

Review of the Regulation of Law Firms: call for evidence



A response by the Association of Personal Injury Lawyers

March 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Membership comprises of solicitors, barristers, legal executives and academics who are all committed to serving the needs of people injured through the negligence of others.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Stephen Lawson	Secretary	APIL Executive Committee
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Executive summary

- APIL believes that current regulatory practice for solicitors is unsatisfactory and ineffective.
- Regulation of the legal profession should be based on clear rules with professional sanctions so that members of the legal profession know what they can and cannot do.
- We believe that regulation should be clear, transparent and have a detailed framework behind it.
- The Financial Services Authority's (FSA's) regulatory regime for insurers is 'principles' based and, in our view, principles based regulation is not specific enough. Whilst principles based regulation can prevent loopholes being exploited a broad brush approach means that it is difficult to predict with certainty the line the regulator will take on a particular issue. This can lead to an inability to robustly regulate.
- A regulator has to be particularly alert to the risks of regulating businesses which may have non-lawyer owners where those owners are subject to different standards of regulation. There must be a 'level playing field' between regulated business structures and all regulated businesses must have to abide by the same rules.
- There are tensions between consumer demands, business requirements and professional values and the pressure is constantly increasing. The consumer demands are paramount and we must ensure that the public are protected.
- It is important to ensure that regulation and bureaucracy are kept to a minimum.

Introduction

It is vital, in our view, that there is transparency and clarity in regulation and that detailed consideration is given to resolving the tension between professional ethical standards on the one hand and commercial enterprise on the other.

We are not placed as an organisation to answer or provide comment on each question and therefore our general comments are given.

The effectiveness, or otherwise of current regulatory practice

APIL believes that current regulatory practice for solicitors is unsatisfactory and ineffective. Regulation of the legal profession should be based on clear rules with professional sanctions so that members of the legal profession know what they can and cannot do. If requested the Solicitors Regulation Authority (SRA) can now publish the disciplinary history of a solicitor and therefore it is essential that solicitors and those employed in their practices are told what the regulator expects of them.

The SRA has been seriously disappointing in its regulation of the profession in two areas recently. Firstly in its inadequacy to discipline members of the profession who have acted unethically in the miners cases and secondly in their failure to enforce rule 9 of the solicitors code of conduct sufficiently.

In the case of the miners claims the disciplinary hearings were brought many years after the breaches had been committed. The solicitors concerned were reported to have made a vast amount of money and by the time the Solicitors Disciplinary Tribunal was able to impose some form of sanction; it appeared ineffectual compared to the breach committed. We believe that this shows a clear failure of the current regulator, as the actions of the SRA were too slow and far too late. The lack of timely

discipline impacts on the public's confidence in the profession and can lead to the entire profession being 'tarred with the same brush'.

Anecdotal evidence from the SRA suggests that over 50 per cent of firms are currently not complying with rule 9¹. At the recent SRA board meeting in December 2008 the Board noted that useful work was being done by the Practice Standards Unit in encouraging compliance of rule 9 but it accepted that the commercial reality tended to mean that good practice was always likely to be under assault from bad.² We believe that 'encouraging compliance' is insufficient. The SRA should be ensuring compliance by imposing sanctions consistent to the level of breach committed. The SRA has stated publicly that it will look at reviewing rule 9 on the basis that people aren't complying with it. We do not believe non compliance with the rule is a legitimate reason for amendment.

There has been a suggestion in the Legal Services Board business plan³ that there is a plan to move towards 'principles' based regulation of the profession rather than rules based regulation. It is vital for the protection of the public, as well as the protection of the regulated person or business, that regulation is clear, transparent and has a detailed framework behind it. We believe there is a risk that a 'principles' based regime will not provide enough clarity and transparency and the regulator must guard against this.

The Financial Services Authority's (FSA's) regulatory regime for insurers is 'principles' based and, in our view, principles based regulation is not specific enough. Whilst principles based regulation can prevent loopholes being exploited a broad brush approach means that it is difficult to predict with certainty the line the regulator will take on a particular issue. This can lead to an inability to robustly regulate.

¹ Solicitors' Code of Conduct 2007

² SRA Extract from minutes of the Board meeting held on 18 December 2008

³ Legal Services Board Draft Business Plan 2009/10, section 4, paragraph 30.

The Financial Services Authority is responsible for regulating insurers and thus a practice known as third party capture (TPC). TPC is the process by which an insurer approaches a person knowing that he has been involved in an accident with the insurer's own insured and in the knowledge that that person could be injured and may want to make a claim for personal injury. The insurer then offers a sum of money to settle the claim immediately or offers to refer the claim to their panel firm of solicitors. The insurer 'captures' the claim to deal with it, generally before independent legal representation can be obtained.

By examining this practice and the principles based regulation of the FSA it can be shown that principles based regulation is difficult to enforce. For example, it is difficult to prove with principles based regulation that an insurer targeting an injured person, in an effort to get them to use their services, is not acting with 'integrity' (integrity is one of their principles based rules of regulation). The insurer could argue that it has the injured person's interests at heart in getting him a quick medical report; however, the reality is that the insurer has an obligation to its shareholders to preserve profits. It is difficult to prove with such a broad principle that the insurer is acting with anything but integrity.

The implications of the move towards ABSs

We believe that the regulator has to be particularly alert to the risks of regulating businesses which may have non-lawyer owners where those owners are subject to different standards of regulation. There must be a 'level playing field' between regulated business structures and all regulated businesses must have to abide by the same rules. To apply different standards to different business structures could potentially give one regulated business a commercial advantage over another. It

would be unfair, in our view, if one type of business structure had a commercial advantage over another type purely because a different regulatory regime applied.

There is a risk of a conflict of interest between the solicitor and client in a referral situation if the solicitor is dependent on the insurer for business or if the insurer has an interest in the solicitor's firm. Solicitors are bound by conduct rules to avoid conflicts of interest but poor or ineffective regulation of alternative business structures may allow less reputable firms or organisations to take advantage of this situation.

Practical issues that may need to be addressed by the Legal Services Board and/or Solicitors Regulation Authority in making any changes

The Legal Services Act said that there must be a division of powers between the Law Society and the regulatory aspect of the Law Society, now the SRA. The paper poses the question, whether the respective roles of the SRA and Law Society with regard to regulation are clear⁴. We suggest that they must be clearer both to the profession and to the public.

There are tensions between consumer demands, business requirements and professional values and the pressure is constantly increasing. The consumer demands are paramount and we must ensure that the public is protected.

There is currently work being conducted by the Ministry of Justice on the claims process and the profession is concerned that the work should be properly costed with evidenced based research to ensure that there is a suitable level of supervision and the needs of the client are provided for. This must also be weighed against the Legal

⁴ Page 89 Call for evidence.

Complaints Service advocating to the profession that if the correct level of service is not provided to the client, a solicitor could be fined.

There is an overwhelming sense amongst the profession that the Government is rushing to pare things down and to improve regulation. However, neither should be done to the detriment of the consumer.

It is important to ensure that regulation and bureaucracy are kept to a minimum. Solicitors and those employed in their businesses are regularly reviewed by the Legal Services Commission (where the practice holds a contract), HM Revenue & Customs, Health and Safety Executive, Solicitors Regulation Authority, Lexcel, Investors in People, and it is important to be mindful that others are regulating the profession too and that some overlap is likely and it must be clear who the overarching body responsible is.

The SRA has this difficulty with the regulation of fraud for this reason. The SRA, police Claims Management Regulator, are all regulating in the same area, but with no overarching person responsible for coordinating the review. When regulation is considered there must be thought as to how to what part others have to play in regulating the profession and ensuring that regulation does not become too onerous.

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