

# Regulatory compliance for solicitors

## Part 1: the key regulatory themes

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**In the first of two articles compliance specialist Jonathon Bray, ([www.jonathonbray.com](http://www.jonathonbray.com)), looks at the new regulatory rules for solicitors and identifies the key themes, with practical advice for how newly appointed Compliance Officers for Legal Practice (COLP) and Compliance Officers for Finance and Administration (COFA) can manage the business of compliance.**

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Anyone who has read the legal press recently will know that the compliance world has finally caught up with solicitors, causing a bit of a furore amongst the profession. You only have to glance at the comments sections of the Law Society Gazette website to take the temperature of solicitors (hint: the word “regulation” elicits some prickly responses).

### Outcomes-focused regulation

Much of the disquiet has been centred around the appointment of the nattily-titled COLP and COFA, whose job it is to:

- take all reasonable steps to ensure their firm’s compliance with the relevant rules, statutory obligations, and conditions of authorisation
- record all compliance failures, and
- report compliance failures to the regulator, the Solicitors Regulation Authority (“the SRA”, ).

Both roles are due to ‘go live’ on 1st January 2013. The COFA is tasked with ensuring compliance with the Accounts Rules, including the protection of client money and financial stability of the practice. The COLP is responsible for everything else.

In particular, the COLP will focus on the Code of Conduct 2011 (“the Code”) which ushers in a new approach to regulating law firms. Moving away from rigid, prescriptive rules there are now fewer than 100 mandatory Outcomes which must be achieved. These are based on the 10 fundamental Principles which are at the heart of the Code.

The Outcomes are supported by guidance in the form of “Indicative Behaviours”, which give examples of how firms might achieve a particular Outcome.

This approach will be familiar to FSA-regulated firms. In effect, lawyers are being asked to self-regulate and hold

their hands up when things go wrong. There are stiff penalties for those who do not play the game, which includes personal liability for Compliance Officers.

### Burden of regulation

As a result of the new regulations, most reputable firms are looking closely at their compliance systems to see where their biggest gaps and risks lie. Paying lip service to quality issues and getting things in order once a year for the external auditors is no longer an option. For some COLPs, the new role will be a full time job, others will employ a support team, and some will outsource some of the burden.

Whatever approach firms take, it is clear that the SRA has driven regulatory compliance to the top of the agenda, and that it will continue to be a significant cost of doing business in the legal services sector.

This is against a backdrop of legal aid cuts, big spenders entering the market in the form of ABSs (see for example Co-operative Legal Services, which is aiming to create 3,000 jobs), a precarious housing market and an impending revolution in personal injury litigation, including a ban on referral fees. These are uncomfortable times for many traditional practices.

### The Code

There are a number of key themes running through the Code.

#### Professional ethics and client care

It should come as no surprise at all that the usual themes (confidentiality, conflicts of interests, not misleading the Court, and so on.) are all uncontroversially present in the Code.

COLPs might take the opportunity to hold refresher training, not just for solicitors - who have these principles drilled into them throughout their careers - but also for support staff, many of whom will also have regular client contact.

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Equally unsurprising is the requirement to “treat clients fairly” and to ensure that matters are taken on, dealt with and concluded in a professional, capable manner. Delay and poor information on costs, two of the big causes of complaints against solicitors, should be monitored and eradicated by the firm, under the COLP’s direction.

Speaking of complaints, it is well worth firms reviewing their complaints procedures to assess how well they work in practice. The Legal Ombudsman has controversially started publicising complaints data against all firms, so the incentive for settling client grumbles before they go any further has never been greater.

## Risk management

This is perhaps where we start getting into unfamiliar territory for many lawyers. The tentacles of risk management run throughout the Code and the SRA clearly expects firms to take a risk-based approach to their business.

A typical practice may routinely identify risks related to a case itself (the complexity, value and novelty) and the client (urgent instructions, serial complainers and so on). What they may fail to take account of are the wider risks for the firm - those which are strategic, regulatory and operational.

Take for example:

- a new competitor moving into the market place
- a creaking IT system without much in the way of backing-up facilities
- recruitment and succession headaches

- a senior partner’s reluctance to open his/her files up to, and be managed by, the COLP; and even
- the effect of compliance itself on the profitability of the firm.

The SRA will expect to see evidence of these kind of issues being actively managed. Putting in place a risk management procedure which provides for regular review meetings, and keeping a live risk register, will be top of most COLPs’ to-do lists.

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## Financial stability

Closely linked to the concept of risk, the SRA takes the view that one of the best ways of protecting clients is to ensure that firms are well run and profitable businesses.

There is a requirement that serious financial instability is reported – this would include reporting events such as a breach of banking

covenants, or an inability to pay rent and wages and so on. But beyond that, there is an active obligation on the firm and its Compliance Officers (primarily the COFA) to ensure that cash flow is not an issue, that work in progress is kept at appropriate levels, and that billing and credit controls are tight.

It is true to say that some lawyers are fantastic technicians, advocates and advisers, but lousy business people. The COFA is in place to ensure that effective financial procedures are implemented and adhered to, and that management information is timely and useful.

Now would be a good opportunity for lawyers to get cosy with their accountants. Many are taking advantage of complimentary management accounting advice, business coaching and financial health checks. Those who can justify the cost might

even consider taking an accountant in-house in a support role or even as an owner/fee-earner in an ABS structure.

## Management of the business

Good management does not begin and end with the figures. At times, the Code oozes corporate governance principles to the point that it does make one wonder how a sole practitioner could ever relate to it.

Having in place “a clear and effective governance structure and reporting lines” is seen as being key, as is having in place all appropriate systems, processes and procedures for managing risks and ensuring compliance with the rules.

There is a duty to comply with all legislation applicable to the business, which is a potentially huge obligation (mirrored by the Compliance Officers’ equally wide duty to ensure compliance with any statutory obligations). It will be interesting to see how widely the SRA interprets that obligation in the future.

Outsourcing considerations are addressed, with the eyebrow-raising requirement to put a clause into supplier contracts allowing the SRA to enter the supplier’s premises. In addition, training, supervision, publicity, and referral arrangements are all singled out as hot topics for the COLP to address.

## Practical considerations

The next article in this series looks at some specific practicalities for COLPs and COFAs to consider. For the present purposes it is worth considering the following 5 suggestions.

### 1. Learn the rules

At the risk of pointing out the obvious, if COLPs and COFAs are to take the lead on compliance projects, and to be a source of authority and guidance on all regulation-related issues, there is no getting away from having to roll up the sleeves and become conversant with the Code.

Things will change of course, and the SRA will almost certainly have to issue some form of guidance (especially when, as is inevitable, it is flooded with reports of trivial breaches of the Code from COLPs taking an overly-cautious approach to reporting). Keeping up to date will be important and there are a number of free and premium resources available.

## 2. Capture evidence

The fact is that the majority of solicitors are ethical, competent and genuinely care about their clients' business. The clear obligation on COLPs and COFAs is to be able to demonstrate this to the SRA by elaborating how each of the Outcomes is achieved by the firm.

For many firms this will be a case of simply documenting what already happens informally. Others may completely revise their systems and office procedures, introducing more comprehensive policies in key areas.

A useful starting point for most firms is to conduct a gap analysis, identifying where compliance weaknesses currently exist, an exercise which can also be helpful in getting to grips with the Code.

Creating an audit trail of compliance will be crucial if the SRA ever needs convincing that procedures are effective and are actually used in practice.

## 3. Engage with the regulator

The SRA is trying to convince the profession that it is those firms which cannot or will not comply with the rules that will find themselves in hot water. For those who can demonstrate that they are engaging with the Code, the SRA says it will leave well alone.

"Engagement" is the regulator's buzz word of choice. The SRA's commitment is to "constructively engage" with any firms in difficulty without necessarily launching into investigative and punitive mode from the first. If true to its word, this would be a very positive step towards a sensible and valuable relationship between

the regulator and the profession.

## 4. Get top level support

The Compliance Officers' jobs will be miserable and nigh on impossible without buy-in from the top. The firm's leadership is in a unique position to validate the COLP and COFA by declaring a commitment to quality and compliance to the rest of the firm. Compliance Officers will also need access-all-areas permission in order to discharge their duties and drive compliance projects.

Many firms are putting their commitments into writing, and some COLPs and COFAs are insisting upon certain assurances from the firm including indemnities for personal liability and reduced billing targets.

If those at the top need any convincing that compliance is more than a support function, they should be reminded that the firm itself along with its owners and managers, remains accountable to the SRA at all times. It is not something that can be shoved onto the COLP and COFA and forgotten about, as may have happened to the Quality Manager in the past.

## 5. Consider accreditation

Lexcel, CQS, ISO 9000 and Investors in People are all potentially useful accreditations to work towards, not to mention membership of practice-specific organisations such as STEP, APIL, Resolution and so on. Not everyone agrees on their marketing value, but if accreditation is viewed more as a tool to keep the focus on quality issues with any marketing benefits a bonus, then they more are likely to be worth the expense.

The real value in these schemes, particularly those which require external audit and additional training requirements, is that they keep everyone on their toes. Nobody wants to be the one to let the side down and so quality and compliance issues get pushed up the agenda.

Whilst it may be a generalisation to say that well-run, compliance-focused firms are more profitable, have fewer complaints, and a lower risk profile, it is probably a generalisation worth making.

Not everyone welcomes the additional burdens that self-regulation brings, but there are certainly opportunities for law firms to use the new flexible approach to their advantage, and those firms that can demonstrate compliance should enjoy a more comfortable and less invasive relationship with the regulator.

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## Conclusion