



Law Society Compliance Reference Group Enquiries and Responses

This document draws together all enquiries to date that have been responded to by the Compliance Reference Group Pilot (CRG). Enquires are submitted to the CRG from Top 100 firms. Further guidance on the CRG can be [found on the website](#).

Enquiry 1:

Para 8.5c of the SRA Authorisation Rules requires that a COLP "must take all reasonable steps to ensure compliance with any statutory obligations of the body, its managers, employees or interest holders in relation to the body's carrying on of authorised activities and record any failure so to comply" and report a failure that is material or part of a pattern of failures.

How extensive are the obligations under this provision?

Response to enquirer:

The Group agreed that in terms of the statutory obligations, it is the Solicitors Act 1974, Administration of Justice Act 1985 and Legal Services Act 2007 and any delegated legislation (i.e. most of the SRA Handbook) made under those Acts, that is relevant. A COLP should satisfy themselves as to which parts of those Acts are relevant to their practice.

However, it was also agreed that this does not obviate the need for COLPs to be alert to other statutory breaches which may render them liable in the absence of a suitable procedure to manage the risk associated with the breach and ensure compliance e.g. Proceeds of Crime Act 2002, or the Data Protection Act 1998. COLPs must manage the risks of statutory non compliance elsewhere i.e. Principle 7 and Outcome (7.5) in the SRA Code of Conduct.

The Group specifically discussed whether a COLP would be required to report (annually) a conviction for dangerous driving. One viewpoint was that if an individual had self-reported under Outcome (10.5) in the SRA Code, that there would be no need for the COLP to report it, but on the other hand a dangerous driving offence might be a breach of Principle 6 (maintaining public trust). There was general agreement that the nature and seriousness of the offence would be a factor in the COLPs decision as to whether it was reportable or not.

Enquiry 2:

My LLP firm operates globally, is headquartered in London, and has a number of separate LLPs and partnerships (where LLPs are not allowed) in other jurisdictions. Each separate body will of course have to have its own COLP and COFA.

At present it is envisaged that one person will be the COLP and another will be the COFA for all the worldwide firm's various entities, to ensure consistency of supervision, management and operation. I, as the global risk & compliance partner, am the prospective COLP, and my colleague, as the global Finance Director, is the prospective COFA. The alternative would be for each authorised entity to have its own COLP and COFA. Neither option is entirely satisfactory.

If we have just two people covering the COLP and COFA roles globally, there could be an argument under the SRA Code and Handbook that we shall not be able to fulfill our duties across a significant number of firms, even though we have electronic access to accounts and files, and proxies (accounts staff and risk partners) in the other offices. For example, it is improbable that we shall each be able to visit every office every year. Our concern is strengthened by the responses given by the SRA in the Q and A session to their most recent webinar.

On the other hand, if each body has its own local COLP and COFA, those individuals will not have the overall knowledge of our systems, and probably not much time to supervise and manage them.



Response to enquirer:

The Group agreed that Rule 8.5 of the SRA Authorisation Rules (the Rules) only requires firms to appoint a COLP and COFA for each SRA recognised body, and that there is no such requirement to do so for overseas LLPs or partnerships which are not authorised by the SRA. In these circumstances, the COLP and COFA maintains global responsibility for compliance, but only has day-to-day obligations in respect of offices recognised by the SRA.

The Rules do not prevent the same individual being appointed as COLP/COFA in a number of recognised bodies, provided they can evidence that regulatory compliance will be met. Where appropriate, a waiver application to the SRA can be made to allow COLPs and COFAs for the main entity to be assigned COLP/COFA status for an overseas entity.

If such an approach is taken, non-recognised overseas bodies will still need to establish local governance mechanisms to facilitate regulatory compliance and ease of reporting across all entities. In these circumstances, the COLP/COFA might consider nominating someone whose role is more locally based, provided they are of sufficient seniority to fulfill the position. Such nominees would report to the COLP/COFA, who would continue the global view while ensuring consistency across all entities and jurisdictions. This approach would also enable firms to accommodate guidance note (xi) to Rule 8 of the Rules, which highlights the need to deal with the unexpected absence of a COLP or COFA.

If effective compliance cannot be achieved using this approach, consideration must be given to dividing all offices into separately-authorised entities, and the creation of localised COLPs and COFAs. Further, there may be disadvantages for some firms elevating the role of COLP/COFA to provide global reach, and each case should be taken on its own merits. The greater the complexity of the firm structure, the greater the need for clear reporting lines and regular liaison with the SRA. It will be important to ensure that COLP/COFA roles are not spread too thinly given the compliance infrastructure surrounding them.

Enquiry 3:

This enquiry concerns a reporting question as to whether in circumstances set out there is a serious breach of the SRA Code of Conduct 2011 (the Code) - and in particular Chapters 3 and 4 - which the COLP would be required to immediately report to the SRA.

Background:

(i) a partner of a firm has not properly analysed conflict check results which has led to the firm acting in a position of conflict.

The potential client conflict was between:

(a) an existing funder client (A) where the firm had an ongoing retainer from instructions concerning a leasing finance transaction to act for client A in providing funding to client B; and

(b) a subsequent retainer to act for client B, in circumstances where client B was undergoing financial difficulties in terms of not complying with its business plan and projections. Client B and its directors, required advice from the firm as to (A), their director's duties in such circumstances and the ability of client B to continue to trade on a "going concern" basis.

The conflict issue was identified by client A, who notified the firm and requested that the firm should withdraw from acting for client B.

The firm withdrew from acting for client B after giving some preliminary generic advice in relation to standard corporate director's duties to client B. 2.5 hours of time recorded.

This matter was resolved to the satisfaction of client A and B by the firm withdrawing from acting for



client B. The matter did not progress to the stage where substantive advice specific to the particular circumstances of client B was provided by the firm.

Client A was content that as the firm had withdrawn from acting for client B, that the firm could continue to act for client A solely for this matter. Client B instructed another law firm to represent its interests which also resolved their concerns.

Confidential Information issues:

Further to these events, the firm did receive a limited amount of confidential information in relation to the balance sheet and trading performance of client A, which was material to the client A instruction.

Although the firm did therefore have in its possession material confidential information of client B that would be relevant to the affairs of client A, client B notified the firm that this confidential information was intended to be disclosed by client B to client A in its capacity as the funder of client B in any event.

In view of the above confirmation, the firm was not required to approach clients A and B to seek mutual duties of disclosure in relation to the confidential information held by the firm regarding client A (from its historic retainer) and client B (from the new retainer). Information barriers were however put in place on a precautionary basis within the firm in relation to the information and to separate the client teams for the client A and client B matters.

Questions:

1. Is it relevant that (i) client A is satisfied that the firm can continue to act for this matter as the firm has withdrawn from acting for client B, and (ii) client B did not suffer any financial detriment, in that they were able to instruct other solicitors at an early stage in the matter and were not invoiced by the firm for its advice?
2. Or is it the case that the fact that the firm has acted in a position of conflict and has been required to withdraw from acting for client B (at the request of client A), should be viewed by the COLP as presenting a serious breach of the Code?
3. Is this breach of the Code therefore serious enough to be immediately reportable, or just one to be recorded on the register to be provided to the SRA on request?

Response to enquirer:

Failure to properly analyse a conflict check could, depending on the circumstances, have significant consequences in terms of compliance. In this case, the Group took the view that the error did not amount to a material breach, as it was identified before it became serious and both clients were accepting of the outcome. It was concluded, therefore, that such an error should be recorded as a non-material breach, reportable at the end of the year.

The Group did however agree that some preventative measures should be taken internally, such as the provision of one-to-one training on conflicts and on-going support to ensure that such failures do not create a systemic problem that would later amount to a material breach. Internal procedures and systems should also be reviewed. If on investigation it became clear that the firm did not have effective checking procedures in place, that would amount to a breach of Outcome (3.1) of the SRA Code of Conduct (the Code) which would be indicative of a wider problem.

If further probing did not point to a systemic problem with an individual or team, and there were no further breaches of the Code, the Group re-affirmed that it would be satisfactory to report this matter at year end. It would also be prudent to make a written record of the reasoning as for why the breach was not considered to be immediately reportable.

Enquiry 4:



Background:

- A firm's client (X) is a tenant of a property surplus to their operational requirements.
- X found a potential assignee (Y) and was in the process of seeking landlord consent to assign.
- After some delays, the landlord and X agreed that instead of an assignment, the landlord would accept a surrender upon payment of premium.
- The firm was instructed on the surrender.
- At no time did the firm mislead Y and there is no suggestion from Y that they did.
- The surrender completed and the firm immediately notified Y via its solicitors.

Initial telephone SRA guidance indicated that the firm should have treated the surrender as dealing with "another buyer". However, the firm considers that this view considerably widens the scope of the Code of Conduct. The firm is awaiting a written response on this issue from the SRA.

The firm considers that the key features that distinguish this situation from a "contract race" are as follows:

- Both Outcome 11.3 (of the current Code) and Rule 10.06 (of the 2007 Code) use the expression "other buyer" which the firm considers to mean that the other buyer should be in a similar position to the original buyer.
- Guidance to the 2007 Code is drafted in terms of property sales and particularly residential property.
- A surrender is always an option for a tenant.
- The effect of a surrender is very different from an assignment and produces a different commercial and economic outcome and legally would not naturally fall into the definition of a "buyer". In this case a premium was paid to the landlord which would not indicate that the landlord would be a buyer.
- It is difficult for the firm to determine when an obligation under Outcome 11.3 applies. A tenant is always in discussions with the landlord about the consent to assign. Furthermore, firms are not always privy to those discussions, and it seems doubtful that clients would expect firms to be.
- The decision to surrender has the same consequences for Y as a decision not to assign but to continue to use the property for other purposes.

The firm acknowledges that Outcome 11.3 is intended to guide solicitors to give priority to Principle 2 (integrity) over Principle 4 (client's best interest). However, the firm considers that an interpretation that suggests that an alternative commercial option (other than an assignment) may be covered simply because there is a counter party (even though the substance of the transaction is fundamentally different) has far-reaching consequences.

Outcome 11.3 gives significant protection to buyers in sales of land for wasted costs, and clearly supports the trust in the profession in an area where there is significant consumer activity. However, similar protections are not afforded to any other form of contract which exposes clients to wasted or abortive costs for any number of reasons.

Substantive issue:

The firm's concern is what it perceives to be an extension to the "contract race" concept that might prejudice clients best interests.

Response to enquirer:

The Group agreed that surrender to the landlord fell within scope of the "other buyer" as cited in Outcome 11.3 of the Code, and that the "contract race" provisions and SRA guidance should have been followed.



There was consensus that the effect of being denied an assignment by virtue of the surrender amounted to the same as if the lease had been assigned to another assignee. Further, it would not be within the spirit of the Code to rely on the technical definition of the term "other buyer", as Y could justifiably claim that it viewed a surrender as being a purchase by the landlord of the interest in which it was an interested buyer.

Accordingly, the Group concluded that Outcome 11.3 had not been achieved. Further, it was held that non-disclosure of the proposal to surrender could amount to a breach of Principle 6 (maintenance of public trust).

However, as wasted costs were moderate and the firm had sought corrective advice from the SRA, it would seem appropriate for this to be reported at year end, assuming that the breach did not form part of a wider systemic failure. It would also be apparent that costs can feasibly be made good on a without prejudice basis in this instance.

The SRA has since confirmed that the term "other buyer" in Outcome 11.3 should be construed as including transactions relating to different interests in the same property, where the sale of one such interest would affect the sale of the other.

Enquiry 5:

This enquiry relates to outsourcing arrangements and how to obtain client consent for disclosure of confidential information.

For a number of years the firm has outsourced legal secretarial services to a well known outsourcing provider ("the OP"). The OP carries out the secretarial work abroad.

At commencement of the outsourcing agreement, the 2007 Code applied and the firm considered the old Rule 4, note 8 which stated: "...Whilst you might have implied consent to confidential information being passed to external service providers, it would be prudent to inform clients of any such services you propose to use in your terms of business or client care letters".

Since then, the firm's terms of business have included a clause headed "Confidentiality" which follows closely the example given in the Law Society's practice note "Client care letters" and gives the client the option to opt out.

The firm's agreement with the OP contains detailed confidentiality provisions, including in relation to confidentiality undertakings. The digital dictation is accessed from the firm's "system", and is not downloaded to any other system.

The enquirer asks for views as to whether client consent for disclosure of information for the purpose of outsourced secretarial services can properly be obtained by a clause in a firm's terms of business, or whether, alternatively, specific informed consent is needed.

The enquirer points to Chapter 4 and in particular Outcome (4.1), IB (4.2) and IB (4.3) as starting points.

The enquirer's view is that client consent can be provided through terms of business, subject to the rules on incorporation of terms. However, there are contrary views - in particular that it may be argued that the fiduciary nature of the duty of confidentiality to clients may give rise to a requirement to obtain specific informed consent from individual clients.

The query also notes that there are other requirements in relation to outsourcing agreements, and the enquirer is not seeking general guidance, but rather just on the particular point set out above.

Response to enquirer:



The Group agreed that a disclosure statement in a firm's Terms of Business is usually sufficient, provided that due diligence and contractual provisions – including the client's right to opt out – are executed properly. Firms should be mindful of Outcome 7.10 of the Code of Conduct, which sets out the obligation to ensure that any such terms do not impact the SRA's ability to monitor compliance.

Caution should be taken to ensure that the permission statement in the retainer or agreement is not too broad. To ensure compliance and to safeguard client confidentiality, wording should highlight the range of circumstances that could give rise to disclosure. In addition, care should be taken to check Service Level Agreements provided by the client which may prohibit disclosure and outsourcing of information.

Significantly, the Group also noted that the duty not to disclose is fiduciary, and where information is deemed extremely confidential, it would be prudent to obtain specific consent after disclosure of the relevant issues.

Members agreed that an outcomes focused approach to compliance would require the firm to have undertaken due diligence on the service provider, and to assure itself that sufficient technical measures have been put in place to protect client information. Details as to whether administrative staff are permitted to use mobile phones when engaged on outsourced service provision may be relevant here, for example. It may not be necessary, however, to go as far as to conduct a local site visit where detailed security arrangements are provided in writing. Firms should also be able to demonstrate that they have robust controls in place to manage information travel between the outsourced provider and the firm.

Protocols should be established to manage the client relationship and reputational risk in the event of a confidentiality breach. Further, the firm should have a strong grasp of the outsourced firms' due diligence processes so that it can evidence that any breach was an isolated event.