THE CITY OF LONDON LAW SOCIETY

Legal Services Act: New forms of Practice and Regulation

Consultation Paper 2: Changes to "Framework of Practice" Rules

The City of London Law Society (CLLS) represents over 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's consultation regarding changes to the "Framework of Practice" Rules has been prepared by the CLLS Professional Rules and Regulation Committee. This response is set out below in relation to the questions and numbering as they appear in Consultation Paper 2.

As a preliminary general point, we are concerned at the level of complexity which has now been introduced to the "Framework of Practice" rules. Determining which rules are applicable to regulated entities themselves, which apply to their managers and which the non-lawyers and employees within those entities are subject to, is not straightforward. For the sophisticated business structures required to be adopted by many City firms to deal with their international operations the difference in application of the rules to overseas branches as contrasted to controlled separate entities and the lawyers and non-lawyers practising through them are also often difficult to understand. It is in this area that the direct and clear language adopted elsewhere in the Code raises concerns as it seems to be lacking. Very clear Guidance in this area is essential.

1 Do you agree that a solicitor in an "authorised non-SRA firm" should be able to provide a reserved legal service to the firm itself, work colleagues, related bodies or pro bono, even if the firm is not authorised to provide services of that sort? (paragraph 2.3)

We agree with this approach. We would recommend that the Guidance clearly explains that such an "in-house solicitor" will be subject to and regulated by the Code in providing any such services, in addition to any regulatory impact of another regulator's rules on his or her activities on behalf of the authorised non-SRA firm.

2 Do you agree with the way 14.04 deals with changes to a partnership, and their effect on a body's recognition? (paragraph 3.12)

The 28-day temporary recognition period seems unnecessarily short, and we suggest a period of 56 days, given the safeguards contained within Regulation

5.3(c). Please refer to the CLLS response to Paper 5. We otherwise agree with this approach.

3 Do you think 14.04 [(4) and (5)] deal adequately with a partnership becoming a sole practitioner? (paragraph 3.12)

We agree that it does, subject to the comments made above regarding the temporary recognition period.

4 Do you think 14.04 [(6) to (9)] deal adequately with a partnership split? (paragraph 3.12)

We agree that it does, subject to the comments made above regarding the temporary recognition period.

5 Do you agree with the way the rules deal with salaried partners and "local" partners? (paragraph 3.13)

We note that this approach may result in additional regulatory obligations for some "local partners" based outside the UK who will in future be treated as managers of the firm as a whole and in some cases will for the first time have to become RFLs with consequential costs and regulatory implications. We understand the logic to support the new approach to treat all those held out as "partners" in a partnership which is a regulated entity to be treated as "managers" for the purposes of the rules and support the consequence that this new approach will remove sometimes artificial and inconsistent treatment which many firms, both large and small, have in the past found difficult to understand. However, we note that those firms which have concerns in the effective widening of the SRA's regulatory net to cover "local partners" overseas, may choose to restructure their legal arrangements overseas to convert branches into separate legal entities in order to avoid additional regulation.

We express concern however, as a more general point, that there appear to be circumstances where the full Code (notably the conflict rules) may be argued to apply to non English partners working abroad in connection with matters where there is no connection of client or subject matter to the UK. The implications of saying that the Code applies to "managers" wherever they practise needs to be better thought through. Please refer to the CLLS response to Paper 3.

6 Do you agree that most of the Code should be disapplied in relation to work a solicitor in an "authorised non-SRA firm" does for clients? (paragraph 4.2)

We agree with this approach. We note, however, it will be important, of course, for the Legal Services Board to ensure that the rules of other approved regulators do not result in a conflict with the duties under the Code which will continue to apply

such as the core duties. It might be necessary to clarify, for example, in Guidance that the core duties will not in these circumstances fall to be interpreted consistently with some of the more detailed rules in the Code if those more detailed rules, for example, may conflict with the detailed rules of other approved regulators e.g. concerning best interests of client/conflicts of duties.

7 Do you agree with the new test for when the Code applies in full to the overseas practice of a recognised body – whether the body is a "solicitor-controlled recognised body"? (paragraphs 4.5 and 4.6)

As a preliminary point, given the complexity of the drafting of these provisions and interrelationship of various definitions, it would be extremely helpful if clear Guidance could be provided to emphasise that what is being introduced is, effectively, three-tiered regulation for firms which have overseas operations:

(i) full compliance with the Code will be required in relation to activities carried out from offices in England and Wales;

(ii) more limited compliance with the Code, as specified in Rule 15, will be required in relation to overseas practice from offices outside England and Wales, but only where the recognised body is "solicitor-controlled"; and

(iii) a much more limited form of regulation will apply to recognised bodies' overseas practices where they are not "solicitor-controlled".

We have two concerns with the new test that is proposed. The first relates to the way in which "solicitor-controlled recognised bodies" are defined and the second relates to the scope of rules which should be applied to the overseas practice of such "solicitor- controlled" bodies. These both need to be considered in the context that it may be for completely random reasons – fiscal, regulatory or other – why particular overseas operations of a firm in a particular country have been structured, for example, as a branch of a worldwide partnership or LLP rather than as a separate local partnership or entity.

A "solicitor-controlled recognised body" is defined as meaning " a recognised body in which lawyers of England and Wales constitute the national group of lawyers with the largest (or equal largest) share of control of the recognised body either as individual managers or by their share in the control of bodies which are managers".

In a multi-national partnership, whether large or small, there may be a large variety of "national groups" of lawyers where the group with the "largest" share of control may well have no real dominant influence on its business and which could fluctuate from time to time during the course of a year as a result of elections and retirements, including lateral hires. As this definition provides such an important jurisdictional test for the application of the rules on a day-to-day basis, including for

example whether the conflicts rules apply, we would prefer more certainty than this definition currently allows. There are also uncertainties in this definition surrounding the term “national group of lawyers” as applied to an international firm in which there are many different nationalities who have multiple legal qualifications, many of which are unrelated to their individual nationalities. We suggest referring instead to a “group of lawyers by primary practising qualification (wherever located)”. The way in which “control” is exercised within the largest multi-national firms can also be complex. These sorts of issues would be capable of resolution on a case by case basis in discussions with the SRA more easily than within a complex definition. A suggestion therefore would be to include an assessment about whether a body was “solicitor-controlled” or not in the annual recognition process which would then continue to apply until it was modified either annually or following material changes notified to the SRA.

We also note there is some confusion in the use of the term “solicitor-controlled” as applicable to a group that may comprise a majority of non-solicitors (given the definition of “lawyers of England and Wales”). Use of the term “English lawyer-controlled recognised body” might be more helpful.

So far as the second issue is concerned, relating to the scope of the applicable rules, we find the distinction that would apply between the rules applicable to the branch of a partnership or an LLP operating overseas and the rules applicable to a separate legal entity which is effectively controlled by such a partnership of LLP, difficult to understand. A firm which is not “solicitor-controlled” would not only avoid having to comply in its overseas practice with the core duties (apart from 1.06 concerning public confidence), but it would also not need to comply with most of the Code or the overseas accounts rules. That would be the case even if all of the partners practising within a particular overseas branch in fact happened to be English solicitors if, overall, the firm is not solicitor controlled. Contrast to the position of a firm which is “solicitor-controlled”; even in a branch office where there are no English solicitors located and where the practice is far removed from English law or English clients, it seems it would be necessary to comply with much of the Code including the Conflicts and Confidentiality Rules. That also contrasts with the position of a separate legal entity which may be effectively controlled by the recognised body but which itself, not being a recognised body, would be outside the scope of the Code as a body which the SRA regulates. That does not seem to us to be appropriate nor is it consistent with informal guidance provided in the past by the SRA concerning the application of Rule 15 to the branch of a recognised body and its practice not involving English solicitors.

8 Do you agree with the new test in 15.5 and 15.27 and for whether the overseas accounts provisions apply – that solicitors control the firm? (paragraph 4.7)

We agree with this approach, subject to the comments made above concerning the definitions of "solicitor-controlled recognised body".

9 Do you agree that a solicitor, REL or RFL should only participate in a recognised body or authorised non-SRA firm as a lawyer? (paragraphs 5.3 to 5.5)

We do not understand the justification for this restriction and are concerned that it could be problematic for firms which wish to continue to employ solicitors in parts of their business where they are not practising as lawyers, but for example, in management, HR, or business manager roles. It is suggested in paragraph 5.5 that by virtue of section 1A of the amended Solicitors Act a solicitor will be deemed to be practising as a solicitor if employed in connection with the provision of any legal services, in any event. It is not clear, however, whether the impact of proposed Rule 20.04 would be to prohibit a solicitor from practising in a non-legal capacity within a firm. If so, this would be objectionable as there are many roles, particularly within the larger firms, where past experience in acting as a solicitor would be invaluable to those performing certain business services or practice support roles and if a solicitor were required to remove his or her name from the roll before he or she could accept such a position, it might make the recruitment of lawyers into these roles much more difficult.

10 Do you believe any of the proposed amendments to the Rules annexed will have a particular impact (adverse of otherwise) on any group or category of persons?

The proposed amendments have a substantial and onerous impact on employees of regulated firms as a result of the proposed amendments to the definition of "employee" in Rule 24, the amendments to the compliance duties in Rule 14.02 (1) and (4) and, most importantly the extension of Rule 23.01 (1) (d) to employees of recognised bodies. As a result, provisions of the Code now seem to apply directly to all the firm's, employees and self employed contractors, however junior they may be and in whichever office in the world they may be practising. We understand the justification for widening the scope of regulatory duties to be owed directly not simply by the regulated entities but by those who manage and control or have ownership interests in the entity. We also understand why this scope reasonably should be wider to include, in relation to the recognised body, the obligations of solicitors, other lawyers and even non lawyers who have management positions. However, the justification for extending direct regulatory obligations to secretarial and administrative staff seems obscure. We are concerned that the additional regulatory obligations imposed by the Code on non-legal staff of this sort which would not be applicable to similar staff in other regulated organisations might put

the legal profession at a competitive disadvantage in recruiting and retaining individuals in these roles. We are also concerned that these changes do not seem to be highlighted as part of the consultation process and that without clarification of the impact in Guidance the full extent of the scope of these changes on the profession may be missed.

11 Have you any other comments on the draft amendments to the Rules?

We have a number of additional comments on the draft amendments which are set out in the attached Appendix.

APPENDIX

1 Rule 14.01 (1): This restricts the business of a recognised body to the provision of "professional services of the sort provided by individuals practising as solicitors and/or lawyers of other jurisdictions". Although this is extended to allow services of the sort provided by notaries public and to cover the educational and training activities and authorship, journalism and publishing referred to in Rule 21.03, as well as allowing ownership interests in separate businesses, we are concerned that the restriction to services "of the sort provided by individuals" etc may stifle innovation in the development or delivery of legal services since those who pioneer particular services or delivery methods might find it difficult to fall within this restriction. We would like to see Rule 14.01 (1) (a) widened to allow for innovative developments perhaps by referring to "professional services of the sort which from time to time may properly be provided…..". It would also be helpful to include clarification, either here or in Guidance, that the conduct of a recognised body's business through an affiliated firm, effectively controlled by the recognised body, will not be treated as a separate business.

2 Rule 14.01 (3)(a): We are concerned about the multi-tiered corporate restrictions referred to in paragraphs 3.9-3.11 of the Paper. Whilst we understand that these are being introduced to comply with prospective changes to the Administration of Justice Act 1985 (by the introduction of a new section 9A), we very much hope that the SRA, in line with its commitment to targeted and proportionate regulation, is lobbying for those changes to be "withdrawn" (by means of an amending Statutory Instrument) before they are brought into force. Not only do these unnecessary restrictions adversely impact on the existing structures of some firms (meaning that they will, at considerable cost and inconvenience, have to restructure), they are an unfair fetter on the freedom of law firms to structure themselves as they wish, and for a very wide variety of entirely legitimate business-related reasons (e.g. for tax or accounting purposes), going forward. There is no regulatory reason why law firms should be any more inhibited in this respect than any other type of business operating in any other sector.

3 Rule 14.02 (1); (a):It would be helpful for this to clarify that it applies "only in so far as it applies to them" to ensure that there is no obligation imposed on managers and employees except where respectively stated for each of them.

4 Rule 14.02 (4) and (5): There is a typographical error duplicating (5), with a second subparagraph (4).

5 Rule 14.04 (11): We assume this provision is not intended to restrict the giving of undertakings to a lender financing the provision of capital subscriptions under which partners/firms conventionally agree that any partner capital to be repaid to the partner will first be applied in repaying any capital subscription loan with any balance repaid to the partner. Strictly, this could be treated as creating a third party

interest over a partner's interest in the partnership and thus be prohibited although we do not believe that is what is intended. The same issue arises in relation to a member's interest in an LLP under Rule 14.05 (3).

6 Rule 15.03: As referred to above, we believe that there should be additional exceptions relating to Rules 3 and 4 in relation to matters which do not involve any solicitors and where the subject matter is unrelated to assets situated in England and Wales.

7 Rule 15.05 (4) (b): There are cross referencing errors to correct.

8 Rule 15.27 (2): Typographical error- the text retained before sub paragraph (1) should have been deleted.

9 Rule 24: "In-house practice": Cross references need correcting.

10 Rule 24 "manager": delete "means" and insert quotation marks in the first column. Also consider whether this definition should include those who have equivalent status to a member - this is covered by the definition of "partner" to include those held out as partners but is not covered in relation to a "member" of an LLP. for those with equivalent status.

11 Rule 24 "practice from an office": Although this definition has not changed it is used in a number of new contexts in the rules. In particular, it can cause some confusion when you try to apply its use for jurisdictional reasons such as in relation to Rule 23.01 (1) and (5) when considering limb (b) of the definition as this includes practice carried on "from an office of the firm in which you are a principal, director, or an owner, even if you are not based there". That would seem to require the partner or owner of a recognised body who is based outside the UK, personally in relation to his or her own overseas practice, to have to comply with the full scope of the Code pursuant to rule 23.01 even where the applicable recognised body would only be required to comply with more limited provisions (under rule 23.01 (5)). Issues could also arise, under this definition at least for some of the larger international firms, relating to lawyers who do not have a business base in any particular office but who operate across a region of multiple locations for example in Central Eastern Europe with a "virtual base".