

Time to play by the rules?

John Gould offers some advice on how to strike a balance between clarity & flexibility in recent changes to the solicitors' rule book



IN BRIEF

► Proposed changes to the solicitors' Code of Conduct which highlight 'choice of providers and consumers as to the services they want' may be the first steps on a longer journey in the pursuit of regulatory clarity.

© iStockphoto/trendolights

The recent bout of World Cup fever reminded me of the film *Mike Bassett: England Manager*. Mike wasn't one for prescriptive procedures and was proud that he wrote his England team selection on the 'back of a fag packet'. On the appearance of Ron Benson and Tony Hedges (two overweight, unknown, superannuated lower league players) in the squad, he remonstrates with the Football Association's administration who, no doubt following the rules to the letter, had issued the baffling call-up to the unknowns. 'Where does it say Benson and Hedges on that?' he demands, waving the branded cigarette packet. He plays them anyway so as not to lose face—as so often in the past, it doesn't go well...

Striking the right balance

The story illustrates both the problems of rules which are followed unthinkingly and the unpredictable consequences when important processes are extemporised on the basis that detailed rules are unnecessary and inhibiting. In an application of that well-worn phrase, the Goldilocks Principle, rules—like the proverbial porridge in many ways—need to be just right. Not so flexible that it's hard to know what's expected and not so prescriptive as to prevent approaches which are harmless and might even be beneficial.

Another reason to try and strike the right balance is that uncertainty can have a greater chilling effect than even prescriptive rules. If cautious internal interpretations of high level rules become

the norm, only regulatory risk takers may decide to chance their arm. This is even more likely where there is greater regulatory reliance on the ex post facto deterrence of high penalties and stronger enforcement.

A necessary evil?

In June the Solicitors Regulation Authority (SRA) published its post-consultation position on changes to the solicitors' rule book. Two of the published objectives in making changes are not new aspirations: to set high professional standards and make the rules 'user friendly'. The other two are potentially the first steps of a longer journey. The objectives are framed in terms of choice: the choice of providers as to structures and the choice of consumers as to the services they want of solicitors.

A critic might say that choice was a surprising selection for the central objective of the design of a regulatory system. A nod is given to high professional standards, but regulatory protection is seen as something which needs to be accommodated within a particular vision of the solicitors' profession. Almost as if it were a necessary evil and a brake on the engine of progress to be accommodated.

A different approach might be to set standards in the broader public interest within an efficient and effective system of regulation and protection and then to seek to eliminate unnecessary elements of the system which would restrict choice or competition disproportionately. Choice would be one of a number of desirable subsidiary features. The central concerns, however, would be the rule of law, the administration of justice, and public trust and confidence. These principles remain and are not in doubt, but the difference is the developing emphasis on facilitating structural variety among providers and the multiplication of choice for consumers.

This may sound like a rather nuanced difference in approach and up to a point that is true. It is, however, an important difference because it represents a direction of travel and a positioning of the role of lawyers in society. Over time that fundamental positioning may by increments and expectations become permanent. Is the professional structure necessary for the rule of law and the administration of justice to be decided by elected governments and Parliament in the broader public interest or by individual choices by entrepreneurs and consumers of legal services?

Identifying a vision

The SRA's objectives are neither clearly the chicken nor the egg. They suggest a need to keep up with developments in the market but also draw attention to the wish to initiate change by increasing flexibility through loosening rules. The developments in the market, insofar as they relate to solicitors, must presumably be ones which have been accommodated within the existing rules or the developing practice of rule waivers. Presumably there is no relevant market in the provision of services by rule-breaking solicitors. Keeping up with market developments in legal services by non-solicitors requires a fairly fundamental policy decision that the relative homogeneity and clarity of the current role of solicitors is less important than allowing the broadening of the activities to which the assurance of the solicitor's regulated status may be applied.

The role of a statutory regulator is essentially technical—making the law work, taking operational decisions based on knowledge of the sector and devising rules on the same basis. Broader public policy decisions are for governments and Parliament. There has been no change in the key objectives in legislation since 2007.

Consultation is a good thing but, however many people are asked, fundamental change in the role of regulated lawyers in society should be effected by legislators not incrementally by regulators. If a vision is being implemented, exactly whose vision is it?

It might fairly be said that this is all very well but the record of governments in legal services legislation is weak. They have produced structures of Byzantine complexity and show no appetite for having another attempt. Professional representatives tend to reflect the conservatism of established professionals. The field therefore is open for regulators to identify a vision and move towards it.

Changing the rules

So what of the proposed changes to the Principles and Code of Conduct themselves? The good news is that they come across as simple and, as general requirements, mostly uncontroversial. The Principles cover the bases including: the rule of law and the administration of justice; independence; public trust and confidence; honesty; integrity; and the best interests of clients. Authorised persons must also positively encourage equality, diversity and inclusion.

The more detailed rules which follow are expressed to be underpinned by the new enforcement strategy. There is always a risk that an absence of detail in simply stated rules is made good in either the detail and complexity of an enforcement strategy or ad hoc decisions on enforcement by a regulator's employees. Matters which have been omitted from rules also have a habit of popping up under the guise of published (or unpublished) guidance or practice.

These issues can be illustrated by reference to the first group of Rules. Rules 1.1 to 1.4 are grouped under the heading 'Maintaining trust and acting fairly'.

This section illustrates the challenges of viewing the new rules in isolation. It is worth setting the section out in full; they are as promised short and simply expressed:

'Maintaining trust and acting fairly'

- 1.1 You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.
- 1.2 You do not abuse your position by taking unfair advantage of clients or others.
- 1.3 You perform all undertakings given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time.
- 1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).

Rule 1.1 is at a high level of generalisation. A breach would involve unfairly discriminating on the basis of your personal views so as to affect your professional relationships or the way you provide services. The key here, as in other rules, is likely to be the word 'unfairly'. I may form a personal view that a person is a money laundering fraudster and discriminate between him and honest clients so as not to provide him with any services or form any professional relationship. That doesn't sound unfair, but what is unfair can be rather subjective. If a hard-nosed and unenlightened solicitor behaves in a way which another more empathetic solicitor would consider to be unfair, would he be in breach?

Rule 1.2 involves an abuse of position to take unfair advantage of clients or others. Here someone must judge it to be both an abuse of position and an unfair advantage in relation to someone (whether client or not). When is it unfair to 'take advantage' of someone other than the client? Is it unfair to take advantage of the lack of high level expertise of another solicitor for a client's benefit?

Honouring undertakings in rule 1.3 seems clear but what about undertakings that become impossible? This illustrates another potential source of clarification of simple rules. Solicitors, as officers of the court, can have their undertakings summarily enforced by proceedings. Case law provides plenty of detail of when and how undertakings are enforceable. Similarly the fairness duty is a particular take on the fiduciary duty owed by solicitors to their clients at law. The law is in many areas there to fill in the gaps of simple codes.

Finally, in rule 1.4 the duty not to mislead seems uncontroversial, but it includes a duty not to allow others (not just the client) to mislead others (not just the client and the court). How far does 'allow' go? When is it a solicitor's business to interfere?

Guidance, enforcement policy, adjudication decisions, firm-level compliance policies and law will no doubt over time fill in any gaps and make good any uncertainties that really matter. In the meantime the team that is the solicitors' profession will have to use their ethical instincts. The referee wants to see more flexibility in what is allowed to get the ball in the net.

Get out there on the pitch, play and express yourself!

NLJ

John Gould is senior partner of Russell-Cooke LLP & author of *The Law of Legal Services* (2015, Jordan Publishing) (www.russell-cooke.co.uk).

Court Success.

Lexis® PSL Dispute Resolution

Practical commercial advice and tools to help you get more done each day
Trial today – lexisnexis.co.uk/PSLDR/NLJ