

# Solicitors: are you ready for the changes to the SRA's Code of Conduct?

On 25 November 2019 the Code of Conduct in the SRA Handbook 2011 (the **Code of Conduct 2011**) will be replaced with two new codes of conducts - one for solicitors and one for regulated firms. Are you ready?

We consider below the problems with the current code, the changes being implemented and the impact upon professionals.

## **THE CODE OF CONDUCT 2011**

The Code of Conduct 2011 was intended to be a move away from the previous detailed rules towards a system of '*outcomes*' focussed regulation. Each chapter in the current code lists a number of '*outcomes*' and indicative behaviours, designed to demonstrate compliance with the 10 mandatory principles set out in the SRA Handbook 2011. The 10 principles required solicitors and firms to:

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each client;
5. provide a proper standard of service to your clients;
6. behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. comply with legal and regulatory obligations and deal with regulators and ombudsmen in an open, timely and co-operative manner;
8. run the business or carry out roles in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. run the business or carry out roles in the business in a way that encourages equality of opportunity and respect for diversity; and
10. protect client money and assets.

There have been various amendments to the SRA Handbook 2011 since its release. However, following a three year consultation, the SRA Handbook 2011 is now being replaced by the SRA Standards and Regulations (the **2019 Handbook**).

The consultation was triggered by various factors. Firstly, it was widely considered that the extensive list of indicative behaviours set out in the Code of Conduct 2011 blurred the lines and that the SRA Handbook 2011 was

long, complex, and expensive to apply. The SRA therefore wanted to make it easier for solicitors and firms to operate.

Secondly, the SRA needed to respond to the Competition and Markets Authority market study report on legal services, published 15 December 2016, which recommended that the legal profession needed more flexibility and transparency.

Finally, there have been an increasing number of complaints referred to the Solicitors Disciplinary Tribunal (**SDT**) relating to inappropriate communications, which led to the SRA issuing a warning notice in August 2017 which highlights SRA concerns, particularly in relation to emails and the use of social media both inside and outside practice. It lists the type of behaviour the SRA has investigated including offensive comments about race, sexual orientation or religion, derogatory comments about women, sexually explicit comments and abusive comments made to firms, clients or unrepresented individuals. The SRA also published a revised SRA Enforcement Strategy in February 2019 which states that:

*"We are concerned with the impact of conduct outside of legal practice including in the private lives of those we regulate if this touches on risk to the delivery of safe legal services in the future."*

## **WHAT DO THE NEW RULES REQUIRE?**

The 2019 Handbook will replace the 2011 Handbook from 25 November 2019. The changes made in the 2019 Handbook are seen as an attempt by the SRA to refocus the minds of legal professionals on what the SRA considers to be the issues most important to protect the public and their money.

Whilst there have been few changes to the actual rules and principles, the rules have been reorganised and simplified to make them easier to use.

The single Code of Conduct 2011 will be replaced with two new codes of conduct: one for solicitors, Registered European Lawyers (**RELS**) and Registered Foreign Lawyers (**RFLs**), which will apply regardless of whether the solicitor is in practice or in house; and one for regulated firms.

The existing 10 principles have been cut down to the following 7 principles, which provide that legal professionals must act:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice;
2. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons;
3. with independence;
4. with honesty;
5. with integrity;
6. in a way that encourages equality, diversity and inclusion;
7. in the best interests of each client.

The key theme throughout is the need to act with honesty and integrity. The old Principles 8 and 10 (the entity based principles) have been removed and now feature in the code of conduct for regulated firms, and the old principles 5 and 7 are now in the code of conduct for solicitors, RELs and RFLs.

The old outcomes and indicative behaviours are being replaced by '*requirements*', and the ways in which solicitors can practice, and the public can access legal services has been widened. In particular, the definition of 'solicitor' has been amended to remove the requirement to work for a regulated entity. The rules which governed how in-house solicitors practiced will be repealed, meaning that solicitors can, in certain circumstances provide both unreserved and reserved legal activities to members of the public directly on a freelance basis. The solicitor cannot hold client money or employ people, and must maintain adequate indemnity insurance. Finally, certain reserved activities can only be provided by solicitors or barristers working for regulated firms. These include the exercise of a right of audience; the conduct of litigation; certain conveyancing activities; probate activities; notarial activities and the administration of oaths.

The new Enforcement Strategy makes it clear that the new rules will apply to conduct outside of work, as well as professionally.

The aim of the changes is a drive towards *ethics* based principles of practice, rather than adhering to a full set of black and white rules. This drive will extend to the conduct of solicitors outside of legal practice, where this impacts the delivery of safe legal services.

The focus is now very much upon the behaviour of the individual, including a personal obligation to report breaches; the rules send a strong message that the solicitor will be personally accountable for any breaches.

## **WHAT DOES THIS MEAN FOR YOU?**

### *Solicitors*

Solicitors will need to review the 2019 Handbook (note that the current version on the SRA website is not final and may change before 25 November 2019) and read the SRA enforcement strategy and linked 'topic guides' for a summary of the main mitigating and aggravating factors the SRA will take into account when considering cases.

You should understand the personal obligation to report a *reasonable belief* that there has been a 'serious breach of the standards' by your own behaviour, or that of other solicitors you work or deal with. The obligation to report extends to other legal services regulators such as CILEX, and reports must be made promptly – early engagement with the SRA is key. It is advisable that you document anything which involves personal judgment, such as a decision not to report, or the timing of any report made, so that this can be justified to the SRA if necessary.

Finally, read your firm's social media policy. Be alive to issues such as client confidentiality when using social media.

### *Firms / In-house legal teams*

Firms and in house legal teams should review internal policies and procedures, in particular whistle-blowing and reporting breaches policies, so that they reflect the SRA's enforcement strategy and the new obligation to report 'serious breaches'.

You should also ensure that members of the legal team are aware of their personal obligations in the new Code of Conduct, the reporting expectations and the reporting procedure.

## **COMMENT**

The SRA has confirmed that the 2019 Handbook is designed to be more flexible, allowing "*solicitors greater flexibility in how they work - making it easier for people to get help*".

However, with this flexibility comes increased risk. The extended focus, now on the conduct of solicitors outside work as well as in practice, will inevitably lead to an increase in prosecutions. This shift in focus can be seen in the huge raft of disciplinary decisions which are making headlines. There is a pattern of the SRA taking an extremely tough approach, with little room for second chances. In 2018 alone, the SDT ordered that 80 solicitors be struck off the roll.

Indeed, the SRA is expecting a sharp increase in the number of cases referred to it in 2020, with the new requirement to report a 'reasonable belief' that there has been a serious breach.

The SRA is anticipating a shift in the nature of cases being brought, with an expected increase in the number of sexual misconduct cases, those relating to the use of social media and cases concerning conduct outside of the professional arena. Indeed, disciplinary decisions handed down since the SRA's August 2017 Warning Notice illustrate the stance the SRA is likely to take in response to a perceived 'threat' to the solicitors brand. For example, disciplinary action has been taken against solicitors for posting offensive anti-Semitic comments on Facebook; assaulting paramedics whilst intoxicated; and posting 'puerile' comments on social media about cases being worked on.

Firms can expect increased scrutiny, and an expectation of active engagement with the SRA.

Key contacts

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