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

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
are not 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
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 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.

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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”, 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.

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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 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 many 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!

Pitch perfect

Mike Jones is managing director of Intrinsic Values