

Compliance and Engaging Clients Online: a Legal Analysis

Introduction

We are often asked about the compliance of DirectLaw with the Solicitors' Code of Conduct 2007 (as amended) and other legislative and regulatory provisions that concern solicitors. It is fair to say that these provisions were not drafted with the online delivery of legal services specifically in mind. As a result, the interpretation and applicability of these provisions is not always entirely clear.

The SRA recognises this and is considering producing guidance for solicitors on the subject. We have been consulted in connection with this.

In the meantime, we have been particularly careful to ensure that the DirectLaw service is fully compliant for use by solicitors. In doing so, we have extensively consulted with the SRA, the compliance departments of major law firms who already use our platforms, and with independent counsel.

Information on how, or if, certain compliance issues affect the DirectLaw service, is set out below:

Money Laundering Regulations 2007

These impose obligations on '**independent legal professionals**' to implement management systems that will enable the detection of money laundering and terrorist funding activities by imposing a duty of '**customer due diligence**'. The Regulations define an independent legal professional as:

"a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning:

- a) the buying and selling of real property or business entities;*
- b) the managing of client money, securities or other assets;*
- c) the opening or management of bank, savings or securities accounts;*
- d) the organisation of contributions necessary for the creation, operation or management of companies; or*
- e) the creation, operation or management of trusts, companies or similar structures,*

and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction."

The duty of customer due diligence imposes on independent legal professionals obligations:

- To establish adequate and appropriate policies and procedures relating to risk assessment and management in order to prevent operations related to money laundering or terrorist financing

- To determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of client, business relationship, or services to be provided
- To be able to demonstrate to their anti-money laundering supervisory authorities that the extent of customer due diligence measures is appropriate in view of the risks of money laundering and terrorist financing
- To take a risk-based approach and have adequate measures to verify the identity of beneficial owners so that they are satisfied that they know who the beneficial owner is and what the control structure is in respect of a client who is other than a natural person
- To undertake scrutiny of transactions and other activities throughout the course of a business relationship to ensure consistency with businesses' and individuals' knowledge of the client, his business and risk profile
- To keep up-to-date the information collected in applying customer due diligence measures
- To apply customer due diligence measures at appropriate times to existing clients on a risk-sensitive basis

The customer due diligence measures that must be taken when the duty applies comprise:

- Identifying the client and verifying their identity on the basis of documents, data or information obtained from a reliable and independent source
- Identifying, where there is a beneficial owner who is not the client, the beneficial owner, and taking adequate measures, on a risk-sensitive basis, to verify his identity, so that you are satisfied that you know who the beneficial owner is. This includes understanding the ownership and control structure of a legal person, trust or similar arrangement
- Obtaining information on the purpose and intended nature of the business relationship

However, the duty simply does not arise if a solicitor, in the context of a particular transaction or relationship, is not within the definition of an independent legal professional. An essential element of this definition is involvement in financial or real property transactions, i.e. those where there is a high risk of money laundering occurring. If there is no financial or real property transaction, the Regulations do not apply to that solicitor in relation to that transaction or relationship, and the duty of customer due diligence does not arise.

In these circumstances, the core DirectLaw service (the web-based document drafting platform with the provision of a legal advice component) does not engage the Regulations.

In the first instance, the core DirectLaw service does not incorporate any activities or processes that would amount to involvement in real property transactions.

Secondly, the Treasury has confirmed that the following would not generally be viewed as participation in financial transactions:

- Preparing a home information pack or any document or information for inclusion in a HIP - it is specifically excluded under the 2007 Regulations
- Payment on account of costs to a solicitor or payment of a solicitor's bill
- Provision of legal advice

- Participation in litigation or a form of alternative dispute resolution
- Will-writing, although any accompanying taxation advice may be covered
- Publicly-funded work

It follows that the provision of the core DirectLaw service by a law firm would **not** amount to that firm becoming involved in a financial transaction for the purposes of the Regulations.

Further, the Law Society, in its practice note, states that in terms of the activities covered by the Regulations, it should be noted that:

- Managing client money is narrower than handling it
- Opening or managing a bank account is wider than simply opening a client account. It would be likely to cover a solicitor acting as a trustee, attorney or a receiver.

The DirectLaw service avoids these delicate considerations by being structured so that firms do not receive client money. The price paid by a client through the DirectLaw service is an agreed fee, which is office money under the Solicitors' Accounts Rules.

Although there is no obligation to conduct customer due diligence in accordance with the Regulations for retainers unless they involve regulated activities, and the core DirectLaw service does not involve regulated activities, this does not mean that the Regulations can never apply in relation to a client obtained through the DirectLaw service.

Firms will need to keep in mind that they have an ongoing obligation to monitor transactions or retainers, and that the Regulations may apply in relation to non-core DirectLaw services (for example, a legal advice telephone call or email), or to a retainer formed in connection with the provision of a core DirectLaw service if there is any change in its nature, or to a new retainer formed subsequent to the provision of a DirectLaw service, or (in any case) where the firm suspects money laundering or terrorist financing.

Solicitors' Code of Conduct 2007

Rule 2 - Client relations

a) Taking on clients

The Code states that a solicitor must refuse to act or cease acting for a client in the following circumstances:

- *Where instructions are given by someone other than the client, or by only one client on behalf of others in a joint matter, a solicitor must not proceed without checking that all clients agree with the instructions given; or*
- *Where a solicitor knows or has reasonable grounds for believing that the instructions are affected by duress or undue influence, s/he must not act on those instructions until s/he has satisfied himself/herself that they represent the client's wishes.*

These are general provisions, but they have particular relevance to Wills and Lasting Powers of Attorney. Although there are currently no provisions under rule 2 or under the Mental Capacity Act 2005 which prohibit the provision of Wills or Lasting Powers of Attorney remotely without meeting the testator or

donor, some firms may be uncomfortable with their ability to make the usual and appropriate checks without a face-to-face meeting.

Our system is flexible. The drafting can take place online, but it is always open to firms, if they consider it appropriate, to require the testator/donor to call into their office to execute the document, and ultimately firms can refuse to release a document to a client if the client declines or neglects to do so.

b) Information to clients

Rule 2 is designed to help both a firm and its clients understand each other's expectations and responsibilities. In particular, the purpose of 2.02 (Client care) and 2.03 (Information about the cost) is to ensure that clients are given the information necessary to enable them to make appropriate decisions about if and how their matter should proceed.

Rule 2 stipulates that certain information must be 'given', 'told' or 'confirmed' in writing.

The 'prepaid' mode of the DirectLaw service ensures that all the information in relation to the core DirectLaw service that is known at the point of sale and which is required to be given to a client under Rule 2 is provided and accepted online. The 'free to access' mode of the service contemplates that firms will have to deal with their obligations under Rule 2 manually.

In the 'prepaid' mode, some information will not be known at the point of sale (for example, the identity of the fee earner who will undertake the document review), and this information will need to be provided by firms in accordance with rule 2 in the usual way. Similarly, information in relation to non-core DirectLaw services will need to be provided by firms manually outside of the DirectLaw system.

Firms should also be alive to the fact that Rule 2 imposes an ongoing obligation. Rule 2 information provided online may need to be updated or varied manually in the light of any relevant change of circumstances.

Rule 3 - Conflict of interests

Firms will need to carry out their conflict checks in the same way as they do now. The DirectLaw service facilitates this by ensuring that a retainer is not established with a firm until that firm has accepted the matter submitted to it through the system.

Rule 7 - Publicity

A firm's website is regarded as the firm's publicity and is therefore subject to the requirements of rule 7 (publicity) in the Code and to the guidance notes which accompany that rule. Some key requirements which are particularly relevant to a firm's provision of services online are that:

- Publicity must not be misleading or inaccurate (rule 7.01);
- Publicity relating to charges must be clearly expressed, particularly regarding disbursements and VAT (rule 7.02);
- Certain details about the firm's identity and regulation must be included on the website

An aspect of this is the service level description that appears on firms' sites. Firms are responsible for how this is worded. Otherwise, we ensure that firms' DirectLaw websites are fully compliant with the requirements of rule 7.

Rule 8 - Fee sharing

Rule 8 restricts the persons and businesses with whom or with which solicitors can share their professional fees. Broadly, solicitors may not share fees with a non-lawyer unless the fee sharing is with a non-lawyer employee or manager in their firm, or in the strictly defined circumstances set out in the rule. Its purpose is to protect a solicitor's independence and professional judgment in these situations for the ultimate public benefit.

However, the DirectLaw service falls within an exception to these restrictions contained in rule 8.02, which provides that a solicitor may share professional fees with another person or business if the purpose of the fee sharing arrangement is solely to facilitate the introduction of capital and/or the provision of services to the solicitor's firm.

We will be happy to answer by arrangement, any further questions or issues you may have in relation to compliance. Contact us on 0845 644 9444.

January 2010