

Codes of conduct: clarity needed?

The cleaner did it! John Gould considers the rules & responsibilities which apply to non-solicitor employees of a firm



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IN BRIEF

► Every employee within a firm is a regulated person, whether or not they are personally engaged in reserved legal activity. In principle, this means that individual employees who are not legal professionals could be made subject to rules and punished for breaches.

► While the Solicitors Regulation Authority sets out a Code of Conduct for solicitors and firms, it is not clear which rules apply to individual employees.

Legal firms employ a lot of people. According to a report by KPMG commissioned by the Law Society, in 2018 there were many more than 225,000 people employed in the 'legal activities' sector in the UK ('Contribution of the UK legal services sector to the UK economy', January 2020). Over the last four years, this number is likely to have grown. Many of these employees are not themselves lawyers, but still deal with clients and their money every day.

But what happens if one of those employees misbehaves? Can a rogue employee be taken to a disciplinary tribunal and made to pay? On what basis do the Solicitors Disciplinary Tribunal (SDT) and the Solicitors Regulation Authority (SRA) impose penalties—sometimes running to many thousands of pounds—on people who are not solicitors, compliance officers or 'managers' at all? For solicitors, regulatory arrangements focus on individual solicitors and the firms within which they practise. Each has a Code of Conduct setting out the rules they must observe, but which rules apply to employees individually is not so clear.

Covered by the Code?

Although the Code of Conduct for solicitors, registered European lawyers (RELs) and registered foreign lawyers (RFLs) does not claim to impose obligations beyond solicitors, RELs and RFLs, in the Code of Conduct for Firms, the SRA warns that breaches may lead to it taking action against not only a firm but also its managers, compliance officers or employees for breaches for which they are responsible.

There is no doubt that an action by an employee may lead to a breach of the rules by their employer. Entities only act by the agency of humans, and many rules do not require fault on the part of managers or principals themselves to be breached. That, however, is not the same as the individual employee being personally subject to disciplinary proceedings and sanction.

Traditionally, the solicitors' regulatory regime was based on the accountability of individual solicitors for rule breaches, including any failure to supervise others properly. Regulatory powers exercisable in relation to non-solicitor employees were very limited. After a dishonest employee had been hauled away in handcuffs, there was no question of a disciplinary sanction against them as an individual. They were not bound by any code of conduct and could not be struck from a roll of solicitors within which they had never been included.

The problem of a potentially roving rogue employee was covered by a power to control the ability of any solicitor to employ problem people in s 43, SA 1974. Either the SRA or the SDT may order that no solicitor employ or remunerate, in connection with their practice as a solicitor, the person with respect to whom the order is made except with the SRA's permission. The cost of the investigation and any SDT proceedings may be recovered from the employee.

For a 'control order' to be made, a person involved in a legal practice (but who is not a solicitor) must have been convicted of a criminal offence or have (in the opinion of the SRA) occasioned or been a party to an act or default in relation to legal practice which involved conduct on their part of such a nature that, in the opinion of the SRA, it would be undesirable for them to be involved in legal practice.

For the purpose of both the application and the order, 'involved in legal practice' essentially means being employed, remunerated, undertaking work in the name or under the supervision or direction of a solicitor; being the manager of a recognised body, or having or intending to acquire an interest in a recognised body.

Apart from the possible award of investigation and other costs, it is important to appreciate that this is conceptually an order directed towards solicitors generally rather than the individual concerned. An order is based on a public interest decision that they should not henceforth be involved in legal practice, not a finding of a breach of a rule. Section 43 does not provide a power to impose a financial penalty on the individual—for that power, we must look elsewhere.

Who's responsible?

Surprisingly, every employee within a firm is a regulated person whether or not they are personally engaged in reserved legal activity. The effect of this is that there is a statutory basis to bring employees and managers within any of the rules made by regulators. In principle, this means that individual employees, who are not legal professionals, could be made subject to rules and punished for breaches. Employees and managers do have a statutory duty to comply with the regulator's rules, but only to the extent that they apply to them (under s 176, Legal Services Act 2007).

So, to what extent do the rules apply to non-solicitor employees?

Paragraphs 8.1 and 9.1 and 9.2 of the Code of Conduct for Firms set out the requirements of managers and compliance officers in regulated firms. If you are a manager—eg the sole principal in a recognised sole practice; a member of a LLP; a director of a company; a partner in a partnership; or in relation to any other body, a member of its governing body—you are responsible for compliance by your firm with the Code. This responsibility is joint and several if you share management responsibility with other managers of the firm.

If you are a compliance officer for legal practice (COLP), your obligations are expressed as taking all reasonable steps to ensure compliance by the firm, its managers and employees and to make prompt reports. As a compliance officer for finance and administration (COFA), you must take all reasonable steps to ensure compliance with

the SRA Accounts Rules and report and inform promptly.

In its Introduction to the Code for Firms, the SRA suggests that, in addition to compliance officers and managers, it may also take action against employees working within the firm for any breaches for which they are responsible. Since there are no obligations on such individuals within this Code, it is difficult to see how such individual employees would be liable for breaches of this Code, whatever their responsibilities within the firm.

It is reasonably clear that the SRA Code of Conduct for Solicitors, RELs and RFLs only applies (as it says on the tin) to solicitors, RELs and RFLs, and so a misbehaving employee doesn't appear to be at risk under this Code.

The SRA Accounts Rules apply to firms, managers and employees and also indicate that the firm's managers are jointly and severally responsible for compliance by the firm, its managers and employees. Most of the Accounts Rules relate to how systems must be operated and how funds are to be controlled and it is difficult to see how an employee, who is not a manager, could be considered in most cases to have any regulatory responsibility for breach.

Even if there were some risk to employees under the Accounts Rules, it cannot surely be a risk for all employees. Would an employed cleaner who recklessly discarded a cheque required to be paid into client account be in breach? As they would be unlikely to know that the Accounts Rules existed, still less what they said, that seems particularly far-fetched.

Beyond compliance

It is not enough for a regulator to simply assert that all employees must comply; there must be a factual basis upon which an individual responsibility to comply arises. It is difficult to identify what in principle that factual basis is intended to be. The issue is

whether a duty to comply arises at all, not about the level of culpability in any alleged conduct. The duty should not arise from the description of jobs within a firm because the delegation of tasks does not mean the sharing of responsibility for compliance with rules. If an employee (who is not a manager or solicitor) does something contrary to the Accounts Rules, it seems to me to be highly unlikely that anyone other than the firm or its managers is in breach of those rules. A general statement that all rules must be complied with by employees is not sufficient to apply any particular rule to them when it is clear that many individual rules have no application to them at all.

The SRA's most direct claim to a power to regulate employees occurs in relation to the SRA Principles. The Introduction to the Principles states that the SRA expects all employees of authorised firms to uphold 'the fundamental tenets of ethical behaviour', but this is also problematic. The principles are nearly all framed in a way which means that compliance falls to be assessed against the benchmark of a solicitor acting properly, but that is not the standard which should be applied to all employees.

Even 'integrity' is a concept which only has meaning in relation to the ethical standard of solicitors, because it is profession-specific (see *Wingate v SRA* [2018] EWCA Civ 366, [2018] All ER (D) 61 (Mar)). With no disrespect to cleaners, the ethical standard expected of them is very unlikely to be the same as that expected of solicitors—for all I know, integrity in a cleaner would relate to things like vacuuming under sofas. The one SRA principle of universal application—because it is a general standard applying to everyone—is the requirement for honesty. Even then the question remains as to what effect in relation to employees has actually been achieved by the rules as drafted. It is perfectly arguable that they are insufficiently specific to have any effect.

The SRA does have power to apply its rules to employees of solicitors with such additions, omissions or other modifications as appears to it to be necessary or expedient (under s 34A (1), SA 1974). A breach of rules 'as they have effect in relation to an employee' (s34A (2), SA 1974) allows any person to make a complaint to the SDT. If a breach is proved, the SDT have a range of powers including: a financial penalty; ordering the SRA to 'take steps'; a s 43 type order or a direction to refer the employee to another regulator. In answer to the question 'Which rules apply to employees?', however, the answer 'all of them' may well mean 'none of them'.

The SRA's Guidance 'How we regulate non-authorised persons' expresses no doubt that disciplinary process and sanctions beyond s 43 may be imposed on employees, and describes the considerations which would apply as if the rules applied to employees in exactly the same way as solicitors and their firms. For that to happen, however, the SRA must establish that a particular rule or principle does actually have effect in relation both to employees generally and to the relevant employee particularly. The logical starting point should be that the regulation of employees is primarily a matter of control under s 43, and that anything more than that requires proof that the particular rule said to be breached has effect in relation to the particular employee in question.

A cleaner who discards a messy litigator's original documents is not in breach of a duty to uphold the rule of law, because the duty does not apply to them. It is not a question of general blameworthiness.

Perhaps it's time to make clear which rules apply to whom.

NLJ

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