

SRA Standards and Regulations November 2019

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Overview of Changes

There is no doubt that the new STARS are simpler and shorter. In place of the old Code which was based around “outcomes focused” regulation and indicative behaviours, there are now two short Codes, or rather Principles - one set is for individual solicitors and one for authorised entities.

As well as the simplification of the Code of Conduct, the SRA have described these new Standards and Regulations as facilitating the ‘uberisation’ of legal services. Their grounds for stating this is that currently it is estimated that 40% of legal services are delivered by entities that are unregulated – trades unions, employment advisors, will writers, immigration advisors etc. A stated purpose by the SRA of these reforms is to facilitate competition against these bodies from within the regulated sector. The way that is to be achieved is by enabling Freelance Solicitors and practising Solicitors working within unregulated entities to deliver legal services to the public without professional indemnity insurance in certain circumstances, especially advisory work.

The Seven Principles for Individuals

These are simply stated. A solicitor must act:

1. In a way that upholds the constitutional principle of the rule of law and administration of justice;
2. In a way that upholds public trust and confidence in the solicitors’ profession;
3. With independence;
4. With honesty;
5. With integrity;
6. In a way that promotes equality, diversity and inclusion; and
7. In the best interests of each client.

There are approximately six pages of elaboration on these principles. They apply to solicitors 24/7 in or outside work. Insofar as it may affect the handling of claims for professional negligence against solicitors then perhaps the most relevant section is that relating to service and competence. A solicitor must “ensure that the service provided to clients is competent and delivered in a timely matter...” and must “maintain their competence to carry out their role and keep professional knowledge and skills up to date...”. A solicitor must also ensure that his or her client is “in a position to make informed decisions about services they need, how their matter will be handled and the options available to them.” He or she will need to evidence compliance if called upon to do so by the regulator. So, it would seem competence now becomes a regulatory concern.

The SRA Code of Conduct for Firms

The Code for firm is focussed on management controls. Again they run to only six pages or so but can be summarised by the statement that firms, its principals and managers must have effective governance structures, arrangements, systems and controls in place to ensure compliance with all of the SRA's regulatory arrangements and must keep and maintain records to demonstrate compliance with the SRA's regulatory arrangements.

That is quite a tall order. Whilst it may be that large firms are well resourced to have manuals, policies and procedures in place, in smaller firms that may not be so.

What does this mean in practice?

The major practical impact is the enabling by the new regulatory structure of Freelance Solicitors. Freelance Solicitors will not be able to hold client money nor to employ anybody. However, they will be entitled to deliver legal services without professional indemnity insurance, provided those services do not constitute any of the reserved activities under the Solicitors Act 1974. The same goes for a solicitor employed in an unregulated business providing services to the public eg a will writing company.

However, if such a solicitor does provide any of the six classes of reserved legal activities (for practical purposes these are mainly the conduct of litigation, advocacy, conveyancing and extracting a grant of probate) then that solicitor will have to ensure that he or she has in place "adequate and appropriate" professional indemnity insurance, or ensure that the entity in which they are working has such insurance in place.

There is little guidance from the SRA upon what constitutes adequate and appropriate professional indemnity insurance for freelancers. What there is, is entirely focused on the level of cover and does not consider matters such as run off, or whether or not the terms of cover comprise or contain the Minimum Terms and Conditions that apply to professional indemnity insurance taken out by regulated bodies.

Other Changes

There are new Transparency Rules coming into place which relate to pricing information, complaints procedures and signposting to the Legal Ombudsmen and the SRA. There are also new Accounts rules.

These when read with the SRA Indemnity Insurance Rules, make it clear that any breach of the Accounts Rules amounts to claim for the purposes of the firm's PII policy. Otherwise the accounts rules are much shorter than the old version and follow the same path as the other reforms by the SRA, namely to set out Principles and then mandate that it is for each regulated entity to put in place systems, controls and procedures, so as to ensure compliance with those Principles. There are not the detailed rules around handling of the money that there used to be (for example about when money can be transferred from client into office account), although I expect that many firms will continue and/or adopt the old rules as their manual.

Another point worthy of noting in the changes is that the SDT will operate on the civil rather than the criminal burden of proof.

The responsibility on every individual Solicitor to report misconduct is also changing. Currently a solicitor is obliged to report (themselves or others) to the SRA when satisfied there has actually been serious misconduct. Under the new STARS an individual must report an individual or regulated entity to the SRA if he or she "reasonably believes facts that are capable of amounting" to a serious breach of the SRA's regulatory requirements.

So what does this mean for professional indemnity insurers?

I would expect to see a greater emphasis by Claimants and those representing them upon testing and examining the systems, processes and procedures in place to ensure that clients were properly advised and informed. That may range from a much great insistence upon retainer letters that clearly set out client objectives and risk factors to assertions that if records are not in place detailing clearly the advice given, that will be a non-compliance with the Standards and Regulations and prima facie negligence. The attendance note or email advice looks like assuming greater importance.

We shall have to wait and see whether or not the concept of Freelance Solicitors takes off but if it does there may be quite a few disputes over coverage and the adequacy of insurance. Probably their success or failure depends upon Insurers' appetite for the risk.

Anecdotally the SRA are gearing up to ensure compliance with these new Standards and Regulations with a new enforcement strategy. That should be of concern to every Solicitor who is in a position of responsibility or management within a firm, since the STARS make it

clear that any person with management responsibility within an authorised body has joint and several liability to ensure that the body within which they practice complies with the Code for Firms. This will mean that individual partners, and particularly COLPs and COFAs may well find themselves the subject of regulatory and disciplinary investigation and action. It is anticipated within the profession that this will lead to more firms specialising in this area of practice (regulatory defence and systems checking) and to an uptake in the demand for D&O and/or legal expenses insurance.

Certainly, the partners at Leigh Day were pleased they had put legal expenses insurance in place!

To find out more about the new SRA Standards and Regulations, and to explore how Browne Jacobson can help you, [please get in touch](#).

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