

Regulation of corporate law firms

This is the response of the City of Westminster and Holborn Law Society to the call for evidence by Nicholas Smedley in connection with the regulation of corporate law firms, a distinct sub-strand of the wider Legal Regulation Review, commissioned by the Law Society, and led by the Rt Hon Lord Hunt of Wirral.

Introduction and Summary

1. The City of Westminster and Holborn Law Society represents solicitors and trainees working in an area bordered by the City of London, Middlesex, west and south London. Solicitors in this Society have many different types of practice. Some are indistinguishable from major firms in the City of London. Others are similar to 'High Street' firms and there is almost every type of practice in between. This means we are ideally placed to contribute to the review of corporate legal work.
2. We are unhappy with the notion that there is such a thing as a 'corporate law firm'. Many firms undertake work on behalf of corporate clients but they also undertake, or may undertake, work on behalf of 'real' people as well.
3. Any review of the regulation of work undertaken for corporate clients needs to be sensitive to the public interest that all solicitors must be able to accept instructions from any party seeking their assistance regardless of the nature of that party's legal personality. For example, an individual director of a company should not be prevented from seeking advice from the same firm as his company should he choose to do so simply because he is a private individual (provided there is no conflict of interest).
4. Already solicitors and their firms are subject to several regulatory agencies so any review must also be sensitive to the needs of solicitors to be subject to a coherent regulatory regime emanating from as few different sources as possible. The risk of creating a regulatory maze or unnecessary complexity should be avoided in the interests both of those regulated and of those seeking to make use of the services, and therefore protected by such regulation.
5. One of the problems is that the skills needed to regulate high street practices are quite different from those required to understand the workings of international legal practices with complex finances and how regulation impacts on them. The SRA could consider secondment of staff from this type of firm to assist in understanding the nature of their practices. Staff returning to the firms can bring a mutual benefit of knowledge of the workings of the regulator.

Question 1: What is the public interest that the regulation of corporate law firms is designed to protect?

6. The public interest which the regulation of corporate legal work is designed to protect includes –
 - the need to ensure that all clients, including corporate clients, are protected appropriately when using the services of a solicitor; and
 - the reputation of the legal profession itself, as a custodian of the rule of law;
7. It is a key tenet of a civil society that its members, both corporate and real, should be able to repose trust in the legal profession because of their crucial role in supporting

and promoting the rule of law. Solicitors need, therefore, to be able to reflect the values of society at large so that all clients feel able to trust them with their secrets, money and with the conduct of their endeavours. Trust is a commodity hard won and easily lost. Currently the legal profession in this jurisdiction enjoys considerable levels of public trust and confidence. This can be endangered by self-seeking behaviour on the part of lawyers, and the recent case of solicitors disciplined in respect of miners' claims is important in showing how regulation can assist in protecting both the public and the reputation of the profession.

8. Not all clients, including corporate clients, will wish to reflect in their conduct the same high ethical standards as solicitors. Solicitors are their clients' professional advisors. It follows that, in this rôle, it is sometimes necessary for solicitors to refuse to carry out the wishes of their clients, whether because those wishes would lead to a breach of law or because to do so would risk damaging the reputation of the profession. For example, solicitors are not permitted to act for clients in situations which give rise to a conflict of the solicitor's interests and the client's interests, even if the client wishes the solicitor to do so.
9. Many corporate clients are the source of extremely valuable work to the solicitors' profession and as such they are able to exert very considerable power in the relationship with their solicitor. Effective regulation of corporate work will ensure that the solicitor is protected from overbearing clients, regardless of type, in circumstances where yielding to the clients' pressure would be harmful to the solicitor, or to the reputation of the profession. There is a public interest in those who serve the needs of corporate clients being regulated as every solicitor is regulated because to do so enhances the public confidence in the profession as a whole. It may well be that the individual solicitor would be happy to take a higher level of risk because of his or her particular knowledge of the circumstances of an individual case. However, the risk, being one which affects the reputation of the profession, cannot be determined by the practitioner acting alone, or in concert with his or her own client. It is understandable that this will result in hard outcomes in some cases.
10. If those who conduct largely corporate work wish to benefit from the advantages of being able to hold themselves out as solicitors they must submit themselves to constraints on their conduct which are necessary to ensure that the confidence of the public in solicitors is not diminished. There seems to be no way in which they can be released to conduct themselves in a fundamentally different manner if this poses any significant risk to the standing of the profession as a whole unless they are also willing to distance themselves from the profession by, for example, re-branding themselves.

Question 2: In your experience, does the current regulatory regime focus on the risks most likely to arise from the work of these firms?

11. It is not clear what is meant by a 'corporate law firm' but we have taken it to mean a firm which largely services corporate clients and for our purposes we have called these 'City firms'. It is not apparent that the SRA focuses on any particular risks in relation to City firms. The action of the SRA in relation to all firms is understandably carried out largely in a confidential manner which lacks transparency. Recent reports of a monitoring visit being carried out at a particular City firm in order to provide an opportunity to establish how such visits might be conducted in the future created the impression that monitoring visits to City firms were still a complete

novelty. In terms of monitoring and enforcement, the SRA appears to still be ill-equipped to carry out these tasks particularly in relation to larger firms.

12. From the information available to this Society, it does not appear that the SRA work focuses on City firms. For example, there does not appear to have been any significant enforcement of the anti-discrimination Rule in the City despite widespread condemnation of an unequal pay regime for men and women (including trainees) in the profession and the absence of a professional work force which reflects the gender, race, age and disability ratios currently existing within the profession- all of which breaches Solicitors Practice Rule 6. On the other hand, the SRA recently prosecuted a small firm of solicitors, at considerable expense, for a relatively minor infringement of a conduct rule where the infringement was common practice throughout the profession. A practice note to the profession advising them how the SRA monitoring teams would view continued breaches would have been likely to achieve a higher level of compliance. These are examples of how the SRA appears loath to tackle major issues in City firms while picking up 'quick wins' (or possibly 'losses') in relation to smaller, non-City firms.
13. If the reviewer is asking a narrower question about the focus of the practice rules, then these seem, for the most part to be broadly acceptable subject to this one caveat which affects all solicitors, regardless of work type. Despite the intentions of the SRA to move to principle-based regulation, several of the rules, such as those relating to conflict, confidentiality, client relations and referrals, appear to be unnecessarily detailed. This leads to a cumbersome compliance based approach to disentangling what the rules do and do not permit, rather than establishing the deeper importance of the simple principles behind the rules themselves. For example, the client relations rule sets out a series of micro-managed steps which firms must take in relation to each of their clients and then provides for a general dis-application – for example see R.2(02)(3). While a balance needs to be struck between bland assertions of principles and detailed codes, in too many places the balance seems to have come down in favour of a compliance-based approach to regulation. The SRA is at risk of producing a profession which spends its time looking for ways to seek to dis-apply the rule, rather than at ways of deepening their commitment to the application of the essential principles of ethical conduct. Ideally a profession should be encouraged and, indeed facilitated, to regulate itself and the current tendency to a compliance based approach leads away from, rather than towards this ideal.

Question 3: Are there any particular rules which cause difficulties?

14. Subject to our comments above, none. However, continuing the SRA's current approach to investing time in developing more and more complex 'loopholes' or exceptions (see their current consultation on proposed changes to the conflict and confidentiality rules), the SRA risks breeding legal service providers who are required to do no more than compare their conduct against a list of prescribed and prohibited behaviours. In so doing they will produce a regulated body of technicians without adequate skills to exercise professional judgments.

Question 4: Are there any aspects of the way the current regulations are drafted, interpreted or enforced that create problems?

15. See responses to questions 2 and 3.

Question 5: Are there any examples from overseas, or other professional services that could be used as a model for regulating corporate legal work?

16. Medical regulation is less compliance based and offers an approach close to that of professional regulation. On the other hand the regulation of the banking industry seems likely to offer many lessons about what can happen when a regulator neither understands enough about the activities of the regulated bodies nor is sufficiently accountable for failures of regulation.

Question 6: What skills, knowledge and experience does the regulator of corporate legal work require?

17. Across the globe regulators¹ have experienced difficulty regulating large firms of lawyers. Regulators also have the same problem with some industries sectors such as banking. Indeed, the current economic difficulties in the UK and across the globe are due in no small part to the failure of the proper regulation of the banking industry despite regulators being in place to carry out that very task. The SRA needs to engage in these debates about how to regulate the sophisticated and powerful in accordance with the principles embedded in the Legal Services Act.

18. The work of professional people in the corporate field can be complex, and few staff employed by the regulator are likely to have experienced working in these environments and therefore be less familiar with them than with, for example, High Street practices. Excellent regulatory staff are always vulnerable to being 'poached' by those they are regulating. This makes it constantly difficult for the regulator to build up the experienced and confident staff needed to regulate powerful regulated entities and to challenge assertions made by the regulated.

19. Regulators can lack the necessary experience, expertise and possibly even the political will to carry out their activities. The risk of pursuing a powerful opponent in disciplinary proceedings carries very considerable risk when the regulated person or entity will have large resources to defend the proceedings.

20. The SRA Board needs to consist of both professional and lay members of the highest calibre who have an in depth understanding of the full range of the regulated activity for which they are responsible, and the lay members should be selected for their ability to bring objectivity and fresh vision to the work of the Regulator

Question 7: Is there a case for differentiated regulation, distinguishing between corporate law firms and others?

21. There is no such case, first because there can be no satisfactory definition of "corporate law firm" and secondly because of the importance of a consistent regulatory system, and the need to ensure common principles across a common profession. In suggesting the possibility of a differentiated regime, it is essential to take into account the risk of unnecessary or disproportionate expense being

¹ Academics have written widely about these difficulties in the USA, Australia, New Zealand and in Japan

incurred; of increasing (for the profession and the public) complexity, duplication and a regulatory maze. The Government's review through Sir David Clementi was set up to ensure that such a regulatory maze did not continue or be extended. However, in ensuring that the regulation of the profession is appropriate, the challenge for the SRA is to provide a flexible regulatory regime which enables all those regulated by them to be regulated appropriately. This includes principle based rules and skilful and experienced regulatory staff for enforcement and advice.

Question 8: If there were to be a differentiated approach, how would that work? What would determine how different law firms should be regulated differently?

22. This is a task which should not be embarked upon. Trying to devise what can, at best, be a clumsy separation out of one type of firm or client group from others will be divisive to the profession as a whole at a time when we would do better to hold together. The profession needs to prepare itself to move into a post-ABS world at a time when we are also dealing with a global economic down turn as well as saving money to meet the start up costs of both the LSB and the OLC. We have commented above on the difficulty of distinguishing between firms based on the type of client, or the nature of the work.
23. The complaint from firms in the City that they are being over-regulated does not appear to amount to more than their desire to deal with a competent regulator, and that is a wish which all firms and solicitors share.
24. In particular, no step should be taken which would restrict the ability of a solicitor to practice in one firm and not in another as a consequence of the type of work undertaken.

Question 9: Are there any other issues that the Review should consider?

25. The cost of regulation, which must be proportionate to the benefit achieved by the regulation. If further separate regulation of lawyers within the solicitors' profession is proposed, then any additional costs should be considered in advance and justified.