthermore, more generally we believe that the repetition of the extracts of the Principles in each section of the current Code is not particularly helpful. On a first reading of the new Code, it may be useful to be reminded of the Principles, but soon after its introduction they will no doubt be familiar to solicitors. It would be more straightforward if they could just be set out at the start of the new Code, which could then follow with specific chapters. This is especially the case considering that none of the Principles are in any way dis-applied on a chapter by chapter basis in any event.

4. In what areas do you think explanatory guidance would be particularly helpful?

In our view, the Principles ought to be drafted sufficiently clearly, such that no guidance is needed to explain their meanings or how they should be applied.

5. Do you agree with the new Code structure?

We think it is helpful that the new Code has been divided into four sections, as this makes it easy to find the chapters dealing with firms' relationships with their clients, their business, the regulator and others.

The outcomes-approach means that there are decisions to be made about whether desired results constitute "Outcomes" or "Indicative Behaviours". Similarly, you will have to consider the extent to which the "Indicative Behaviours" duplicate "Guidance". We presume that the Guidance will be more in the

nature of an explanation as to how the “Outcomes” and “Indicative Behaviours” fit together in the light of the Principles, and that it will fill any descriptive gaps that might exist in the Indicative Behaviours. This is because, as you say, the Indicative Behaviours cannot constitute an exhaustive list of the kind of behaviour which tends to establish compliance with, or contravention of, the Principles or Outcomes.

We suggest that it would be helpful for the Guidance to cover the new Code’s application to different sectors and types of business. Perhaps the Guidance could be initially prepared by the Law Society or its specialist Committees, and then approved by the SRA (see also the response to Question 7 below).

6. Do you have any overall comments on the new format (Principles, outcomes, indicative behaviours)?

See above. See also specific comments on aspects of the new Code below.

In addition, we have concerns about how the SRA’s outcomes-focussed regulation (“OFR”) project will operate generally, and in terms of the practical interrelationship and interaction between the new Code’s Principles, Outcomes and Indicative Behaviours.

We understand that, if the mandatory outcomes are appropriately drafted, a failure to achieve an outcome could be seen as *prima-facie* evidence of a failure to comply with the Principle to which it relates. Our main concern is with the interplay between the Outcomes and Indicative Behaviours.

The Outcomes will necessarily be achieved on a case by case basis (see our response to Question 7, below). As such, an objective judgement must be made in each instance as to whether a particular outcome has been achieved. We query the need for additional “evidence” in making this decision, and do not think it relevant to look at the achievement/non achievement of the indicative behaviours relating to the outcome.

In practice, the Indicative Behaviours (institutionalised by firm policies and procedures for the most part) are those which have a reasonable likelihood of achieving the new Code’s Outcomes in any given situation, and these are sector specific. If we are correct in asserting that the Indicative Behaviours are not "evidence" in deciding whether a given outcome has/has not been achieved, then we believe that it would be more appropriate to view the Indicative Behaviours as:

1. Behaviours which are likely to deliver the outcomes;

2. Evidence of good governance and that firms are organised in such a manner as to promote compliance; and

3. Matters which the regulator will properly take into account as mitigation in the event that something goes wrong (perhaps in a similar manner to the "adequate measures" defence in the Bribery Act 2010).

7. Do you think that the outcomes (together with the indicative behaviours), achieve the right balance in providing sufficient clarity on the SRA’s expectations of the firms whilst enabling firms to operate flexibly?

We have a number of detailed comments on the Outcomes and Indicative Behaviours. These are set out in Annexes A-E (below). At a high level, our view is that the Indicative Behaviours provide insufficiently detailed application of the circumstances applicable to many different sorts of businesses and sectors, such as the Corporate firms comprised within the CLLS’s membership, to provide sufficient clarity and certainty as to the application of the Principles and Outcomes. They seem to be heavily focussed on traditional “High Street” style practices and to contain very few examples of behaviour applicable to other types of firms and businesses. That “gap” could be capable of being covered by more detailed guidance perhaps as suggested above.

An area where the Code's applicability to Corporate firms, especially the larger international firms, does not appear to have been fully thought through is in the treatment of overseas practice (see comments below). We are concerned that the definition of "manager" in Chapter 14 ("Interpretation") excludes all the "non-member partners" in limited liability partnerships who are usually located in offices outside the UK but who may well be solicitors. This is especially as such individuals will usually have equivalent status and management influence within the firm as partners who are members.

Outcomes

We have a general concern that it may be unfair to judge firms on purely whether or not they have achieved particular Outcomes. This is on the basis that firms (particularly City firms) are complex organisations. Outcomes may not be pursued on a matter by matter basis; rather the firm will have to agree a compliance strategy, set up process and training and so forth. While the strategy ought to achieve the right results all in all, there are going to be instances where it does not. In assessing whether a firm has complied with the Code, surely the yard stick ought to be whether the firm has adopted a reasonable compliance strategy to procure the required outcome, and, having done so, whether it has implemented that strategy with reasonable competence. It seems very unfair for a regulatory breach to arise (at least in principle) on a strict liability basis right across the new Code, and yet that seems to be the way it is structured. Indeed, while three of the FSA core Principles incorporate the concept of the "reasonableness" of actions, none of the SRA ones do. It may be that the SRA intends to resolve this situation by reference to its policies on enforcement. It would assist firms if the SRA clearly articulated the approach it intends to take in this regard.

In addition, we have some concerns about the "mechanics" of how the Outcomes will operate, and about their scope.

In terms of mechanics:

- Some of the Outcomes seem to be too vague and could be further clarified (e.g. Outcome 5 of Chapter 1 ("Client care") in Section 1 ("You and your client") (see Annex A below), Outcome 10 of Chapter 7 ("Management of your business") in Section 2 ("You and your business") (see Annex B below), and Outcome 2 of Chapter 10 ("You and your regulator") in Section 3 ("You and your regulator") (see Annex C below)). Furthermore, some Outcomes appear to be formulated as the means by which other more general outcomes are to be achieved (e.g. Outcomes 2, 4 and 6 of Chapter 7).

- Furthermore, some Outcomes appear to be inconsistent with the Indicative Behaviours to which they relate (e.g. Outcome 2 (which relates to Indicative Behaviours C and N) of Chapter 10).

- In addition, a number of the individual Outcomes involve a form of "egg shell skull" rule. For example, the question of whether or not a client is "in a position to make informed decisions about the services it needs" (Outcome 10 of Chapter 1) turns as much on the competence of the client's internal organisation as it does on the firm's activities. While it is clear that a firm must take reasonable steps to adapt its systems and process to each individual client's peculiarities (but that is the point), the test for how the Outcome has been achieved should include a "reasonableness" element. The outcomes should not create strict liability. (In addition, it is unclear how strictly some of the other Outcomes will be applied (e.g. Outcome 5 of Chapter 4 ("Confidentiality and disclosure") in Section 1)).

In terms of scope:

- The new Code contains examples of Outcomes which appear to be too broad (e.g. Outcome 6 of Chapter 5 ("Your client and the court") in Section 1), to be of uncertain scope (e.g. Outcome 10 of Chapter 7, and to even extend the scope of a solicitor's duty (e.g. Outcome 5 of Chapter 1). (Furthermore, some other Outcomes overlap with each

other. (See for example Outcomes 1 and 2 of Chapter 2 ("Your client and equality and diversity") in Section 1.) Some are addressed to all Handbook users notwithstanding that they are capable of being fulfilled, in most cases, only by firms (e.g. the obligations contained in the Outcomes of Chapter 7).)

- In contrast, some of the other Outcomes seem too specific: it appears in some cases that the Outcomes actually set out the "behaviour" required to achieve the relevant mandatory objective/s, rather than the objective/s that the relevant behaviour is expected to promote. (See for example our comments on Outcomes 3, 4 and 5 of Chapter 2, Outcome 8 of Chapter 7,and Chapter 7 generally, Outcome 5 of Chapter 8 ("Publicity") in Section 2 and Outcomes 2, 3 and 4 of Chapter 11 ("Relations with third parties") in Section 4 ("You and others").) Furthermore, some of the Outcomes do not cover all of the aspects that it would be expected they would cover. For example, the requirements to be included in the SRA Authorisation Rules for firms to appoint a CoLP and CoFA are not referred to as part of the business management requirements under the new Code (see Chapter 7).

Indicative Behaviours

As with the Outcomes, we also have some concerns about the "mechanics" of the new Code's Indicative Behaviours, and about their scope.

In terms of mechanics:

- Some of the Indicative Behaviours seem to be too vague and broad (e.g. Indicative Behaviour D of Chapter 5, and Indicative Behaviour N of Chapter 10). In other cases, it is difficult to know what the Indicative Behaviours mean in practice (e.g. Indicative Behaviour D of Chapter 5).

- Furthermore, some of the Indicative Behaviours appear to be inconsistent with others (e.g. Indicative Behaviour J (ii) of Chapter 5), or to be inconsistent with the Outcomes to which they relate (e.g. Indicative Behaviour C and Outcome 2 of Chapter 10).

In terms of scope:

- It appears that some of the Indicative Behaviours overlap (e.g. Indicative Behaviours C and H of Chapter 5, and Indicative Behaviours E and F of Chapter 7) or are substantially the same as other Indicative Behaviours in the same chapter (e.g. Indicative Behaviours A and H of Chapter 2 and Indicative Behaviours C and H of Chapter 5). Others appear to be too broad (e.g. Indicative Behaviour F and I of Chapter 11).

- Furthermore, some of the Indicative Behaviours appear to be too limited in scope (e.g. the Indicative Behaviours in Chapter 7).

In addition, we are concerned that some of the Indicative Behaviours do not take sufficient account of the complexities of work required by clients in the Corporate sector (e.g. Indicative Behaviour I of Chapter 4 or the reality of work practices in that sector (e.g. Indicative Behaviour B of Chapter 7)). (In addition, Indicative Behaviour I of Chapter 10 appears to impose an overly burdensome reporting requirement.) As mentioned in the response to Question 5 above, it would be useful if the Indicative Behaviours contained more examples of behaviours applicable to specialist sectors. As above, there is still a concern, given the stated evidential value in establishing compliance, that the fact that the new Code does not contain sufficient examples of behaviours applicable to specialist sectors will put "specialist firms", like those in the Corporate sector, at a regulatory disadvantage. If this concern proves correct, this disadvantage will need to be addressed, if not through appropriate guidance, then at least by incorporating the appropriate level of relationship management support and guidance into the regulatory supervision of these sorts of firms.

8. Do you have any comments on The Models Annex D for regulating [conflicts]?

Refer to the CLLS's letter to the SRA of 10 August 2010 regarding conflicts of interest.

9. Do you have any comments on the removal of the detailed provisions relating to conveyancing, gifts etc [as above].

No comment at this stage.

10. Do you believe that outcomes provide sufficient clarity for regulating conflicts or do you think rules would be more appropriate?

Refer to the CLLS's letter to the SRA of 10 August 2010 regarding conflicts of interest.

11. Do you agree with our approach with the provision of services through a separate business?

We can see that there is a concern that non-reserved legal services may be deliberately provided through a separate business owned by a firm, or an associate of a firm, which is not authorised and regulated by the SRA, and which therefore undermines client protection. Furthermore, such an arrangement would potentially, in our view, give such a separate business a competitive advantage as it would be free from regulatory costs. The temptation to arrange activities in this way would be even greater in the case of an ABS, where there is likely to be a greater proportion of non-regulated activity and a desire to remove it from the regulatory regime intended to apply to the ABS by the SRA. We therefore agree with your intention to continue the current SRA prohibition on conducting certain non-reserved legal activities through a separate unregulated business.

Our comments are set out in more detail in Annex D below in relation to Chapter 12 ("Separate Businesses").

12. Do you agree with our proposals concerning the application of the Code to overseas practice, in-house practice etc.?

<u>Overseas practice</u>

We have considerable reservations about the new Code's proposed application to an overseas practice. As currently drafted, the new Code would appear to have a significantly wider application to an overseas practice than the current Code as applied by Rule 15. Specifically, there are a significant number of outcomes in the new Code which will apply to an overseas practice after October 2011 where the provisions of the current Code they replace do not currently apply; details are set out in Annex E.

We consider any extension of SRA regulation overseas to be unnecessary and undesirable and believe that, as a minimum, the application of the new Code should be restricted to the extent of the application of the current Code under Rule 15. Further, we believe that the opportunity should be taken to review the new Code's application outside of England and Wales generally.

We accept that the SRA has a legitimate interest in the regulation of:

1. Individual England and Wales Solicitors practising as such wherever they are in the world, and irrespective of whether or not the solicitors' firms or employer are subject to these rules;

2. Overseas branch offices of an authorised body, but only in respect to the manner in which the business is structured and managed; and

3. Non-solicitor managers of an authorised body (whether lawyer or non-lawyer) in respect to the management of the authorised body only.

We draw a distinction between regulations which address the structure and proper management of an overseas branch of an authorised body (e.g. Section 2 ”You and your business”, Section 3 ”You and your regulator”, Chapter 12 (“Separate businesses”) of Section 3: “You and others”), and the regulation of the delivery of legal services supplied by individual lawyers within that branch office (e.g. Section 1 “You and your client“ (see Annex A below), and Chapter 9 (“Fee sharing and referrals”) of Section 2 (see Annex B below).)

Where the services are delivered by England and Wales solicitors, these will be properly subject to SRA regulation. Where the services are delivered by lawyers of another jurisdiction, each will be subject to regulation by their own codes of conduct and supervised for compliance by their respective professional bodies. In the latter situation we do not think it appropriate for the SRA to overlay its own rules; the lawyers concerned should not be subjected to dual, and possibly conflicting, regulation. (The problem of dual regulation is especially acute where the branch office is primarily or exclusively the practice of local lawyers.)

We appreciate that the current application provisions in Chapter 13 (“Application and waivers”) and the definitions of "overseas practice", "practice" and "practice from an office" in Chapter 14 (“Interpretation”), have largely been transcribed from the current Code. We suggest that these need to be re-written from scratch to address the above points. We also recommend that the provisions applying the Outcomes to an overseas practice, currently appended to each chapter, should be drawn together in one place and rewritten to apply the Outcomes appropriately to the different groups identified above.

In addition, the application of the rules overseas to affiliated entities, which are not branches of authorised bodies, is somewhat arbitrary under the current (complicated) application provisions. We anticipate that a clear focus on the regulation of individuals and authorised bodies as outlined above will deliver consistency. (See also our comments in relation to Chapter 7 (“Management of your business”) of Section 2.)

It also remains unclear how the new Code will apply to services outsourced by a firm overseas. See our comments on Chapter 7 (see Annex C below).

The CLLS and our Members have a keen interest in ensuring that the overseas application of the new Code is proportionate, does not result in unnecessary dual regulation, and respects the local cultural and professional diversity of the countries and lawyers involved. To this end we would welcome the opportunity to assist the SRA in the development of the new application provisions.

<u>In-house practice</u>

Our Members are not best placed to comment on the new Code’s application to in-house solicitors, although see our comments in relation to Chapter 7 regarding “in house practice” (in Annex B below).

13. Do you have any comments on the revisions to the Accounts Rules?

In general, and subject to the following, we are in agreement with the revisions to the Accounts Rules.

The nature of the risks inherent in the handling of money necessitates a more prescriptive regulatory regime than in most other aspects of practice. In addition, the controls and procedures required to effectively protect client money are relevant to all solicitors' practices, irrespective of differences in scale, client base, or the volume or value of transactions undertaken.

We strongly support the decision to make a clear distinction between the rules and the explanatory elements, and to give the status of non-mandatory "guidance" to the currently mandatory "notes". Much of the detail in the notes is not crucial to protecting client money, has unnecessarily constrained the systems and processes firms implement. This detail also results in many irrelevant, and incidental, trivial breaches being notified to the SRA through the annual accountants’ report.

We also agree with the decision to apply an outcomes-focussed approach to the areas of signing on client account and the interest provisions. In particular, the application of a "one size fits all" approach to payment of interest does not work, and has imposed an unnecessary constraint on the commercial arrangements firms enter into with business clients. Our members will welcome the flexibility to develop solutions that fit their businesses and meet their clients' specific needs and expectations.

Multi-disciplinary practices

We agree that the accounts rules should apply to all regulated businesses in the same way, and appreciate the reasons why the SRA would seek to limit application only to activities for which an MDP is regulated.

Nevertheless, in the context of an integrated MDP it may be difficult for firms to clearly identify, and thus ringfence, money arising from regulated activities when engaged in a multi-disciplinary instruction. In these circumstances there is a serious risk of a regulatory vacuum being created whereby client money is not protected at all.

These new types of business require an innovative, and holistic, approach to regulation which is not delivered by the current proposal. Our strong preference would be for a single client account for the entire MDP supported with a memorandum of understanding agreed between the regulators for managing the interface to ensure full and unbroken protection for the clients concerned.

Compliance Officer for Finance and Administration (CoFA)

As mentioned elsewhere in our response, we do not support the CoFA role on traditional law firms.

The role of the reporting accountant

We believe that the role of the reporting accountant, the terms of reference for the annual inspection, and the nature and scope of the accountants report needs to be revised in the light of the new OFR environment and approach to regulation.

We understand that this matter is being considered by the SRA Financial Assurance Reference Group, and we look forward to the opportunity to input to this process through our representatives.

Overseas application

The rule dealing with the application of the overseas accounting provision has been transcribed from Rule 15.27. The effect of this rule, which refers to direct ownership and control by solicitors, has always resulted in an anomalous application of the rules dependent on the structure and constitution of the practices concerned.

The international application of the new Code is dealt with elsewhere in this response. We recommend that the application of the overseas accounting provision should be considered as part of the wider review of regulation outside of England and Wales.

14. Do you have any comments on the structure of the Specialist Services section?

No comment at this stage.

15. Do you believe that the financial services and property selling exemptions should be extended to ABSs?

No comment at this stage.

16. Do you agree with our proposals to apply the requirements for a CoLP and a CoFA to all firms (including recognised sole practitioners)?

No. We have serious reservations about the imposition of this requirement to all firms (see our response to Question 1 above). While we can see that the HoLP and the HoFA may help to ensure appropriate governance in ABSs comprising a significant percentage of non lawyer managers, these roles have the potential to undermine the shared sense of duty that has traditionally been a feature of a solicitor partnership and therefore to hinder rather than help application of the Code. We think it would be preferable to deal with this issue by including an appropriate Indicative Behaviour relating to the objectives concerning governance and management of firms, with an acceptance that some firms will have appropriate alternative roles and responsibilities for ensuring accountability for regulatory compliance within non-ABS firms which will not require the appointment of a CoLP or CoFA.

17. Do you agree with our contention that more information should be required from applicants to enable the SRA to make the right judgement concerning authorisation?

No comment at this stage.

18. What in-house services to the public should require authorisation?

No comment at this stage.

19. Do you believe that the disciplinary frameworks should be further harmonised?

No comment at this stage.

20. Do you believe that there should be a single system of findings with appeal to an independent tribunal?

No comment at this stage.

21. Do you agree with our overall approach to applying indemnity requirements to ABSs?

No comment at this stage.

22. Do you have any comments on our initial equality impact assessment, and are there any additional equality issues that we should consider as we work further on the Handbook?

No comment at this stage.

23. Do you have any comments on the timetable?

The consultation's timeframe is extremely compressed, especially considering that the return date for comments is 20 August 2010 (when many key staff are likely to be on holiday). This is especially the case considering the complexity of the issues raised by the consultation paper. We also note that the SRA apparently intends to continue with a tight timetable for the remainder of the overall consultation process, with comments due on the second Handbook (and regulatory processes) consultation in January 2011. We remain concerned that the SRA has not allowed stakeholders sufficient time to consider and respond to these complex and important proposals.

The number and quality of responses that the SRA receives to such an important consultation from across the profession and the market more generally will no doubt illustrate whether our concerns about timing are valid.

In addition, we would appreciate the opportunity of having CLLS representatives meet with the SRA to discuss the matters set out in this paper in more detail.

Yours sincerely

David McIntosh
Chair
CLLS

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES & REGULATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Chris Perrin (Clifford Chance LLP) (Chair)
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R. Cohen (Linklaters LLP)

Ms S. de Gay (Slaughter and May)

A. Douglas (Travers Smith LLP)

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Ms H. McCallum (Allen and Overy LLP)

Ms J. Palca (Olswang LLP)

M. Pretty (DLA Piper UK LLP)

J. Trotter (Hogan Lovells LLP)

Ms C. Wilson (Herbert Smith LLP)

ANNEX A

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)
Section 1: You and your client

We agree with the placement of the section "You and your client" at the start of the Handbook, as it emphasises the client's importance. Subject to our comments below, we consider that the right balance has been achieved between providing firms with sufficient clarity about the SRA's expectations of them, whilst enabling the firms to operate flexibly.

Chapter 1 - Client care

We consider that Principle 8 (which is stated in Chapter 1 to "be of particular relevance in the context of *client* care" is very vague, particularly with regard to the requirement to run a business "in accordance with proper governance" (as mentioned above in response to Question 3.)

In addition, the Outcomes listed in Chapter 1 all seem appropriate (with the exception of Outcomes 1 and 5, mentioned below). The difficulty in assessing whether a particular event should be an Outcome or an Indicative Behaviour is illustrated by Outcome 3 and Indicative Behaviour U. Outcome 3 is that "you have the resources, skills and procedures to carry out your clients' instructions". That is in a way clear enough as it stands. The negative Indicative Behaviour U is simply a failure to achieve Outcome 3: "acting for a client when you have insufficient resources or competence to do so properly".

We are doubtful about the second part of Outcome 5 in Chapter 1 ("you only enter into fee agreements that... you consider to be in the client's best interests"). Solicitors should provide their clients with relevant information about fees, but it is for the clients themselves to decide whether entering into any particular fee agreement is in their best interests. For example, a client that has an established relationship with a solicitor may approach that solicitor to conduct a straightforward matter, and that solicitor may consider that the work could be satisfactorily done by another solicitor at considerably lower cost. Is the solicitor with the established relationship obliged to decline to enter into a fee agreement with the client at rates the client is happy to pay because the solicitor considers that it is not in the client's best interest for him or her to do the work at its normal rates? Or suppose a potential client approaches a solicitor in relation to a dispute that the solicitor personally feels is trivial and that will cost far more to resolve than is financially at stake. After having given the client the correct advice as to how to proceed, should the solicitor be obliged as a matter of regulation to decline to act for the potential client because the solicitor considers that it is not in the client's best interest to enter into any fee arrangement for the matter?

The Indicative Behaviours more generally seem to focus disproportionately on fee-sharing and referral arrangements, as well as complaints-handling, but we presume that that reflects the number of difficulties that tend to arise connected with those aspects.

The description of Indicative Behaviour A would benefit from clarification. What is meant by "agreeing an appropriate level of service with your client"? The description of Indicative behaviour A would benefit from clarification along the lines of the current guidance note 14 to rule 2. We suggest that Outcome 1 is amended to "you provide services to your *client(s)* in a manner which "seeks" to protect their interests". Otherwise a client might read this as a guarantee of success.

In addition, the Indicative Behaviours for this chapter omit the exceptions currently contained in rule 2 relating to circumstances where it is inappropriate to provide certain information to clients. This is also particularly unhelpful to those firms, like many of the CLLS's Member firms, who work regularly for the same sophisticated clients on similar matters in the Corporate sector.

Chapter 2 - Your client and equality and diversity

It appears that Outcome 2 (substantial disadvantage) in this chapter is otiose. This is because every employer discriminates against a disabled employee who is substantially disadvantaged if it fails to implement reasonable adjustments to remedy the position. (See for example section 21.2 Equality Act 2010, and the general wording regarding reasonable adjustments, from section 20 of the Equality Act.) The position is therefore dealt with quite adequately in Outcome 1. Since Outcome 2 does not mirror the wording of the act, the new Code appears to go further than the recent legislation.

Furthermore, Indicative Behaviour A (which is an example of Outcome 1 ("your decision to accept or refuse instructions to act for a client is not based on grounds of unlawful discrimination")) is simply the opposite of negative Indicative Behaviour H ("declining to act for someone on the grounds of unlawful discrimination".) As such, it does not appear that both Indicative Behaviours are required.

Furthermore, we believe that Outcomes 3, 4 and 5 should be re-cast as Indicative Behaviours.

Chapter 4 - Confidentiality and disclosure

In terms of the Outcomes contained in this chapter, we suggest the following:

1. Adding the words "(unless, with informed consent, the client has agreed to amend the duty of disclosure in a manner consistent with the individual's ability still to comply with the Principles)." to the very end of Outcome 2. This additional wording would cover the situation where, for instance, a client comes to a specific solicitor because of that solicitor's expertise in a particular market sector, and the client appreciates that the solicitor might well have knowledge of the plans of other clients in that sector. (See also point 7 below.)

2. In addition, we suggest adding the words "on a matter" after "A" in line 1 of Outcome 4. We also suggest that the words "or former client" should be inserted after "client" in line 1, and the words "in relation to that matter" should be inserted after "A" in line 2 of the Outcome.

3. Furthermore, there is a concern that the requirements of sub-para (iii) ("the safeguards your firm will put in place comply with the common law") of Outcome 4 will be interpreted to mean that all information barriers have to be "common law compliant", even where the client has agreed either generally (such as in the firm's standard terms of business) or specifically relating to the matter in question, that a less onerous standard of segregation will be appropriate in the circumstances. The stricter common law standards ought only to apply, as now, to situations where consent has not been obtained. This distinction needs to be made clear, perhaps by amending (iii) to read "you agree suitable safeguards with B or, where this is not possible, you put in place safeguards which comply with the common law; and...".

4. It is also unclear how absolute Outcome 5 is intended to be, that is, whether the Outcome is that the systems and controls are expected always to identify and protect, or whether they are to give a suitably high level of confidence that they will do so. It is impossible to give a 100% guarantee of confidentiality.

In terms of the Indicative Behaviours contained in this chapter, we suggest the following amendments:

1. The word "even" in Indicative Behaviour B should be deleted.

2. Furthermore, an Indicative Behaviour to support Outcome 3 would be to say "you promptly cease to act for a client towards which you cannot fulfil your duty of disclosure without breaching a duty of confidentiality to another client or former client, unless the client agrees that a different standard of disclosure applies".

3. We also suggest that the words “all necessary” be replaced by “appropriate” or “reasonable” in Indicative Behaviour D. This is as there is a significant cost implication in the varying levels of scrutiny, both physical and electronic.

4. In addition, we suggest that a new (ii) be inserted into Indicative Behaviour E as follows: “where to disclose would breach a duty of confidentiality to another client or former client”. The former “(ii)” would then become (iii).

5. We also suggest inserting the words “or former client” after “client” in Indicative Behaviour F. This additional wording should reflect the requirement for adversity in the current Rule 4.

6. We do not understand the SRA’s logic in Indicative Behaviour H in distinguishing the collection of debts from different sorts of outsourcing. Effective debt collection would be a benefit to the profession. A reminder of Principle 6 (“you must behave in a way that maintains the trust the public places in you and in the provision of legal services”) would prevent the use of unscrupulous collectors.

   Furthermore, we disagree with the suggestion that it would be inappropriate for a lawyer to disclose to third parties details of bills sent to a client in relation to the collection of book debts, and believe it would be unrealistic, and impractical to require the client’s consent in such circumstances. Lawyers are often left in the unfortunate position of having to sue their clients for payment, and in that context often need to justify their fees. They invariably do so by reference to their bills, and the details thereof. In its current form, this indicative behaviour would have the invidious (and we imagine unintended) effect of preventing lawyers from suing on their bills.

   There are also other circumstances in which it may be appropriate for a lawyer to disclose to a third party details of a bill sent to a client, for example, in order to comply with any legal or regulatory obligation.

   We therefore suggest amending this Indicative Behaviour to read “disclosing to third parties details of bills sent to clients unless (1) the client has consented, or (2) required by law or regulatory authorities or for the purposes of judicial or arbitration proceedings brought by you to enforce the bill.”

7. We also suggest that the words "except where your client has given specific informed consent to such non-disclosure, in circumstances where you remain able to comply with the Principles." be added to the end of Indicative Behaviour I. This would cover the situation where, for instance, a solicitor is given information by an opposing solicitor for analysis of, say, competition issues which would arise on a possible M&A transaction, but on the basis that it is not also given to the client. This is a good example of how the Indicative Behaviours in the Code often do not take sufficient account of the complexities of work required by clients in the commercial sector.

Chapter 5 - Your client and the court

In the main, Chapter 5 of the new Code repeats the rules in the current Code. Re-casting those provisions in terms of "Outcomes" and "Indicative Behaviours" is a change in form, rather than one of substance. (However, it is useful that there are more indicative behaviours than outcomes and that the proportion of negative indicative behaviours is higher than elsewhere, as this provides more practical guidance regarding what is expected of an advocate.) Subject to that general point, our specific comments are as follows:

1. We feel that Outcome 6 ("where children and other vulnerable people are involved in proceedings, taking necessary steps to safeguard their wellbeing") is too broad, and should be confined to cases where a solicitor is acting for children or other vulnerable people. Suppose, for example, that a solicitor is acting for a mortgagee or landlord in residential possession proceedings that will, if successful, potentially result in children becoming homeless or the break-up of a family. On the strict wording of the new Code, a solicitor should refuse to act on his or her

client's instructions to seek possession because doing so would not safeguard the wellbeing of the children who are (indirectly) involved in the proceedings. Or suppose that a litigant in person complained that proceedings against him or her made him or her feel suicidal. Is the solicitor obliged to disregard his or her client's instructions to proceed with the case because to do so would not safeguard the vulnerable defendant's wellbeing?

2. The first part of this Indicative Behaviour reproduces a provision of the current guidance note 20 to rule 11, the retention of which we consider to be inappropriate. Solicitors should advise their clients of the consequences of failing to comply with a court order, but it is for clients themselves to decide whether or not they comply with such an order. To take an example, a money judgment may be given against a foreign defendant, perhaps in default of acknowledgment of service. Any solicitor advising the judgment debtor must explain the consequences of a failure to pay the judgment debt (e.g. what steps the claimant might take to enforce the judgment), but there is no impropriety in a defendant with no assets in the UK or other countries in which an English judgment can be enforced declining to meet the judgment and requiring new proceedings in the courts of the judgment debtor's domicile. Or suppose that a debtor owes both judgment and non-judgment debts, and it is prudent in the circumstances to pay a non-judgment debt before a judgment debt. Solicitors must be able to advise in the round as to where their clients' interests may lie, and not be constrained in the advice that they can give by SRA rules.

3. We are unsure what Indicative Behaviour D ("properly protect sensitive evidence") means or what outcome it supports. Does it mean that solicitors must seek to ensure that any confidentiality in their clients' documents is maintained? For example, does it mean that solicitors must seek to safeguard documentary evidence that they are concerned might otherwise disappear? Or does it mean that the sensitivity of Governmental evidence must be respected? Furthermore, does it override a solicitor's obligations to his or her client?

4. Indicative Behaviour E ("immediately informing the court, with your client's consent, if during the course of proceedings you become aware that you have inadvertently misled the court, or ceasing to act if the client does not consent") is the same as paragraph 12 of the current guidance to SRA Rule 11. We have considered whether the requirement for client consent should remain but, particularly in the light of the overlap with Indicative Behaviour F, a majority considered that it should. We note, however, that, the Bar Code of Conduct does not appear to include a comparable rule or guidance.

5. It is unclear what Indicative Behaviour H ("when acting as an advocate, advising the court of relevant cases and statutory provisions and drawing to the court's attention any material procedural irregularity") adds to Indicative Behaviour C, which is written in almost identical terms, save for the opening words "when acting as an advocate".

6. It is not clear why the wording of Indicative Behaviour J(ii) (a solicitor must not "suggest[] that any person is guilty of a crime, fraud or misconduct unless such allegations:... (ii) appear to you to be supported by reasonable grounds") differs from I(ii) (a solicitor must not construct facts or draft any documents containing "any allegation of fraud unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud"). The two behaviours overlap significantly but apply different tests. The confusion may arise from the Bar's Code of Conduct, which has an equivalent of behaviour I(ii) in Rule 704(c) and an equivalent of behaviour J(ii) in Rule 708(j). However, Rule 708(j), unlike behaviour J(ii), only applies "when conducting proceedings in court". The Bar's Code of Conduct therefore distinguishes between drafting documents, which is done out of court, and the conduct of proceedings in court, a distinction that the new Code fails to follow.

Chapter 6 - Your client and introductions to third parties

We have no comment on Chapter 6. Again, the balance between the Outcomes and Indicative Behaviours seems appropriate, although there are less in each category within this chapter.

Annex B

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)
Section 2: You and your business

Chapter 7 - Management of your business

1. There are several "Outcomes" in this chapter which do not seem to be formulated as outcomes, but rather as the means by which other more general outcomes are to be achieved. For example:

   - Outcome 2 requires appropriate systems and controls to be in place to achieve and comply with all the Principles, Rules and Outcomes and other requirements of the Handbook;

   - Outcome 4 refers to maintaining systems and controls for monitoring financial stability etc.; and

   - Outcome 6 refers to there being a policy in place to promote equality and diversity etc.

2. We have no real objection to the substantive requirements of these Outcomes (but see below as to detailed drafting) but more a concern as to whether they should be re-drafted using a more outcomes-focused formulation. We are assuming that what the SRA really wants to achieve is that its regulated firms are properly and appropriately managed in various different ways. It should not really be relevant whether a firm has particular systems, controls or policies designed to achieve certain management outcomes, but that those specified management outcomes are themselves achieved. As currently drafted, it appears that it is the "behaviour" that is required as the mandatory outcome, rather than the objective which the behaviour is designed to promote. Furthermore, it is not clear from the Outcomes as to whether or not it will be enough for these purposes for firms to put in place the systems described or whether they will be required to prove to the SRA that they are in place and are effective. How will the SRA judge whether or not such systems are acceptable, and what would happen if they were deemed not to be?

3. Some further clarity is needed about the scope of application of Chapter 7 in two respects:

   - First, the chapter is stated to be about "the management and supervision of your firm". The term "firm" is defined in Chapter 14 to mean "an authorised body or any business through which a solicitor or REL practises other than in-house practice." We question the necessity to extend English regulation to affiliated entities, and our concerns are set out in the response to Question 12 (above) dealing with the international application of the new Code.

   - Secondly, the obligations contained in the Outcomes in Chapter 7 are all addressed to "you" even though they are capable of being fulfilled, in most cases, only by firms and not by individual solicitors or managers. However, this point does not seem to have been addressed in the drafting of this chapter, or that of Chapter 13 (which concerns the application of the new Code).

4. Outcome 8 refers to firms having a system for supervising clients' matters, to include the regular checking by suitably competent and experienced people of the quality of the work done. This seems to be far too specific, in that it could be read as prescribing a method of achieving the outcome. The real outcome presumably should be that the firm appropriately manages quality control. There are obviously a number of different means of dealing with quality assurance, and thus achieving the desired outcome, particularly in complex businesses like those of the Members of the CLLS and the other Corporate firms in the City, which are not recognised here.

5. In addition, Indicative Behaviours E and F both seem to encompass business continuity and thus could be combined.

6. Further clarification of what is expected or intended in relation to Outcome 10 (outsourcing) would be helpful. In relation to legal activities, it is unclear whether the SRA regard the subcontracting of specialist, local or overseas advice (perhaps even by way of instructing Counsel or other specialist legal experts) as an outsourcing of legal services. Is it simply LPO-style outsourcing (usually to lower cost overseas jurisdictions) which this Outcome is trying to address?

7. Similarly, so far as "operational functions" are concerned, practically every firm of whatever size or type will tend to outsource some services (even if it is just office cleaning or security or some other administrative support). Is the SRA considering all third party services as being covered by Outcome 10 or only the large scale finance or IT outsourcing exercises, often carried out by overseas contractors, as being covered here? However broad the scope may be, there is a concern that <u>any</u> form of offshore outsourcing to a third party to some extent will impact on the SRA's ability to monitor compliance (unless, for example, the SRA were resourced and prepared to be able to inspect third party offshore facilities). As such, we query whether the standard stated in paragraph (ii) of Outcome 10 is the correct one. Should the standard really just be addressing adverse impact on the firm's ability to ensure compliance rather than the SRA's ability to monitor it?

8. There is also the question of what may be missing from these Outcomes. We find it a little odd that the requirements to be included in the SRA Authorisation Rules for firms to appoint a CoLP and CoFA are not referred to as part of the business management requirements under the new Code. If it is just because these requirements are thought to be "rules" and not "outcomes", the distinction is understandable. But we consider it is a little confusing and certainly unhelpful to the uninitiated for <u>all</u> of the continuing obligations relating to managing your business not to be dealt with in the same part of the Handbook, even if just by way of cross reference to other sets of rules or requirements. (For example, compare Chapter 7 with Chapter 10 ("You and your regulator") on the issue of information requirements.)

9. We also consider it a little odd that the "Indicative Behaviours" in Chapter 7 are so limited in scope. There are all sorts of additional systems of control and good management practices with which the CLLS' will be familiar which are not really dealt with in a list of behaviours that seems to be entirely focused on small businesses.

10. In addition, Indicative Behaviour B discusses maintaining a system for controlling and recording the giving of professional undertakings. Whilst firms are already likely to have policies in place for controlling the giving of undertakings, it would be challenging for international firms to have a system of recording all undertakings given, and in our experience very few currently do so. (See also our comments on undertakings in relation to Chapter 11, below.)

11. Furthermore, the paragraph in this chapter entitled "In-house practice" is particularly unhelpful and unclear as drafted. It refers to "most of the outcomes" being applicable in some cases and "fewer" being relevant in others, but it does not give any indication of which Outcomes are relevant in which circumstances.

<u>Chapter 8 - Publicity</u>

1. Outcome 5, regarding the wording that needs to be included on the letterhead etc., seems to be a prescribed rule rather than an outcome. We would suggest that the relevant outcome here should be that clients are made aware that the firm is authorised and regulated by the SRA (which is really already covered in Outcome 4). An indicative behaviour could cover the requirement for the letterhead etc. to include the relevant prescribed language.

Chapter 9 - Fee sharing and referrals

1. The only comment we have on this chapter, which could also be made in relation to Chapters 7 and 8, is that the statement that the Outcomes apply to overseas practice does not make clear the position for subsidiaries and branches of an authorised body and how the Outcomes apply in relation to English solicitors employed by non-UK registered and regulated entities.

Annex C

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)
Section 3: You and your regulator

Chapter 10 – You and your regulator

We have a number of comments regarding the SRA's proposals in relation to cooperation between the profession and its regulator/ombudsman.

1. We would observe at the outset that the Rules regarding reporting requirements are yet to be circulated by the SRA. It follows that we may have further comments on this chapter as a whole when the full regime becomes clearer in October.

2. With regard to the draft reporting obligations in Chapter 10, we think it is vital for the SRA to find the right balance between being sure that the profession is required to draw matters to its attention which ought to be reported, and creating a regime under which, for fear of sanction, solicitors report on a "safety first" basis. It is vital that the SRA does not create a reporting situation which mirrors some of the deficiencies of the Proceeds of Crime Act 2002 ("POCA") regime.

3. As you will be aware, the "hair trigger" reporting requirements placed on lawyers (and others) by POCA have caused widespread defensive reporting: at one time solicitors were believed to be reporting in excess of 40,000 "suspicious matters" per year. Were the SRA to be inundated by defensive reports arising under Chapter 10, it would drive up the SRA's costs (as well as those of the law firms themselves). It would also create the risk that the SRA would be so overwhelmed by irrelevant matters that it would be poorly placed to deal with genuine issues of concern.

4. We believe that, as presently drafted, Chapter 10 creates a substantial risk of defensive reporting. This risk arises because the circumstances when a report must be made are not in any way straightforward and the relevant sections do not gel. On this basis:

    - Outcome 2 (which is clearly one of the most important Outcomes in the entire new Code) is broad and vague. It is not clear what is meant by the words "other requirements of the Handbook" in the Outcome. Are the Indicative Behaviours relating to this Outcome "other requirements"? Given the importance of this obligation, the scope must be clearly set out. In the same light, it is unclear what the words "significant breaches" mean. Firms need to be able to understand the scale and scope of the breaches which would give rise to a reporting requirement. For City firms, individual errors on mandates could be seen as being "significant" merely because of the high profile nature of much of the work they carry out. Likewise, Indicative Behaviour N which indicates that behaviour will be unacceptable if there is a failure to "report matters relevant to the Principles and the Outcomes", is unclear.

    - The references in Chapter 10 that deal with reporting are inconsistent with each other. Outcome 2, Indicative Behaviour C and Indicative Behaviour N use different language when referring to the same general subject area. (For example, Outcome 2 requires firms to "report significant breaches of the Principles etc". On the other hand, Indicative Behaviour C implies that performance by firms will only be adequate if they report "any issues identified" as a result of their monitoring.) We believe that this will cause firms, fearing that they have misinterpreted one or other section, to file reports on a safety first basis.

5. We recommend that Outcome 2 be modified so as to be more readily understood whilst also ensuring that the SRA receives sufficient notification of issues which are of genuine concern. The references in the Indicative Behaviours should then be conformed to the new drafting.

6. Specifically, we think that the references to "changes to relevant information" are too vague. It would be preferable if the categories of information that the SRA needed to receive periodically (and to have updated) were specified in the rules on reporting and if the rules also dealt with the requirements to update the SRA if there was a material change to that information. Outcome 2 could then constitute the general requirement to bring to the SRA's attention *ad-hoc* situations regarding one's own firm which might have regulatory significance. We suggest that Outcome 2 might be phrased as follows:

   "*You notify the SRA of any significant breach by you of the principles, rules or outcomes. For these purposes a significant breach is any non-compliance which has or is likely to have a material adverse impact on a client, your firm or any person connected with it, or which is or is likely to be materially detrimental to the public interest or the standing of the legal profession*."

7. In this regard we do not think it is appropriate to refer to "breaches" of "other requirements of the Handbook" (unless these can be adequately specified) because much of the rest of the Handbook will not be binding on practitioners (for example, the Indicative Behaviours). If a requirement is not binding, it seems unnecessarily onerous to require its non-achievement to be reported.

8. We have a number of other, more general, comments on Chapter 10:

   - Both Outcome 1 and Outcome 3 impose a regulatory duty on firms to procure an outcome which is actually dependent upon the SRA. Whether or not the SRA has sufficient information to make a decision, and whether or not it is in a position to assess something, is dependent upon the SRA's disposition, internal organisation and the training and competence of its staff. A fairer formulation of, for example, Outcome 3 would be "*You provide to the SRA all information known to you which it would be reasonable to think would assist the SRA to assess whether any persons requiring prior approval are fit and proper at the point of approval etc...*".

   - While we accept that the wording is a carry across of text which is in the existing Code, we think that Outcome 7 should be modified slightly. It is an unfortunate fact that vexatious or tactical reports to regulators are becoming more common. Firms need to be able to react to these in an employment context or otherwise. In order to ensure that firms have the scope to respond legitimately to vexatious complaints, we think that Outcome 7 could be modified to read as follows without weakening it in any way: "*You do not act against anyone for reporting your conduct to the SRA or the Legal Ombudsman in good faith*." As revised, the provisions would then mirror those of the Public Interest Disclosure Act 1998, by which whistle blowers are only protected if they make a disclosure in good faith (Employment Rights Act 1996, s 43C)

   - Outcome 5 clearly tracks the old Rule 20.06. However, we think that the Outcome should be more explicit about the limitations imposed on the duty to disclose by confidentiality and legal professional privilege (the latter particularly in the light of the recent decision in *Quinn v. The Law Society*). While there is a reference to confidentiality in the drafting, the suggestion that it ought to be taken in to account "where necessary" is rather unclear. It should be explicit that no reporting duty arises where the information that would be reported is subject to client confidentiality and/or privilege.

   - Guidance will be required in relation to Outcome 10 (Delegation of Regulatory Responsibilities). For example, a firm may decide to outsource certain back office financial functions or first level client due diligence/verification. Or it might delegate the provision of AML training to satisfy the Money Laundering Regulations. Furthermore,

individual Managers will as an internal matter delegate to a committee, risk partner or managing partner. Such delegations would not be an abrogation of the firm's regulatory responsibilities, but they would certainly constitute delegations. It is unclear why they should be considered unacceptable if the firm continues to take ultimate responsibility for the correct performance of the obligations. Given that a likely scenario over the next five to ten years will be an increase in the degree to which firms outsource back and middle office functions, the imposition of Outcome 10 in its current form does not seem to be a very helpful development.

- Indicative Behaviour I discusses reporting to the SRA when there is reason to believe that any person or firm authorised by the SRA, or any employee (for example) is in serious financial difficulty. We note that this has been adapted from the current version of the Code, but now with much wider application. As drafted, a firm would be obliged to report whenever any of its employees was in serious financial difficulty. The current version of the Code requires firms/solicitors to report when solicitors, managers of recognised bodies or firms etc. are in serious financial difficulty "*which could put the public at risk*". We would suggest that this italicised wording be reinstated and that employees should not be included in the reporting requirement. If left as it is currently drafted, the Indicative Behaviour's wording could create an overly onerous reporting requirement, with no level of materiality, for no obvious reason.

Annex D

Detailed comments on Draft SRA Code of Conduct (as set out in Annex C of the consultation paper)
Section 4: You and others

Chapter 11 - Relations with third parties

We have a number of comments regarding the SRA's proposals in this section:

1. Outcomes 2, 3 and 4 strike us as being examples of indicative behaviours of Outcome 1 (not taking unfair advantage of third parties) and should accordingly be included under the "Indicative Behaviours" heading.

2. In relation to Indicative Behaviour B, it will not always be possible to comply with this in litigation.

3. In relation to Indicative Behaviours E and F, we are not aware that it is the practice of larger firms to maintain a firm-wide system of recording when undertakings have been given and discharged. We think that such a system is unnecessary. Further, either the definition of "undertakings" needs to be amended so that its application is limited to undertakings given in the course of practice, or as a solicitor, or Indicative Behaviour F needs to be amended to this effect. (See also our comments on undertakings in relation to Chapter 7, above.)

4. Certain remedies, such as a demand for an apology in a defamation claim, are not strictly recoverable through the proper legal process, and an appropriate exception needs to be made. Further, it is an advantage of mediation that you can pursue an outcome not recoverable at law, for example a contract on different terms.

5. Indicative Behaviour I should be qualified so that such usage would be indicative of taking an unfair advantage only where it is inappropriate to use the professional title of solicitor to advance one's personal interest. For example, it would not be inappropriate to use it in applying for a loan, a lease, or membership of a club.

6. We take it that the Guidance to Chapter 11 will include the specific points presently addressed in the extensive Guidance to Rule 10 on Relations with Third Parties. We believe that this detailed Guidance is necessary and addresses points of practice on which practitioners rely.

7. We repeat the concerns on the application of these Outcomes to overseas practices referred to in our comments elsewhere in this response.

Chapter 12 - Separate businesses

1. We note the point raised in paragraph 71 of the consultation concerning the risk that non-reserved legal services are deliberately provided through a separate business owned by the firm, or an associate of the firm, which is not authorised and regulated by the SRA, and which therefore undermines client protection. In our view, this sort of arrangement would give such separate businesses a competitive advantage as they would be free of the regulatory costs that would otherwise apply.

2. In an ABS environment, we believe greater clarity as to what is permitted is needed here. In light of the desired goal, we do not believe that the separate business requirements lend themselves to an "outcomes-focused" approach. There is only one way of achieving the Outcomes identified here, and that is not to own or have the interests indicated. It is confusing to suggest that there may be a variety of routes to achieving the Outcomes.

3. As a result, we wonder whether this particular requirement concerning separate businesses should be dealt with outside the new Code, on a prescriptive rule-based basis, along the lines of the Accounts Rules.

4. In any event, the exceptions presently stated in Rule 21.02 of the current Code should be incorporated as necessary in the relevant definitions. Again, we anticipate that the extensive Guidance on Rule 21 will be re-stated.

Annex E

Comments on the comparison of the provisions of the current Code and new Code as they relate to overseas practice

	Provisions of the current Code which will apply under the new Code	Location in the new Code	Commentary
Rule 2	2.01 – Taking on clients 2.02 – Client care 2.03 – Information about the cost 2.05 – Complaints handling	**Chapter 1 – Client care** - all	CURRENT CODE - does not apply to an overseas practice. Replaced with express provisions dealing with: • Commissions - 15.02(2). • Limitation of liability by sole practitioners - 15.02(3). • Contingency arrangements for work undertaken in relation to contentious proceedings - 15.02(4). NEW CODE - all Outcomes apply to an overseas practice except for 7 (clients are protected by compulsory PI insurance) and 8 (informing clients of right to complain to the ombudsman). These Outcomes are replaced by equivalent Outcomes tailored/relevant to an overseas business.
Rule 5	5.01 – Supervision and management responsibilities 5.03 – Supervision of work for clients and members of the public	**Chapter 1 – Client care** – in part (particularly 5.01(1)(a)(d)(e)(f)(g)(h)(i), 5.03) **Chapter 7 – Management of your business** – in part (5.01(c)(j)(k)(l)) For 5.02 see **Authorisation and Practising Requirements**	CURRENT CODE - does not apply to an overseas practice. Replaced with express provisions dealing with: • Restriction on setting up a sole practitionership outside of England and Wales (15.05(2)). • Minimum practising

	Provisions of the current Code which will apply under the new Code	Location in the new Code	Commentary
		section of the Handbook	experience requirements for at least one manager (15.05(3)). • A general obligation on solicitors, RELs, recognised bodies and managers practising outside of England and Wales to ensure that the firm is managed and supervised properly (15.04). NEW CODE • Chapter 1 - all Outcomes apply to an overseas practice (see Rule 2 above). • Chapter 7 - all Outcomes apply to an overseas practice. • A&P requirements - apply to regulated individuals and bodies.
Rule 6	6.01 – Duty not to discriminate 6.02 – Evidence of breach 6.03 – Equality and diversity policy 6.04 – In-house practice 6.05 – Waivers 6.06 – Meaning of terms	**Chapter 2 – Your clients and equality and diversity** – except 6.05 and 6.06	CURRENT CODE - does not apply to an overseas practice. NEW CODE - two of the 5 Outcomes apply to an overseas practice, specifically: • Not discriminating without lawful cause or victimising or harassing in the course of your professional dealings; and • Not putting clients and staff who are disabled at any disadvantage in comparison with

	Provisions of the current Code which will apply under the new Code	Location in the new Code	Commentary
			those who are not.
Rule 9	9.01 – General 9.02 – Financial arrangements with introducers 9.03 – Referrals to third parties	**Chapter 6 – Your client and introductions to third parties –** 9.03 only **Chapter 9 – Fee sharing and referrals** - 9.01 and 9.02	CURRENT CODE - does not apply to an overseas practice except for an express obligation to ensure that referrals do not breach the core duties or "any other applicable provisions of these rules". NEW CODE • Chapter 6 - all Outcomes apply to an overseas practice. • Chapter 9 - all Outcomes apply to an overseas practice.
Rule 19	19.01 – Independence	**Chapter 6 – Your client and introductions to third parties** **Chapter 9 – Fee sharing and referrals**	CURRENT CODE - does not apply to an overseas practice except where regulated services or conducted from an office in Scotland or Northern Ireland, or into the UK from an office outside of the UK (this is covered by the core duty of independence - 1.03). NEW CODE • Chapter 6 - all Outcomes apply to an overseas practice. • Chapter 9 - all Outcomes apply to an overseas practice.