THE BRIEF

GUISE
Solicitors

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The ABC of the ABS

The first Alternative Business Structures (ABSs) regulated by the Council of Licensed Conveyancers (CLC) have arrived and the SRA will start to accept applications from those wishing to become an ABS from 3 January 2012. Applications are expected to be granted at the end of February 2012 and as ABSs start to develop, next year may start to reveal the impact which ABSs will have on the legal services market.

The SRA claims that it is expecting up to 20 serious applications to become an ABS and the Co-Op, DAS and HBOS are already well advanced in their development of structures to enable them to do so. The Co-Op plans to offer across the board legal services including residential conveyancing and family law. The family law offering will focus on low income work which is not covered by legal aid for clients earning between £15,000 and £40,000 per year. This is an area which will expand due to the proposed legal aid cuts in family law.

However, the success for “big name brands” entering the legal service market depends on whether consumers will perceive them as a professional and trusted body for the delivery of legal services. When asked by YouGov to rank at least 16 retail and banking brands in order of their purchase preference, 60% said they would choose at least one of them.

YouGov also polled over 2000 members of the public on the most important factors when choosing a lawyer. 60% said that specialist legal knowledge and an approachable service were the most important factors. This does not necessarily entail the cheapest option but rather accessible, trusted advisors who are experts in their field.

A recent survey by YouGov SixthSense supports this. A survey of 1,959 UK adults who had purchased a residential property in the last two years found that Solicitors were the top choice for conveyancing and used by almost 9 out of 10 house purchasers. Only 3% entrusted the legal aspects of the transaction to an online conveyancing site and using someone local was the most frequently mentioned reason for choosing a conveyancer. There was a general lack of trust of big name brands providing conveyancing services, particularly amongst the over 55s, of whom 4 in 10 said they would not use a big name brand.

The future landscape of the market still remains uncertain, making it difficult to know how to react. There are a range of options open to firms wishing to protect their share of the market, one of which may involve becoming an ABS. These are some of the regulatory issues that are worth contemplating when considering whether the ABS model is right for your firm.

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Choose an appropriate regulator

If your ABS is restricting itself to particular reserved legal activities (such as the preparation of deeds – e.g. conveyancing) it maybe that the lighter touch regulation of the CLC may be the better option for you, make sure you shop around.

What follows is a review of the likely regulatory issues which need to be considered by ABSs seeking regulation by the SRA. As the 6 October also marked the SRA's introduction of its new handbook, ABSs must get to grips with Outcomes Focused Regulation (OFR) and all references are to the SRA Principles and SRA Code of Conduct 2011.

Principle 3

You must not allow your independence to be compromised.

Ceding control de facto or otherwise before becoming an ABS will attract serious regulatory censure. You must always ensure you represent your clients' interests in accordance with your professional judgment untramelled by the wishes of non-lawyer owners. Without a licence, do not allow non-lawyers to:

* use your firm as a front for their businesses
* become shadow directors of your firm
* control in fact or otherwise any part of your firm
* buy an interest in your firm
* render your firm a subsidiary of an outside business
* create a separate business in which your firm is involved could run foul of the separate business rule (rule 12.1)

In the light of the removal of referral fee arrangements in the Legal Aid, Sentencing and Punishment of Offenders Bill following the recommendation in Jackson L.J.'s Final Report, many claims management companies are understandably concerned that their business model will disappear and are actively seeking firms to acquire.

Such acquisitive businesses may wish to dictate the terms on which you conduct your business and represent your clients. They may seek to invest heavily in your firm or provide a substantial number of instructions such that your firm becomes dependent upon that source of work. The risk may be run that clients are charged inappropriately. For further information regarding this see our technical paper on the Solicitors Disciplinary Tribunal (SDT) decision in the case of Tilbury (14.10.08 – 9880 of 2008) at **www.guisesolicitors.co.uk/referralfeesbadnews.pdf** or visit the Publications page on our web site and click on "*Referral fees - first the bad news".*

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Rule 3 – Conflict of interests

O(3.4) *you do not act if there is an own interest conflict or a significant risk of an own interest conflict;*

O(3.5) *you do not act if there is a client conflict, or a significant risk of a client conflict, unless the circumstances set out in Outcomes 3.6 and 3.7 apply;*

Do not allow the presence of external investors, who are focused on maximising profit, to lead you into a conflict between the interests of the client and your own business interests. An example of this is where a large corporation has already set up a law firm which is, on the face of it, an integral part of the corporation but is, in fact, a discrete business. The managers of the law firm seek to maximise revenue so that the firm can be sold to their de facto "parent company" for a substantial sum. The route to maximising revenue however involves case workers being required to settle personal injury claims within unrealistic time frames. This is not necessarily in the client's best interests as the rush to settlement may involve the client accepting a lower settlement than might otherwise be the case.

A lower standard of service may also be required by your investors, consider carefully see Indicative Behaviour (1.1) "*agreeing an appropriate level of service with your client, for example the type and frequency of communications"*

Rule 4 – Confidentiality

O(4.1) *you keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents;*

It is vital to ensure that any non-lawyers involved in your ABS enter into a confidentiality agreement to ensure that their review of management information which will or may reveal the names of your clients and former clients (amongst other confidential information) does not occasion a serious breach of this rule.

Planning your ABS response

Is an ABS appropriate for your firm? If so consider carefully how best to prepare for this move. Possible steps which you can take in preparation for becoming an ABS include:

- discussions with potential business partners
- a non-binding arrangement with a potential business partner for the setting up of an ABS (i.e. an arrangement "subject to contract")
- registration of company names, acquisition of domain names
- an agreement to enter into exclusive negotiations with a potential business partner
- entering into conditional contracts to be activated once the regulatory requirements have been relaxed and all necessary approvals granted—e.g. an agreement to accept non-lawyers or an outside investor into partnership

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COLPs and COFAs

The SRA requires all authorised and licensed bodies to have a Compliance Officer for Legal Practice (known as the COLP) and a Compliance Officer for Finance and Administration (known as the COFA).

The COLP, who must be a lawyer, ensures compliance with the terms of the authorisation and reports any failure to comply with those terms.

The COFA, who does not need to be a lawyer, ensures compliance with the rules that relate to the treatment of money held by the regulated body and that breaches of those rules are reported.

The authorized body can select the COLP and COFA but the chosen individual must also be approved by the SRA The SRA will take account of the Suitability Test when deciding whether to approve a candidate, the same test is also used when deciding whether to admit a person as a solicitor. The SRA's application of that test can be draconian. **If you experience any issues in this regard Sabina Rinker has experience of managing appeals from refusals to approve (known as reviews) and would be delighted to help.**

Choosing the right people to take on these roles is vital whether you are an ABS or traditional law firm. These are new positions which did not previously exist and changes will be required to the approach taken by law firms in terms of resources, governance structures and reporting lines. Failure to comply will indicate a failure to comply with OFR.

Conclusion

ABSs presents the profession with new opportunities however they are not without commercial and regulatory risk. The key to maintaining compliance is effective management of regulatory obligations. Keeping pace with the SRA is as important, and sometimes as difficult, as keeping pace with a client or opponent. Sufficient resources and procedures need to be invested to ensure your firm is compliant.

We have been invited by the Surrey Law Society to deliver a seminar on ABS responses and the associated regulatory considerations in Guildford on Thursday 15 December 2011. For details visit www.surreylawsociety.org.uk

This technical paper has been written as a general guide only. It should not be relied upon as a substitute for specific legal advice. No responsibility can be accepted by the author or the firm for any loss occasioned as a consequence of acting or refraining from action on the basis of this paper.

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