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## Evidence base

By Peter Scott 24 January 2024

Demonstrating compliance, and evidencing it, is necessary in the current regulatory landscape. Peter Scott offers some practical ways to do it.



The following Solicitors Regulation Authority (SRA) requirements can all too easily be overlooked in a busy law firm, where everyone is prioritising looking after their clients to the best of their abilities and in a compliant manner. However, being compliant on its own is not sufficient. Solicitors, and their firms, must also be able to demonstrate and evidence compliance. The SRA Code of Conduct (Code) requires:

- you are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA's regulatory arrangements (para 7.2), and
- you keep and maintain records to demonstrate compliance with your obligations under the SRA's regulatory arrangements (para 2.2).

If challenged by the SRA, how would you and your firm be able to prove that you are compliant with the regulations?

## Supervision

Paragraph 3.5 (b) of the code requires you to effectively supervise work being done for clients, and para 4 requires that you must have an effective system for supervising clients' matters.

Supervision of more junior lawyers is not only a vital risk management function, but is also an integral part of the law firm financial model based around 'leverage', which involves work being delegated to those with the appropriate level of expertise (and cost). Since COVID-19, with more lawyers working from home, supervision has become even more important and hybrid working is likely to be a permanent feature of many firms' working arrangements.

Whenever there is an allegation of negligence, or non-compliance, arising out of the work of a more junior lawyer, the following questions arises as to whether that junior lawyer has been adequately supervised:

1. Did the firm have an effective system in place for supervising clients' matters?
2. Was the person who was required to 'supervise' actually doing so to the required standard?

A great deal of advice is given to lawyers about what they need to do to effectively supervise, but very little if anything is said about how to evidence supervision.

This was brought into sharp focus for me when providing compliance training to a law firm. When explaining the need to evidence supervision, I suggested that those supervising should make an attendance note every time they carried out supervision. In response one of the partners said: "I manage eight fee-earners, each of whom comes to see me several times a day. How can I possibly make an attendance note every time I supervise a fee-earner? It is just not possible given my own workload and everything else I have to do."

At that point, one of her fee-earners responded: "Every time I come to see you to ask you a question or with a draft for your approval, I then go back to my desk and do an attendance note for the file."

I suggested to that partner that if each of her fee-earners did that in respect of her supervision of them, then there would be a complete record of how she was supervising them. She agreed that this was really the only practical way she could create an evidential base for the supervision of her

group. If a system like that can be established, whereby those supervised are required to record how they are being supervised, with those supervision records being monitored and filed on a separate supervision file, then that can be an effective way to demonstrate compliance to a regulator.

## **Referrals**

Paragraph 5.2 of the Code for Solicitors states that “where it appears to the SRA that you have made or received a referral fee, the payment will be treated as a referral fee unless you show that the payment was not made as such”.

The Code for Firms applies the provisions of paras 5.1, 5.2 and 5.3 of the Code for Solicitors in their entirety.

A particular compliance risk here is likely to relate to referrals of clients to other professionals or third parties in circumstances where those third parties also refer work to the law firm. It is a fact of legal life that clients ask solicitors for recommendations to other professionals such as accountants, and solicitors will, with the best interests of a client in mind, offer such referrals. If the feedback from your clients is excellent about a particular professional firm you have recommended, then it is likely that you will continue to refer clients to that firm.

That other professional may also regard you as an excellent solicitor, and in turn refer clients to you. This is what happens in practice, with referrals being made by each firm to the other, always in the best interests of their clients, and without there being any arrangement between them as to reciprocity. However, such a course of referrals could trigger an allegation by the SRA under para 5.2 above, that you have made a referral fee (by referring clients to the other firm) and received a referral fee (by receiving introductions from the other firm).

I would suggest that one way to provide evidence that you did not make a referral fee will be to record clearly on each occasion the reasons for your referral of a client to that third party, by way of an attendance note, and preferably by an email or letter to the client.

On the other hand, how can you prove that you have not received a referral fee from the other firm in return for having made referrals?

## **Other SRA regulations**

Paragraph 2.1 of the Code for Firms requires you to have effective governance structures, arrangements, systems, and controls in place that ensure you comply with all the SRA's regulatory arrangements, as well as with other regulatory and legislative requirements, which apply to you.

Given the non-specific ambit of this regulation, how can you demonstrate that you are on a continuing basis meeting those requirements?

## **Data protection**

For example, in September 2018 the Information Commissioners Office (ICO) issued a 'privacy sweep' to assess how well organisations across various sectors in the UK had implemented key elements of privacy accountability into their own internal privacy programs and policies, and one of the questions was the following: "Confirm your organisation ensures staff are given training regarding the protection of personal information, and you inform them of organisational privacy policies, procedures, and best practices."

This became a very real issue for a law firm client which had reported a data loss (eventually established not to have been caused by the firm) to the ICO. The firm then received a letter from the ICO with detailed questions, including the following:

- What training did [the firm] provide to its staff in relation to the requirements of [data protection legislation] prior to this incident?
- Was this training mandatory?
- How frequently did this training occur?
- Please provide details as to the measures you had in place to ensure that all staff attend the mandatory training.
- Please provide the training documentation used or outline the content of this training.
- Can you confirm that the employee(s) involved in this incident received the above mentioned data protection training?
- If so, when did they receive this training?

Happily, that firm had records to answer all those questions.

Data protection and data loss involve high incidence and high impact risks, and require:

- The identification and assessment of all such risks;
- Evidence of compliance to be recorded by embedding every aspect of such compliance in a firm's IT systems; and
- The effectiveness of such risk and compliance control procedures to be monitored, reviewed, and reported, on a continuing and regular basis.

Developing systems to embed compliance procedures into IT systems in this way is, I would suggest, a cost-effective way to enable law firms to evidence compliance.

In the example given above, if that law firm had not been able to prove to the ICO that it had provided the requisite training for its fee-earners, then it would also have been SRA non-compliant, not only under para 2.1 (a) of the Code for Firms, but also under the SRA's continuing competency requirements below.

### **Continuing competence**

Paragraph 3 of the Code for Solicitors indicates the importance of service and competence to the SRA. In particular:

- Paragraph 3.3 states you maintain your competence to carry out your role and keep your professional knowledge and skills up to date.
- Paragraph 3.6 states you ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical, and regulatory obligations, up to date.

And likewise in the Code for Firms:

- Paragraph 4.3 states you ensure that your managers and employees are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date.

Most solicitors I speak with say that they keep a diary of the learning and development they undertake. However, this is not only a requirement for the individual, but equally one for those who are managing others, and for their firms. How can those managing others, or their firms, evidence the continuing competence of everyone in the firm? I would suggest that all learning and development activities are embedded in a firm's IT systems in order to evidence compliance.

## **Third parties and outsourcing**

The above are just a few examples which show how difficult it can be to demonstrate compliance relating to everyday activities in a law firm. However, there are many more requirements in SRA regulation which solicitors and their firms need to be aware of, including some very broad requirements in paragraph 2 of the Code for Firms: “Ensuring third parties you contract with do not cause or contribute to your being in breach of SRA regulations.”

Paragraph 2.1 of the Code for Firms requires you to have effective governance structures, arrangements, systems, and controls in place that ensure your managers and interest holders and those you employ or contract with do not cause or substantially contribute to a breach of the SRA’s regulatory arrangements by you or your managers or employees.

This can have implications in relation to outsourcing which is used by many law firms to provide services and functions that a firm does not wish to, or cannot cost effectively, provide itself. However, there can be risks to law firms when outsourcing to third parties (particularly in relation to complying with the duty of confidentiality in the sphere of IT outsourcing and use of the cloud).

How can a law firm when outsourcing, both control third party outsourcer provider risks, and manage the SRA regulatory risks associated therewith, as well as evidencing compliance outlined above?

Contractual provisions can attempt to do so, but with many outsourcer providers (particularly in the IT sphere) being more contractually powerful than law firms, and often based abroad, it is not always possible to do so, or at best, contractual provisions are illusory.

## **Managing all material risks**

Paragraph 2.5 of the Code for Firms requires you identify, monitor and manage all material risks to your business, including those which may arise from your connected practices.

As with the requirement to “comply with other regulation and legislation which applies to you”, this requires that you have:

- identified all material risks which apply to you; and
- taken steps to manage all of them.

How can you not only achieve those requirements, but also evidence you are doing so on a continuing basis?

These requirements are not easy to achieve and require much thought and effort on the part of law firms, and the evidence of compliance will need to be embedded in a firm's IT systems.

### **Monitoring financial stability**

As law firms continue to fail, steps taken to ensure financial stability must be evidenced.

Paragraph 2.4 of the Code for Firms requires you to actively monitor your financial stability and business viability. Once you are aware that you will cease to operate, you effect the orderly wind-down of your activities.

Prudent financial management to ensure financial stability is a topic too large to adequately deal with here, other than saying for the purposes of demonstrating compliance, that law firms should:

- stress-test cash flows against all relevant criteria on a regular basis and document it; and
- always take appropriate advice, act on it and document it.

### **Laying an audit trail**

Law firms will be at risk of non-compliance unless they are able to lay an audit-trail to evidence their compliance. Using technology integrated with the other IT systems they use may be a cost-effective way to:

- streamline the identification, assessment, mitigation, and monitoring of all risks;
- create and maintain a central and up to date risk and compliance database;
- embed all risk and compliance procedures into their operations; and
- provide information access to all who need it (including access to regulators, to demonstrate compliance).

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