Ethics in Law Firms: A Practical Guide

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UK/EUROPE/Asia OFFICE
Ark Group Ltd
6-14 Underwood Street
London N1 7JQ
United Kingdom
Tel +44 (0)207 549 2500
Fax +44 (0)20 7324 2373
publishing@ark-group.com

NORTH AMERICA OFFICE
Ark Group USA
4408 N. Rockwood Drive
Suite 150
Peoria IL 61614
United States
Tel +1 309 495 2853
Fax +1 309 495 2858
publishingna@ark-group.com

Australia/NZ OFFICE
Ark Group Australia Pty Ltd
Main Level
83 Walker Street
North Sydney NSW 2060
Australia
Tel +61 1300 550 662
Fax +61 1300 550 663
aga@arkgroupasia.com

Online bookshop
www.ark-group.com/bookshop

Commissioning Editor – Legal
Helen Roche
hroche@ark-group.com

Reports Publisher – International
Fiona Tucker
fiona.tucker@ark-group.com

UK/Europe/Asia enquiries
Ken Fitzgerald
ken.fitzgerald@wilmington.co.uk

US enquiries
Daniel Smallwood
dsmallwood@ark-group.com

Australia/NZ enquiries
Steve Oesterreich
aga@arkgroupasia.com

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Chapter 1: Introduction

PROFESSIONAL CONDUCT, sometimes described as professional ethics or legal ethics, is a phrase used to describe the standards of behaviour which must be demonstrated by all solicitors. What these phrases support is the notion of values and standards which must be met to ensure a consistent approach to the business of law and the delivery of a proper level of service.

The source of these values is both statutory (for example, through the Solicitors Act 1974 and the Legal Services Act 2007) and non-statutory (such as through common law developments). These values are often closely connected.

Who sets the standards?

The standards of behaviour are set and monitored by the Solicitors Regulation Authority (SRA). The SRA is the independent regulatory body of the Law Society of England and Wales, and on its website it states: ‘Our purpose is to protect the public by ensuring that solicitors meet high standards and by acting when risks are identified’.

These high standards are achieved through various means:

- By setting standards for the education of solicitors and for continuing professional development;
- Issuing practising certificates to solicitors;
- Authorising and regulating law firms;
- Setting standards of behaviour for solicitors and all those working in law firms;
- Supervising solicitors and law firms; and
- Taking disciplinary and enforcement action when necessary.
In its work, the SRA must ensure that it upholds the regulatory objectives in the Legal Services Act 2007. This is required of all regulators of legal service providers (bodies such as the Bar Standards Board for barristers and the Council for Licensed Conveyancers for licensed conveyancers who are known as ‘approved regulators’). These are statutory requirements to support the following concepts:

- Protecting and promoting public interest;
- Supporting the constitutional principles of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse, and effective legal profession;
- Increasing public understanding of citizens’ legal rights and duties; and
- Promoting and maintaining adherence to the professional principles.

The professional principles highlighted in the final regulatory objective must be achieved by ‘authorised persons’, which means individuals who are authorised and able to perform reserved legal activities (activities statutorily restricted to specific categories of qualified persons such as advocacy and litigation).

The professional principles are that:

- Authorised persons should act with independence and integrity;
- Authorised persons should maintain proper standards of work;
- Authorised persons should act in the best interests of their clients,
- Persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court by virtue of being authorised persons, should comply with their duty to the court to act with independence in the interests of justice; and
- The affairs of clients should be kept confidential.

Where are the professional conduct behaviours explained?
The standards of behaviour for solicitors are contained in the SRA Handbook. This is an online resource available on the SRA website. The Handbook is
kept under constant review and is regularly updated to reflect changes in the SRA’s requirements and legal changes. You must always ensure to use the most current version of the Handbook.

The Handbook contains all the rules and regulations which the SRA can use to ensure that the regulatory objectives and professional principles are achieved. Table 1 provides an overview of the various entries in the Handbook.

<table>
<thead>
<tr>
<th>Handbook requirement</th>
<th>Purpose</th>
</tr>
</thead>
<tbody>
<tr>
<td>SRA Principles</td>
<td>The ‘scene setters’ – 10 mandatory ethical behaviours which are the starting point for all conduct related decisions</td>
</tr>
<tr>
<td>SRA Code of Conduct 2011</td>
<td>The application of the Principles in particular scenarios, such as in terms of the behaviours which must be demonstrated when considering conflict, when appearing in court, or dealing with third parties. The requirements are expressed as Outcomes</td>
</tr>
<tr>
<td>SRA Accounts Rules 2011</td>
<td>Rules to regulate the holding of client money which are designed to ensure that client money is safe</td>
</tr>
<tr>
<td>SRA Practice Framework Rules 2011</td>
<td>Restrictions on the types of business through which solicitors may practice – so that clients and the public have statutory protections when receiving such services</td>
</tr>
<tr>
<td>SRA Authorisation Rules 2011</td>
<td>The framework for the authorisation of law firms by the SRA including detailed conditions relating to initial and continuing authorisation</td>
</tr>
<tr>
<td>SRA Practising Regulations 2011</td>
<td>Requirements about applications for practising certificates by solicitors (and registration by European lawyers and registered foreign lawyers (RFLs)) including conditions which must be met and notification requirements</td>
</tr>
<tr>
<td>Solicitors Keeping of the Roll Regulations 2011</td>
<td>Regulations relating to the upkeep of a roll (list) of all solicitors of the Senior Courts of England and Wales</td>
</tr>
<tr>
<td>SRA Qualification Regulations 2011</td>
<td>Regulations setting standards relating to the training of students and trainee solicitors</td>
</tr>
<tr>
<td><strong>SRA Training Provider Regulations 2011</strong></td>
<td>Regulations setting standards in respect of training providers and training establishments, training principals, and professional skills course providers</td>
</tr>
<tr>
<td><strong>SRA CPD Regulations 2011</strong></td>
<td>Regulations which govern the compulsory ongoing training of practising solicitors and registered European lawyers (RELs)</td>
</tr>
<tr>
<td><strong>SRA Admissions Regulations 2011</strong></td>
<td>Regulations relating to the process of admitting individuals to the roll of solicitors including notification requirements and the appeals process</td>
</tr>
<tr>
<td><strong>SRA Qualified Lawyers Transfer Scheme Regulations 2011</strong></td>
<td>Regulations which set criteria for the training and admission of lawyers seeking to become solicitors from other jurisdictions and from other UK-qualified lawyers</td>
</tr>
<tr>
<td><strong>SRA Higher Rights of Audience Regulations 2011</strong></td>
<td>Regulations relating to the qualifications required by solicitors and registered European lawyers seeking to exercise rights of audience in the higher courts in England and Wales</td>
</tr>
<tr>
<td><strong>SRA Quality Assurance Scheme for Advocates (Crime) Regulations 2013</strong></td>
<td>Regulations regulating the practice of criminal advocacy in England and Wales</td>
</tr>
<tr>
<td><strong>SRA Suitability Test 2011</strong></td>
<td>A test to assess the suitability of individuals as follows:</td>
</tr>
<tr>
<td>• Students and trainees</td>
<td></td>
</tr>
<tr>
<td>• Qualified lawyers under the Qualified Lawyers Training Scheme Regulations</td>
<td></td>
</tr>
<tr>
<td>• Individuals seeking admission to the roll of solicitors</td>
<td></td>
</tr>
<tr>
<td>• Individuals applying to become compliance officers, owners, or managers under the SRA Authorisation rules</td>
<td></td>
</tr>
<tr>
<td>• Individuals seeking restoration to the roll of solicitors</td>
<td></td>
</tr>
<tr>
<td><strong>SRA Indemnity Insurance Rules 2013</strong></td>
<td>Rules relating to compulsory professional indemnity insurance requirements applicable to private practice in England and Wales</td>
</tr>
</tbody>
</table>
### Table 1: An overview of the SRA Handbook

<table>
<thead>
<tr>
<th>SRA Indemnity Rules 2012</th>
<th>Rules relating to indemnity cover for practices which ceased before 31 August 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>SRA Compensation Fund Rules 2011</td>
<td>Rules relating to the maintenance of a fund, and contributions to the fund, so that grants can be made to clients in specific circumstances</td>
</tr>
<tr>
<td>SRA Intervention Powers (Statutory Trust) Rules 2011</td>
<td>Rules relating to the maintenance of a statutory trust fund by the SRA</td>
</tr>
<tr>
<td>SRA Disciplinary Procedure Rules 2011</td>
<td>Rules regulating the procedures for use of disciplinary powers by the SRA</td>
</tr>
<tr>
<td>SRA (Cost Of Investigation) Regulations 2011</td>
<td>Regulations prescribing the charges which must be paid to the SRA in respect of disciplinary procedures</td>
</tr>
<tr>
<td>SRA Overseas Rules 2013</td>
<td>Regulations applying to individuals practising overseas and to overseas practices</td>
</tr>
<tr>
<td>SRA Property Selling Rules 2011</td>
<td>Rules setting standards for the estate agency departments of law firms</td>
</tr>
<tr>
<td>SRA Financial Services (Scope) Rules 2001</td>
<td>Rules setting the scope of regulated activities which can be undertaken by law firms without being authorised by the Financial Conduct Authority</td>
</tr>
<tr>
<td>SRA Financial Services (Conduct Of Business) Rules 2001</td>
<td>Rules setting standards applicable to the regulated activities carried on by law firms without authorisation by the Financial Conduct Authority</td>
</tr>
<tr>
<td>European Cross-Border Practice Rules 2011</td>
<td>Rules applying to European cross-border practice</td>
</tr>
<tr>
<td>SRA Insolvency Rules 2012</td>
<td>Rules relating to standards which must be met by solicitors and registered European lawyers when carrying on insolvency practice</td>
</tr>
</tbody>
</table>

## How does the SRA regulate?

The SRA regulatory style is designed to ensure that it supports the regulatory objectives and creates a framework in which the professional principles are
more readily achieved. The style is expressed as being outcomes-focused, risk-based, and entity-based.

Outcomes-focused regulation (OFR) is described by the SRA in the following way: ‘OFR is a regulatory regime which focuses on the high level principles and outcomes that should drive the provision of services for clients. It is backed by firm enforcement action where required’. The regulator says that this means OFR requires you to put your clients’ interests first (unless this prejudices the public interest), that it is about flexibility, and it is a move away from prescriptive rules wherever this is appropriate. It is not intended to be light touch, tick box, or ‘one style fits all’ regulation.

Risk-based regulation is a style of regulation which rates the severity of an event in terms of its impact on the achievement of the regulatory objectives and the impact on clients and the public interest. In this way risk is graded, and the regulator’s response is intended to be a proportionate one.

The SRA has given clues to its assessment of risk by publishing a Regulatory Risk Index identifying level 1 risk as the highest category of risk event that can occur. High-level risks include many acts associated with poor conduct behaviours such as breach of confidentiality, failure to act with integrity and ethics, and discrimination. The expectation is that firms will adopt appropriate risk prevention measures with systems, controls, monitoring, and review procedures intended to minimise the likelihood of a risk materialising and, if this cannot be avoided, attempting to limit the damage caused.

Entity-based regulation represents a change in emphasis from regulating individuals to regulating firms (which includes sole practitioner businesses) as entities. This means that the SRA is looking very closely at the safety of the entities which it authorises and has an expectation that there are more visible and well-structured corporate responsibility and governance arrangements. It also means that it expects everyone within the entity, regardless of their legal qualification or role, to understand regulatory requirements.

The SRA regulates solicitors and also authorises and regulates law firms. As mentioned in the previous paragraph, a law firm may be a sole practitioner. It can also be a recognised body (meaning a conventional law firm where the partners, directors, or members are all solicitors), or a licensed body (meaning a law firm in which solicitors are in business with, and/or are owned by, or are receiving external investment from, non-lawyers). This last type of business was
introduced by the Legal Services Act 2007 and a business providing legal services in this way is sometimes described as an alternative business structure (ABS).

Regardless of structure or composition, the same high standards of behaviour must be demonstrated by all entities, and all entities must comply with the same regulatory requirements in the SRA Handbook.

The role of compliance officers
Regardless of the type of business, it is a standard condition of authorisation that there must be two specific role-holders employed within the entity: a compliance officer for legal practice (COLP) and a compliance officer for finance and administration (COFA).

The role-holders must be approved by the SRA and they have specific functions:

- The COLP must take all reasonable steps to ensure compliance with the terms and conditions of the firm’s authorisation (except for any obligations imposed under the SRA Accounts Rules). They must also ensure compliance with any statutory obligations of the firm, its managers, employees, or interest holders in relation to the body’s carrying on of authorised activities;
- The COFA has a similar role but it is restricted to the SRA Accounts Rules (in other words, a responsibility to keep client money safe);
- Both must record all breaches of SRA requirements; and
- Both have reporting obligations. All material breaches must be notified to the SRA in a timely manner. In the case of compliance officers working in an ABS, they must also report all other (non-material) breaches as well. The compliance officers in non-ABS firms do not have to report non-material breaches, but they do need to have up-to-date records available for SRA inspection and they may be asked to produce these on demand.

What is a material breach?
This is an important concept to understand. Professional conduct failings may create a breach which must be notified to the compliance officers and reported to the SRA immediately if classified as a material breach.
The SRA does not produce a list of material breaches as it expects the firm to evaluate this. However, pointers can be extracted from the Handbook and in SRA communications with the profession. For example, guidance notes to the Authorisation Rules state that whether a breach is material or not may be tested against the following criteria:

- The detriment, or risk of detriment, to clients;
- The extent of any risk of loss of confidence in the firm or in the provision of legal services;
- The scale of the issue; and/or
- The overall impact on the firm, its clients, and third parties.

In other commentaries, the SRA has suggested other tests of materiality:

- Would you feel you were being transparent with the SRA if you did not disclose something?
- A good rule of thumb to adopt is that, if you are not certain about materiality, it is worth letting the SRA know;
- Well-run firms should be able to use their own judgement about what constitutes a breach or a serious risk; and
- If a COLP/COFA is wondering if something is material, then it probably is.

Where do I start?
This report focuses on three particular sets of requirements which are the SRA Principles, the SRA Code of Conduct 2011, and the SRA Accounts Rules 2011 (although others are mentioned from time to time as necessary). A brief explanation of these sets the scene for the remainder of the report.

The SRA Principles
These are 10 behaviours which the SRA describes in the following way: ‘They embody the key ethical requirements on firms and individuals who are involved in the provision of legal services. You should always have regard to the Principles and use them as your starting point when faced with an ethical dilemma’.

These statements of behaviour set the tone for your professional personality. They are described as over-arching and all-pervasive, which
means that breach of a Principle can result in disciplinary action. They apply not only to solicitors (however they practice) but also to every other non-solicitor employee (which therefore means all support staff, trainee solicitors, paralegals etc.) or managers (director, partner, or member) working in a law firm. The Principles are as follows:

‘You must:
1. Uphold the rule of law and the proper administration of justice;
2. Act with integrity;
3. Not allow your independence to be compromised;
4. Act in the best interests of each client;
5. Provide a proper standard of service to your clients;
6. Behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. Comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;
8. Run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. Run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity; and
10. Protect client money and assets.’

Key points to note about the Principles
- The principles are mandatory;
- The Principles apply to everyone working in the law firm and not just the solicitors;
- How you respond to a Principle will be determined by various factors including your role, responsibilities, and experience. The phrase ‘run your business or carry out your role in the business’ makes this explicit in Principles 8 and 9;
- The Principles will be breached if you allow another person to do something on your behalf which would be a breach of the Principles if you did it;
Where two or more Principles come into conflict, the Principle which takes precedence is the one which best serves the public interest, especially the public interest in the proper administration of justice. (Consider the dilemma should your client or a third party want you to help them to mislead the court; this may be in the client’s best interests, but the requirement to uphold the rule of law and the proper administration of justice would override this consideration); and

- The reference to independence in Principle 3 relates to independence from the influence of others as well as the ability to give independent advice to clients.

The SRA Code of Conduct 2011

The Code describes the conduct behaviours which must be achieved in dealings with clients, with colleagues, with third parties, the court, and the SRA. The behaviours are described as Outcomes. Achieving an outcome is expressed as a positive result which will benefit and protect clients and the public.

How you achieve an Outcome will depend on the circumstances. In this way, the Code is the purest form of outcomes-focused regulation in the SRA’s current armoury. The SRA has created a system which enables you to think flexibly so that you can take into account the way you work, the risks of breaching behaviours, and the needs of your clients. This is very different from the previous style of setting conduct behaviours by way of very detailed and prescriptive rules and comprehensive guidance.

In fact, there is actually a lack of guidance in the Code. Instead, the Outcomes are supported by a series of Indicative behaviours (IBs) which, the SRA states, ‘specify, but do not constitute an exhaustive list of, the kind of behaviour which may establish compliance with, or contravention of the Principles’. This means that whilst the Outcomes are mandatory, the IBs are non-mandatory. The SRA has issued warnings that an individual should not follow an IB without thinking about the actual circumstances.

The Code is divided into sections and chapters as shown in Table 2.
Key points to note about the Code

- Achieving an Outcome is necessary in order to ensure that you are also achieving the overarching SRA Principle;
- Outcomes are mandatory;
- Outcomes must be achieved by everyone working in the law firm, regardless of qualification or role, and not just the solicitors;
- The Outcomes deal with very familiar issues and should not be surprising, particularly if you are employed in a well-run firm with a good compliance culture with good business disciplines;
- What may be surprising is that how you achieve an Outcome is based on personal choice and much will depend on your circumstances, the nature of your work, and the clients you are servicing;
- Whilst the IBs give pointers about how to achieve Outcomes they are not mandatory and come with an SRA health-warning that they should not be adopted without regard for your client’s needs; and
Your firm will have systems and controls designed to ensure that it can demonstrate that the Outcomes are being achieved and that breaches are being recorded by the COLP as required under the SRA Authorisation Rules. Everyone will be expected to be familiar with these systems.

SRA Accounts Rules 2011
This is a long document containing 52 detailed rules designed with one purpose in mind: to keep client money safe. Risk to client money is seen as having one of the greatest impacts on the reputation of the profession, and the Accounts Rules allow very little scope for flexibility. After all, an Outcome to keep client money may generate a lot of unsafe responses without the support of very detailed Rules to show what is expected.

The COFA’s focus is on compliance with these Rules and to ensure that everyone in the firm – regardless of job role – complies with the Accounts Rules.

Key points to note about the SRA Accounts Rules
■ The Rules are mandatory; They create a very prescriptive framework for keeping client money safe;
■ The firm’s COFA is responsible for recording all breaches and for reporting all material failings;
■ There will be systems designed to ensure that all breaches are kept to a minimum. There are a number of breaches which can be avoided simply through good housekeeping and ensuring a well-organised approach to handling client money; and
■ Mistakes will happen and the safest thing to do in such circumstances is to let the COFA and the accounts team know what has happened as quickly as possible; in other words, openness will make the firm a safer environment in which to work.

Understanding the language
Part of the mystery of regulation is the overuse of abbreviations and acronyms and relying on over-used phrases when writing about, or discussing, regulatory matters. Table 3 summarises the most common terms to be aware of.
<table>
<thead>
<tr>
<th>Term</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABS</td>
<td>Alternative business structure</td>
</tr>
<tr>
<td>Code</td>
<td>Solicitors Code of Conduct</td>
</tr>
<tr>
<td>COFA</td>
<td>Compliance officer for finance and administration</td>
</tr>
<tr>
<td>COLP</td>
<td>Compliance officer for legal practice</td>
</tr>
<tr>
<td>Handbook</td>
<td>The SRA Handbook</td>
</tr>
<tr>
<td>IB</td>
<td>Indicative Behaviours in the SRA Code of Conduct 2011</td>
</tr>
<tr>
<td>LeO</td>
<td>The Legal Ombudsman</td>
</tr>
<tr>
<td>Outcomes</td>
<td>Outcomes in the SRA Code of Conduct 2011</td>
</tr>
<tr>
<td>OFR</td>
<td>Outcomes-focused regulation</td>
</tr>
<tr>
<td>Principles</td>
<td>The SRA Principles</td>
</tr>
</tbody>
</table>

Table 3: The most commonly used terms

Reference

1. See: www.sra.org.uk.