Susanna Heley flicks through the new solicitors' handbook and pauses on conflict rules

Code of conflict

I have some predictions about the new code of conduct, published by the SRA last week (6 April 2011). It will be met with general approval by City and commercial firms, a mixture of approval and suspicion by smaller and mid-sized firms and with weary resignation or disbelief by many sole practitioners.

The SRA tells us that those who are compliant now will continue to be compliant if they keep doing what they're doing. I'm not convinced. Some provisions will need firms to revise their policies and procedures (these will be the subject of later articles).

The structure of the handbook is relatively simple: ten overarching principles which apply at all times, mandatory "outcomes" setting out what firms will need to do to demonstrate compliance and non-mandatory "indicative behaviours" (IBs) indicating what the SRA might expect firms to have done to show compliance.

The SRA stresses that the IBs will not be the only way to show compliance and that the onus will be on firms to demonstrate that they are meeting the outcomes and complying with the principles.

Overall, the SRA has done a good job in the time it has had available. I might perhaps have made a few tweaks here and there, and there will inevitably be changes and reviews as the new system beds in. The real test of the new code is not so much in its detail but in how the SRA will interpret and enforce it. The culture change required within the ranks of the SRA is a challenge in itself; the new code will require a level of mutual trust and cooperation between the profession and the SRA which has been notable by its absence in recent years.

The new code is undoubtedly shorter than the existing code. It forms part of an overall handbook containing all of the relevant rules and regulations which affect solicitors' practices. Overall, the handbook runs to 563 pages, of which the code makes up 54. Despite the long and drawn out wrangling over the existing conflicts rule, the new code devotes just four pages to the subject.

There remain two types of conflicts of interest: "own interest conflicts" and "client conflicts". "Own interest conflicts" are conflicts between your interests and those of your client(s).

Firms are required to have appropriate systems in place to identify own interest conflicts. Such systems must be appropriate to the size and nature of your firm and are likely to present rather more difficulties for larger practices purely because of logistics. No guidance is given as to what systems may be appropriate and firms will need to assess what systems may be appropriate for them. Acting (or continuing to act) where there is an own interest conflict is prohibited.

Despite a minor inconsistency in definition, "client conflicts" relates to a conflict of interests between two or more current clients. Firms are generally prohibited from acting where there is a client conflict save with appropriate safeguards within two limited exceptions set out in new outcomes 3.6 and 3.7.

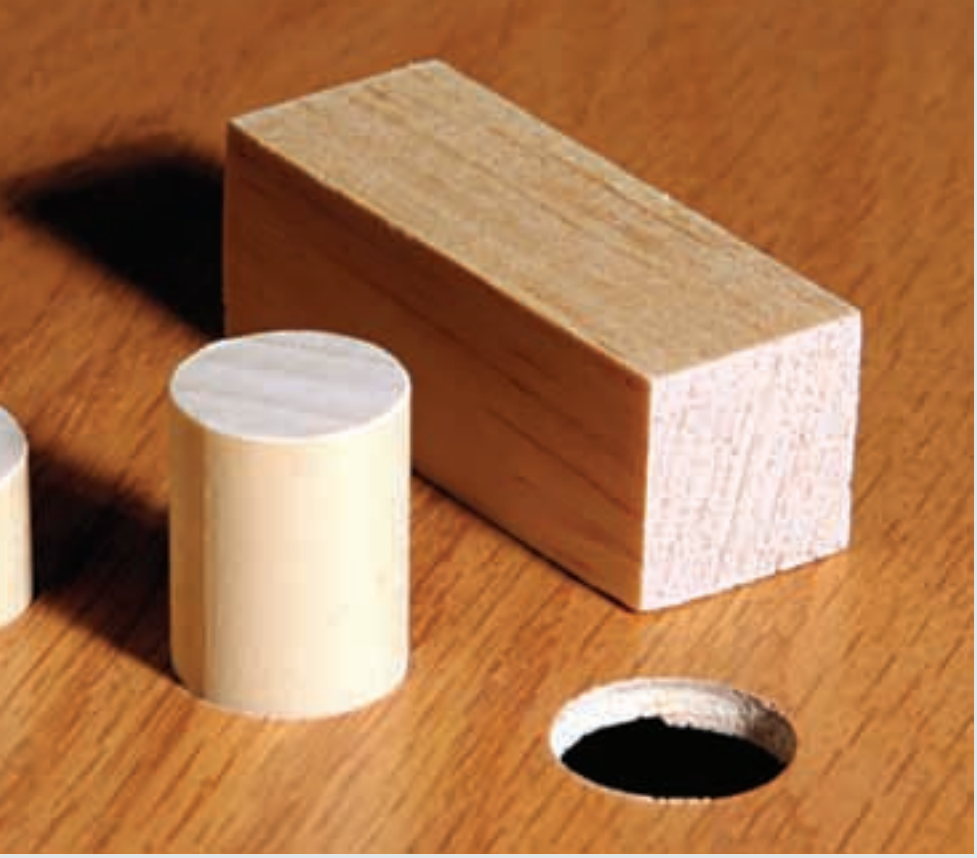
Outcome 3.6 is the familiar "common interest" exception. It enables firms to act where there is a client conflict but the clients have a substantially common interest and the benefit of you acting for both or all of the clients outweigh the risks of you doing so. There are, of course, the standard requirements for informed consent and a reasonable belief that your continuing to act is in the best interests of the clients.

Outcome 3.7 permits firms to act where clients are competing for the same objective provided that the various conditions set out in outcome 3.7 are observed. Again, clients need to have given informed consent and you need to have explained the risks to them.

Confidentiality

Practitioners know that "informed consent" can be difficult. It is easy for clients to challenge firms on the subject after the fact. Firms must also tread a careful path through the issue of confidentiality. If firms are not able to explain the risks of their continuing to act without imparting confidential information belonging to the other affected client(s), they will need to get consent for such disclosure before explaining the risks all round. There are a number of potential pitfalls and firms will need to have systems in place to navigate them.

The SRA has heeded – to a limited extent – the concerns raised by property lawyers during the consultation process and has not excluded property transactions from the



"The real test of the new code is not so much in its detail but in how the SRA will interpret and enforce it"

exceptions in outcomes 3.6 and 3.7. It has added some property specific indicative behaviours, such as IB 3.7 which deals with firms acting for mortgagees and purchasers in purchases of land.

Although the mandatory provisions directly relating to conflicts of interest are very short, the issue rears its head regularly in other parts of the code. Chapter 4 of the code deals with confidentiality and maintains the position that a solicitor's duties of confidentiality to a client or former client trump his obligations of disclosure to a current client.

Outcome 4.4 prohibits a solicitor from acting where he is prevented from disclosing material information to a current client as a result of his obligations of confidentiality to another client unless safeguards are in place.

Other important provisions are littered throughout the code – such as the requirement to inform clients of any act or omission which may give rise to claim by them against you in outcome 1.16. Naturally, if a firm informs a client of such an act or omission, there will then be an own interest conflict and solicitors will need to cease acting. Conflicts also raise their head in chapter 5 – conflicts between your obligations to your client and your duties to the court.

Sensible approach

All in all, the approach to conflicts seems sensible. It is undeniable that one size does not fit all both in terms of legal services providers and the clients that instruct them. Property lawyers may feel uncomfortable about the removal of detailed rules and, in many respects, they are the people most likely to be affected. The IB related to acting for lenders and purchasers is, after all, merely a non-mandatory IB and firms will need to be satisfied that their procedures for accepting instructions meet the mandatory outcomes.

This change in focus arguably places an additional burden on practitioners to assess conflicts in cases which would have been regarded as standard under the existing regime. However, given the picture emerging from the ashes of the last recession, encouraging the profession to treat lenders as independent clients in their own right cannot be a bad thing.

Susanna Heley is a solicitor at Radcliffes LeBrasseur. She will examine specific implications of the new handbook in her regulatory watch column in the next few months

Pitch perfect

Mike Jones explores the next steps towards successful pitches: documents, meetings and presentations

Last month I talked about the first five tips for building a winning pitch process: 1) Act immediately; 2) Don't pitch for everything; 3) Get into the client's shoes; 4) Build relationships; and 5) Uncover the buying criteria. Now we look at the final five ideas to help make the most of the precious pitch opportunities that come your way.

6) Documents don't win pitches

If this is true, why do lawyers and law firms spend so much time and energy on producing pitch documents? In a very well-researched paper recently, over 100 directors of leading UK companies were asked to rank the importance of 15 different factors when assessing bids from law firms.

Of those factors, the proposal document was consistently ranked much lower than 'leadership', 'chemistry', 'commitment' and 'listens and responds'. What matters to buyers are the people factors NOT the document. The pitch document may lose you a pitch but it will never win one for you.

7) Ask them to assess a draft

One of the best ways to use the document part of any pitch is to make it part of your relationship-building strategy. Many (if not most) clients will happily accept a draft document in advance of the final submission if asked nicely.

This gives you two distinct advantages. First, you receive early feedback which ensures you are on the right wavelength. Second, you involve the buyer in the process so they feel a greater sense of ownership and attachment to the final submission.

8) Focus on the benefits

Do not simply reel off a catalogue of 'features' about you and your firm. The usual "we have 20 offices in ten different countries" or "we have one of the largest pensions practices in the UK".

Such statements mean very little to clients and hold virtually no sway with them unless they are directly relevant to their needs and can be communicated as a benefit. For example, how much more compelling to say: "You told us you require pensions advice. Ours is one of the largest and most respected pensions practices in the UK, which has advised successfully on hundreds of schemes similar to yours. This means you can be confident we have the breadth and depth of knowledge to handle even your most complex matters."

9) Rehearse, rehearse, rehearse

A team has never lost because of over practising! However, the road to failure is littered with many woefully inadequate presentations caused by the absence of rehearsal.

If the pitch is important invest time to make sure you and your team give it your best shot and come across as a coordinated, professional, well-drilled unit. Anything less and you short change yourselves and your potential client. You might just as well have not bothered to pitch. Teams that rehearse are teams with a high win rate.

10) Never give up

There are countless examples of decisions being overturned and even more examples of work being given to 'losing' teams after the event. You will already have invested a lot of time in building a relationship.

Stay in touch. Offer advice. Don't simply wait another three years before the next tender process is run otherwise you will remain the outsider. Finally, good luck!

Mike Jones is managing director of Intrinsic Values