Robin Simon LLP August 2007

News flash

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The Solicitors' Code of Conduct - Red Tape or Opportunity?

Megan Howe and Sophie Lucas review the new Code of Conduct and consider whether its introduction should be viewed as an addition to the administrative burden faced by firms, or as an opportunity to improve risk management during a "soft" solicitors indemnity insurance market - and reap the benefits when the market hardens.

After almost eight years in the pipeline, the Solicitors' Code of Conduct was introduced on 1 July 2007. The general view among solicitors and commentators seems to be that the Code is a tidy-up of the existing rules and regulations, as the radical changes (to the rules on conflicts and confidentiality) were introduced in April last year. Many solicitors are taking the view that, provided that they operate a well-run practice, they will comply with the new Code and will not need to make significant changes to the way they run their practices.

Will Underwriters take the same view come renewal? And should solicitors use the Code as an opportunity to ready their practises for changing conditions in the solicitors indemnity market?

The most significant changes, from Underwriters' perspective, are likely to be Rules 2 and 5, which relate to client care and business management.

Client Care

Rule 2.02 sets out a list of information which must normally be given to a client as soon as possible after the solicitor has agreed to act. The solicitor must:

- Clearly identify the client's objectives in relation to the work to be done;
- Provide a clear explanation of the issues involved & options available to the client;
- Agree the next steps to be taken;
- Keep the client informed of progress, unless otherwise agreed;
- Agree an appropriate level of service with the client at the outset of the matter and, if necessary, during the course of it;
- Explain both the solicitor's and the client's responsibilities;
- Ensure that the client is given (in writing) the name and status of the person dealing with the matter, and the name of the person responsible for its overall supervision; and
- Explain limitations or conditions resulting from the solicitor's relationship with a third party which affect the steps that can be taken on the client's behalf.

There is also a continuing obligation to keep the client up to date with progress of the matter and any changes affecting the original agreement between the client and the solicitor. Although the Code does not specify that the information must be given in writing, it does specify that it must be provided in a clear and readily accessible form. As it will be for the solicitor to show that they have complied with the requirements, we expect that Underwriters will look for evidence that the requirements are being met – and the easiest way to show compliance will be to record the information in a letter to the client.

This all sounds very sensible, and we suspect that most solicitors would consider their clients are currently made aware of, and understand, these points. However, a close

examination of these requirements shows that they go further than current obligations, and that a 'pro-forma' client care letter is unlikely to be sufficient to meet the new requirements. A lot of the information that must be provided will be unique to the particular matter, and consequently, client care letters currently in use may not satisfy the new obligations.

Underwriters are likely to see these new obligations as something of a double-edged sword. If a firm complies with the Code, the chances of a successful professional negligence claim against it will decrease significantly due to the clarity surrounding the scope of the retainer. Balanced against that however, is the "red-tape" risk which always accompanies increased regulation – that if a firm is guilty of a technical default against the Code, even where the default has no substantive impact on the handling of a matter or the result achieved for the client - the Code means it is possible that awards may be made against firms. Only time will tell how this situation is dealt with by the Solicitors Regulation Authority, who have said that breaches will be dealt with proportionately. This assertion has been met with some hesitation given the Authority's apparent desire to show that they are a regulator with some muscle.

Business Management

Eleven pages of the Code are devoted to Business Management. Rule 5.01(1) sets out a list of twelve matters which the principals of firms, members of LLPs and directors of companies must make particular provision for the effective management of. Those matters are diverse and range from those which clearly relate to the protection of client interests (such as the supervision of client matters, the control of undertakings and identifying conflicts), to matters such as budget control, expenditure and cash flow, IT failures and abuses, and equality and diversity. The value of making matters such as equality and diversity a concern of the Solicitors Regulation Authority is arguable.

The emphasis of Rule 5 is on creating arrangements to ensure compliance. Arrangements encompass all "systems, procedures, processes and methods of organisation put in place to achieve the required outcome". The guidance to the Code sets out that while the method for delivery is a matter for the firm, evidence that arrangements are in place, and are operating, is required to show compliance. Arrangements are unlikely to be considered appropriate unless they include a mechanism for periodic review for effectiveness. All of this points to the need for a broad-range of written systems.

In this way, it appears that the Solicitors Regulation Authority is trying to move the profession towards the internal audit focus which has been adopted by accountants and other professionals. What are the benefits of this focus, and should firms be using the opportunity provided by the new Code of Conduct to cement an internal audit approach?

In any kind of market, Underwriters will be attracted to those firms which are able to show they take a pro-active approach to risk management, as those firms tend to be lower risk. The market for solicitors indemnity insurance has been continually "soft" since the demise of SIF in 2000, but the general expectation is that the market must start to harden within the next few years. During a "soft" market, Underwriters tend to be more flexible about the risks they will accept and the premiums negotiated by firms can be very favourable. However, during a "hard" market Underwriters will take quite a different view to risk.

Apart from the obvious benefits which accompany a risk aware firm culture, there is also likely to be a clear commercial benefit once the solicitors indemnity market hardens, in terms of the availability of cover and the premiums payable. While this incentive has always been there, the likelihood of a hardening market, in conjunction with the new regulatory requirements, means that a whole-hearted acceptance of the requirements of the Code is likely to bring significant commercial benefits to firms in the near future.

If you would like to know more about the new Code, its impact on your practice and your insurance arrangements, please contact:

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