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TO REPORT OR NOT REPORT - THAT IS THE QUESTION

This month's article is not just the last one of the year, but also the last one before all firms should have their nominations for COLP and COFA confirmed – we hope – by the SRA. The Compliance Officers will take up their posts in the New Year and the self-regulating era heralded by the SRA Handbook in 2011 will then be fully in place.

We have examined the roles of COLP and COFA in recent months, along with the preparatory steps required. A quick reminder: an up to date office manual is key to most of the compliance systems required and the SRA Authorisation Rules suggest that a 'compliance plan' should also be compiled. This is best seen as a high level management overview document setting out the broad profile of the firm, including its services, client groups and management arrangements. Risk management should feature prominently in this document, with the SRA now seeking on many recent visits a 'risk review'.

If preparations are in hand, COLPs and COFAs can then look forward to the full implementation of the regime required by the Authorisation Rules. There are four main aspects of both roles, the COLP having the more general remit with the COFA's role being limited to the SRA Accounts Rules. These are:

- to ensure that suitable compliance arrangements are in place;
- to instigate and maintain adequate monitoring as to the degree of compliance;
- to maintain records of breaches; and
- to report to the SRA 'as soon as reasonably practicable' any material breaches.

A question increasingly asked is what sort of breaches the COLP might anticipate. Inevitably these will mostly arise from the SRA Code of Conduct and since the client care arrangements at chapter 1 are key to the day-to-day activities of all solicitors they are bound to feature prominently in the records of all breaches of service provision. The most likely topics will be O(1.12) on the retainer information that the client might expect and O(1.13) on costs information, but there are more general outcomes which might produce more uncertainty. Chief amongst these would be O(1.1) which requires that clients be treated fairly: taken alongside O(1.2) requiring

that clients should have their interests protected in the matter and O(1.5) that the service should be delivered in a 'timely manner' taking into account 'your clients' needs and circumstances' this might suggest that complaints and errors made by the firm may well also feature in the record of breaches.

The toughest question that either COLP or COFA might face is when a breach will have to be regarded as being 'material'. No examples have yet been provided by the SRA, merely some guidelines to be taken into account in any such situation. These are to be found in the guidance note (x) to this part of the Authorisation Rules and can be summarised as:

- the possible detriment that clients will or might suffer;
- any possible loss of confidence in the firm to provide legal services;
- the scale of the issue; and
- the overall impact on the firm, its clients and any relevant third parties.

In all probability most client care problems will not, of themselves, amount to a material breach, but one of the issues that the COLP will have to monitor is whether the failure to keep costs estimates up to date (as also required by O(1.13)) has become so persistent that it amounts to a material breach.

Other areas of the Code, however, may well have greater potential to create a material breach from an isolated incident, such as confidentiality breaches under chapter 4. An email advice intended for a client but sent by mistake to her husband acting in person could cause such detriment to the client that it should be reported as a material breach.

However, there will be some breaches which are more difficult to classify as material or non-material. Where a decision is made not to report, practitioners would be well advised to keep a note of the reasons for the decision by reference to the Code and to the Authorisation Rules. Practitioners can always rely upon external advice as a means of providing justification to the SRA at a later date for non-reporting. Until we have clearer guidance from the SRA as to the sorts of issues it expects to be noted and reported we will all need to take our reporting duties very seriously indeed. ■

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