The Law Society

Legal Compliance Bulletin

Issue 57 September 2018

Client care: back to basics

Amanda Croxon

From on-boarding to conclusion – building the complete care package.

Read more on page 3

Coping with risk in a mid-size firm

Peter Scott

What are the specific risk factors for medium-sized practices? And how does the picture change as firms scale up?

Read more on page 5

The Money Laundering Regulations 2017: one year on

Alison Matthews

Twelve months down the line, have you come to grips with the new rules, or is there still work to be done?

Read more on page 8

About this newsletter

Legal Compliance Bulletin is published six times per year. The aim of the publication is to provide up-to-date, very practical information on all those issues covering legal compliance and regulation for solicitors, barristers and practice managers.

The Insurance Distribution Directive: ready or not?
Gillian Roche-Saunders 10

Seven elements of an effective SAR
Amy Bell 12

Also in this issue...

News in brief 2–3
The SDT and the standard of proof 13–15
Andrew Hopper QC: obituary 15–16

Editorial board

General editor:
Peter Camp
lcbeditor@lawsociety.org.uk

Cases editor:
Nigel West, *RadcliffesLeBrasseur*

Rebecca Atkinson, *Howard Kennedy LLP*

Amy Bell, *Teal Compliance*

Peter Cadman, *Russell-Cooke*

Tracey Calvert, *Oakalls Consultancy Ltd*

Michelle Garlick, *Weightmans LLP*

Melissa Hardee

Alexis Hearnden, *39 Essex Street*

Andrew Hopper QC (see page 15)

Alison Matthews, *Shoosmiths*

Sue Mawdsley, *Legal Risk*

Iain Miller, *Kingsley Napley*

Elaine Mitchell, *Gowling WLG*

Pearl Moses, *Law Society*

Sarah Mumford

Peter Scott

Bronwen Still, *Infolegal Ltd*

Publishing editor:
Janet Noble, *Law Society*

Law Society Publishing
113 Chancery Lane
London WC2A 1PL

Subscriptions

Standard subscription rate:
£165 per year. Subscription rates for electronic format, multiple subscriptions and other details are available from customer services on 0870 850 1422 or visit our website at ***www.lawsociety.org.uk/bookshop.***

News in brief

Law Society practice notes

The Law Society has issued a number of new and updated practice notes, available at **www.lawsociety.org.uk/support-services/advice**. Note that the majority of practice notes are accessible only to those with a My Law Society profile. Signing up is free and simple to do. The following three practice notes were updated online in July 2018.

File closure management

This practice note sets out good practice for managing file closure at the termination of a matter and the need to manage risks inherent in the mismanagement of file administration.

Appointment of a professional executor

This practice note provides advice on meeting the requirements for providing clients with sufficient information to make an informed decision about the appointment of an executor.

House competitions

This practice note highlights a number of risks associated with such transactions in relation to illegal lotteries, fraud and money laundering.

LSB approves new transparency rules

The Legal Services Board (LSB) has approved new transparency rules proposed by the Solicitors Regulation Authority (SRA) which will require firms to publish price and service information. The SRA says the new requirements will come into force in December 2018. The Law Society has developed a briefing for members to provide more detailed information about the changes and help them consider the implications for their practices. See **www.lawsociety.org.uk/news/stories/sra-announces-new-transparency-rules**.

Bribery Act 2010

The Law Society, City of London Law Society and Fraud Lawyers Association have made a joint submission to the House of Lords ad hoc Select Committee reviewing the operation of the Bribery Act 2010. For details, see, **www.lawsociety.org.uk/policy-campaigns/consultation-responses/bribery-act-evidence-submission**.

Shake-up of legal services not backed by evidence

The Law Society recommends that the proposals to create different tiers of solicitors and reduce consumer protections should be rejected by the LSB. The Society is formally objecting to the LSB and urges all Law Society members to do the same. For details, see **www.lawsociety.org.uk/news/press-releases/shake-up-of-legal-services-not-backed-by-evidence**.

Practice Advice Service Q&As

The Law Society regularly issues practice advice in the form of Q&As, available at **www.lawsociety.org.uk/support-services/help-for-solicitors/practice-advice-service/q-and-as**. A selection of the latest are referred to below.

What should I do if I receive a letter of complaint from someone who is not a client?

In this Q&A a solicitor acted for the seller in a conveyancing matter with an unrepresented buyer. The solicitor has received a letter of complaint from the buyer who wants the firm to pay compensation for delayed completion. What should the solicitor do?

Do partners have to sign bills?

This Q&A asks whether a partner of the firm must sign all bills before delivery to the clients.

What insurance products cover compliance officers?

A newly appointed compliance officer for a small firm asks if there are any insurance products covering personal liability for compliance officers for legal practice and compliance officers for finance and administration.

What are the four categories of fee earner?

A solicitor wants to know what the categories of fee earner are, as outlined in the Senior Court Costs Office 'Guide to Summary Assessment of Costs'.

Anti-Money Laundering

Sanctions and Anti-Money Laundering Act 2018

The Sanctions and Anti-Money Laundering Act 2018 received Royal Assent on 23 May 2018. The Act establishes the framework for the implementation of sanctions and anti-money laundering and counter-terrorist financing measures post-Brexit.

Defence against money laundering FAQs

The National Crime Agency (NCA) has published a collection of FAQs designed to assist money laundering reporting officers in submitting a request for appropriate consent (referred to by the NCA as a 'defence against money laundering') under Part 7 of the Proceeds of Crime Act 2002 and Part 3 of the Terrorism Act 2000. The FAQs provide practical guidance on how to seek a defence against money laundering and improve the quality of reporting. For details see **www.nationalcrimeagency.gov.uk/publications/902-defence-against-money-laundering-faq-may-2018/file**.

Finalisation of the Fifth Money Laundering Directive

Amendments to the Fourth Money Laundering Directive (commonly referred to as the Fifth Money Laundering Directive) were published in the EU Official Journal on 19 June 2018, meaning that the 18-month countdown to transposition has begun. While the UK is due to leave the EU on 29 March 2019, it is nevertheless likely that the government will implement the directive. For more details on these and other money laundering issues, see the articles by Alison Matthews (page 8) and Amy Bell (page 12) in this issue.

PPI cap and guidance

The government's cap on fees that can be claimed for helping clients seeking compensation due to mis-selling of payment protection insurance (PPI) has been introduced. The small number of firms operating in this area will only be allowed to take 20 per cent. For details, see **www.sra.org.uk/sra/news/press/ppi-fee-cap.page**.

Insurance Distribution Directive

A new Insurance Distribution Directive will come into place in October 2018. The Financial Conduct Authority and LSB have agreed their approach, while the SRA will be publishing guidance on the new directive in the coming months. For details, see **www.sra.org.uk/sra/news/press/european-insurance-distribution-directive.page** and the article by Gillian Roche-Saunders on page 10.

Looking to the future: the Handbook

The SRA has finalised its proposals for reforming the Handbook, making it easier to follow and placing more trust in solicitors' own professional judgment to do the right thing by their clients. This has been a four-year process involving extensive consultation. For details, see **www.sra.org.uk/sra/news/comp-news-27-handbook.page**.

Client care: back to basics

Amanda Croxon

It might sound like stating the obvious, but it's always worth reflecting on and keeping under review how your firm complies with basic client care requirements. Here we take a whistlestop tour of your client care obligations from on-boarding through to the conclusion of the matter

Step 1: the new client enquiry

Your first dealings with a potential new client (unless it is a repeat client) will be when they contact you to discuss their legal problem to establish whether you can help. Handling new client enquiries is an important part of your business and should be treated as such. Those within your practice taking the calls or responding to the enquiries must possess the appropriate level of skill and knowledge, as well as have time to handle the query. It is, after all, the gateway to your firm for new clients and has the potential for creating long-lasting professional relationships over many years to come.

When dealing with the initial enquiry, it is always worth considering the following questions before deciding whether or not, subject to there being no conflict, you want to take on the matter.

- Why did the client come to you? Have they been referred by an existing client or other third party?
- Is the nature of the work within your expertise and practice area?
- Do you have sufficient time to deal with it, bearing in mind existing workloads?
- Would it make better sense for someone else to act either internally or externally?
- Is the matter particularly unusual or difficult?
- Does the client have the means to pay?
- Are there any tight deadlines that need to be met, such as the expiry of a limitation period?
- If you are not the first firm to be instructed, why is the client changing solicitors?

Remember you are generally free to decide whether or not to accept instructions in any matter, provided you do not discriminate unlawfully.

However, once you have agreed to act, you must not terminate the retainer without good reason and without providing reasonable notice. If you have reservations about taking on a new matter that subsequently turn out to be well-founded, you could end up having to continue to act, despite your misgivings.

Step 2: conflict checking

You must not act if there is a conflict or a significant risk of a conflict of interest arising between:

- you and current clients of the firm (an 'own interest conflict'); or
- two or more current clients (a 'client conflict').

Your firm should have established procedures in place for identifying and dealing with potential conflicts, including commercial conflicts.

A commercial conflict arises where there is no actual conflict of interest, but rather a perceived one. So, for example, a repeat commercial client might object to you acting for one of its competitors even though there is no question of any conflict arising and no issues around confidentiality or disclosure that would prevent you from acting.

In such circumstances, you will need to take a commercial decision which will involve weighing up the risk of jeopardising the relationship with your existing client.

Step 3: on-boarding your client, carrying out a risk assessment and assessing authority to act

Having satisfied yourself that there is no conflict, the next stage is to properly on-board your client so that you know for whom you are acting and understand fully what you are being retained to do.

As with conflict checking, your procedures for identifying your clients, their source of funds and source of wealth should be well established as compliance with anti-money laundering (AML) legislation has been a requirement for many years.

There are effectively three aspects of AML checking:

1. **client due diligence** – you must be satisfied that your clients are who they say they are by obtaining photographic proof of identity and proof of address for individuals, and understanding the corporate structure, directorships and beneficial owners for companies, as well as securing the relevant documentary evidence in support;
2. **source of wealth** – the origin of a person's entire wealth and how it has been acquired;
3. **source of funds** – the origin of the particular funds or other assets involved in the transaction that you are instructed to act upon. A clear understanding of your client's source of wealth will help you recognise the type of transactions that are consistent with your knowledge of their business activities.

If you have concerns about your client's identity, source of funds, wealth or the nature of the legal transaction, ask further questions. You should not act or start working on a matter until you are satisfied that you have complied with your obligations under the AML regulations.

Remember also that, in accordance with reg.28(10) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the 2017 Regulations), where a third party is acting on behalf of your client you must:

- verify that the representative is authorised to act on your client's behalf;
- identify the representative; and
- verify the identity of the representative on the basis of documents and information from a reliable source that is independent of both the representative and the client.

Another important part of your on-boarding process is the requirement under the 2017 Regulations to undertake a documented risk assessment to understand and assess the level of risk arising from acting for the client.

When undertaking this assessment you must consider whether your client is high risk because they:

- are politically exposed;
- sanctioned; or
- live in or operate from a high-risk jurisdiction.

You must also assess the level of risk contained in the work you are doing, for example, by considering whether:

- it makes sense for you to be instructed;
- there is an underlying legal transaction; or
- the work is consistent with what you know about the client.

From this analysis you should assess the risk as being low, medium or high. If the assessment is medium or high then you should have a process in place for enhanced ongoing monitoring of those clients.

Another important consideration at the on-boarding stage of the client relationship is *authority*. If you are acting for a corporate entity, partnership or a client via a family member or other third party, ensure that you have the requisite authority to act.

If you are being asked to act for multiple clients, for example several family members in the administration of an estate, insist on meeting or making independent contact with everyone authorised to give instructions. Confirm arrangements in writing.

If you are acting for a company, always bear in mind the scope of your instructions and whether you are being asked to advise the company as a whole, its directors or shareholders. Consider whether or not there are any conflicts between them and always check that the person giving instructions has the requisite consent and authority from other office holders to do so.

Step 4: initial instructions, scope of retainer and client management generally

The initial meeting with your client might be face to face, but with the increasing use of technology this isn't always the case. However it takes place, you should ensure that by the end of the initial interview:

- you have a clear understanding of your client's objectives;
- timescales are clear and agreed;
- you have explained the issues involved and options available to the client;
- you have provided the best possible costs information, as well as having discussed funding options and considered the cost–benefit analysis; and
- that the next steps to be taken by you and the client are agreed.

It is vitally important that your letter of engagement properly scopes out the work you have been instructed to undertake and deals with many of the issues set out above. If a complaint or potential allegation of negligence were to arise at a future date, the engagement letter will be one of the first documents the Legal Ombudsman or your professional indemnity insurers request. Always ensure that your client signs the letter and that a copy is retained on file.

You are under a professional duty to advise your clients and act in accordance with their instructions. You should agree

service levels at the outset, covering your own obligations as well as what you expect from the clients. So, for example, if your responsibilities are to include providing details of the type and frequency of communications, the client's obligations should include the provision of clear, timely and accurate instructions, prompt responses to requests for information and the provision of funds. You should set out the likely consequences if they do not comply with their obligations.

Managing clients' expectations is a crucial part of your role. It is therefore important that you are honest about the prospects of success, that you properly update your clients as the matter progresses and advise on the impact of any fresh evidence that might affect the merits and possible outcome of the case. Communicating in plain English is vital. Avoid using jargon and making assumptions that something is obvious and needs no further explanation when that might not be the case.

Keeping an accurate record of all work undertaken is essential to the maintenance of good client relations. Notes should be accurate and succinct, recording the date of the meeting or telephone attendance, those present, the salient points discussed along with the advice you have given. If necessary, follow up by letter or email, particularly if you are at a crucial stage, for example, discussing the terms of settlement.

Step 5: ending the retainer and file closure

Once your work is completed you should raise your final bill and account to the client for any monies due to them. This is a regulatory requirement and firms who fail to clear residual balances have found themselves before the Solicitors Disciplinary Tribunal.

As part of your file closure process you should carrying out the following tasks:

- report to the client on the final outcome of the case;
- return original documents or, if you are to retain them for safe-keeping, confirm the arrangements;
- explain your storage arrangements and destruction policy, plus steps that should be taken if the client requires their file or any documents from storage while they are being retained;
- confirm whether or not the client needs to review the matter at a future date and, if so, when and why – for example, if there is a future limitation date; and
- mark your file with a destruction date and archive it promptly.

Dealing with file closure procedures is equally as important as the client on-boarding process, but it is something that many firms struggle with, particularly when it comes to clearing small residual client account balances. It is much easier to sort these issues out while the case is still fresh in your mind, rather than several months later when the matter is likely to be long forgotten and, worse still, the original fee earner is possibly no longer at the firm.

Conclusion

The key to providing a good service rests in properly identifying your client and their objectives, managing their expectations and keeping them properly updated, particularly with regards to timescales, costs and merits.

Do not agree to act if you do not have the skills, time and resources to do so. Declining to act is likely to be preferable to agreeing to act where you have reservations, for example, that the client has unrealistic expectations, is likely to dispute your fees and has already sought advice from other solicitors.

Amanda Croxon *is senior risk and compliance solicitor at Howard Kennedy.*

Coping with risk in a mid-size firm

Peter Scott

Levels of risk and strategies for dealing with them vary, depending on the size of the practice. Here, we look at the particular risks associated with medium-sized firms

What is a mid-size firm?

Defining a mid-size law firm is not easy, given that there are around 11,000 law firms in England and Wales and perceptions of size differ. For the purposes of this article, I have used two criteria and both relate to resources, the availability or scarcity of which are either enabling or limiting factors when considering how such firms are able to manage their risks. These criteria are:

1. the number of partners – when researching this, one definition suggested to me was that a mid-size firm is between five and 20 partners: a possible starting point, but on its own it may not necessarily accurately describe the kind of firm we are proposing to look at;
2. revenue and fee earners – the number of partners in a firm needs to be looked at in relation to the overall number of its lawyers and the revenue being generated by them. For example, if the leverage ratio of a 20-partner firm is one partner to four other fee earners, that firm could well have revenues which would place it comfortably in the top 100 law firms by turnover in the UK. Such a firm would not necessarily be regarded as mid-size.

Using these two criteria, for the purposes of this article, I am discussing firms:

- within the five to 20 partner range; and
- with revenues roughly between £5m and £20m (in 2017 a £20m turnover would have put a firm at 113 in the top 200).

Risk challenges for mid-size firms

We often hear advice given to law firms such as 'Get big, get niche or get out!' when discussing their future strategic options.

Similar advice might also apply when discussing risk management because, as with strategic positioning, those firms occupying the middle ground can get 'squeezed' when it comes to managing their risks.

Very large firms, because of their size and the revenues they generate, tend to have sufficient resources (finance and people) to manage their risks, although how well they do so is also likely to depend on the extent to which managing risk in its widest form (particularly when it relates to protecting reputation) is seen by those running such firms as a priority. As Cedric Lenoire, head of FM Global's business risk consulting division has said (as quoted in an article in *The Times*, 21 January 2013):

'It has got to make financial sense, but you have to see risk management as one of your strategic objectives. Business resilience is actually a competitive advantage.'

Large businesses (including large law firms) increasingly see risk management in those terms. I wonder how many mid-size firms think in a similar way?

To show their intent to manage the totality of their risks, large law firms have for some time been following their clients and appointing their own general counsel whose priorities are likely to closely follow those revealed by a survey carried out by Grant Thornton in 2015 which listed the changes being made by corporate general counsel in managing their regulatory risks.

Change	%
Strengthening policies and procedures	70%
Increasing education and training	60%
Engaging outside advisers/consultants	41%
Adding internal compliance personnel	36%
Subjecting vendors and suppliers to monitoring and audit	33%
Conducting more internal investigations	30%
Implementing software tools	28%
Repurposing internal audit towards regulatory matters	21%
Utilising data analytics	21%
Increasing actions against violators	9%

The percentages set against each topic are the percentages of those general counsels surveyed who had made those changes. Those actions could well be said to be examples of *best practice* to which large firms increasingly adhere as they take steps to more effectively manage their risks, in particular, risks to their reputations. Mid-size firms also need to aspire to and implement such changes as appropriate to the scope and nature of their businesses if they are to continue to practise compliantly and safely.

Many mid-size firms are the products of transformation processes from the small firms they were previously into the firms we now see. As they have continued to grow they have expanded their numbers of partners and other staff and often have more than one office, all of which factors increase risk. Mergers and acquisitions have also been a particular feature of growth within this group and merged firms (as well as the merger process itself) can also be a source of increased risk. However, internal cultures and attitudes to risk and the management and supervisory controls needed to adequately manage increasing risks may not necessarily have kept pace with their rate of growth. From observations it would seem that some firms in this group still retain their 'small firm mentalities' and try to manage their now larger businesses in the same way they did when they were smaller. Having a 'lean' management structure can be a good thing, but that is quite different to having inadequate management.

I still come across managing partners of mid-size firms who continue to carry heavy client workloads and who readily admit that they should instead be devoting all or most of their time to managing their firms, but fear what may happen when their terms of office end. Good risk management must, however, come from the top, and managing partners of mid-size firms who are seen to give greater priority to their client work than to management of their firms (including managing risk) are not providing the right example when leadership is needed to embed a risk culture.

The result is that often internal attitudes and the risk and compliance systems needed as firms grow in size are seemingly constantly having to play 'catch-up'. The following areas need to be prioritised:

- governance arrangements need to be appropriate to firm size;
- lawyers in management roles need to have the skills and knowledge to manage;
- teams of professional managers need to be in place to support the lawyers, not only risk managers but also for finance, human resources, IT, knowledge management and training – all of which are areas which can involve serious risks to a firm; and
- above all, as such firms expand their businesses, it is even more important that *knowledge is managed*, otherwise it will not be possible to manage a firm's risks. This touches every aspect of a firm, as shown in this paradigm.

The resource problem?

The same need to prioritise risk management applies equally to mid-size firms as to large firms because they have many of the same issues, but they do not have the same access to resources. This is often the justification given for not putting in place appropriate risk management. 'We can't afford to' needs to be met with the response 'Can you afford not to?'

Even though mid-size firms may have fewer resources than their larger brethren, I question whether the problem really is one of lack of resources, or whether it is more an unwillingness on the part of those running or owning such firms not wishing to invest in managing risk and/or a perception that they cannot afford to do so.

A *mindset* change is needed on the part of those running mid-size firms as they grow from small-firm beginnings (particularly following merger) to adapt themselves to the different needs of a larger firm.

A couple of examples illustrate the problem.

- The finance director of a firm at the upper end of mid-size told me that no non-fee-earning staff in any discipline could be recruited without the approval of an equity partners' meeting, because such roles were seen as 'non-productive' and to be avoided if at all possible. There was a mindset on the part of the partners which was stuck in the time when they had been a small firm and this was a typical example of the 'growing pains' experienced by some mid-size firms as they expand, but where the mindset of management and partners lags far behind.
- Another firm, also at the upper end of mid-size, asked for my advice in relation to a regulatory problem. The firm, though well managed in other respects, had no professional risk manager. Instead, it had a number of people (mainly partners) trying to get to grips with different areas of compliance, but lacking the time or enthusiasm to do so properly. Together we undertook a cost–benefit analysis, comparing the current cost of time involved and fee-earning work lost trying to manage compliance with the cost of employing a professional compliance officer. That analysis (and the scare they received from the particular regulatory problem!) convinced them they should recruit a professional manager, which they did.

How many mid-size law firms have suitably experienced professional risk managers who have overall responsibility for managing all risk areas? These risks include:

- regulatory risks;
- people risks (together with the human resources (HR) professionals);
- cyber risks (together with appropriate IT professionals);
- reputational risks (together with, for example, a reputational risk committee); and
- the processes and controls to manage the risks of negligence.

Instead, we often see that risk management is undertaken with no overall coordination by anyone, for example:

- a compliance officer for legal practice (usually a busy partner) spending a few hours a week (or at weekends) struggling to keep on top of all the problems arising, as well as the avalanche of new regulation;
- a money laundering reporting officer (often a busy property partner) who may or may not be well trained or knowledgeable about the latest AML requirements;
- someone (possibly another busy partner) dealing with data protection and struggling to cope with the EU General Data Protection Regulation;
- an HR manager managing people issues (but not necessarily partner-related 'people risk' issues as they are often 'off limits' to HR);
- an IT manager trying to ensure that the firm's IT systems are as robust as they need to be, but where neither adequate finance nor staff training to build awareness of cyber fraud are made available; and
- client and matter inception procedures being managed 'locally' in departments with no effective central control over the matters or clients taken on. (For the opposite approach, see the article in *Legal Compliance Bulletin* [2017] November, issue 52, p.10–12 by Peter Bennett of BWB LLP for an example of how professional indemnity, regulatory and reputational risks can be successfully managed in a mid-size firm, by risk assessing matters and clients at inception.)

Mid-size firms should, if they have not already done so, 'bite the bullet' and accept that they need to invest in risk management by:

- carrying out an audit of their risk and compliance management to see where gaps exist;
- examining what they will need to do if they are to fill any gaps revealed by that audit;
- undertaking a cost–benefit analysis to see the best way to achieve this; and
- considering how they can use IT to 'systemise' their risk and compliance monitoring to better capture knowledge required to more effectively manage risks.

On the last point, many mid-size firms have, over the past few years, invested heavily in new IT systems and they should consider how to make that investment work for them in better managing risk. Using IT innovatively can be a powerful (and cost-effective) tool to:

- create and maintain a central, up-to-date risk and compliance database;
- provide information access to everyone who needs it in relation to exposure to risk and how to manage it;
- embed into a firm's systems, its compliance and other risk management procedures, such as client and matter inception procedures;
- streamline the identification, recording, assessment and mitigation of compliance and other risks, including exceptions to compliance; and
- demonstrate to insurers, the Solicitors Regulation Authority and other regulators that a firm is effectively managing risks.

My observations are that many mid-size firms are more or less coping with managing their risks, but they could do so much better if they were to 'formalise' their risk management by implementing a realistic plan covering all aspects of risk, taking into account the resources available to them. But first they may need to change mindsets. This is likely to require:

- top-level buy-in – management must not only drive risk management, but also live it;
- investment in training and education programmes to build awareness and change mindsets;
- continuous and systematic monitoring and reporting so compliance becomes accepted as 'the norm'; and
- adopting a zero-tolerance approach, as in just do it! Risk management in mid-size firms (and indeed all firms) can never be a voluntary matter in today's world.

Peter Scott *runs his own consultancy practice* ***www.peterscottconsult.co.uk***.

The Money Laundering Regulations 2017: one year on

Alison Matthews

They say a week is a long time in politics, but the last year in the anti-money laundering (AML) field has certainly been eventful. Just over a year ago, the new Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017) were introduced at three days' notice

At the time the regulators, accepted that firms could not implement the new regulations within a short timescale, particularly as the Legal Sector Affinity Group (LSAG) guidance was not available.

However, the LSAG guidance was published in draft in September 2017 and approved by the Treasury in March 2018. The Solicitors Regulation Authority (SRA) has reminded firms to comply with the regulations, given that the LSAG guidance and the Risk Assessments are now available. What has happened since then?

1. The second National Risk Assessment has been published by the government.
2. The SRA has published (a) its 2018/2019 Risk Outlook, (b) the results of the Thematic Review and (c) reissued its money laundering and terrorist financing warning notice, as well as its improper use of a client account as a banking facility warning notice.
3. The Law Commission is consulting on the Proceeds of Crime Act 2002 (POCA).
4. The Fifth Money Laundering Directive has been adopted.
5. The Financial Action Task Force (FATF) has undertaken the Mutual Evaluation Review of the effectiveness of the UK's AML/counter-terrorism financing (CTF) regime (the outcome of which is awaited).
6. The Criminal Finances Act 2017 is now in force which introduced unexplained wealth orders, further information orders and allows the moratorium period to be extended by court order.
7. The National Crime Agency has issued further guidance on how to submit a good quality suspicious activity report (SAR).

The MLR 2017

In a previously published article (*Legal Compliance Bulletin* [2017] September, issue 51, pp.3–7) I set out the requirements in some detail. The areas of particular challenge have been the firm-wide risk assessment, the additional client due diligence (CDD) requirements for corporate clients, the changes in relation to beneficial owners and the increased emphasis on client and matter risk assessment. The beneficial owner register requirements have necessitated additional resources for the trust department.

The firm-wide risk assessment is critical as the firm's systems and controls flow from the assessment. The SRA's Thematic Review in March 2018 found that, of the 50 firms visited, only 11 firms had a firm-wide risk assessment in place and only a further six firms were in the process of implementing one.

Once the assessment has been undertaken and approved by the board or equivalent, it will need to be kept up to date – taking account of the government's second National Risk Assessment and the SRA's Risk Assessment. The money laundering reporting officer (MLRO) will also have to consider how to ensure that relevant employees are aware of the risk assessment.

The CDD requirements for corporates, in particular, may have provided a burning platform to move to centralised client and matter inception rather than training the relevant employees. It is important that the new requirements are understood and that it may be necessary to ask clients for more information (e.g. for the full names of the board and the senior managers responsible for the operation of the business).

Similarly, the obligations to identify the beneficial owner and take reasonable measures to verify their identity require additional compliance. It is important that where fee earners/personal assistants undertake client inception, they understand what they need to do. Clear procedures as well as monitoring will be necessary to ensure compliance.

The focus in the past has been more on the client risk assessment, but now the emphasis must also be on the matter risk assessment. The instructions of the sophisticated money launderer may change over time and so you need to understand the transaction, why it is happening, who is involved and the source of funds. The degree of assessment will depend on the risks and the knowledge of the client. Conveyancing or real estate work will always be higher risk, but an employment matter may be lower risk. Jurisdiction will also be important.

The LSAG guidance provides considerable assistance, not only in terms of compliance with the regulations, but also with the challenges of complying with POCA. The SRA has also issued guidance which you should familiarise yourself with.

The SRA

The SRA's 2018/2019 Risk Outlook was released in July 2018 and a money laundering warning notice was reissued in March 2018. The MLRO does need to keep up to date with the SRA's publications and ensure that the relevant people within the firm are also aware.

In addition, the SRA has reminded solicitors not to act as a bank with regard to client money. This warning notice is one that should be circulated within the firm, with an appropriate covering email so everyone understands the importance of complying with rule 14.5 of the SRA Accounts Rules 2011.

The spring Risk Assessment of March 2018 sets out the risk factors to be taken into account. The issues raised should be familiar to firms, but the document provides a useful reminder. The SRA may ask to see your risk assessment as part of routine monitoring visits or in response to information received.

The revised Thematic Review was also issued in March 2018. Further thematic visits are anticipated and firms must ensure they implement all the requirements of the MLR 2017.

The SRA has commented that the risk assessment at client and matter level fell short of expectations as there was only evidence of a risk assessment on 69 of the 100 files reviewed.

In terms of the CDD requirements, the picture was generally positive. In some situations, clients have put fee earners under pressure to commence work before completion of CDD. One fee earner commented that he had said to clients, 'If it is really urgent, you will comply urgently.' The SRA has indicated that the use of signed statements by partners is not sufficient CDD.

The SRA highlighted that only 16 of the 50 firms visited kept a central list of clients who were politically exposed persons which they identified as a useful practice to help to assess and monitor the firm's risk more effectively.

The summary of the report is that the SRA was generally satisfied that most firms had shown the right approach and that the majority of firms had made changes to their systems and procedures in the light of the MLR 2017.

All MLROs should ensure that they have read the Thematic Review and taken appropriate action.

The Law Commission's consultation

On 20 July 2018, the Law Commission issued a consultation (which will end on 5 October 2018), *Anti-Money Laundering: the SARs Regime*. The aim is to analyse the functions of and benefits and problems arising from the consent regime, including:

- the defence provided by the consent regime;
- the ability of law enforcement to suspend suspicious transactions and to investigate and secure convictions as a consequence of the wide scope of the offences;
- the abuse of the automatic defence to money laundering provided by the consent provisions;
- the underlying causes of the defensiveness over the reporting of suspicious transactions under the consent and disclosure provisions;
- the burden placed by the consent and disclosure provisions on entities under duties to report suspicious activity; and
- the impact of the suspension of transactions under the consent provisions on entities.

This is clearly a critical consultation given the impact of the legislation on firms and their clients. It is good to see the comment that it is worth considering whether the cost of the regime is proportionate and whether it is as efficient as it could be. In addition, the consultation also comments that the UK's competitive position has the potential to be undermined by unnecessary regulation or regulation which fails to produce verifiable results. Firms are encouraged to study the consultation and at least the summary paper, and consider responding to the consultation. The Law Society's Money Laundering Task Force welcomes comments and examples of the challenges of the regime to assist in drafting its response. There has been much discussion over many years about the effectiveness of the current regime and this is an excellent opportunity to comment and perhaps have a more proportionate regime in the future.

The FATF

The FATF visited the UK during 2018 to undertake the Mutual Evaluation Review of the effectiveness of the UK's AML/CTF regime. It was fascinating to have the opportunity to be interviewed by the assessors and to explain some of the challenges faced by the legal sector in the UK, including the scope of the legislation itself and the challenges around the NCA. It will be interesting to see the final report which is due in the near future.

FATF has also issued a report (**www.fatf-gafi.org/publications/methodsandtrends/documents/professional-money-laundering.html**) on the techniques and tools used by professional money launderers (e.g. lawyers and accountants). The report provides recent examples of financial enterprises acquired by criminal enterprises or co-opted to facilitate money laundering. It is always helpful to see real-life examples of money laundering to inform – and to scare!

The Fifth Money Laundering Directive

On 19 June 2018 the final text of the Fifth Directive was published. EU members will have 18 months to transpose it into national law. The Fifth Directive makes amendments to the Fourth Directive, which include:

- increased transparency around beneficial ownership information and trusts;
- regulating virtual currencies and pre-paid cards to prevent terrorist financing;
- improving safeguards for financial transactions to and from high-risk countries; and
- ensuring that centralised national bank and payment account registers or central data retrieval systems are accessible in all member states.

Registers of beneficial ownership

The Fifth Directive allows public access to the registers' records, without having to demonstrate any kind of 'legitimate interest'. Trusts will also be required to meet greater transparency obligations, including the beneficial ownership requirements. Where an entity poses a significant money laundering or tax evasion risk, the threshold for identifying beneficial ownership may be reduced from 25 per cent to 10 per cent.

Enhanced due diligence

The Fifth Directive requires enhanced due diligence when dealing with transactions from high-risk countries. As well as obtaining evidence of the source of funds and source of wealth, information on beneficial ownership and background to the intended transaction must also be recorded. The EU may also designate a 'blacklist' of high-risk countries for money laundering.

The Fifth Directive also amends the 'reliable and independent source' requirement for verification of customer information to include 'where available, electronic identification means'. This suggests that not only will the source have to be reliable and independent, it will also have to be electronic.

Regulating bitcoin

Under the Fifth Directive, virtual currencies such as bitcoin will have a legal definition. Virtual currency platforms and wallet providers will also become regulated entities under the scope of the directive. While many already conduct due diligence and report suspicious transactions, the Fifth Directive will make it a legal requirement.

Increased reach

The Fifth Directive has been extended to cover all forms of tax advisory service, lettings agents and art dealers. Access will also be available to members of the public to request information on the real owners of firms operating in the EU, a measure aimed at quashing letterbox companies established solely to launder money and hide wealth. Whistleblowers who report money laundering will also have increased protection and the right to anonymity.

NCA challenges

There continues to be criticism about the quality of SARs and the NCA offers a range of resources to help firms complete their SARs. Recent publications have included 'Defence against money laundering FAQs' which was issued in May 2018 (**www.nationalcrimeagency.gov.uk/publications/902-defence-against-money-laundering-faq-may-2018/file**) and guidance on submitting better quality SARs, which was re-issued in August 2017 (**www.nationalcrimeagency.gov.uk/publications/899-guidance-on-submitting-better-quality-sars-v2/file**).

The Law Society's very useful webinar by Amy Bell, chair of the Money Laundering Task Force and Tony Fitzpatrick from the NCA, explains how to get your SARs right the first time.

The Criminal Finances Act 2017

The Criminal Finances Act came into force on 30 September 2017 and firms should now have procedures in place. The HMRC guidance which sets out the six guiding principles that firms should be complying with was issued on 1 September 2017, and the Law Society's helpful practice note was issued on 8 September 2017 (**www.lawsociety.org.uk/support-services/advice/practice-notes/criminal-finances-act-2017**). The approach is very similar to that of the Bribery Act 2010.

In addition to the corporate offences of failure to prevent criminal facilitation of tax evasion, the Act also introduced unexplained wealth orders, and further information orders (FIOs), and allows a moratorium period to be extended by court order.

Of these, the FIOs are particularly relevant to the legal sector. The NCA can apply to a magistrates' court for an FIO in relation to money laundering and terrorist financing. It can require the person making the disclosure or any person carrying on a business in the regulated sector to provide specified information or any other information as the court deems appropriate, following a SAR. Practices are not required to provide privileged information. If the information is not provided, the court can impose a fine of up to £5,000.

Under the amendments to POCA, the moratorium period can be extended by court order. It is also automatically extended if an application has been made and the 31-day period would end before the application is heard by the court. Paragraph 9.3.7 of the LSAG guidance provides more advice.

There are further conditions in the case of a request to the NCA from an authority in a country outside the UK.

Conclusion

Firms should now be complying with the MLR 2017 as the Risk Assessments and the LSAG guidance are now available. It is important to be aware that the SRA is continuing the Thematic Reviews. Not only must the MLRO and the senior management be familiar with the requirements, but firms need to ensure that employees are too. The Law Society has published the second edition of the *AML Toolkit* to assist firms with compliance.

The outcome of the consultation on the consent regime will be interesting. It is important to respond so that there is a better understanding of the challenges posed by the current regime.

While the Fifth Directive will have less of an impact than the Fourth, there may still be amendments required to systems and controls. Further information will be available in the Law Society's AML Update.

Finally, as it is almost a year since the Criminal Finances Act 2017 came into force, you should ensure that you have implemented reasonable prevention procedures and that employees understand their obligations to prevent the facilitation of tax evasion.

Alison Matthews *is director of quality and risk at Shoosmiths LLP.*

The Insurance Distribution Directive: ready or not?

Gillian Roche-Saunders

There's just under a month to make preparations before the Insurance Distribution Directive (IDD) is implemented

The IDD is set to capture law firms who get involved with arranging insurance for their clients or third parties. While you might have assumed that this EU Directive only applies to companies whose primary business is selling insurance, its application goes further, including all firms who help to distribute insurance products. This is the case even where the distribution of these insurance products is complementary to the main services provided by your firm. From arranging property insurance on a conveyance, after-the-event insurance in a personal injury matter, or helping new directors apply for directors and officers insurance in connection with an acquisition, law firms across the UK may find themselves caught by this regulation.

A quest for greater harmony

The IDD is not the first EU Directive in this area. When it is implemented on 1 October 2018, it will replace the Insurance

Mediation Directive (IMD) in place since 2002. Its purpose is to create better harmonisation across European Member States and to raise standards, particularly around consumer protection.

In practice, as the UK's implementation of the IMD exceeded the minimum requirements, the effects of the IMD/IDD are less likely to come as a shock to UK firms. However, with enhanced standards applying to areas such as disclosure requirements, codes of conduct and the complaints handling process, firms affected by the IMD/IDD need to take steps to be ready by 1 October 2018.

Are you in or out?

As the scope of the IDD extends beyond the traditional insurance industry and applies to all distributors of insurance products, law firms must consider whether the nature of products and services they offer falls within its remit.

To assess whether you could be caught by the IDD, you need to examine whether the extent of your activities makes your firm an intermediary. In addition to obvious activities, such as selling and advising on the conclusion of insurance contracts, more peripheral activities are also covered by this legislation. For example, compiling an insurance product list for clients or securing a discount on the price of an insurance contract could be enough to make your firm an intermediary.

How regulatory status dictates your approach

If your activity is caught by the IDD, you will then need to check your regulatory status to identify how the changes will apply.

Law firms regulated by the Solicitors Regulation Authority (SRA) can undertake financial services-regulated activity that is complementary to their main business, including insurance distribution, as an exempt professional firm. This status removes the need to be directly regulated by the Financial Conduct Authority (FCA) and such firms need to comply with specific, additional SRA rules.

For these firms, the financial services rules that they are subject to have been updated. Earlier this year the SRA updated both the SRA Financial Services (Scope) Rules 2001 and the SRA Financial Services (Conduct of Business) Rules 2001 (COB rules), and, in July 2018, this approach was approved by the FCA and Legal Services Board.

On the assumption that your law firm does not offer insurance as a principal professional activity, it is likely that under the IDD you will be given the status of 'ancillary insurance intermediary'. For exempt professional firms who are ancillary insurance intermediaries, the SRA has made the most of its discretion in order to apply fewer rules.

Other law firms will have obtained FCA authorisation on the basis that their regulated activities are not always merely complementary to their main business. For these firms, fewer concessions have been made, even if the firm can still claim ancillary insurance intermediary status.

As a result, there is a range of updated sourcebooks within the FCA Handbook to which firms will need to adapt, covering topics such as product governance, inducements, conflicts of interest, and suitability or appropriateness. Beyond policies and processes, such firms will also find that their professional indemnity insurance needs to be renegotiated as IDD minimum levels are higher than insurance intermediaries will have previously been subject to.

So ... are you ready or not?

In the words of Benjamin Franklin, 'by failing to prepare you are preparing to fail', and, with the IDD arrival date looming, firms need to take adequate steps to prepare for implementation.

Once you have identified whether your firm is caught by the IDD, you will need to familiarise yourselves with the regime change, as captured by the SRA or FCA rules.

It will be particularly important to ensure that the new disclosure requirements are fully met by this date so that any customers receive material that meets the new standards of consumer protection from 1 October 2018 onwards.

Disclosures

The information that must be disclosed to clients before any insurance intermediation is far more extensive than under the IMD and firms will need to have in place an insurance product information document (IPID) that provides a range of background, including:

- whether advice given is based on fair and personal analysis of the market;
- where your firm is contractually obliged to place business with a specific insurer;
- the 'nature' and 'basis' of the remuneration your firm will receive; and
- the exact fee a client will be charged, or the method of calculation if the exact fee cannot be provided.

In addition to changing the client documentation, you may need to consider the impact on your remuneration, charging, complaints and conflicts procedures to ensure that they comply with the disclosure rules.

Understanding your client's needs

If, as part of facilitating insurance, your firm provides advice (a 'personal recommendation') to a client about which policy is right for them, you will again need to upgrade your processes. Under the IDD, firms are now required to specify the needs and demands of clients before the insurance contract is concluded and to follow prescribed steps around which policies are proposed and the level and form of information provided to clients about the contract of insurance and why it meets their needs.

The thin end of the wedge

The IDD does not stop at the above operational changes and, if your firm is affected, you will also want to assess the impact of other IDD-driven changes, ranging from the processes dealing with whom you accept complaints from, data retention policies, and training and qualification standards for staff involved with the insurance intermediation.

Don't be caught out

With the deadline fast approaching, it is essential for affected law firms to familiarise themselves with the revised changes brought by the IDD and to prepare themselves ahead of 1 October 2018. It has been said that the changes do not to put an 'unnecessary' burden on law firms, which means that there will be limited tolerance for a lack of preparation.

Gillian Roche-Saunders *is a partner at Bates Wells Braithwaite and head of its financial services regulatory consultancy, BWB Compliance.*

Seven elements of an effective SAR

Amy Bell

In July 2018, the Law Commission launched a consultation on whether the suspicious activity reporting regime is effective in preventing money laundering and terrorist financing. The regulated sector (those involved in financial transactions) has been singled out for criticism for poor quality suspicious activity reports (SARs). What are the issues behind that criticism and how can you get your SAR right first time?

What is a SAR?

The Proceeds of Crime Act 2002 (POCA) criminalises certain activities in relation to suspected criminal property. It also imposes on the money laundering reporting officer (MLRO) the requirement to report suspicions of money laundering, even where the MLRO or their firm is not directly involved in the money laundering. There are two types of SARs which a MLRO may need to make to the National Crime Agency (NCA).

The first type of SAR, commonly known as a consent or defence against money laundering (DAML) SAR, is made where the reporter wishes to obtain a defence for carrying out an activity which would be considered money laundering under s.327 (converting criminal property), s.328 (becoming concerned in an arrangement to launder criminal property), or s.329 (having possession of criminal property). When a consent SAR is submitted, the NCA has seven working days to come back to the MLRO to give or withhold consent. If you do not hear from them within the seven working days (starting the day after you submitted the SAR), you will have deemed consent. If the NCA withholds consent, you will enter the moratorium period, which is initially 31 calendar days and can be extended for up to 186 days following application to the court.

The second type is where you are only providing information to the NCA, and where you do not intend to carry out a transaction which would amount to money laundering. In these cases, no consent is needed, and therefore you are unlikely to hear back from the NCA.

Tipping-off risk

Once a report to the NCA has been made, the reporter and anyone who suspects that a report has been made is at risk of committing a tipping-off offence if they make a disclosure that is likely to prejudice any investigation which might be conducted following the report. Accordingly, the sooner the firm gets consent to proceed the better, otherwise there may be unwelcome questions from the client about the delay.

Quality of SARs

The NCA's resources are limited, in particular by a legacy IT system which has not been able to keep pace with developments in technology. Many reporters complain about the old-fashioned nature of the IT system, and that the form that has to be completed is not user friendly. Efforts are underway to resolve the IT issues, and the Law Society is involved in the consultation for that work.

One of the impacts of this resource issue, exacerbated by a steady increase in the number of SARs year on year, is that the NCA is under pressure to deal with SARs promptly. A couple of years ago some work was done to understand how much time is spent, or indeed wasted, in dealing with SARs, and it emerged that some SARs are of low quality with some, in fact, misconceived.

The impact of this is that precious time is wasted getting in touch with reporters for clarification, or dealing with SARs which should not have been made in the first place.

The NCA has been trying to drive up the quality of SARs over the last few years by rejecting SARs which do not meet the criteria. The result of that, for those submitting DAML SARs, is that they need to resubmit the SARs with the relevant information, and the seven working days timetable starts all over again, leading to delays, and increasing the chances of that difficult conversation with the client about the hold-up without tipping them off.

Getting your SAR right first time is therefore essential. Here are our seven top tips for submitting your SAR.

1. Tick the box if you need consent

If you need consent to do something, then make sure you tick the relevant box on the form. Otherwise the report will follow a different track and you won't hear anything from the NCA. This could mean that you proceed with the activity, believing wrongly that you have deemed consent, and instead commit the offence of money laundering.

2. Use the Glossary Codes

The NCA encourages reporters to use Glossary Codes (**www.nationalcrimeagency.gov.uk/publications/725-sar-glossary-code-and-reporting-routes/file**) to help prioritise SARs. This is particularly important if you have a vulnerable person involved. Use of that code will likely accelerate the NCA's consideration of your SAR.

3. Be clear and concise

All consent SARs are read by a person at the NCA who has very little time to decipher them, so be as clear as possible.

- Structure your report in a logical format, including all relevant information.
- Provide a chronological sequence of events.
- Avoid acronyms and jargon.
- Do not write in capital letters: it makes it hard to read.

4. Give your reasons for suspicion

In order to be at risk of committing a POCA offence, the reporter must have a suspicion that there is criminal property which can be or has been laundered. Without that suspicion, the

NCA cannot give you a defence. The NCA has seen a number of SARs – which it calls defensive SARs – made where no suspicion has been identified, but that have been submitted 'just in case'. From my discussions with reporters, quite often it is the case that a suspicion has been identified, but just not clearly laid out on the SAR itself. Making sure you answer the following questions in your reasons for suspicion should make sure you have provided enough information.

- Who is involved?
- How are they involved?
- What is the criminal/terrorist property?
- What is the value of the criminal/terrorist property?
- Where is the criminal/terrorist property?
- When did the circumstances arise?
- When are the circumstances planned to happen?
- How did the circumstances arise?
- Why do you know or suspect this?

5. Fill in the SAR as fully as possible

Make sure you provide as much detail about the suspect as possible including, for example, postcodes, mobile phone numbers, dates of birth. You should do the same for any associated suspects, and if possible include details of financial transactions and bank account details. All of this information can be used by law enforcement agencies to identify patterns of activity and link individuals together.

6. No attachments

Put all the information which you need to give on the form. Do not attach separate pages containing your reasons for suspicion. The IT system is unable to search through attachments.

7. Be specific about what you are planning to do

Many of the instances where the NCA has had to contact a reporter for more information are those in which the reporter has not been clear about what they want to do, namely what they want the defence for. Be specific, using wording like in these examples provided by the NCA:

- 'to buy/sell the property at (address) for (value amount)';
- 'to disburse the funds between the following people ...';
- 'to buy/sell the (named company)';
- 'to draw up contracts between party X and party Y, transfer the ownership of the (named company) to party Y, and transfer the (value of funds) to party X which is all part of the arrangement'; and
- 'to release the funds in account A to person B'.

Guidance

In the legal sector, our MLROs tend to be occasional reporters. We don't see as many suspicious transactions, in contrast to the banking sector, and it is not unusual for many months to pass between reports. Therefore, next time you have to do one, as well as referring to this article, check the NCA's website (**www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/ukfiu**) where you will find guidance on submitting SARs, as well as some FAQs in relation to how SARs work. You can also contact the Law Society's Practice Advice Service for further guidance.

Amy Bell *is chair of the Law Society's Money Laundering Task Force and a director of Teal Compliance.*

The SDT and the standard of proof

Nigel West

In a current consultation, the Solicitors Disciplinary Tribunal (SDT) is looking at the standard of proof in its proceedings

The difficult questions

Should a solicitor be struck off for dishonesty if the SDT is not sure whether he has been dishonest? Is it in the public interest for a solicitor to practise if it is more likely than not that she has been dishonest, but the SDT cannot be sure of this?

It is tempting to say 'No' to both of those questions. But you cannot have it both ways. That has been highlighted by the current consultation on the SDT rules.

The SDT consultation

The SDT has the statutory power to make rules about its own procedures under the Solicitors Act 1974, s.46. At present the SDT applies the criminal standard of proof. A solicitor will not be found guilty of dishonesty, or in breach of any professional rules, unless the SDT is 'sure' of the breach. However, there has been mounting pressure over the past 10 years to change the standard of proof to the civil standard, so a solicitor is guilty if a breach is 'more likely than not'.

The matter is coming to a head because the SDT is updating its rules, and needs to decide whether the criminal or civil standard should apply to its proceedings. A consultation paper was issued on 16 July 2018 inviting members of the profession to make representations on the standard of proof (and, if they wish, other issues on the rules) by 8 October 2018.

English law on the standard of proof

In 1956 in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 the Privy Council considered the standard of proof during an appeal from the Court of Appeal of East Africa in a case of a solicitor who had been found guilty of professional misconduct. The Privy Council said the standard of proof should be higher than the civil standard for the following reason:

'In every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities'.

That left the standard undefined, but somewhere above the civil standard.

In *Re a Solicitor* [1993] QB 69, the Divisional Court had to decide whether the criminal standard of proof should apply to a solicitor facing an allegation of perjury. Lord Lane said that the criminal standard should apply to all cases where 'what is alleged is tantamount to a criminal offence'.

Twelve years later, in *Campbell v Hamlett* [2005] UKPC 19, the issue was considered again when the Privy Council heard an appeal by a Trinidadian lawyer who had been accused of dishonestly retaining the purchase monies for a property. Lord Brown went further than *Re a Solicitor* and said that the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession. That was confirmed by the House of Lords in *Re (D) v Life Sentence Review Commissioners (Northern Ireland)* [2008] UKHL 33, by Lord Carswell, who said on an obiter basis that the criminal standard of proof is required in disciplinary proceedings.

In *Richards v Law Society* [2009] EWHC 2087 Sir Anthony May said, without reference to the then recent decision in *Re D*, that counsel for the Solicitors Regulation Authority (SRA) came close to accepting that the High Court is bound by the authorities which apply the criminal standard and, insofar as the authorities might arguably leave some room for manoeuvre, that is better debated and decided in a case where the standard of proof makes a difference, and probably in the House of Lords.

The standard of proof was mentioned again in passing in 2016 in *Arslan v SRA* [2016] EWHC 2862. *Arslan* is a case involving an appeal by Mr Arslan against an internal decision of an SRA adjudicator. On internal disciplinary proceedings conducted by the SRA, adjudicators apply the civil standard. Mr Arslan's appeal raised the question whether the SDT should, when exercising its appellate function relating to SRA adjudication decisions, apply the same standard of proof used by the SRA in its original decision (being the civil standard), or whether it should apply the criminal standard in line with its normal practice. It did not directly address the question whether the criminal standard should apply to first-instant decisions relating to solicitors in the SDT. The SRA's counsel asked the Divisional Court to consider that issue. Leggatt J declined, but stated that the authorities 'do seem to me ripe for reconsideration'. Sir Brian Leveson underlined that point by stating:

'I emphasise the observations of Leggatt J in relation to the standard of proof in these cases and underline the need for a re-evaluation of the approach to disciplinary measures intended to protect the public. Notwithstanding [counsel's] encouragement to do so, to go further than the confines of this case would not have been appropriate.'

The shifting sands of regulation

The judicial encouragement in the High Court in *Arslan* to reconsider the standard of proof reflects the changing stance of regulators over the past 10 years. In 2009, the Shipman Enquiry encouraged the medical profession to consider whether the criminal standard continued to be appropriate, and by 2010 all the medical regulators had moved to the civil standard. In 2011 the SRA applied the civil standard to its new internal disciplinary rules. In 2014 the Legal Services Board, as the oversight regulator for the legal profession, recommended the adoption of the civil standard by all of the legal regulators. Next year the Bar Standards Board will be applying the civil standard to all allegations of misconduct with effect from 1 April 2019.

Leaving aside the Bar Standards Board and the SDT, the only regulator now applying the criminal standard is the Royal College of Veterinary Surgeons.

The Tribunal's impetus for change

The Tribunal's consultation paper sets out four points which are considered to be relevant matters when deciding whether the standard of proof in the Tribunal should change. The four points are:

1. *'The LSB considers that the application of the civil standard is more appropriate for protecting the public.'*
2. *'The Tribunal recognises that it is not necessarily in the public interest for solicitors to be able to avoid a disciplinary sanction when it is more likely than not that they are guilty of professional misconduct but the Tribunal cannot be "sure" of this. The Tribunal recognise the argument that this position may be perceived by the public as working in the interests of the profession and not in the interests of the public or consumers.'*
3. *'Almost every other professional regulator, except for Veterinary Surgeons, now applies or will apply the civil standard of proof to professional misconduct allegations. It is argued by some that this leaves the Tribunal out of step with the large majority of the other professional regulators.'*
4. *'[This also] means that solicitors could be accorded what might appear to be preferential treatment compared with other professions.'*

In short, the consultation paper places great emphasis on the need to protect the public interest at the expense of the interests of the solicitor facing prosecution. The emphasis suggests that the standard of proof is likely to be reduced to the civil standard and that solicitors facing allegations of dishonesty are likely to be judged on the civil standard.

The European Convention on Human Rights

Two cases on disciplinary proceedings that reached the European Court of Human Rights (ECtHR) suggest that a solicitor may be entitled to the criminal standard under the Article 6 right to a fair trial.

In *Brown v the UK* (38644/97) the ECtHR had to consider whether a complaint made by an English solicitor relating to Tribunal proceedings should be treated as a civil or criminal complaint. The ECtHR stated that the court should adopt a threefold test by having regard to: (1) the classification in domestic law; (2) the nature of the offence itself; and (3) the nature and severity of the sentence. In the circumstances of the case, the ECtHR decided that the solicitor's complaint was a civil complaint. The charges were classified under domestic law as disciplinary offences and were examined in a Tribunal without any involvement by the police. The offences were of a disciplinary nature which applied only to persons of a specific professional group rather than the general public. The severity of the

Next issue

The next issue will be published in November. Some of the topics covered will include:

- PI insurance: how much is appropriate?
- Price transparency update
- Lawful processing under the GDPR
- Do you need cyber insurance?
- SRA Handbook: where are we now?

penalty, which was a £10,000 fine, was not of itself such as to render the charges criminal in nature.

In *Albert and Le Compte v Belgium* (7299/75 and 7496/76), the ECtHR again decided that disciplinary proceedings against two Belgian doctors could not be characterised as criminal, but recognised the hybrid nature of disciplinary proceedings. The ECtHR said that it may not hold good for all disciplinary cases to not be characterised as 'criminal', and, on the facts of the case, the court decided that sub-paras. (a), (b) and (d) of Article 6 (which relate to criminal proceedings) should be taken into account in deciding whether the disciplinary proceedings constituted a fair trial.

Both of those ECtHR cases suggest that a professional conduct complaint should not be treated as a civil complaint in circumstances where the charge is so serious that a solicitor is at risk of being struck off. The ECtHR case law is compatible with the long line of English decisions stretching from the Privy Council decision of 1956 to the High Court decision of 2009. Together they call into question the stance taken by regulators in England over the past 10 years.

Participating in the consultation

The Tribunal consultation paper can be found on the SDT website: **www.solicitorstribunal.org.uk**. Responses to the consultation can be submitted by email to: **feedback@solictorsdt.com**, and need to be received by the SDT by 8 October 2018.

Nigel West *is a partner at RadcliffesLeBrasseur and author of* The Solicitors Disciplinary Tribunal *(Law Society, 2016).*

Andrew Hopper QC

Gregory Treverton-Jones looks at the life of Andrew Hopper, a long-time Editorial Board member and contributor to this publication

Andrew Hopper, who died at home in South Wales on 25 July 2018, was, without question, the country's foremost solicitor in the field of the regulation of legal professionals. For many years he was the first and last port of call for solicitors facing regulatory or disciplinary investigations or proceedings. He helped many hundreds of fellow solicitors through what can be the most frightening and stressful period of any solicitor's professional career. As a result, he built up a devoted following: his clients loved him, and, with a few exceptions, he loved them back. In him they knew that they had found someone who would fearlessly and unflinchingly fight their corner against a powerful and often unsympathetic regulator.

Andrew was born in Swansea. His father died when Andrew was 11, and the family then pooled its resources and purchased Talygarn House in the Vale of Glamorgan, just outside Pontyclun. He remained at that house for the rest of his life, both before and after his marriage to Ros. They enjoyed a long and happy marriage. He was admitted to the Roll in 1972. After a stint at a Cardiff firm, Adams and Black, he struck out on his own, working from home as a sole practitioner. By then he had started to specialise in solicitors' regulatory work.

From the late 1970s until early 2002 the bulk of his instructions came from the regulatory arm of the Law Society, known variously as the Solicitors Complaints Bureau, the Office for Supervision of Solicitors, and, since 2007, the Solicitors Regulation Authority (SRA). For many years, he was the principal prosecutor instructed by the regulator. He acquired rights of audience in the High Court, and impressed the late Lord Bingham of Cornhill, and other members of the senior judiciary. In those days most regulatory and disciplinary appeals by solicitors against decisions of the Law Society or the Solicitors Disciplinary Tribunal were heard by the Master of the Rolls (regulatory appeals) and the Lord Chief Justice or his deputy (disciplinary appeals). He was appointed Queen's Counsel in 2001, only the fifth solicitor, and the first outside the City of London, to achieve that distinction.

I first came across Andrew in about 1990 when I started to receive instructions from the Law Society. He was, to put it mildly, a little different from the average instructing solicitor. His swept back fair hair was longish. He rarely wore a suit unless he had to. If a judge asked me a question to which I did not know the answer, Andrew would supply it in a stage whisper loud enough for the judge to hear. If he felt that the judge was being a little slow on the uptake, that too would be conveyed in the same loud stage whisper, a rather uncomfortable experience for the young barrister who was supposed to be presenting the case and getting on the right side of the judge.

In 2002 he decided no longer to accept instructions from the Law Society due to what he perceived to be increasing unfairness by the regulator against those it was regulating. Thereafter he devoted his time to assisting solicitors who were in regulatory difficulties. It was this last period which was, I have no doubt, much the most enjoyable and fulfilling of his professional life. Although there are a small number of 'rotten apples' in the profession, Andrew did not attract that sort of client. The overwhelming majority of his clients comprised decent men and women under investigation or facing disciplinary action by their regulator, or those seeking advice as to whether they could make business decisions that are compliant with their regulatory obligations. He was a constant beacon of hope to countless solicitors under investigation. He helped many hundreds of men and women, often without financial reward (he reckoned to have advised/represented approximately one thousand in the post-2002 period).

Advising and representing solicitors in regulatory and/or disciplinary matters against the SRA can often be a difficult and thankless task. As can be easily imagined, the scales in regulatory proceedings are loaded fairly heavily in favour of the regulator. But Andrew advised and represented a series of Davids against Goliath with distinction and success, skill and integrity. In 2006, I switched to the 'defence' side also, and worked closely with him for the next 11 years. I saw at first hand the supreme

quality of his work, even if correspondence which he drafted was from time to time unnecessarily abrasive in its criticism of the regulator.

His contribution was far wider than that, however. He put his unique store of knowledge and experience at the disposal of the profession. He was an editor of *The Guide to the Professional Conduct of Solicitors*, published by the Law Society, and distributed free of charge to the profession until 1999. He was an editor of *Cordery on Solicitors* (now re-branded as *Cordery on Legal Services*) for many years.

In 2007, Andrew and I conceived the idea of *The Solicitor's Handbook*, a publication to take over from the defunct *Guide*: the first edition was published by Law Society Publishing in 2008, and six subsequent editions have been produced. We decided to write it because there was nowhere convenient for solicitors to turn when they came up against a regulatory or disciplinary problem. Andrew wrote the lion's share of each edition. Likewise, when the SRA created outcomes-focused regulation, in 2011, our publishers turned to Andrew and I to write about it: the result was *Outcomes-Focused Regulation: A Practical Guide,* published again by the Law Society, in August 2011.

For many years Andrew possessed the only searchable database of decisions of the SDT: he made that resource readily available to those who asked, only rarely charging for the research he carried out. When the SDT created its own searchable database, it turned to Andrew to help set it up. He contributed hours of his time to help to create that resource, which is now available to all who consult the SDT website.

In recent years Andrew was recruited by the Law Society to sit on its Regulatory Affairs Board. He was also chair of the Regulatory Processes Committee – effectively the sharp end of representation of the profession in dealing with the SRA, its rules and processes. He was a member of the Legal Ombudsman's Stakeholder Advisory Panel, selected personally (not as a Law Society representative) by the Legal Ombudsman, to provide advice and feedback on its systems and processes. For several years, he sat as a respondent's representative on the Users' Group established by the SDT to enable the Tribunal to have a forum for debate to ensure efficiency and fairness in its procedures. All of this was unpaid, and all of it was done for the benefit, not of himself, but of the profession.

He was a constant beacon of hope to countless solicitors under investigation

One of Andrew's defining characteristics was his generosity. He was generous to his clients, always working hard, often for no financial reward. He was also generous to other lawyers, always dealing rapidly with queries sent to him by those who needed to know the answer to a knotty regulatory issue. He was seen by other solicitors as an oracle, and received many such requests for advice. He always responded. And he was astonishingly generous to me in many different ways.

In case anything that I have written above should lead the reader to believe that Andrew was a paragon of virtue, he would, I know, wish me to correct that inaccurate impression. He could be rude and waspish, usually in the direction of the SRA. He loved gossip, the more salacious the better. Although he loved tennis and badminton, he developed an irrational dislike of Andy Murray. He had very little time for vegetables or salads, but adored red wine and cheese. Within the profession he was seen as something of a maverick, and was able to live life in his own way and on his own terms.

The cancer, when it came, was brutal and relentless. He was diagnosed almost exactly a year ago, and although the initial surgery seemed to have been successful, the cancer spread and became inoperable. In April, he was told that he had only a limited time left. He did not plan to rage against the dying of the light. He regarded himself as having lived a charmed life, and wanted only to celebrate with Ros and carefully selected friends at a series of parties. The disease progressed too rapidly for that, and it was not to be. I saw him two days before he died, and by then, I think, he was ready to let go.

Professional life without Andrew will seem very empty for me and many others. His regular clients will, I know, be devastated. But he was right in saying that he had led a charmed life, and he was able to use a large part of that good fortune for the benefit of others. He leaves behind a wonderful legacy of memories. All of us who came along for parts of the ride are the richer for it.

Greg Treverton-Jones QC *is a barrister at 39 Essex Chambers.*

Copyright information:
ISSN: 2040-5022
© The Law Society
Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hants
Design: alec@alecchin.com

All rights reserved. Any unauthorised or restricted act in relation to this publication may result in civil proceedings and/or criminal prosecution. Applications should be addressed in the first instance, in writing, to Law Society Publishing.

While all reasonable care has been taken in the preparation of this publication, neither the publisher nor the authors can accept any responsibility for any loss occasioned to any person acting or refraining from action as a result of relying upon its contents.

The views expressed in this publication should be taken as those of the authors only unless it is specifically indicated that the Law Society has given its endorsement.

The Law Society