



The Law Society

SRA consultation on Co-operation agreements

Law Society response

23 January 2013

supporting
solicitors

The Law Society welcomes the chance to respond to the SRA's consultation on co-operation agreements. Please find the answers to the consultations questions below.

(1) Do you feel that the SRA should develop a policy on reaching agreements with co-operating witnesses?

We are not convinced of the need for a policy on co-operation agreements. The SRA's enforcement policy highlights that 'whether a [firm] has reported the circumstances to us itself' will be taken in consideration when the SRA decides on the enforcement action it will take. The co-operation agreement policy does not appear to add much to the enforcement policy. Furthermore, there is limited evidence available about the need for such a policy. The SRA has indentified that it deals with a handful of cases a year where potential witnesses might come forward and benefit from a co-operation agreement. The evidence provided by other regulators about the utility of these agreements is limited. In the case of the cited increase in calls to the FSA whistle blowing line between 2007 and 2009, the influence of a leniency scheme introduced in 2009 is likely to be limited or non-existent. Furthermore, these regulators operate in a different market from the SRA. For instance, the OFT offers a leniency programme in relation to cartels. Cartels by their nature are difficult, if not impossible, to detect and participants rarely record their involvement in such arrangements. The same cannot be said of solicitors' misconduct.

On balance, even if the policy did provide sufficient incentives, the Law Society would be reluctant to support a co-operation policy as the principles of acting with integrity should act as an incentive for solicitors to report regulatory breaches.

(2) Do you agree that there could be significant benefits in implementing a co-operation agreements policy? Do you feel that there are any objectives which have not been included in the policy which should be?

No, we do not agree that there would be any significant benefits. As noted above, we believe that the policy essentially replicates the position within the enforcement policy. We are aware that co-operation policies can encourage witnesses to come forward and this enables regulators to identify regulatory breaches that they might not identify otherwise. However, to encourage witnesses there need to be sufficient incentive. Given the requirements placed upon the witness, the lack of guarantees that the SRA provides to any witness and the presumption in favour of publication, it is not clear that a co-operation agreement provides any greater incentive to potential witnesses than the current enforcement policy. If the SRA believe that solicitors are not sufficiently aware of this aspect of the enforcement policy then it may wish to publicise this information more widely, for instance within its whistleblowing policy.

(3) Do you agree with our views as to the main risks and challenges posed by such an approach? Are there other issues which you feel should be considered?

We believe that the SRA has identified most of main risks and challenges posed by the co-operation agreement policy. However, in order for the policy to work as intended, witnesses will need to trust the SRA (given the SRA will give no guarantees until there has been full disclosure). Trust between the SRA and the profession is limited and, while we recognise the SRA has been attempting to improve this, we do not believe that matters have improved to the extent where this policy will act as a positive incentive for potential witnesses.

As the SRA highlights, there are already numerous reporting obligations both on individuals and on compliance officers. We are concerned that the proposed policy risks undermining the newly

established role of compliance officer by encouraging direct reporting to the SRA rather than through the COLP.

While the SRA cites the examples of the OFT's and FSA's leniency policies, it has not considered the issues these organisations have met when these policies were implemented. For instance, the first full criminal trial following a cartel member whistleblowing under the OFT's leniency policy collapsed. There are serious questions about the reliability of evidence from witnesses who have admitted their own part in dishonest actions. It can also be difficult for a prosecuting body to question the evidence provided by a whistleblower once they have entered into a public co-operation or leniency agreement. Once this occurs the prosecuting body has a degree of commitment to the evidence which can limit its ability to look critically at it.

(4) Do you feel that the steps proposed to minimise the risks posed by such an approach are sufficient and appropriate? Are there any other safeguards which you feel should be included, such as excluding very serious conduct from the scope of the policy?

Despite the SRA's attempts to limit the risks posed by the policy, it still raises ethical issues. Solicitors are in a position of trust and need to be seen to act with integrity. Failure to report matters is a breach of the rules and of the principle that solicitors should act with integrity. This policy provides an incentive for solicitors to report matters that they are obliged to report and undermines the duty of solicitors to act ethically.

As noted above, there are risks that entering into co-operation agreements may put the SRA in a difficult position, as it may be more difficult to critically examine evidence obtained in this manner. Thus, if the policy is implemented there would need to be some oversight into its use.

(5) Do you agree with the content of the draft policy and the proposed process for dealing with such matters? Do you feel that this could be improved in any particular way?

As noted above, we do not believe that there is a need for such a policy.

(6) Do you envisage any particular section of the public or a group of stakeholders being placed at a disadvantage by the policy or the implementation of the policy? If so, do you feel that there are any steps or adjustments which can reasonably be taken to minimise any impact?

The SRA has provided limited information about the type of cases that might involve the use of this policy. However, the example given indicates that the policy is focused on smaller firms. BME solicitors are more likely to work in these types of firms. Therefore the SRA should consider how this policy might impact upon this section of the profession.