

## The ABC of the ABS

The arrival of the ABS in October 2011 should facilitate (if the architects of the new market are right) a surge in the development of customer-focused businesses which will transform the delivery of legal services providing a much improved range of choice for the consumer. Whilst the detailed rules are not yet formulated these are some of the regulatory issues that are worth contemplating when considering whether the ABS model is right for your firm.

### Choose an appropriate regulator

Whilst the SRA intends to seek a licence from the Legal Services Board (LSB) to authorise ABSs to trade it will not be the only front line regulator seeking to authorise ABSs and 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 of regulation by the Council for Licensed Conveyancers may be the better option for you. Shop around for your regulator.

What follows is a review of the likely regulatory issues to be considered for those ABSs seeking regulation by the SRA and all references to rules are to the rules in the Solicitors Code of Conduct, 2007.

### Rule 1 – Core duties

#### *1.03 Independence*

#### ***You must not allow your independence to be compromised.***

Ceding control de facto or otherwise before ABS Day will attract serious regulatory censure. In any event, you must always ensure you represent your clients' interests in accordance with your professional judgment untrammelled by the wishes of non-lawyer owners. 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 21)

In the light of the recommendation in Jackson L.J.'s Final Report that referral fees should be abolished many claims management companies are understandably concerned that their business model may become extinct and are actively seeking firms to acquire on ABS Day. 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. Our paper on the recent SDT decision in the case of Tilbury is worth reading. Just copy and paste this into your web browser: [www.guisesolicitors.co.uk/referralfeesbadnews.pdf](http://www.guisesolicitors.co.uk/referralfeesbadnews.pdf) or visit our the Solicitors Regulatory issues section of our Publications pages and click on "Referral fees - first the bad news".

## Rule 3 – Conflict of interests

### *3.01 Duty not to act*

***You must not act if there is a conflict of interests (except in the limited circumstances dealt with in 3.02).***

One large corporation has already set up a law firm which is, on the face of it, an integral part of the corporation but which is, in fact, a discrete business. The managers of the law firm seek to maximise revenue so that on ABS Day 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 very tight 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 imposed by your investors and/or the cost-benefit test of a course of action may not be met, see rules 2.02(2)(a) and 2.06.

## Rule 4 – Confidentiality

### *4.01 Duty of confidentiality*

***You and your firm must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by your client (or former client).***

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.

## Preparing for ABS Day

The SRA encourages firms to actively prepare for ABS Day by considering whether such arrangements are appropriate for your firm and if so considering how best to prepare. Acceptable steps 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

## HoLPs and HoFAs

The LSA requires all ABSs to have a Head of Legal Practice (known as the HoLP) and a Head of Finance and Administration (known as the HoFA).

The HoLP must be a lawyer and ensures compliance with the terms of the ABS's licence and for reporting any failure to comply with the terms of the licence.

The HoFA (who does not need to be a lawyer) ensures compliance with the licensing rules that relate to the treatment of money held by the ABS and for the firm's accounts, and for reporting breaches of those rules.

The ABS option presents the profession with new opportunities but they are not without risk both before and after ABS Day.

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