‘PRINCIPLES-BASED’ REGULATION

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The SRA has now taken a further step in its long-heralded move towards ***‘principles-based regulation’*** with the publication on its website of a position paper on its proposals. Consultation is invited, with responses requested to be with the authority by 27th July 2010. As yet the SRA is consulting merely on the format of a new rule book for the profession and not the content. Many will judge the new proposals when these final details are made available, but it is important to chart the SRA’s thinking on the way forward before a draft rule book appears.

By common consent the current Code of Conduct, which took effect in July 2007, had been overtaken by events during the many years of its formal approval as it had been bogged down in the extensive statutory review processes. The Code which was based on rules conceived some five years beforehand was issued to a profession that had seen the division of the Law Society and the introduction of a brand new regulator (SRA) earlier that year. The initial aims of the ***‘Better Regulation Task Force’*** – headed by former President Edward Nally – had been to simplify the rules that solicitors were subject to and to free them to operate in a more commercial manner. The former Guide to Professional Conduct, it was thought, had been drafted in those far-off days when disenchanted clients did not sue their solicitors and so were in much greater need of consumer protection than is the case with many, though not all, clients today. The emphasis of the new shorter Code was therefore on more accessible rules, with the extensive guidance being precisely that, and not forming part of the rule book ***per se***.

Unfortunately it was not just the regulatory structures that had changed by the time that the Code of Conduct took effect. With the main principle underpinning the Legal Services Act being that regulation should be ***‘in the consumer’s interest’*** simpler rules for the profession no longer seemed to be the priority. Whether right or wrong the SRA has generally expected the guidance to the Code to be complied with unless a firm can show some good reason not to have done so. The rather disappointing result, in the view of many regulatory specialists, has therefore been that the shorter rule book that had been promised did not in fact materialise.

So will a shorter rules revision be possible in 2011, concentrating more on principles and ***‘outcomes’*** than literal rules? Perhaps, but the more fundamental question is whether the profession still sees this as a worthwhile aim. A precisely drafted rule book might limit the actions of firms, but it also serves to provide solicitors with a clearer idea of what they can and cannot do in advance of potential enforcement. The risk is that the SRA’s avowed intent to move to ***‘outcomes-focused regulation’*** may well make subsequent enforcement more unpredictable. With no rule book to consult – only outcome indicators – a firm’s good intentions at the outset of a matter or project might be judged harshly by the regulator at a later stage and with the wisdom of hindsight. As yet it is not clear if and how the new proposed regime will overcome the potential disadvantage of uncertainty. We can only participate in and monitor the consultation process.

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