

Update

The growth of outcomes-based regulation? Transatlantic developments

In the course of our work advising on and defending professional liability disputes and regulatory matters for law firms across the globe, we are noticing an ever-increasing degree of similarity between the issues which firms are facing, wherever they may be headquartered or operating. Internationally, we are seeing firms troubled by the same common causes of claims, regulatory concerns and risk management issues.

An interesting recent illustration of the way in which regulators, too, are taking an interest in developments in other jurisdictions, is the adoption by the American Bar Association (“ABA”) of a set of overarching regulatory objectives for lawyers - the ABA Model Regulatory Objectives - which closely resemble the Principles in the Code of Conduct of the Solicitors Regulation Authority of England and Wales (“SRA”).

Background

Despite the special relationship between the United States and the UK, there have traditionally been significant differences between the American and British legal systems, including regulation of the legal profession.

All solicitors in England and Wales are governed by a single body, the SRA. Scotland and Northern Ireland are their own distinct jurisdictions. In the US, legal regulation is a state matter, and each state has its own governing body which regulates the legal profession in that particular jurisdiction. The ABA co-exists alongside the state regulators at a national level, and on a voluntary basis: its mandate is to support the legal profession and improve the administration of justice across the US.

In February 2016, the ABA adopted the ABA Model Regulatory Objectives, a set of overarching regulatory objectives for lawyers that are similar to the mandatory Principles set out in the SRA’s Code of Conduct (“the Code”) – and not by accident. In developing these Objectives, the ABA actively sought inspiration internationally. Regulators are clearly paying attention to their counterparts in other jurisdictions, which means changes in one jurisdiction could have an impact on another.

In practice, the new ABA Objectives reveal two new (and important) similarities between the regulatory systems in the US and England:

1. Regulators are moving away from rigid, overly-prescriptive rules of professional practice in favour of an outcomes-focused regulatory framework; and
2. Regulators have developed a framework that either extends the application of regulatory rules to professionals who practise in a non-traditional legal framework and even to non-lawyers or, in the case of the US, a framework that envisages such an extension in future.

Given Clyde & Co's global reach, including our malpractice and regulatory work for law firms and the insurers of law firms headquartered on both sides of the Atlantic, we are watching this shift in the regulatory landscape with interest.

SRA "Outcomes-Focused" Regulation

In October 2011, the SRA changed the Code from a rules-based code, with prescriptive rules that solicitors had to follow, to an outcomes-focused one.

The outcomes-focused approach specifies targets that must be met by legal practitioners whilst acknowledging that there might be a variety of ways to achieve those targets. The aim of the change was to allow solicitors more flexibility to manage their legal practice whilst still providing legal services to a high ethical and technical standard.

The Code also sets out ten mandatory Principles that underpin the practice of law in the jurisdiction generally. Those are:

1. Uphold the rule of law and the proper administration of justice.
2. Act with integrity.
3. Do 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.
10. Protect client money and assets.

The inclusion of Principles 7 to 10, which were added in 2011 to supplement previous regulatory guidelines, is a clear illustration of the fact that regulatory focus has shifted to include within its scope business management and not simply legal practice in isolation.

The SRA has also commenced a process of discussion and consultation aimed at removing from its 600-page Handbook further rules and guidance which it still considers are overly-prescriptive, or do not allow sufficient flexibility to cover the provision of legal services outside the traditional model.

These are natural developments in light of, for example, the introduction of alternative business structures ("ABs") in the Legal Services Act 2007, which allow non-lawyers to participate in the provision of legal services by owning or investing in law firms.

US Legal Regulation

The SRA's approach to outcomes-based regulation, and the increased focus on governing the business of law, has been mirrored in the changes to the regulatory regime recently adopted by the ABA.

On 8 February 2016, the ABA adopted Resolution 105 which sets out ten Model Regulatory Objectives, which are:

- A. Protection of the public.
- B. Advancement of the administration of justice and the rule of law.
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems.
- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections.
- E. Delivery of affordable and accessible legal services.
- F. Efficient, competent, and ethical delivery of legal services.
- G. Protection of privileged and confidential information.
- H. Independence of professional judgment.
- I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs.
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

The ABA adopted these Objectives in the expectation that legislators and regulators of the legal profession in each state will assess the current regulatory framework and develop any areas which do not meet the new Objectives, particularly in the context of non-traditional legal service providers.

Further information

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Some of the ABA Objectives reflect similar ideals to the SRA Principles – the second ABA Objective (advancement of the administration of justice and the rule of law), for example, is almost identical to the first SRA Principle (uphold the rule of law and the proper administration of justice). More generally, the approach of the ABA Objectives parallels the objectives-based approach of the SRA's Principles. In the context of the state regulators, this clearly has the advantage of allowing each state to adapt these Objectives for effective implementation in its own governance of the profession.

The ABA Objectives also follow the SRA's new focus on ensuring that the profession is adequately regulated in the face of evolving legal models. Unlike the SRA Principles, the ABA Objectives do not currently apply to non-lawyers; however, in reporting on the new Objectives, the ABA made clear that they were designed with the future of legal practice in mind, in particular an industry in which legal services providers offer a range of services in “dramatically different ways” (similar to England's recognition of ABSs – which were specifically referred to in one report) in order to improve access to legal services.

According to the ABA, the new Objectives will enable legislators, courts and state bar authorities to “identify and implement regulatory innovations related to legal services beyond the traditional regulation of the legal profession”.

Managing regulatory risk

The implementation of outcomes-focused frameworks places a greater responsibility on the profession in terms of compliance and risk management. By design, it prevents a “tick box” approach to regulation and puts the onus on the firm or professional to achieve regulatory targets – whatever that might entail – instead of simply meeting administrative requirements.

This can have a big impact on legal professionals in practice. It may necessitate overhauling a firm's structure, policies and procedures to accommodate the systemisation of compliance obligations, ensuring that proper controls are put in place and that policies are developed to monitor and mitigate risk and protect clients.

Particular attention also needs to be paid to the introduction of rules on separate businesses, the application of regulatory rules to the legal business and to non-lawyers and, in jurisdictions where these rules have already been rolled out, compliance with these rules.

In a market where the spectrum of legal services is diversifying in the drive to provide added value for clients and promote competition, legal professionals, and those involved in the management of legal businesses inevitably face increasing challenges in regulatory compliance and risk management.

Although there are growing parallels between the regulatory regimes in the UK, US and elsewhere, there remain significant differences. Our experience in England and Wales means we are well-versed in what outcomes-focused regulation means for firms, whilst our extensive network of offices globally advises on regulatory regimes “on the ground” in their respective jurisdictions. This provides our global lawyers' liability team with unequalled access to ever more important local expertise and know-how which enables us to provide tailored and seamless advice and solutions to our global law firm clients.