

Cryptic Code

In articles published in 2007 (Gazette 104/17 16.04.07) and 2008 (03.07.08) we drew attention to the problems posed for in house and local government lawyers by the application of the Solicitors Practice Rules (SPR) and Rule 20.01 of the Code of Conduct 2007 (the 2007 Code). One only needs a practising certificate (PC) if held out as a solicitor or if undertaking the reserved activities (e.g. conducting litigation or obtaining grants of probate). The Law Society's enforcement philosophy however took a much wider view and this led to many unfair regulatory investigations under the SPR. This philosophy was codified and expanded with the introduction of the 2007 Code and the requirement to hold a PC if undertaking "business services".

The 2007 Code drew much criticism from, amongst others, the Commerce & Industry Group who tirelessly pursued negotiations with the SRA to bring the Code into line with primary legislation. My firm was involved with those negotiations for the C&I Group and that led to important amendments being achieved in the 2009 revisions (the 2009 Code, in force from 31 March 2009). In particular the introduction of a new guidance note (number 55) set out the requirements of primary legislation. Unfortunately the 2009 Code (rule 20.02) remains at odds with primary legislation. The SRA have gone further in that the phrase "business services" which gave rise to so much uncertainty in the 2007 Code has been replaced by the equally enigmatic term "other services" in the 2009 Code. Like "business services" the term "other services" remains undefined in the Glossary. Rule 20.02 of course takes precedence over the helpful guidance in note 55.

When the use of the phrase "other services" was first mooted with me as a possible solution (on a visit to the SRA's Redditch office last November) I expressed concern that this phrase did not assist in arriving at a clear understanding of when a solicitor would, or would not, require a practising certificate. The officers explained that "other services" included the kind of services which men or women of business affairs would provide but this, it seems to me, only serves to confuse the issue further.

During 2010/2011 the Code has to be amended again to facilitate ABSs and the SRA may take that opportunity to sort out the mess then. The representational Law Society would perform a great service to in house and local government lawyers by making appropriate representations to the SRA about this matter.

The problems the present drafting creates lead many in house and local government lawyers to become subject to protracted and expensive regulatory investigation quite unnecessarily. This begins when, for whatever reason, someone on the Roll but not holding a PC applies for a certificate. This usually requires an explanation to be given in form RFs12 of how the

solicitor has spent his or her time and whether they have been undertaking the reserved activities or have been held out. The introduction of the SRA Practising Regulations 2009 has brought a new form (Reg3) which must be completed. This omits the questions in section 6 of RFs12 that tended to lead to self-incrimination. In form Reg 3 section 6 simply asks:

“have you practised or been held out as a solicitor/REL since you last held a PC or had registration. If “Yes” please provide details on a separate sheet”

This is an exercise which calls for great care lest an applicant leave him or herself open to allegations of practising whilst uncertificated or being other than frank with the Regulator, potentially a breach of the Core Principles in Rule 1.

Despite the improvements secured by the C & I Group there still remains much to resolve.

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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