

SLAUGHTER AND MAY

I N - H O U S E R

A practical guide to
the SRA Standards and
Regulations 2019 for
in-house lawyers

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A: Introduction to the SRA Standards and Regulations 2019

1. The SRA Standards and Regulations 2019

- 1.1 As from 25 November 2019, the Solicitors Regulation Authority (the “SRA”) Standards and Regulations 2019 (the “StaRs”) set out the professional rules that apply to all solicitors admitted in England and Wales.
- 1.2 The StaRs are the culmination of a three year consultation period designed to reform and simplify the rules applying to solicitors.
- 1.3 In terms of reform, the StaRs have liberalised the use of the solicitor title so that:
 - solicitors are no longer limited to practising solely through regulated entities such as law firms and alternative business structures or as authorised sole practitioners;
 - solicitors (including in-house lawyers) will be allowed to provide unreserved legal services to the public through non-SRA regulated businesses; and
 - subject to certain conditions, individual solicitors will also be able to provide both unreserved and reserved legal activities (see [Appendix 3, Meaning of “reserved legal activities”](#)) to members of the public as “independent solicitors”.
- 1.4 In addition, the StaRs are shorter and starker than predecessor rules set out in the SRA Handbook 2011, with more emphasis on individual obligations. In particular, under the StaRs:
 - the SRA Principles 2019 (the “Principles”) have been reduced from ten (under the SRA Principles 2011) to seven, with public interest principles having a more obvious priority;
 - the SRA Code of Conduct 2011 has been split into two, with one version applying to SRA regulated entities and another, the Code for Solicitors, RELs and RFLs (the “Code for Solicitors”), applying to individual solicitors wherever they work in England and Wales;
 - individual solicitors are personally accountable for compliance with the Code for Solicitors and must always be prepared to justify their decisions and actions. In addition, the Code for Solicitors imposes specific responsibilities on those who supervise or manage others; and
 - the Code for Solicitors introduces wide reporting obligations which require all solicitors not just to report actual serious misconduct but also to promptly report “any facts or matters that [they] reasonably believe are capable of amounting to a serious breach of [the SRA’s] regulatory arrangements”. See [Section B, paragraph 7, What duties do I owe my regulator?](#)
- 1.5 The StaRs apply to all in-house solicitors admitted in England and Wales. The rules of most relevance to in-house solicitors working in commerce or industry in a traditional in-house lawyer role in England and Wales are contained in the:
 - Principles;
 - Code for Solicitors;
 - SRA Assessment of Character and Suitability Rules (the “Character and Suitability Rules”);
 - SRA Authorisation of Individuals Regulations (the “Authorisation of Individuals Regulations”); and
 - SRA Glossary (the “Glossary”).
- 1.6 For those in-house solicitors admitted in England and Wales but practising in a traditional in-house lawyer role outside England and Wales, the relevant rules are contained in the:
 - SRA Overseas and Cross-border Practice Rules (the “Overseas Rules”);
 - Character and Suitability Rules;
 - Authorisation of Individuals Regulations; and
 - Glossary.

2. The Principles

- 2.1 The Principles set out the fundamental ethical and professional standards which all in-house lawyers practising in England and Wales must adhere to. They stand alone, separate from the Code for Solicitors, and so assume a greater importance.
- 2.2 The Principles are mandatory and underpin all the regulatory requirements applicable to in-house lawyers, whether they relate to their relationship with their employers, third parties or the SRA itself. Each time a regulatory issue is considered, the first point of reference should be the Principles. For a full list of the Principles, see [Appendix 1, The Principles](#).
- 2.3 Principle 1 (acting in a way which upholds the rule of law), Principle 2 (acting in a way that upholds public trust and confidence in the solicitors' profession and in legal services) and Principle 5 (acting with integrity) apply to in-house solicitors outside their practice, as well as in it. The case of *The Solicitors Regulation Authority v Main [2018] EWHC 3666 (Admin)* illustrates how the SRA and the courts are prepared to enforce these standards against in-house solicitors where their behaviour falls short outside of work. See further, [Section B, paragraph 8, Does my regulator care about what I do outside work?](#) and [Appendix 7, Cases involving in-house lawyers](#).
- 2.4 Where two or more Principles come into conflict, the Principle that best serves the public interest in the particular circumstances will take precedence.
- 2.5 Principle 3 (acting with independence) has a positive quality to it (under the SRA Principles 2011 solicitors were required simply not to "allow their independence to be compromised") and is often said to be best illustrated by a solicitor's ability to say "no" to a client or at least to push back on their requests. The difficulties relating to acting with independence are particularly pertinent to in-house lawyers who primarily act for their employers. See further, [Section B, paragraph 6, What are my obligations when dealing with third parties?](#)
- 2.6 The Principles must be read in conjunction with the SRA Enforcement Strategy (the "Enforcement Strategy"), which explains in more detail the SRA's approach to taking regulatory action. Along with the Code for Solicitors, the Principles are designed to drive high professional standards. Through them, the SRA seeks "to give a clear message to the public, regulated individuals and firms about what regulation stands for and what a competent and an ethical legal professional looks like".
- 2.7 In line with the Court of Appeal judgment in *Wingate & Anor v The Solicitors Regulation Authority [2018] EWCA Civ 366*, in which Lord Justice Jackson clarified that, for solicitors, integrity is about more than simply acting honestly, the SRA has stated the duties to act with integrity and to act with honesty as two separate Principles. The effect of this is to underscore the SRA's view that integrity is a more expansive concept. In its Enforcement Strategy, the SRA states that conduct or behaviour which demonstrates a lack of honesty or integrity is at the "highest end of the spectrum" in a profession whose reputation depends on trust. Where misconduct indicates a lack of honesty or integrity, the SRA's view is that "we may consider that the matter cannot be remediated or that, in any event, action is necessary in order to uphold public confidence in the legal profession".

3. Code for Solicitors

- 3.1 The Code for Solicitors sets out, in more detail than the Principles, the specific professional rules applying to solicitors admitted and practising in England and Wales.
- 3.2 The standards cover eight separate topics as follows:
- maintaining trust and acting fairly;
 - dispute resolution and proceedings before courts, tribunals and inquiries;
 - service and competence;
 - client money and assets;

- referrals, introductions, separate businesses and other business requirements;
 - conflict, confidentiality and disclosure;
 - co-operation and accountability; and
 - providing services to the public or a section of the public.
- 3.3 One of the more challenging aspects of the Code for Solicitors is the obligation on in-house lawyers to manage duties of conflicts of interest, confidentiality and disclosure whilst potentially advising a wide range of clients. For further details on how to address these obligations, see [Section B, paragraph 3, Do I have a conflict of interest?](#) and [paragraph 4, Do I have a confidentiality conflict?](#)
- 3.4 Although the Code for Solicitors does not impose any explicit requirements on in-house lawyers or their employers to have effective systems and controls in place, Rule 3.5, Code for Solicitors stipulates that, where you supervise or manage others, you remain accountable for their work and must effectively supervise it. Further, Rule 3.6 imposes an obligation on those who manage others to ensure that “the individuals you manage are competent to carry out their role and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up-to-date”. For further details on these obligations, see [Section B, paragraph 5, What systems and controls are in place?](#)
- 3.5 The Code for Solicitors also introduces wider reporting obligations, so that in-house lawyers must now not only report actual misconduct (by SRA regulated firms or individuals), but also “any facts or matters that [they] reasonably believe are capable of amounting to a serious breach of [the SRA’s] regulatory arrangements”. In addition, in-house lawyers must “promptly inform the SRA of any facts or matters that [they] reasonably believe should be brought to its attention in order that it may investigate whether a serious breach of its regulatory arrangements has occurred or otherwise exercise its regulatory powers”.
- There is no definition of “serious breach” set out in the Glossary, and so this term must be interpreted by reference to the Enforcement Strategy. See further, [Section B, paragraph 7, What duties do I owe my regulator?](#)
- 3.6 Rule 7.2, Code for Solicitors requires in-house lawyers to be “able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA’s regulatory arrangements”. In practice, this suggests that in-house lawyers may need to keep records of any difficult ethical judgements that they have taken (for example, in relation to their conflicts or confidentiality obligations) in order to be able to answer any questions that the SRA may have.
- 3.7 The requirement to ensure that the service you provide to clients is competent (Rule 3.2, Code for Solicitors) must be read in conjunction with the SRA requirements on continuing competence set out in the SRA Continuing Competence toolkit. These require in-house lawyers to:
- reflect on the quality of their practice, by reference to the SRA’s Competence Statement, to identify their learning and development needs;
 - plan and address those needs through suitable activities; and
 - record and evaluate the steps they have undertaken, so that they can demonstrate to the SRA that they have ensured their continuing competence.
- 3.8 Each in-house solicitor (regardless of where they practice) will be required to make an annual declaration to the SRA to confirm that they have completed these steps. For further details on how the rules on continuing competence apply to in-house practice, see [Section B, paragraph 10, How can I ensure my continuing competence?](#)

4. Character and Suitability Rules

- 4.1 All solicitors applying for admission or restoration to the roll must be of satisfactory character and suitability.
- 4.2 The Character and Suitability Rules set out the kind of factors that the SRA will take into account when considering the character and suitability of an in-house lawyer. In summary, these include the SRA's need to:
- protect the public and the public interest;
 - maintain public trust and confidence in the solicitors' profession and in legal services provided by authorised persons;
 - take into account the nature of the in-house lawyer's role and individual circumstances on a case-by-case basis; and
 - consider any information available to it and take into account all relevant matters including, but not limited to, reports of criminal conduct or other types of behaviour relating to an in-house lawyer's integrity and independence, financial conduct or situation or any regulatory or disciplinary findings.
- 4.3 In-house lawyers have an ongoing obligation to tell the SRA promptly about anything that raises a question as to their character and suitability, as well as any change to information previously disclosed to the SRA in support of their application to become a solicitor. This obligation to notify the SRA continues for as long as the in-house lawyer remains a solicitor. In-house lawyers reporting issues relating to their character and suitability are required to provide evidence relevant to the matters being disclosed for the SRA's consideration. See further, [Section B, paragraph 7, What duties do I owe my regulator?](#)

5. Authorisation of Individuals Regulations

- 5.1 The Authorisation of Individuals Regulations set out the SRA's requirements relating to admission and the issuing of practising certificates.
- 5.2 They also set out what authorisation entitles you to do. In-house lawyers who are authorised solicitors with a current practising certificate are entitled to carry on all reserved legal activities, except notarial activities. This provision is in line with section 13 of the Legal Services Act 2007 (the "LSA") which states that a person is entitled to carry on reserved legal activities where they are authorised to do so. Reserved legal activities are defined in section 12 of Schedule 2 to the LSA and are set out in [Appendix 3, Meaning of "reserved legal activities"](#).
- 5.3 Section 15(4) of the LSA limits this general right to carry on reserved legal activities. In particular, in-house lawyers may not provide reserved legal services to the public (or a section of the public) unless these services are not provided as part of their employer's business. For further details on who an in-house lawyer may advise, see [Section B, paragraph 1, Who is my client?](#)

6. Overseas Rules

- 6.1 In-house lawyers who are established outside England and Wales for the purpose of providing legal services in an overseas jurisdiction are subject to the Overseas Rules (in place of the Principles and the Code for Solicitors).
- 6.2 The Overseas Rules reflect the SRA's view that detailed regulatory requirements are less appropriate in a situation where the services are being provided outside its home jurisdiction, and where there will be different legal, regulatory and cultural practices.
- 6.3 Not all overseas practice will be governed by the Overseas Rules. In particular, where services are provided on a temporary basis from outside

the jurisdiction, the full Principles and Code for Solicitors will apply as if the services were provided from within England and Wales. For further details on overseas practice, see [Section B, paragraph 11, What are my obligations when practising overseas?](#)

7. SRA guidance, case studies, warning notices and topic guides

- 7.1 Although none of the rules set out in the StaRs include any guidance or notes, the SRA has indicated that it intends to publish a range of guidance and case studies to help solicitors apply the rules in practice. It is expected that this guidance will be replaced or updated more frequently than the rules.
- 7.2 As at the date of publication, the SRA has published a number of guides on the StaRs, including on the following topics:
- When do I need a practising certificate?, 4 July 2019;
 - Acting with integrity, 23 July 2019; and
 - Guidance on the SRA's approach to equality, diversity and inclusion, 23 July 2019.
- 7.3 In addition, the SRA has published a number of case studies, which are mainly directed at solicitors working in private practice. As at the date of publication, the following two case studies refer to in-house lawyers:
- Balancing your duty to the court with client's best interests, 12 July 2016; and
 - Misleading the court and your duty to uphold the rule of law, 12 July 2016.
- 7.4 From time to time, the SRA issues warning notices (published on the SRA website) to help solicitors and other regulated persons understand their obligations and how to comply with them. Although warning notices do not form part of the StaRs (or the Handbook before them), the SRA may have regard to them when exercising its regulatory functions. At the date of publication, recent

warning notices which may be of interest to in-house lawyers have included:

- Use of non-disclosure agreements (NDAs), 12 March 2018; and
- Money laundering and terrorist financing, 2 March 2018.

- 7.5 The SRA has also issued a number of topic guides to support its staff in making sure the SRA reaches fair and consistent enforcement decisions. These internal documents are designed as reference tools only; the final decision on how any matter is dealt with will be considered on a case-by-case basis, taking into account any relevant information. These topic guides are available on the SRA's website and provide an indication of some of the factors that the SRA considers during an investigation and when considering appropriate sanctions. As at the date of publication, topic guides which may be of interest to in-house lawyers include:
- Criminal offences outside practice, 7 February 2019;
 - Use of social media and offensive communications, 7 February 2019; and
 - Driving with excess alcohol convictions, 7 February 2019.

8. The aim and scope of this guide

- 8.1 The StaRs do not set out a definition of "in-house lawyer", "in-house solicitor" or "in-house practice". For the purposes of this guide, these terms are intended to include any solicitor who is employed as a solicitor by a business or other organisation which is not itself subject to regulation by the SRA, or any other approved regulator under the LSA, as an entity.
- 8.2 The aim of this guide is to help in-house lawyers navigate the requirements of the StaRs. It adopts a practical approach to determine what obligations apply to in-house lawyers but does not seek to promote any particular approach or best practice.

- 8.3 This guide is primarily directed at in-house lawyers working in commerce or industry in a traditional in-house lawyer role. It assumes that in-house lawyers do not charge their client fees; pay fees for referrals or introductions; advertise their services; handle client money; or act for the public. The rules applying to these areas are therefore not considered in detail, even though they are stated within the StaRs to apply to in-house practice.

Further reading

Legal Services Act 2007:

www.legislation.gov.uk/ukpga/2007/29/contents

SRA Standards and Regulations 2019:

www.sra.org.uk/newregs/

SRA Continuing Competence toolkit:

www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page

SRA guidance:

www.sra.org.uk/solicitors/guidance.page

SRA case studies:

www.sra.org.uk/solicitors/guidance/case-studies/

SRA warning notices:

www.sra.org.uk/solicitors/guidance/warning-notice/

SRA topic guides:

www.sra.org.uk/sra/strategy-2017-2020/sub-strategies/enforcement-practice/

B: The in-house lawyer guide

1. Who is my client?

Key issues:

- If you are an in-house lawyer practising in England and Wales, you are free to act for your employer and for other persons or groups within your employer's organisation.
- Subject to certain restrictions, you may also advise persons outside your employer's organisation.
- Your scope of practice will depend on whether you are acting for persons within your employer's group or for the public (or a section of the public).
- When acting for more than one client, you must act in the best interests of each client and ensure that there are no conflicts of interest or confidentiality conflicts.
- Your obligations under the Code for Solicitors will vary depending on who your client is.
- Understanding who your client is in each instance, and whether you have more than one, will assist with complying with all the requirements of the StaRs.

- 1.1 With the introduction of the StaRs, the SRA has effectively liberalised the use of the solicitor title so that solicitors are no longer limited to practising solely through regulated entities such as law firms and alternative business structures, or as authorised sole practitioners. In the in-house context, the StaRs have not replicated the restrictions set out in the SRA Handbook 2011 on who an in-house lawyer may act for.
- 1.2 This means (in theory at least) that in-house lawyers are no longer limited to acting solely for their employer, related bodies or work colleagues but may now (in respect of unreserved legal services only) also act for the public (or a section of the public). This may, for example, include the customers of their employer, subject always to consideration of, for example, conflicts of interest, confidentiality and transparency issues.
- 1.3 Rule 9.1, Authorisation of Individuals Regulations allows in-house lawyers who are authorised as solicitors and holders of current practising certificates to carry on all reserved legal activities, except notarial activities. This is in line with section 13 of the LSA, which states that a person is entitled to carry on reserved legal activities where they are authorised to do so. For further details on what amounts to a reserved legal activity see [Appendix 3, Meaning of "reserved legal activities"](#).
- 1.4 However, section 15(4) of the LSA limits this general right to carry on reserved legal activities. In particular, in-house solicitors may not provide reserved legal services to the public (or a section of the public) unless these services are not provided as part of their (non-SRA regulated) employer's business.
- 1.5 The LSA does not provide any definition of the "public" or "section of the public", nor any explanation of what is meant by "part of an employer's business". However, paragraph 71 of the Explanatory Notes to the LSA makes it clear that: "where a body employs lawyers to provide in-house legal services to that body or to certain persons connected to that body, but not to the public or a section of the public, the body in question will not need to be an authorised person".

- 1.6 This means that, where an in-house solicitors' practice is restricted to providing services solely to their employer, employees of their employer and other persons and bodies connected to their employer, they are free to provide both reserved and non-reserved legal activities. However, in line with section 15(4) of the LSA, in-house lawyers providing services to persons not connected to their employer (for example, their employer group's own customers) must limit their services to non-reserved activities and cannot, for example, provide conveyancing or litigation services (to the extent that they constitute reserved legal activities) to those customers.
- 1.7 The restriction in section 15(4) of the LSA does not preclude in-house lawyers from providing services that include reserved legal activities to the public (or a section of the public) where such services are not part of their employer's business. This would suggest that in-house lawyers may, outside of their employment, advise on reserved legal matters.
- 1.8 However, the extent to which in-house lawyers may advise on reserved legal activities outside of their employment as an in-house solicitor is limited by Rule 10 (Practising on your own) of the Authorisation of Individuals Regulations, which prohibits individual solicitors from providing services that include reserved legal activities as part of their practice unless they:
- are authorised by the SRA as a sole practitioner;
 - carry out these activities through an organisation which is authorised by the SRA or another LSA approved regulator; or
 - carry out these activities as a lone and self-employed solicitor, practising in their own name and not through a trading name or service company with adequate and appropriate insurance cover (referred to by the SRA as an "independent solicitor").
- 1.9 The word "practice" as defined in the Glossary refers simply to the private legal practice of an authorised body. This suggests that the above restrictions do not therefore seem to preclude an in-house lawyer from advising on reserved legal matters in their personal capacity without remuneration (for example, advising friends and family or engaging in pro bono activities).
- 1.10 Where advising the public (or section of the public), in-house lawyers are subject to additional obligations, including the requirement to take steps to identify the client in question, establish and maintain a complaints procedure and provide clients with transparency information, including on the cost of the matter. For further details see [paragraph 2, What duties do I owe my client?](#)
- 1.11 The general perception is that in-house lawyers have one client: their employer. This client may instruct them to consider matters that may involve other entities or individuals within the client group. However, within any organisation (and, in particular, in larger corporate structures), in-house lawyers may advise or receive instructions from a wide range of separate legal entities. On occasion, they may also advise their work colleagues or provide pro bono advice (whether to work colleagues or others). In addition, their employer may, technically speaking, be a service company (rather than, say, the quoted PLC which heads their employer's group). As such, it is prudent for in-house lawyers to consider who their client is in each particular situation.
- 1.12 There are two main reasons for this: firstly, it is only by knowing who your client is that you can fulfil your duties to that client and ensure that you are acting in their best interests; secondly, failing to establish who your client is in any particular situation could give rise to uncertainty over the scope of legal professional privilege. For example, where your client is your employer entity, communications on legal matters with employees and/or members of the board of directors of your employer may only enjoy the protection of privilege where those individuals are acting as the

employer's representatives and have been expressly charged with seeking and receiving legal advice on the employer's behalf (rather than on their own behalf). There may also be issues in relation to your duties of confidentiality and disclosure (and these are discussed further in [paragraph 4, Do I have a confidentiality conflict?](#)).

- 1.13 In-house solicitors owe a number of general duties to their clients under the StaRs (as well as under the common law). For example, Principle 7 requires them to act in the best interests of each client by ensuring there are no conflicts of interest or confidentiality conflicts. It is therefore important to understand when you may be acting for more than one person to ensure that their interests are in fact aligned – although this is as likely to be of concern to your employer as it is to you. For further discussion on the duties applying to in-house lawyers, see [paragraph 2, What duties do I owe my client?](#), [paragraph 3, Do I have a conflict of interest?](#) and [paragraph 4, Do I have a confidentiality conflict?](#)
- 1.14 Determining in each instance who your client is may be counter-cultural. In general, in-house lawyers are conditioned to consider the different parts of an organisation as being part of a single business. To establish who you are acting for, you should consider the following:
- are you acting for your employer or any of its employees (for example, its directors), or both?
 - where the matter concerns a wholly-owned entity within your employer group, are you advising your employer, the related body, or both?
 - where advising a related body within your employer group, is this entity wholly-owned by your employer, or is the advice being given to a joint venture entity or partnership in which your employer only holds a stake?
- 1.15 This approach is not without difficulty. For example, in larger organisations, the in-house lawyer (together with most other employees) may be employed by a group services company and not the

main operating company. In these circumstances, most of the work done by the in-house lawyer (except in relation to employment contracts) will be for the main operating company, which will devise any policies relating to who within the group can instruct in-house lawyers and what the remit of the legal department is.

Practical examples

1. You act for your employer, X Plc, a financial services company. Part of your role is to devise standard form loan documentation used for agreements between X Plc and its customers. In time, X Plc outsources the administration of some of these loans to a third party provider. Shortly after the arrangement is put in place, the third party provider has a number of queries in relation to the administration agreement. Your employer is keen to assist the third party provider and suggests that you call their contract team direct to talk them through the relevant clauses. Are you able to help?

Although the StaRs allow an in-house lawyer to advise both their employer and other persons or groups within or outside their employer organisation, your ability to do so is framed by your obligations to act in the best interests of each client (Principle 7) and subject always to the rules on conflicts of interest and confidentiality as set out in the Code for Solicitors. In this scenario your employer is happy for you to assist the third party, but you will still need to consider carefully what your role is and to whom you owe any duties. For example, if the third party specifically asks you to advise on the impact of the standard clause documentation on their business and the merits of agreeing to these clauses, you may find yourself in a position where your duties to your employer and to the third party conflict. A more prudent approach therefore would be to limit your involvement to explaining what the clauses mean, together with any relevant background, so as to avoid creating a solicitor/client relationship. Consider also whether you should make your limited and non-advisory role clear to the third party provider, to avoid any

risk of there being a misunderstanding and it being said you may have taken unfair advantage of them (something contemplated by Rule 1.2, Code for Solicitors).

2. **You are asked to assist a German work colleague who has recently joined the UK business with the rental of a London flat. Can you help?**

A key question here is who is instructing you, and who in this scenario is your client? Who will be renting the property – your employer or your work colleague? If your employer has agreed with the work colleague that, as part of their relocation to the UK, the company will provide them with accommodation of their choice, it is likely that the lease will be signed by the company and that, even though you will be discussing the matter with your work colleague, your advice will ultimately be for the benefit of the company. If the flat does not form part of your colleague's package but the company has said you will assist that individual on the legal aspects of renting a property, you will need to consider whether this could give rise to any conflicts of interest with your employer (which seems unlikely where a price has been agreed with the company), as well as considering whether this type of work amounts to a reserved legal activity (and, if so, whether the restrictions in section 15(4) LSA which prevent you from advising on reserved legal activities for the public (or a section of the public) mean you cannot take on this work). In the light of the explanatory notes to the LSA, you may feel that you will be able to advise your work colleague even if this is a reserved legal activity because, in this context, they are probably a person "connected to your employer". The analysis may be different where there is no obvious benefit to your employer (for example, where the work colleague asks you to assist on the purchase of a holiday home which the company is not funding).

Next steps

In-house lawyers who manage or supervise others providing legal services remain accountable for the work they do and must effectively supervise the work being done for clients, as well as ensuring that those who they manage are competent to carry out their role and that they keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up-to-date. In order to ensure all members of the legal department understand the implications and restrictions on who they can act for, in-house lawyer managers should consider (to the extent this does not already exist) adopting a "Who is my client?" policy for the legal department which covers the following:

- who can in-house lawyers advise within the employer group? For example, your policy might say that in-house lawyers should be free to advise all wholly-owned and majority-owned subsidiaries of the employer, but that requests for advice from entities in which the employer only has a minority stake and no management control should be referred to a named General Counsel or senior lawyer in the team;
- what restrictions are there on advising work colleagues? Should any requests to advise particular potential clients require authorisation? For example, in-house lawyers may advise directors of wholly-owned subsidiaries of the employer on their fiduciary duties, but any requests to advise on personal matters should be referred to a supervisor (or declined). In practice, many in-house teams restrict an in-house lawyer's ability to act for work colleagues on personal matters; and
- who can in-house lawyers talk to if they are unsure who their client is in any particular case?

2. What duties do I owe my client?

Key issues:

- In-house lawyers practising in England and Wales are subject to a number of duties in contract, tort and under professional conduct rules.
- There are times when duties to your client may need to be overridden by public interest considerations. The practical effect of this is that you may, on occasion, have to say “no” to your client (or at least push back on their requests).
- A number of duties set out in the Principles and the Code for Solicitors apply not only to your relationship with clients, but also in respect of the public at large. For example, your duties to act with integrity; to not abuse your position by taking unfair advantage; and to not mislead apply to your interactions with clients and with the court and others.
- The Code for Solicitors sets out a number of rules that relate to the standard of service that in-house lawyers must provide to clients. There are also requirements applying to in-house lawyer supervisors and managers relating to the supervision of such work and/or to ensuring competence within the team.
- Where advising the public (or a section of the public), in-house lawyers are subject to additional transparency obligations.

- 2.1 In-house lawyers owe contractual and tortious duties to their client. In addition, there are a number of regulatory duties that apply to in-house lawyers that arise out of the Principles and the Code for Solicitors. Finally, in-house lawyers are subject to a number of separate, but largely overlapping, common law fiduciary duties.
- 2.2 Under the StaRs, a solicitor must:
 - act in the best interests of each client (Principle 7);
 - act with both honesty (Principle 4) and integrity (Principle 5);
 - not act where there is a conflict of interest (Rules 6.1 and 6.2, Code for Solicitors);
 - keep client information confidential and disclose any material relevant information of which they are personally aware (Rules 6.3 to 6.5, Code for Solicitors);
 - not abuse their position by taking unfair advantage of clients or others (Rule 1.2, Code for Solicitors); and
 - not mislead or attempt to mislead their clients, the court or others, either by their own acts or omissions or allowing or being complicit in the acts or omissions of others (including their client) (Rule 1.4, Code for Solicitors).
- 2.3 The Code for Solicitors also sets out more specific standards relating to the service you provide to clients. For example, you must:
 - only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf (Rule 3.1, Code for Solicitors);
 - ensure that the service you provide to clients is competent and delivered in a timely manner (Rule 3.2, Code for Solicitors);
 - maintain your competence to carry out your role and keep your professional knowledge and skills up-to-date (Rule 3.3, Code for Solicitors); and
 - consider and take into account your client's attributes, needs and circumstances (Rule 3.4, Code for Solicitors).

- 2.4 In-house lawyers who supervise or manage others providing legal services remain accountable for the work carried out through them and must effectively supervise work being done for clients (Rule 3.5, Code for Solicitors). This would indicate that senior members of the team should be reviewing the work of more junior lawyers on an ongoing basis. See [Next Steps](#) section for suggestions on how to comply with this requirement.
- 2.5 Under Rule 3.6, Code for Solicitors, in-house lawyers must also ensure that those who they manage are competent to carry out their role and keep their professional knowledge and skills, as well as their understanding of their legal, ethical and regulatory obligations, up-to-date. See [paragraph 5, What systems and controls are in place?](#) for suggestions on how to comply with this requirement.
- 2.6 When advising the public (or section of the public), in-house lawyers are subject to additional obligations, including taking steps to identify the client in question, establishing and maintaining a complaints procedure, and providing clients with transparency information (including on the cost of the matter). In practice, it is unlikely that in-house lawyers working for traditional in-house legal departments will be advising the public as part of their day to day jobs. This is because consideration would need to be given to, for example, conflicts of interest and confidentiality issues. Even where employers wish to take advantage of the liberalisation of the solicitor title and offer legal services to their clients, it is unlikely that the same lawyers who advise the employer would also be advising the employer's customers.
- 2.7 There are times when duties to your client may be overridden by other rules of professional conduct. The introduction to the Principles states that, should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over individual client interests. It also makes it clear that you should, if relevant, inform your client of the circumstances in which your duty to the court and other professional obligations will outweigh your duty to them. See further, [paragraph 6, What are my obligations when dealing with third parties?](#)
- 2.8 Given their proximity to the business, in-house lawyers have a natural advantage when it comes to acting in their clients' best interests. However, this is not a duty without limits and so in-house lawyers should be aware of when they may need to say they cannot, or can no longer, advise. Saying "no" to an employer or pushing back on a request can, however, be challenging, especially in circumstances where employers may fail to understand that, despite being employees, in-house solicitors are regulated by the SRA and have to adhere to certain professional standards which do not apply to the business itself. Nevertheless, as illustrated by the case of *Brett v The Solicitors Regulation Authority [2014] EWHC 2974*, there is no doubt that in-house solicitors need to be mindful that their regulatory and common law duties to the courts and the public at large in upholding the law and the reputation of the profession should always take precedence over their duty of loyalty to their clients (or their own interests). See also [paragraph 6, What are my obligations when dealing with third parties?](#) In this regard, in-house lawyers may find it helpful to consider:
- the circumstances in which conflicts may arise, either between the in-house lawyer and the client or between the individual interests of clients, with a view to ensuring that potential problems are avoided or identified at an early stage (see further, [paragraph 3, Do I have a conflict of interest?](#));
 - whether what they are being asked to do affects their duty to act with integrity (Principle 5), to uphold the rule of law and the proper administration of justice (Principle 1) or to uphold public trust and confidence in the solicitors' profession and in legal services provided by authorised persons (Principle 2).

Of particular importance here is the understanding that acting in a client's best interests does not override your obligation to not mislead the court or others (see SRA guidance "Acting with integrity", 23 July 2019); and

- how best to remind employers of the limits of your duties of loyalty. Generally this may be a point best addressed at the start of the employer/employee relationship, although clients may need to be reminded of this from time to time or through, for example, the adoption of a legal risk policy which applies to everyone who works for the business and explains, amongst other things, the role of in-house legal.

Practical example

On Monday 31 March, you are assisting your employer in negotiating a short term bridging loan with its major financiers. The loan must be put in place by the end of the day. Negotiations proceed well but by the time the documents are ready it is 2 am on Tuesday 1 April. One of the contacts at the Agent bank still present in the room suggests that the document is dated 31 March. Everyone seems to agree. What do you do?

As an in-house lawyer, it is important that you act in your client's best interests but also that you act with honesty, integrity, and independence. Backdating a document is a fraud and therefore it is not something that you should lend your name to, even if your client does not seem to be objecting to this course of action. (Perhaps they are expecting you to do so?) Although in-house lawyers will sometimes find it difficult to reconcile the conflicting duties of acting both in the client's best interests and in the public interest, it is important not to take too narrow a view of what actually amounts to your client's "best interests". In this case, even if the client contact in the room is persuaded of the merits of backdating the document, it will hardly ever be the case that your employer would want a bridging loan to be unenforceable or subject to a fraud/similar allegation. Your duty therefore in this case would be to explain to your client contact how you can best reflect what has been agreed in the document, perhaps by including an effective date clause. Where you meet resistance, think about escalating the issue, notwithstanding the unsociable hour, to your GC.

Next steps

In-house lawyers who manage or supervise others remain accountable for the work those individuals do and must effectively supervise that work. They must also ensure that anyone they manage is competent to carry out their role and that they keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up-to-date. In order to satisfy their obligations, in-house lawyer managers should consider how best to:

- ensure that those who they manage have tools in place to be able to establish who they are acting for and how their duties may apply in practice. See the [Next steps](#) section in [paragraph 1, Who is my client?](#) for suggestions relating to the adoption of a policy;
- implement effective systems and controls to ensure that no conflicts of interest arise (this is crucial to complying with Rules 6.1 and 6.2, Code for Solicitors (Conflict of interests) and Rules 6.3 to 6.5 (Confidentiality and disclosure), Code for Solicitors). See [paragraph 3, Do I have a conflict of interest?](#) and [paragraph 4, Do I have a confidentiality conflict?](#) for further suggestions;
- ensure that the service that their team provides is competent and delivered in a timely manner (Rule 3.2, Code for Solicitors). For example:
 - > does your department have a correspondence policy that sets out when in-house lawyers should clear any outgoing work (whether letters, documents or emails) with their supervisors, or when they should copy their work to their supervisors? Are final drafts of documents always signed off by supervisors?
 - > do supervisors review files at, or towards, the end of a transaction or project? Are there particular circumstances where this may be advisable?
 - > do your lawyers regularly have performance reviews? Are these reviews documented?
 - > do you review existing learning and development policies and procedures on a regular basis to ensure that your in-house lawyers are keeping their professional knowledge and skills, as well as knowledge of their legal, ethical and regulatory obligations, up-to-date? See [paragraph 10, How can I ensure my continuing competence?](#) for further suggestions; and

- reinforce, for more junior team members, the ethical responsibilities of working in-house. See further, [paragraph 5, What systems and controls are in place?](#)

Further reading

Brett v The Solicitors Regulation Authority [2014] EWHC 2974 – see [Appendix 7, Cases involving in-house lawyers](#) for a summary of this case.

SRA guidance: Acting with integrity, 23 July 2019:
www.sra.org.uk/solicitors/guidance/ethics-guidance/acting-with-integrity/

3. Do I have a conflict of interest?

Key issues:

- In-house lawyers practising in England and Wales must not act for more than one client in relation to the same matter (or related matters) in circumstances where there is an actual or potential conflict in their separate duties to act in the best interests of each client in relation to that matter or any aspect of it.
- In-house lawyers are also prohibited from acting where they have a personal or “own interest conflict”.
- As employees, in-house lawyers owe duties of good faith to (and, of course, are remunerated by) their employer. This has the potential to create an own interest conflict whenever they are advising someone other than their employer.
- In-house lawyers who manage or supervise others must ensure that junior in-house lawyers know how to identify and assess actual and potential conflicts of interest.

- 3.1 Rule 6.2, Code for Solicitors prohibits an in-house lawyer from acting in relation to a matter or a particular aspect of it if they have a “conflict of interest” or a significant risk of such a conflict in relation to that matter or any aspect of it. Under the Glossary, a “conflict of interest” is any situation where you owe separate duties to act in the best interests of two or more clients, in relation to the same or a related matter, and those duties conflict.
- 3.2 In guidance (directed at solicitors who are employed by non-regulated businesses and who provide services on behalf of their employer to the public rather than to traditional in-house lawyers) the SRA emphasises that for a conflict of interest to occur, you must be acting on concurrent matters or on related matters. The guidance states: “although the most obvious examples of conflict of interest occur when you are acting for all the clients on the same matter, a conflict of interest can also arise when one or more of the clients are involved in related matters and an issue arises in one matter that impacts on the other. The key question is whether you are unable because of the work for each to act in the best interests of all the clients”. The potential for related matters to give rise to conflicts is something which can get over looked, not least because related matter conflicts are harder to spot than same matter conflicts. This may, therefore, be worth flagging in your departmental training programme.
- 3.3 Rule 6.2, Code for Solicitors states that you must not act where there is a conflict of interest, or a significant risk of one, unless you can establish that your clients have a substantially common interest in relation to the matter (or aspect of it), or that the clients are “competing for the same objective”. In the context of in-house practice, the “substantially common interest” exception is the one most likely to apply because it would be very unusual for different companies in the same group/parts of the same entity to be competing for the same objective (for example, by bidding to buy the same target by way of auction process).

- 3.4 A “substantially common interest” means, according to the Glossary, a situation where there is both a clear common purpose between the clients and a strong consensus on how it is to be achieved, and the following conditions have been met:
- all the clients have given informed consent;
 - where appropriate, you put in place effective safeguards to protect your clients’ confidential information; and
 - you are satisfied it is reasonable for you to act for all the clients.
- 3.5 The informed consent required from each client when relying on the substantially common interest may be given or “evidenced” in writing (Rule 6.2(b)(i), Code for Solicitors). This would suggest that an in-house lawyer relying on the substantially common interest exception could make a file note of any client consent given orally (rather than obtain formal written consent). See further, [paragraph 5, What systems and controls are in place?](#)
- 3.6 “Competing for the same objective” means, again according to the Glossary, any situation in which two or more clients are competing for an “objective” which, if obtained by one client, is unattainable to the other client or clients. An “objective” is narrowly (and comprehensively defined) as meaning an asset, contract or business opportunity which two or more clients are seeking to acquire or recover through liquidation (or some other form of insolvency process) or by means of an auction or tender process or a bid or offer, but not a public takeover. It is difficult to see how this exception might apply in the in-house context.
- 3.7 Rule 6.1, Code of Solicitors prohibits you from acting where there is an own interest conflict, or a significant risk of one. The Glossary defines an “own interest conflict” as any situation where your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter. As in private practice, an own interest conflict may arise whenever a lawyer is asked to advise on a course of action that could be detrimental to them personally – for example, because it affects their financial position. However, in the in-house context, the scope for own interest conflicts is much greater because in-house lawyers are invariably acting for their employers (or, if not, in their employer’s interests). The implied duty of good faith owed by in-house lawyers to their employer in their capacity as employees and the fact that in-house lawyers are financially dependent on their employer mean that it is hard for them to be completely independent advisers in any work related context. Their careers and income are very obviously linked with the financial success of their employer group, for example.
- 3.8 Although the rules on client conflicts of interest apply to in-house practice in the same way as they do to private practice, in reality the scope for client conflicts arising is more limited. Whilst in-house lawyers frequently advise on transactions or projects that concern a number of entities or individuals within the employer group, in most circumstances no conflicts of interest arise. This is because the likelihood of employers allowing their in-house lawyers (or those lawyers agreeing) to advise a body connected to their employer or a work colleague in circumstances where their duty to their employer is likely to conflict with their duties to the other entity or individual is low.
- 3.9 Nevertheless, it is worth considering when conflicts of interest challenges may arise in the in-house context. For example:
- A. [You act for a wholly-owned subsidiary of your employer on a purchase that is guaranteed by your employer \(and both entities are solvent\).](#)
- In these circumstances, where there seems to be an agreed course of action between the two parties that is in the best interests of both, it is unlikely that a client conflict or an own interest conflict would exist. However, should there be any change in circumstances (for example, because the wholly-owned subsidiary becomes financially unstable), a client conflict may arise.

- B. You act for your employer on the disposal of a wholly-owned subsidiary. You are also assisting the management of the wholly-owned subsidiary in compiling the disclosures against the warranties set out in the share purchase agreement. One of the directors of the subsidiary company asks you to prepare a memo on any personal exposure they may have in respect of any failings in the disclosure process.

Often it will be in the interests of both your employer and the director to have full and adequate disclosure. However, should you become aware that the director is seeking advice directly from you on how best to protect themselves against claims by your employer, you should suggest that the director seeks independent legal advice on any proposal you might put forward to deal with this (as you would be putting forward the proposal in your capacity as your employer's adviser).

- 3.10 Closely related to the issue of conflicts of interest are the duties in-house lawyers owe to their clients in relation to confidentiality and disclosure. These topics are discussed further in [paragraph 4, Do I have a confidentiality conflict?](#)
- 3.11 Where a conflict of interests arises, you will need to cease acting for one, or possibly even all, of the clients concerned. In practical terms, you will not wish or be able to cease acting for your employer. Although this will generally be understood within the group context, it may be worth explaining this to other clients from the outset to avoid any embarrassment later. See [Appendix 6, Precedent terms and conditions for instructing X Plc's legal team](#). In any circumstances where you are acting on the basis of a substantially common interest and have the consent of the parties, you should keep a file note setting out the basis of that consent (and the steps you have agreed to take should a conflict subsequently arise) (see [Appendix 5, Checklist when relying on substantially common interest exception](#)).

- 3.12 Although conflicts of interest are unlikely to arise in circumstances where an in-house lawyer does not act for anyone other than the employer and its group companies, it may not always be clear at the outset whether a conflict of interests is likely to arise (see [paragraph 3.9](#)).

- 3.13 There is no guidance as to how best to ensure that any individuals you manage understand their conflicts obligations. In the context of in-house practice it will not, in many cases, be practicable for in-house teams to maintain searchable records of every new instruction that would enable them to carry out definitive conflict checks. Moreover, this approach is unlikely to be necessary given that any potential client conflicts would, in most cases, be readily identified by the employer itself at the outset of any matter.

- 3.14 A more meaningful approach might therefore be one in which individual solicitors are encouraged to assess the risks and potentials for any conflict (including own interest conflicts) at the outset of the matter and to discuss any concerns with their supervisor/manager. This could be done by referring to a "conflicts checklist" which sets out a series of questions to assist such analysis. See [Appendix 4, Conflicts and confidentiality checklist](#).

- 3.15 Conflicts may also arise as a result of a clash of duties. In the Introduction to the Principles, the SRA makes it clear that, should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law and public confidence in a trustworthy solicitors' profession) take precedence over others. You should therefore, where relevant, inform your client of the circumstances where your duty to the court and other professional obligations will outweigh your duty to them. See [Practical example 3](#) below, and [paragraph 6, What are my obligations when dealing with third parties?](#)

Practical examples

1. You are employed by X Plc, part of a large retail group. You are asked to advise Packingco, a wholly-owned subsidiary of your employer, on a long-term supply agreement with Cardboardco, a third party customer. Packingco produces all the packaging for X Plc, but also for a growing number of third party customers.

Packingco's obligations under the contract will be guaranteed by X Plc. Once the contract with Cardboardco is finalised, Packingco would also like you to help renegotiate a number of contracts with its own customers, including the one with X Plc.

This scenario raises a number of issues. First, who is your client? In relation to the supply agreement, you are clearly acting for Packingco, but what about in relation to the guarantee? Will you be able to act for both parties? Will you be able to act on the renegotiation of Packingco's other customer contracts? Will there be a conflict of interests?

In relation to the supply agreement with Cardboardco and the guarantee, assuming both entities are solvent, you should be able to advise your employer, X Plc, and its subsidiary, Packingco, even though the matters are closely related. From these facts, it would seem that the interests of both are aligned and so there is no significant risk of a conflict. In relation to the renegotiation of the contracts with Packingco's other customers, similar issues arise.

By contrast, the potential for conflict is more obvious where you are advising Packingco on a contract with X Plc. Although Packingco is a wholly-owned subsidiary of X Plc, its interests would be best served by negotiating terms with its customers that ensure a high price for the goods etc.; something that is not necessarily in the best interests of X Plc. Despite this, if both clients have already substantially agreed the commercial terms and your role is merely to document an arm's length agreement, for example, to protect intellectual property rights, then the likelihood that you will be able to act for both clients on documenting the agreement without the risk of a conflict arising is improved, provided that you refer any commercial points to be negotiated back to your contacts within the business.

2. Your employer, X Plc, asks you to advise on the acquisition of a private company. Your aunt is a member of the board of directors of that private company. What do you do?

The presence of a family member on the "other side" of a transaction on which you are advising will not automatically mean you have an own interest conflict. To determine whether you should act in these circumstances, it may be helpful to consider whether you have anything to gain or lose as a result of the proposed transaction. For example, are you likely to benefit financially from any gain your aunt makes as a result of the sale to X Plc? You should also consider whether you are in possession of any information about the target, through your relationship with your aunt, which might be material to your client but that you feel you cannot disclose because you feel a sense of loyalty to your aunt. In any event, you should disclose your connection with the target company to your employer before agreeing to take on the work.

3. You are advising your employer, X Plc, in relation to a dispute. X Plc is anxious that the disclosure process may reveal information damaging to its position. You are asked to see what you can do.

You will be able to withhold privileged material from the other side. However, where privilege is not available, the Civil Procedure Rules on disclosure require parties in a dispute to disclose not only the documents which support their case, but also those which adversely affect their case or which support another party's case. Relevant documents must, therefore, be disclosed even if they are confidential. As a solicitor, you are subject to duties to the court. If you consider your employer is required to disclose certain documents, you must advise it of its legal obligation to do so. If you are being asked to withhold documents on behalf of your employer that you consider must be disclosed, you should decline. This is one of the circumstances in which your duties to the court outweigh your obligations to the client. The SRA has made it clear in the Introduction to the Principles that this is something you should inform your client of.

Next steps

In-house lawyers who manage others should consider:

- adopting or reviewing your policy on who in-house lawyers may advise at any point in time (see [paragraph 1, Who is my client?](#)), which might include a restriction or ban on acting for non-employer clients;
- creating a checklist of questions designed to help solicitors identify and assess any potential conflict issues at the start of a new matter, thereby allowing them to raise queries with their manager/supervisor. Examples of the questions that might be included on a conflict check questionnaire are set out in [Appendix 4, Conflicts and confidentiality checklist](#);
- whether to document the circumstances in which a piece of work was taken on. For example, in the limited circumstances where there is the potential for a conflict of interests to arise (but that risk is not a significant one) and you act on the basis of the substantially common interest exception with consent from both parties, it is important that this is clearly recorded. Although any consent from your client may be “evidenced” in writing (and therefore a file note could record oral consent provided by the client), in order for the exemption to apply the in-house lawyer must be able to evidence that it is reasonable to act in these circumstances. In practice it is unlikely, therefore, to be sufficient simply to record that you have obtained the consent of your clients but also that your clients understand what the likely consequences are should any conflict subsequently arise. For example, when acting for your employer and a subsidiary, does the subsidiary understand that, in the case of a conflict arising, you may not be able to continue acting for it? Both clients should also be provided with an explanation of how confidential information will be shared. The in-house lawyer will invariably need to disclose all relevant confidential information relating to and provided by the subsidiary to their employer but may not be able to do the reverse. Has this been properly explained to the subsidiary and do they agree to this? See [Appendix 5, Checklist when relying on substantially common interest exception](#); and
- where you regularly advise, on a joint retainer basis, a non-employer client and your employer, consider whether you wish to put some general terms and conditions in place that govern the relationship with that non-employer entity. Using such terms would also be one way of providing the transparency information required under the Code for Solicitors when you are providing services to the public or a section of the public (see further, [paragraph 2.6](#)). Precedent terms and conditions are set out in [Appendix 6, Precedent terms and conditions for instructing X Plc’s legal team](#).

Further reading

SRA guidance: Unregulated organisations – conflict and confidentiality, 23 July 2019:

www.sra.org.uk/solicitors/guidance/ethics-guidance/unregulated-organisations---conflict-and-confidentiality/

4. Do I have a confidentiality conflict?

Key issues:

- In-house lawyers practising in England and Wales have a general duty to keep the affairs of clients (and former clients) confidential. This is a continuing duty, which carries on even when your relationship with the client has come to an end.
- You also have a matter-specific duty to disclose to your client any relevant information of which you are aware and which is material to your client's matter. This duty may be varied by agreement with your client.
- In cases where your duty to keep information confidential conflicts with your duty to disclose that same information to another client (in the context of your work on a matter for that other client), your duty of confidentiality takes precedence. However, this does not negate your duty of disclosure; it simply means you cannot decide which of these competing duties you are going to breach.
- It may not be appropriate for you to act or continue to act for a client to whom you cannot disclose material information of which you have knowledge and which is relevant to the matter you are advising them on.

- 4.1 You have a duty to keep the affairs of clients (and former clients) confidential (unless disclosure is required or permitted by law or the client). This obligation extends beyond your relationship with the client and thus continues after you cease to be employed by your client group. Under the common law, all members of your in-house team, including support staff, consultants and locums are likely to have a similar obligation to keep confidential information confidential. In reality, therefore, the whole of your in-house function in England and Wales will have an obligation of confidentiality – and the provisions of confidentiality clauses in employment contracts etc. may cast the obligation further.
- 4.2 Generally, you also have a duty, as an individual, to disclose to a client all information of which you are personally aware and which is material to the matter you are acting on, regardless of the source of that information. This may (prima facie) catch information relating to a previous employer (although you are likely to owe that employer a continuing duty of confidentiality).
- 4.3 Rule 6.4, Code for Solicitors states that there are a number of circumstances where the duty of disclosure does not apply. These are where:
- the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
 - your client gives informed consent in writing (or evidenced in writing), to the information not being disclosed to them;
 - you have reason to believe that serious physical or mental injury will be caused to your client or another if the information is disclosed; or
 - the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed.
- 4.4 If a duty of confidentiality owed to one client conflicts with a duty of disclosure owed to another client, the duty of confidentiality takes precedence. However, that does not excuse any breach of your

duty of disclosure. This may be problematic in circumstances where you are advising a number of clients in relation to the same matter, but they do not wish for their confidential information to be shared. In these circumstances, the duty to disclose may be modified by agreement but, before doing this, you would need to consider whether there is any other reason why you should not act. For example, does withholding information in this case nevertheless call into question your ability to act with integrity (Principle 5) or independence (Principle 3)? This is likely to turn on the nature and materiality of the information in question.

- 4.5 As a general rule, where acting for your employer and another party on the same matter, you will need to ensure that, while the information relating to the specific matter may and should be freely shared between the parties, other information relating to your employer will not be. See [paragraph 3, Do I have a conflict of interest?](#) and [Appendix 5, Checklist when relying on substantially common interest exception](#).
- 4.6 Rule 6.5, Code for Solicitors does not allow you to act for a client (for example, your employer) (“A”) in respect of a matter where A has an “interest adverse” to another party (“B”) if you or someone else in your department has previously acted for B and you therefore have access to confidential information which is material to A’s matter, unless:
- effective measures have been taken which result in there being no real risk of disclosure to you of the confidential information; or
 - B has given informed consent, given or evidenced in writing, to you acting for A, including in respect of any measures taken to protect their information.
- 4.7 Although there is no definition of “interest adverse” in the Code for Solicitors, previous guidance issued by the SRA under the (now superseded) Code of Conduct 2007 (the “2007 Code”) stated that the intention was to mirror what is considered to be adverse for these purposes at common law and referred to the leading case on information barriers

– *Bolkiah v KPMG [1999] 2 AC 222*. A review of the Bolkiah line of cases indicates that a matter needs to be litigious or involve some form of hostility (for example, a contested takeover) in order for there to be an “interest adverse”. However, the old SRA guidance in the 2007 Code went on to suggest that adversity arises simply where one party is, or is likely to become, the opposing party on a matter, whether in negotiations or some form of dispute resolution and might therefore catch many types of “non-contentious” matters too.

- 4.8 Advising “across the table” to a former client could be a reality for in-house lawyers who specialise within a particular industry and change jobs a number of times. Although your employer should be able to accept that you have to vary your duty of disclosure to them in respect of information gathered on previous jobs, it may be harder for you to obtain their informed consent to act against a former employer where it is felt that the knowledge that you possess is still relevant and possibly material – particularly as it will be virtually impossible for you to demonstrate that you have put effective safeguards in place (i.e. segregated the information within your head). Questions may also arise in relation to integrity and independence, even if both your current and former employer have agreed that you may act for both of them. Such issues will, of course, be resolved in most cases by the passage of time, given that most of your knowledge about the affairs of former clients will, in due course, cease to be commercially current and therefore material, or even relevant, to your new employer.

Practical example

[You are asked to advise your client on a potential investment in an entity you were once employed by. Can you do so?](#)

In-house lawyers are personally responsible for ensuring that they have systems in place to identify and mitigate risks to client confidentiality (including in relation to former clients). Although you may have a duty of

disclosure to your existing employer, you also have a duty of confidentiality to your former employer. As your duty of confidentiality takes precedence, ideally you should have varied your duty to disclose to your current employer any relevant information regarding your former employer at the time you started to work for your new employer. (If not done, you could, of course, consider doing this now.)

Despite being able to vary your duty of disclosure, however, there may be other considerations here that will prevent you from acting. For example, if your view, based on information you know about your former employer, is that such an investment would disadvantage your current employer, it may mean that you cannot act. This is because your inability to share this information with your client would put you at risk of breaching Principle 5 (acting with integrity) were you to continue to act, as well Principles 3 (acting with independence) and 7 (acting in the best interests of each client).

Although your duty of confidentiality to former clients never expires, the currency of any confidential information will diminish as time passes. In cases where you have not worked for an organisation for many years, the likelihood of you still possessing relevant confidential information will, in most cases, be low.

See also [Practical example 2, paragraph 3, Do I have a conflict of interest?](#)

Next steps

In many ways, the biggest risks to client confidentiality within the in-house context arise out of own interest conflicts. So, asking in-house lawyers to complete checklists along the lines suggested in [Appendix 4, Conflicts and confidentiality checklist](#) and [Appendix 5, Checklist when relying on substantially common interest exception](#) may assist in helping to ensure that there is an effective system in place to manage any risks to confidential information. In addition, in-house lawyers who are managers may wish to consider:

- including a standard term within in-house lawyers' contracts of employment setting out their duty of confidentiality to their employer and other clients within the employer group, and varying their duty of

disclosure in respect of information they hold on their former clients or others. The term should also require in-house lawyers to report any potential confidentiality conflict to their supervisor (so that the supervisor can consider whether it is appropriate for the in-house lawyer to work on the matter in question at all);

- adopting a confidentiality policy which documents some of the organisational procedures relating to confidentiality (for example, how information should be stored and secured, how it can be shared within the organisation, who has access to what information and how long information should be retained); and
- ensuring that in-house lawyers vary their duty of disclosure when advising clients other than their employer (see [Appendix 6, Precedent terms and conditions for instructing X Plc's legal team](#)).

Further reading

Hilton v Barker Booth & Eastwood [2005] 1 WLR 5677 – this landmark House of Lords decision concerned a solicitor with a “confidentiality conflict”. The fact that he had chosen to put himself in an impossible position did not exonerate him from liability and he could not use his “embarrassment” as a reason why his duty to either client should be taken to have been modified. The facts were, in brief, as follows: Mr Hilton went into property development with Mr Bromage. Mr Hilton knew nothing of Bromage's possible criminal past; however, the firm of solicitors advising Mr Hilton, Barker Booth & Eastwood, had defended Mr Bromage in a criminal trial. The firm failed to disclose this to Mr Hilton. When Mr Bromage failed to keep his side of his property related bargain with Mr Hilton, the bank financing the development foreclosed and Mr Hilton ended up losing his investment. Notwithstanding that the fact that Mr Bromage had been involved in a criminal case was a matter of public record, Barker Booth & Eastwood was (effectively) found to have owed Mr Bromage a duty of confidentiality (through their general duty to act in his best interests in relation to the matter in question). The court also found that the firm owed Mr Hilton a duty of disclosure in respect of the suitability of Mr Bromage as a business partner.

Bolkiah v KPMG [1999] 2 AC 222 – although this House of Lords decision concerned a firm of accountants, it considered the common law fiduciary duties of confidence that apply also to solicitors. KPMG had acted for Prince Jefri Bolkiah and held confidential information relating to him as a result of their retainer. They were subsequently retained by the Brunei Investment Agency (the “BIA”), of which Prince Jefri had been chairman, to investigate the whereabouts of certain assets alleged to have been used by Prince Jefri for his own benefit. The House of Lords granted an injunction preventing KPMG from acting for the BIA. Although KPMG had taken some steps to protect the confidential information they held as a result of their retainer with Prince Jefri (which included the setting up of information barriers and separate teams), the House of Lords held that the burden on KPMG was to show there was “no risk” of the information coming into possession of those members of the KPMG team who were acting for the BIA. In this case, the “ad hoc” information barrier arrangement was within a single department and the separate teams involved were made up of large numbers of employees who joined the teams on a rotation basis. Those employees, whilst on separate teams in relation to the matters, were accustomed to working with each other on other matters. The court further held that the risk of information being disclosed must be a real one and not merely fanciful or theoretical, but it need not be substantial.

5. What systems and controls are in place?

Key issues:

- The StaRs do not specifically impose any obligations on in-house lawyers to put in place systems and controls to ensure compliance.
- As an in-house lawyer, you are personally accountable for compliance with the StaRs and must always be prepared to justify your decisions and actions.
- In-house lawyers who supervise or manage others remain accountable for their work and must effectively supervise it.
- In-house lawyers who manage others must ensure that anyone they manage is competent and that they keep their legal, regulatory and ethical knowledge up-to-date.
- In practical terms, these requirements will mean that in-house departments should (to the extent that they do not already have them) introduce some level of systems and controls to support compliance with the StaRs.

- 5.1 Although the StaRs are silent on the subject of systems and controls, a number of Rules set out in the Code for Solicitors do suggest that in-house legal departments should introduce (or maintain) some level of systems and controls. For example, the Code for Solicitors includes the following provisions:
- where you supervise or manage others providing legal services:
 - > you remain accountable for the work carried out through them; and
 - > you effectively supervise work being done for clients (Rule 3.5);
 - you ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up-to-date (Rule 3.6); and
 - you are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA's regulatory arrangements (Rule 7.2).
- 5.2 A sensible starting point for managers when trying to identify what types of systems and controls might help to address the obligations set out in Rules 3.5, 3.6 and 7.2 may be to focus on:
- the issues most likely to affect your type of client, for example when might conflicts of interest and confidentiality conflicts occur in the type of work your department undertakes - see [paragraph 3, Do I have a conflict of interest?](#) and [paragraph 4, Do I have a confidentiality conflict?](#);
 - when to give matter-specific information to your potential client (for example, where necessary to manage a potential conflict/confidentiality issue. See [Appendix 5, Checklist when relying on substantially common interest exception](#) and [Appendix 6, Precedent terms and conditions for instructing X Plc's legal team](#));

- anything that may result in third party complaints or that might be perceived as not being in the public interest (see [paragraph 6, What are my obligations when dealing with third parties?](#)); and
- ensuring that learning and development programmes cover any changes or updates to the StaRs or relevant SRA guidance as well as ethics training.

5.3 Although no guidance is given in relation to how you might best “justify your decisions and actions to demonstrate compliance” (Rule 7.2), some level of written record might assist with this. To reduce any administrative burden, a starting point might simply be to record circumstances when in-house lawyers deviate from internal policies, for example on conflicts or confidentiality, or where specific information was provided to clients at the start of the retainer on how conflicts might be avoided. These “written records” might take the form of file notes kept in a folder managed by a senior manager or head of department.

5.4 Ensuring that lawyers in your team understand their obligations to act in a way that encourages equality, diversity and inclusion (Principle 6) and in a way that does not unfairly discriminate by allowing personal views to affect professional relationships (Rule 1.1) is something that your employer is likely to be interested in more generally and may have already been addressed. For example, it is likely that the business already has a diversity and inclusion programme which the in-house lawyers are invited or required to participate in.

Practical example

You are a solicitor qualified in England and Wales working in London for a Japanese bank. You support the business teams working in in the UK and the US. The Japanese bank has an in-house legal team based in Tokyo, which occasionally provides you with support. What systems and controls need to be put in place?

The obligations set out in the Principles and the Code of Conduct apply to you because you are a solicitor admitted in England and Wales whose activities are carried out from an office in England.

The locations of the business teams you are advising (in the UK, US and Japan) have no impact on the professional obligations imposed on you by the StaRs.

However, if you are someone who manages others based and practising in England and Wales, you should consider taking steps to ensure that members of your team:

- understand their obligations to act in accordance with the Principles;
- are able to identify risks to client confidentiality and mitigate those risks;
- are able to identify and assess potential conflicts of interests;
- comply with statutory requirements for the direction/ supervision of reserved legal activities and immigration work;
- are at a level of competence appropriate to their work and level of responsibility, and that they are up-to-date on their professional obligations and on ethics; and
- provide advice to clients in a competent and timely manner.

Next steps

In-house lawyers who manage others should consider:

- adopting or reviewing existing procedures relating to supervision (see [paragraph 2, What duties do I owe my client?](#));
- reviewing existing learning and development programmes to ensure that in-house lawyers are sufficiently aware of their legal, regulatory and ethical obligations; and
- wherever possible, learning from any potential breaches of the StaRs to increase ethical awareness and to establish causes and address any weaknesses in systems and controls.

6. What are my obligations when dealing with third parties?

Key issues:

- The StaRs impose specific obligations on how in-house lawyers practising in England and Wales deal with third parties.
- These rules are designed to ensure that the in-house lawyer's obligations relating to maintaining trust and acting fairly apply to third parties in the same way as they apply to clients.
- Where duties to clients and third parties conflict, the SRA's view is that the Principles which safeguard the wider public interest take precedence over the client's interests.
- The practical effect of this is that the extent of the obligation to act in your client's best interests is limited by other Principles.
- This may mean, in certain circumstances, that in-house lawyers have to say "no" or push back on their client's requests.
- There are also additional rules relating to your duties to the court.

- 6.1 The StaRs contain specific obligations relating to how in-house lawyers deal with third parties.
- 6.2 The following Principles: upholding the rule of law and proper administration of justice (Principle 1); acting in a way that upholds the public trust and confidence in the solicitors' profession and in legal services provided by authorised persons (Principle 2); acting with independence (Principle 3); acting with honesty (Principle 4); acting with integrity (Principle 5); and acting in a way that encourages equality, diversity and inclusion (Principle 6) apply both to the in-house lawyer's treatment of third parties as well as their clients. Some of these Principles also apply to the lives of in-house lawyers outside of practice (see [paragraph 8, Does my regulator care about what I do outside work?](#)).
- 6.3 In the introduction to the Principles, the SRA makes it clear that the Principles which safeguard the wider public interest take precedence over your client's interests. In fact, Principle 3 (acting with independence) places the in-house lawyer under a duty not to be compromised by any client interest where doing so would result in the breach of any public interest Principles. This may result in in-house lawyers having to say "no" or "push back" on a client's request where it in some way compromises the in-house lawyer.
- 6.4 In its "Acting with integrity" guide, the SRA makes it clear that it would be likely to take disciplinary action under Principle 5 where a solicitor had taken unfair advantage of clients or third parties, or had allowed others to do so. Other examples include misleading the court or making false representations on behalf of clients.
- 6.5 The Code for Solicitors sets out the following rules:
 - you do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services (Rule 1.1, Code for Solicitors);
 - you do not abuse your position by taking unfair advantage of clients or others (Rule 1.2, Code for Solicitors);

- you perform all undertakings given by you, and do so within an agreed timescale or if no timescale has been agreed then within a reasonable amount of time (Rule 1.3, Code for Solicitors); and
- you do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client) (Rule 1.4, Code for Solicitors).

6.6 The SRA have made it clear in their Enforcement Policy that certain types of behaviour (including taking unfair advantage of clients or others) are viewed as inherently more serious than others and therefore allegations of this type of behaviour are more likely to result in an SRA investigation (see [paragraph 7, What duties do I owe my regulator?](#)).

6.7 In relation to proceedings before courts, tribunals and inquiries the following specific rules apply:

- you do not misuse or tamper with evidence or attempt to do so (Rule 2.1, Code for Solicitors);
- you do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence (Rule 2.2, Code for Solicitors);
- you do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case (Rule 2.3, Code for Solicitors);
- you only make assertions or put forward statements, representations or submissions to the court or others which are properly arguable (Rule 2.4, Code for Solicitors);
- you do not place yourself in contempt of court, and you comply with court orders which place obligations on you (Rule 2.5, Code for Solicitors);
- you do not waste the court's time (Rule 2.6, Code for Solicitors); and
- you draw the court's attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware, and

which are likely to have a material effect on the outcome of the proceedings (Rule 2.7, Code for Solicitors).

6.8 Again, the Enforcement Strategy emphasises the importance of solicitors' obligations to the court and to members of the wider public who may be affected by the work of lawyers (for example, as a party to a dispute or in connection with the legal matter in hand). Complying with these obligations is critical for the effective administration of justice and operation of the rule of law.

Practical examples

1. [You are advising your employer on the acquisition of a family business. You are negotiating against a lawyer specialising in private wealth who admits they have never advised on a commercial sale and purchase. On reviewing the first draft, they do not question the extensive warranties the family has been asked to provide.](#)

Although you must always act in your client's best interests, you are also required not to abuse your position by taking unfair advantage of others.

The question is: how far should you go in ensuring you do not abuse your position? Clearly, here you cannot advise the other party without being in danger of acting in conflict.

You could, however, (with your client's consent) explain the basic concepts to the other side's lawyers with a view to ensuring "better" representation for the other side. Your client may well prefer for the agreement to be fairly negotiated so as to minimise the chance of disputes further down the road. However, there is a fine line between giving information and advising and your better option may be to suggest (possibly through a principal to principal conversation) that the family seeks advice instead from a lawyer with more relevant experience. Indeed, if the existing solicitor ploughs on regardless and is clearly out of their depth, this could fix you with a reporting obligation – see further [paragraph 7, What duties do I owe](#)

my regulator? Under Rule 3.2, Code for Solicitors, services provided to clients by a solicitor must be “competent”.

Where the other side is unrepresented (as opposed to “poorly” represented), you should always take extra care and exercise caution by documenting what you tell the other side and ensuring that they understand the position. In some circumstances, your employer may be obliged (or wish) to pay for the other side to be represented (for example, when settling a dispute with an employee).

2. In connection with a regulatory investigation in England, you are asked to provide the regulator with an undertaking that certain documents will not be destroyed. What are the issues?

An undertaking is any statement made by you that you will do something or cause something to be done, or refrain from doing something, given to someone who reasonably relies on it. Failure to fulfil an undertaking may result in disciplinary action. All undertakings given by in-house lawyers can be enforced by the court. It is therefore important that, before providing an undertaking, an in-house lawyer is certain that they can fulfil it. In this case this would mean being certain that the documents in question are under the in-house lawyer’s custody and control and that other members of the company could not intentionally or inadvertently destroy them. Does your department have a policy on the giving of undertakings? For example, do they have to be reviewed by a peer or signed by your head of department?

3. You are an in-house lawyer advising your client, who is the defendant in a major breach of contract claim. You are familiar with the contract as you were involved in negotiating it some years back. It transpires that the outcome of the case may hang on what happened at a particular meeting between the CEO of your employer, Mr Banks, and the CEO of the claimant company. Mr Banks is required to give evidence and you are helping him to prepare his witness statement. He gives you his account of what transpired at the meeting but the story

does not add up and Mr Banks’ explanation of the discrepancies between his account and the other known facts in the case is not convincing to you. Mr Banks insists his version of events is correct and does not authorise you to amend or alter the draft witness statement. What are the issues?

There are times in practice where your duties of loyalty to your client will conflict with your duties to the court. In these circumstances, your duties to the court will override your duty of loyalty to your client. Rule 1.4, Code for Solicitors prohibits you from misleading the court either by your own acts or omissions or by being complicit in the acts or omissions of others (including your client). Further, under the Civil Procedure Rules a person who makes, or causes to be made, a false statement in a witness statement verified by a statement of truth without an honest belief in its truth is guilty of contempt (CPR 32.14(1)). Allowing a client to submit a witness statement that you believe to be false could therefore amount to misleading the court. Other common law offences of pervasion or concealment may also be relevant. The case of *Brett v The Solicitors Regulation Authority [2014] EWHC 2974* shows that, while employers (and clients) may demand loyalty of their advisers, in-house lawyers should also be mindful of their regulatory and common law duties to the courts and the public at large in upholding the rule of law and the reputation of the profession.

Finally, it is worth, as always, considering carefully who your client is in any given situation. In this case it is the defendant company and not Mr Banks. Sometimes acting in the client’s best interests will involve pushing back on directions given by your client contacts.

Next steps

In-house lawyers who manage others and who are responsible for ensuring that their teams are aware of the rules governing third parties should consider:

- adopting a policy setting out: the limited circumstances in which undertakings may be given; how to avoid giving undertakings that are outside your control; and who can authorise them, as well as providing guidance on the consequences of doing so (for example, potential personal liability); and
- how best to train in-house teams on their professional ethics, and in particular, to ensure that lawyers understand the demands of the public interest Principles.

Further reading

Brett v The Solicitors Regulation Authority [2014] EWHC 2974 (Admin) – see [Appendix 7, Cases involving in-house lawyers](#).

7. What duties do I owe my regulator?

Key issues:

- The SRA sees itself as a public interest regulator.
- In-house lawyers are subject to extensive reporting obligations, which underpin the suggestion that ongoing dialogue and communication with the SRA is expected.
- In-house lawyers must be able to justify their decisions and actions in order to demonstrate compliance with their obligations under the SRA's regulatory arrangements.

7.1 Under the Code for Solicitors, as an in-house lawyer you must:

- be able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA's regulatory arrangements (Rule 7.2, Code for Solicitors);
- cooperate with the SRA, other regulators, ombudsmen and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services (Rule 7.3, Code for Solicitors);
- respond promptly to the SRA and:
 - > provide full and accurate explanations, information and documents in response to any request or requirement; and
 - > ensure that relevant information which is held by you, or by third parties carrying out functions on your behalf which are critical to the delivery of your legal services, is available for inspection by the SRA (Rule 7.4, Code for Solicitors); and
- not attempt to prevent anyone from providing information to the SRA or any other body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest (Rule 7.5, Code for Solicitors).

7.2 In addition, you are subject to a number of ongoing obligations to promptly notify the SRA where:

- anything raises a question as to your character and suitability (as determined by the Character and Suitability Rules) or any change to information previously disclosed to the SRA in support of your application to be a solicitor, after it has been made (Rule 6.5, Character and Suitability Rules);
- you are subject to any criminal charge, conviction or caution, subject to the Rehabilitation of Offenders Act 1974;
- a relevant insolvency event occurs in relation to you (for example, a body owned by you or of which you are a director goes into insolvent liquidation); or

- if you become aware:
 - > of any material changes to information previously provided to the SRA about you or your practice, including any change to information recorded in the roll of solicitors kept under the Solicitors Act 1974; or
 - > that information provided to the SRA about you or your practice is or may be false, misleading, incomplete or inaccurate (Rule 7.6, Code for Solicitors).
- 7.3 All solicitors applying for admission or restoration to the roll must be of satisfactory character and suitability.
- 7.4 The Character and Suitability Rules do not set out the standards of conduct and behaviour that solicitors must achieve; rather they set out how the SRA might consider any criminal or other behaviour which may detract from your character or suitability.
- 7.5 Although the SRA is not likely to take action in respect of conduct which may be considered low-level in terms of seriousness, failure to report may give rise to concerns that you have not acted with honesty and integrity and the SRA may take this into account when making a determination as to your character and suitability (Rule 6.7, Character and Suitability Rules).
- 7.6 In order to ensure that the SRA can properly consider character and suitability issues, it is important that in-house lawyers should, when disclosing anything, submit supporting evidence, both to explain their case (for example, evidence relating to criminal offences and, where relevant, fines being paid) and to support it (for example, character references or evidence of rehabilitation).
- 7.7 Finally, in-house lawyers are also subject to the following general reporting obligations (set out in Rules 7.7 and 7.8, Code for Solicitors) to:
- promptly report to the SRA any facts or matters that [they] reasonably believe are capable of amounting to a serious breach of [the SRA's] regulatory arrangements by any person regulated by them (including themselves); and
 - promptly inform the SRA of any facts or matters that [they] reasonably believe should be brought to its attention in order that it may investigate whether a serious breach of its regulatory arrangements has occurred or otherwise exercise its regulatory powers.
- 7.8 The reporting standard set out in the Code for Solicitors re-characterises the previous obligation to report misconduct or “material” breaches. The effect is the introduction of a lower threshold for reporting which will also affect the timing of reports, meaning some may be triggered before internal investigations have been completed.
- 7.9 The general reporting obligation turns on a number of elements:
- you must be aware of facts and matters – this suggests that some level of investigation will nearly always need to be carried out before a report is made. The fact that the reporting threshold is reached when there is reasonable belief and that any report must be “prompt” does, however, mean that a report may have to be made in some circumstances before the investigation is complete;
 - you must reasonably believe – there is a subjective element to believe, but it is balanced with a more objective “reasonableness” test; and
 - the facts and matters must be capable, if true, of amounting to a serious breach.
- 7.10 There is no definition of “serious breach” in the Code for Solicitors. The SRA’s Enforcement Strategy sets out the SRA’s approach to enforcement and should be taken into account to determine the “seriousness” of any breach in the context of reporting.

7.11 Whilst there is no definitive list of what might amount to seriousness, the Enforcement Strategy is clear that behaviours involving any of the following will always be taken seriously by the SRA:

- abuse of trust;
- taking unfair advantage of clients or others;
- misuse of client money;
- sexual and violent misconduct;
- dishonesty; and
- criminal behaviour.

7.12 Other behaviours may also, depending on the circumstances, amount to serious breach. Although there is no comprehensive set of the factors which the SRA takes into account, issues such as the intent and the experience of the individual, whether the act was planned or repeated, the impact on the alleged victim and whether any steps were taken to remediate the action will all be considered as well as any contextual mitigation (for example, events giving rise to the possible breach). Factors which amount to personal mitigation (for example, anything relating to the background, character and circumstances of the individual) might be relevant to sanction, but not to seriousness.

7.13 The focus of the second limb for general reporting under Rule 7.8, Code for Solicitors, is on situations where the in-house lawyer may not themselves be able to investigate a matter (for example, because the solicitor in question works, or previously worked at relevant times, elsewhere). In these situations, the SRA will have investigatory powers which neither you nor your employer will possess and may, as a result of your report, wish to carry out an investigation.

7.14 Although reporting obligations apply directly to each in-house lawyer, some level of co-ordination from the legal department is advisable, particularly to establish whether the “reasonableness” threshold has been met. In this regard, it may be worth considering whether in-house lawyers should, as a first step, discuss whether or not reports should

be made with a senior member of the team. Whilst this has the possible disadvantage of doubling the reporting burden, a single joint report could be made and, in most cases, the benefit of having a second opinion will outweigh any downside. You will, of course, need to be sensitive to privacy issues and be mindful of not suppressing any whistleblowing rights if, for example, the more junior lawyer thinks (notwithstanding consultation with a senior colleague) that a report needs to be made in circumstances where their senior colleague does not.

Practical examples

1. You, with the help of external solicitors, are advising your client on a settlement agreement with a counterparty. The settlement negotiations are proceeding well and a figure has been agreed. The counterparty agrees to place the settlement monies into your external law firm’s client account pending signing of the settlement agreement. Before the settlement agreement is actually signed, the external advisers issue you a bill for their assistance, letting you know that they have settled their invoice by making a deduction from the sum held in client account.

The money held in client account was not your employer’s money but was instead likely to have been held on trust for the counterparty pending resolution of the dispute. Misuse of money in client account is considered a serious matter under the SRA Enforcement Strategy. However, on these facts, it is not necessarily a matter which would need reporting. Further questions would need to be asked. For example, was this simply an honest mistake (which the law firm could now easily rectify and make good swiftly by returning the deducted monies to client account)?

2. You return home after a two year secondment abroad during which time you rented out your flat. On your return you find a pile of mail that your tenant had failed to pass on to you. On opening the mail you find that you have been issued with a County Court Judgment in relation to non-payment in respect of some building repairs organised by the tenant in your absence. You had assumed that the tenant would be liable for these repairs, but as you do not wish to leave the debt outstanding you take immediate steps to pay the debt in full. Do you need to report yourself to the SRA?

The Character and Suitability Rules require you to inform the SRA if you have been made subject to a County Court Judgment. You will also need to supply the SRA with details of what happened and outline your attitude towards the event, evidence of your good character (in the form of a credible reference written in the knowledge of what happened by an independent person who knows you well) and proof that the judgment has been paid.

Next steps

In-house lawyers who manage others should:

- ensure that those lawyers understand their self reporting obligations in relation to any character and suitability issues;
- consider appointing someone within the team to develop some expertise on the general reporting requirement so that they can help in-house lawyers who may have an obligation to report under the Code of Conduct;
- ensure that HR is kept informed of any conduct issues arising out of self reporting obligations; and
- where in-house lawyers are seeking advice from managers on conduct issues, make them aware that it may not be possible to keep information confidential from HR/their employer.

8. Does my regulator care about what I do outside work?

Key issues:

- The SRA Principles set out the core ethical values that all solicitors must adhere to and which apply at all times and in all contexts.
- The SRA Enforcement Strategy states that the SRA “will always investigate reports of solicitors having committed criminal offences out of legal practice”.
- The case of *SRA v Main [2018] EWHC 3666 (Admin)* illustrates the fact that the Solicitors Tribunal Disciplinary (“SDT”) will enforce the Principles against in-house lawyers where they consider that their conduct outside of work falls short.

- 8.1 The SRA Enforcement Strategy makes it clear that whilst the SRA’s key role is to act on wrongdoing which relates to an individual or a firm’s legal practice, the SRA nevertheless expects solicitors to abide by the SRA Principles “in all contexts”.
- 8.2 Whilst the SRA will not get involved in complaints which relate solely to private matters (for example, concerning a solicitor’s competence as a school governor or involvement in a neighbour dispute) they are concerned “with the impact of conduct outside of legal practice, including in the private lives of those we regulate if this touches on risk to the delivery of safe legal services in future”. Therefore, the closer any behaviour outside work is to professional activities or is a reflection of how a solicitor might behave in the professional context, the more likely the SRA is to be interested in it.
- 8.3 The SRA Enforcement Strategy notes that whilst the SRA will always investigate criminal convictions or cautions whether or not these relate to the individual’s practice, they otherwise take a proportionate approach to regulation. This means that they are less likely to be concerned about behaviour which is “low-level” in terms of seriousness (for example, actions that result in fixed penalty notices or minor motoring offences). However, a failure to report matters of character and suitability (even where these might be considered “low-level”) may itself be viewed at a later date as a failure to act with honesty or integrity (see [paragraph 7, What duties do I owe my regulator?](#)).

8.4 Conduct outside work which raises questions as to a solicitor's fitness to practice or which is capable of damaging public confidence in the profession will be taken more seriously by the SRA. This includes convictions for:

- drink-driving;
- assaults and other offences against the person;
- property offences; and
- convictions resulting in custodial sentences, particularly those relating to:
 - > dishonesty;
 - > fraud;
 - > bribery and extortion;
 - > terrorism;
 - > money laundering;
 - > obstructing the course of justice (such as perjury or witness tampering);
 - > facilitating or concealing serious or organised criminality by others; or
 - > those involving violence, sexual misconduct or child sexual abuse images.

8.5 In the SRA topic guides directed at its own enforcement team on use of social media and offensive communications, the SRA have made it clear that regulatory action can be taken against solicitors acting in their private capacity who use social media to send or repost communications which are offensive, derogatory or inappropriate whether in nature, tone or content. The SRA Warning Notice on Offensive communications notes that even if your communications do not reveal that you are a solicitor, anonymity cannot be assured and material posted under a pseudonym may still be traced back to you.

8.6 In the case of *The Solicitors Regulation Authority v Main [2018] EWHC 3666 (Admin)*, the SRA brought an action against an in-house solicitor who had been convicted of committing sexual assault and racially aggravated assault against a former girlfriend at a party held outside of work.

At the SDT hearing, the SRA alleged that the solicitor had failed to uphold the rule of law and proper administration of justice; failed to act with integrity; and failed to conduct himself in a way that maintains the public's trust in him and the legal profession. In relation to the failure to uphold the rule of law, the SDT found that whilst this duty could encompass actions and behaviour conducted outside of a professional context, it imposed a duty to the court to uphold the rule of law (rather than extending to an overreaching requirement not to break the law). Breaking the law, however, could amount to a breach of Principles 2 (acting in a way that upholds the public trust and confidence in the solicitors' profession) and 5 (acting with integrity). See further [Appendix 7, Cases involving in-house lawyers](#).

Further reading

SRA Enforcement Strategy:
www.sra.org.uk/sra/strategy-2017-2020/sub-strategies/sra-enforcement-strategy

SRA Warning Notice on Offensive communications, 24 August 2017:
www.sra.org.uk/sra/news/press/2017/offensive-communications-warning-notice-2017/

SRA Topic guide: Use of social media and offensive communications, 7 February 2019:
www.sra.org.uk/sra/strategy-2017-2020/sub-strategies/enforcement-practice/social-media-offensive-communications/

SRA Topic guide: Driving with excess alcohol convictions, 7 February 2019:
www.sra.org.uk/sra/strategy-2017-2020/sub-strategies/enforcement-practice/driving-excess-alcohol-convictions/

SRA Topic guide, Criminal Offences outside practice, 7 February 2019:
www.sra.org.uk/sra/strategy-2017-2020/sub-strategies/enforcement-practice/criminal-offences-outside-practice/

9. Do I need a practising certificate?

Key issues:

- In-house lawyers practising in England and Wales as solicitors (and overseas) must hold a current practising certificate.
- The question of whether you are practising as a solicitor depends on the facts of each case.

- 9.1 Being a solicitor does not necessarily mean you are practising as one. You will be practising as a solicitor if you are involved in legal practice and:
- your involvement in the work depends on your being a solicitor;
 - you are held out explicitly or implicitly as a practising solicitor; or
 - you are employed explicitly or implicitly as a solicitor.
- 9.2 The question of whether you are practising as a solicitor depends on the facts of each case. The SRA has published guidance on its website which suggests that you will need a practising certificate in the following circumstances:
- if you advise on reserved legal activities including, for example, in the conduct of litigation or on a conveyancing matter (see [Appendix 3, Meaning of “reserved legal activities”](#)), or you are responsible for supervising unqualified staff in such work;
 - if you instruct counsel and rely on your qualification as a solicitor to do so;
 - if you are employed as a practising solicitor, either explicitly or implicitly;
 - if you are explicitly or implicitly held out as a solicitor; or
 - if you are described, by yourself or by others, as being a member of The Law Society.
- 9.3 You will be explicitly employed as a practising solicitor if any of the terms appear in your job title, or if you use a title which includes any of these terms: “solicitor”, “lawyer”, “counsel”, “attorney” or “legal practitioner”, unless you are entitled to practise under another professional title which would justify your using one of the above titles and you are only practising in that capacity. Additionally, where you use the term “solicitor” as a practising solicitor of another jurisdiction you should make that clear by naming the other jurisdiction.

- 9.4 The effect of these rules and guidance is that most in-house lawyers who have been admitted as solicitors in England and Wales and working in-house will require a practising certificate.

Practical example

You work in the contracting unit of your employer. Although you have been admitted as a solicitor, you have not practised as one for ten years and work alongside non-lawyers. Do the StaRs apply to you and do you need a practising certificate?

The Principles and the Code apply to solicitors, that is to say anyone who has been admitted in England and Wales and whose name is on the roll maintained by The Law Society. This is the case regardless of whether they are practising as solicitors. Although the work you are doing may legitimately be carried out by non-solicitors (because it is not reserved work), you need a practising certificate if your name is still on The Law Society roll or if you are holding yourself out explicitly or implicitly as a solicitor (for example, by adopting a title which suggests you are a legal adviser). You could, of course, avoid the need to get a practising certificate if you came off the roll. Before doing so, you should consider the effect of no longer being a solicitor on your role (i.e. communications with your client will not attract legal advice privilege).

Next steps

In-house lawyers who manage others should:

- check whether any in-house lawyers may require a practising certificate or need to register with the SRA;
- where lawyers do not have a current practising certificate, consider ways of ensuring that these lawyers are not holding themselves out as solicitors or as carrying out reserved legal activities (if unsupervised by a solicitor with a practising certificate), for example by adopting rules on titles that these lawyers can use; and
- introduce a system whereby they ensure that everyone who needs a practising certificate has one and maintains it.

Further reading

SRA Guidance: Do I need a practising certificate? Working for a non-solicitor organisation, 17 September 2014: www.sra.org.uk/solicitors/code-of-conduct/guidance/do-i-need-a-practising-certificate.page

SRA Guidance: When do I need a practising certificate? 4 July 2019: www.sra.org.uk/solicitors/guidance/ethics-guidance/when-do-i-need-a-practising-certificate/

10. How can I ensure my continuing competence?

Key issues:

- All in-house lawyers, regardless of where they practice, must ensure that the service they provide is competent.
- You must maintain your competence to carry out your role and keep your professional knowledge and skills up-to-date.
- All qualified solicitors holding a practising certificate and practising in-house anywhere in the world need to: (i) reflect on the quality of their practice by reference to the SRA's Competence Statement to identify their learning and development needs; (ii) plan and address those needs through suitable activities; and (iii) evaluate and record the steps they have undertaken so that they can demonstrate to the SRA that they have ensured their continuing competence.
- Each in-house solicitor will be required to make an annual declaration to the SRA to confirm that they have completed these steps.
- In-house lawyers must ensure that anyone they manage is competent to carry out their role and that they keep their professional knowledge and skills, as well as their understanding of their legal, ethical and regulatory obligations, up-to-date.

- 10.1 The continuing competence regime applies to all qualified solicitors holding a practising certificate and practising in-house anywhere in the world.
- 10.2 Each in-house lawyer must:
- reflect on the quality of their practice by reference to the SRA's Competence Statement to identify their learning and development needs;
 - plan and address those needs through suitable activities; and
 - evaluate and record the steps they have taken, so that they can demonstrate to the SRA that they have ensured their continuing competence.
- 10.3 Reflecting on your practice involves regularly carving out time, either on a matter related basis, following a specific piece of work or, more generally, by considering what skills and knowledge are required to do your work in order to identify:
- what you think you are doing well (and which therefore demonstrates your continuing competence);
 - what you think you could do better and what steps you need to take to ensure this; or
 - what you think you could do better (but which, having reflected, you are not quite sure how to go about doing better next time, or that you cannot put right without some further work on your own or with some additional help). In this case you will have identified a learning and development need to be addressed.
- 10.4 The SRA has published a Competence Statement for solicitors made up of three parts: (i) the statement of solicitor competence; (ii) the threshold standard (required at the point of qualification); and (iii) the statement of legal knowledge (which sets out the knowledge lawyers are required to demonstrate at the point of qualification). The Competence Statement is fundamental to the SRA's new approach, and meeting the competencies is key to the requirement to comply with Rules 3.2 and 3.3, Code for Solicitors. The steps outlined at [paragraph 10.3](#) should, therefore, be carried out by reference

to your practice and the Competence Statement. Some organisations have chosen to incorporate the requirements from the Competence Statement into their internal development programmes.

- 10.5 The statement of solicitor competence defines competence as being “the ability to perform the roles and tasks required by one’s job to the expected standard” (Eraut & du Boulay, 2001). The statement itself is generic and sets out broad requirements under the following headings: (a) ethics, professionalism and judgement; (b) technical legal practice; (c) working with other people; and (d) managing oneself and one’s own work. The statement should be read holistically – each requirement pervades all areas of work.
- 10.6 As the statement of solicitor competence is generic and will apply to varying degrees depending on what stage of development an in-house lawyer might be at, the SRA has also published a threshold standard which sets out the standard required by solicitors as at the point of qualification. To provide context, it also briefly describes the level solicitors should achieve before and after qualification.
- 10.7 The SRA’s statement of legal knowledge sets out the knowledge that solicitors are required to demonstrate as at the point of qualification and on an ongoing basis. This statement covers a wide range of topics, including ethics; wills and administration of estates; taxation; law of organisations; property; torts; criminal law; contract law; and trusts and litigation. As might be expected, there are some omissions and some topics which are only mentioned briefly (for example, finance law).
- 10.8 When referring to the statement of legal knowledge, the in-house lawyer will need to determine what areas of law are relevant by reference to their practice areas. In-house lawyers will need to ensure that they continue to maintain knowledge and skills not only in areas directly related to their practice, but also in areas which may be relevant to their practice. For example, an in-house lawyer advising solely on corporate matters should have a good understanding of tax as well as the law of organisations. A certain level of judgement will need to be applied by in-house lawyers when deciding which items are relevant to them. However, the SRA has confirmed that lawyers are not required to maintain knowledge of law which has no bearing on their practice area (so in the example of the corporate in-house lawyer, it is likely that there would be no need to maintain knowledge of, for example, wills).
- 10.9 In the context of continuing development, the three standards set out in the Competence Statement can be used as a tool to help in-house lawyers identify areas for development during the reflection process. However, in-house lawyers may also take other steps such as monitoring changes in practice, law and regulation and consider how these changes might affect their practice, as well as reviewing (or proactively asking for) feedback from any clients they have recently advised.
- 10.10 The SRA expects solicitors to dedicate an appropriate time for reflection. The process may be undertaken at the same time as internal performance reviews as well as at other scheduled times. Although not explicit, the SRA’s expectation seems to be that the exercise of reflection would occur regularly (for example, more than once a year).
- 10.11 Having reflected, the in-house lawyer must decide and record how they plan to address any learning and development needs. Although there is no “set way” to do this, the SRA recommends that solicitors maintain a development plan. This would not need to be a complex document, but should capture:
- what you plan to do by way of addressing your identified learning and development needs over the coming three/six/12 months; and
 - why you need to do it.
- 10.12 The development plan should be reviewed regularly and updated following any further period of reflection.

- 10.13 When it comes to addressing your learning and development needs, any approach is valid, provided that you can demonstrate that it contributes to how you will remain competent to deliver a proper standard of service. Examples of activities include:
- formal training – this would include face-to-face training, online training, and external courses;
 - informal training – where in-house lawyers learn from others “on the job” or from feedback;
 - shared learning – where in-house lawyers may report back on the benefits of any formal training to a wider team;
 - research, reading and discussion;
 - networking – for example, joining external networking groups;
 - mentoring/coaching – working alongside a development partner;
 - application – practising the relevant skills or behaviours in order to obtain experience;
 - going on secondment – working in another part of the organisation, or perhaps in another organisation, in order to have exposure to environments and situations that can help address learning and development needs; and
 - using social media – following blogs and twitter accounts, or contributing to online articles.
- 10.14 In-house lawyers should record any activity they have undertaken to address their learning and development needs. This record should also evaluate whether the particular activity addressed the need. One way of capturing this information is in a development plan (see [paragraph 10.11](#) above). Although no specific approach is prescribed, it may be useful to record:
- what you did;
 - how it was related to ensuring your competence;
 - what you learnt;
 - when the activity was completed;
 - how it will positively improve/change your practice; and
 - what you could do next.
- 10.15 Some of this information may be captured by your organisation (for example, through an electronic learning management system). The process of recording it is important, as the information will form the basis of your annual declaration to the SRA. The Law Society recommends that you keep training records for at least six years.
- 10.16 As a mark of the importance that the SRA places on continuing competence, solicitors will be required to make the following annual declaration:
- “I have reflected on my practice and addressed any identified learning and development needs.”*
- 10.17 Although the continuing competence requirements apply to all solicitors, the SRA have made it clear that they expect employers to be responsible for delivering a proper standard of service to their clients and for training their staff to maintain a level of competence appropriate to their work and level of responsibility.

Next steps

In-house lawyers who manage others should consider:

- who within the department is/will be responsible for ensuring that individual solicitors comply with the continuing competence requirements?
- how much support should be given to individual solicitors? The answer to this may depend on whether solicitors are responsible for their own practising certificate renewal or whether a bulk application is made.
- will the organisation provide templates for development plans and records to be used and filed centrally? This may be a good way to monitor compliance.
- will the organisation require solicitors to complete a minimum number of training hours per year (notwithstanding the abolition of the hours-based CPD regime)?
- will the reflective cycle requirement dovetail with your appraisal system and, if not, will changes need to be made to accommodate this?
- will the team take the Competence Statement into account within its own training programmes?

- do existing guidelines or procedures about in-house training requirements need to be updated and communicated (for example, via a training session)?
- would reminders be sent to in-house lawyers to ensure that they are reflecting on their practice at appropriate points of the year (i.e. not just at the time of appraisal)? Who will do this?
- how will compliance be monitored?

You cannot just do nothing. Even if you are confident that you have no learning and development needs, you are still required to reflect on your practice and record the fact that you have not identified any needs. You will also need to make a declaration to the SRA on an annual basis.

As a further consideration, it is worth noting that whilst lawyers are naturally good at reflecting on gaps in their legal knowledge, they may be less aware of gaps in their knowledge of professional rules or ethics. This may be something that managers within the department may wish to address with an internal ethics programme.

Further reading

SRA Continuing Competence Toolkit:

www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page

Continuing Competence FAQs from the Law Society:

www.lawsociety.org.uk/support-services/advice/articles/continuing-competence-guidance-faqs/

SRA Annual Declaration Information Sheet:

www.sra.org.uk/solicitors/cpd/tool-kit/resources/annual-declaration.page

11. What are my obligations when practising overseas?

Key issues:

- The StaRs contain separate rules – in the Overseas Rules - that apply to solicitors practising overseas (that is, providing legal services outside England and Wales).
- When establishing whether the Overseas Rules apply, particular care is required by in-house lawyers who are providing services on a temporary basis from outside England and Wales.
- When applicable, the Overseas Rules should be applied alongside local law and regulation and they replace the domestic Principles and Code for Solicitors.
- In particular, in-house lawyers practising overseas do not need to comply with the detailed rules in the Code for Solicitors relating to conflicts of interest, confidentiality or disclosure.
- Other aspects of the StaRs, notably the Character and Suitability Rules, the Authorisation of Individuals Regulations (including the requirement to hold a practising certificate) and the requirements on continuing competence, will still apply to you in full when you practice overseas.
- The SRA has adopted a lighter touch regime with respect to reporting requirements for in-house lawyers practising overseas as opposed to those practising in England and Wales.
- When practising overseas, you must ensure that you deal with your regulators and ombudsmen in England and Wales in an open, timely and co-operative manner.

- 11.1 In-house lawyers working outside England and Wales will need to establish whether the Overseas Rules apply to them.
- 11.2 The Overseas Rules apply to in-house lawyers “practising overseas”, meaning the conduct of a practice of a solicitor established outside England and Wales for the purposes of providing legal services in another jurisdiction. Where, however, an in-house lawyer is simply providing services on a “temporary basis” from outside the jurisdiction, the SRA Principles and Code for Solicitors will apply to them in the usual way.
- 11.3 Although there is no definition of what might amount to a “temporary basis”, guidance under the (now superseded) SRA Handbook 2011 suggested that the following factors may indicate that an in-house lawyer is established outside England and Wales:
- a requirement for a work permit in a jurisdiction other than England and Wales;
 - the intention to reside outside England and Wales for a period of six months or longer;
 - a requirement for authorisation with the regulatory body for the local legal profession in a jurisdiction other than England and Wales; or
 - an overseas practising address nominated in mySRA.
- 11.4 The Overseas Rules consist of seven mandatory Overseas Principles and a mandatory reporting regime. The Overseas Rules are drafted to operate alongside local law and regulation and are applied instead of the SRA Principles and Code for Solicitors. However, other parts of the StaRs, in particular the requirements relating to character and suitability, holding a practising certificate and continuing competence apply in the same way in relation to overseas practice as to domestic practice. See further [paragraph 9, Do I need a practising certificate?](#) and [paragraph 10, How can I ensure my continuing competence?](#)

- 11.5 The Overseas Principles mirror the domestic SRA Principles (see [Appendix 2, The Overseas Principles](#)). As they are intended to operate alongside local law and regulations, where you practice as a solicitor overseas you need to be aware of any local laws and regulations that apply to your practice. In circumstances where, in addition to being an England and Wales solicitor you are also admitted and practice as a lawyer of the overseas jurisdiction, the Overseas Rules may still apply in addition to your local professional rules to the extent that you hold yourself out to be an England and Wales solicitor.
- 11.6 In the event of any conflict between the Overseas Rules and any requirements placed on you by local law or regulation, the local law or regulation will prevail, with the exception of Overseas Principle 2 (acting in a way that upholds the public trust and confidence in the solicitors' profession and in the provision of legal services), which must be observed at all times.
- 11.7 In addition, Overseas Principle 6 (acting in a way that encourages equality, diversity and inclusion) is expressed to apply "having regard to the legal, regulatory and cultural context in which you are practising overseas".
- 11.8 An in-house lawyer who is seconded, transferred or assigned to work overseas will normally be treated as practising overseas and subject to the Overseas Rules rather than the domestic SRA Principles and Code for Solicitors for the duration of the secondment, transfer or assignment.
- 11.9 Regardless of where you practice or are established as an in-house lawyer, if your practice predominantly comprises the provision of legal services to clients in England and Wales, the domestic Principles and the Code for Solicitors will apply to you. This will be particularly relevant to those employed by a service company overseas but who predominantly support English or Welsh operating companies.
- 11.10 In respect of conflicts of interest, confidentiality and disclosure, in-house lawyers practising outside England and Wales must follow local law and regulation in the jurisdiction in which they are practising.
- 11.11 This means any potential for conflicts of law to arise as a result of you being a lawyer admitted in England and Wales and practising in an overseas legal department should be minimised and you will be able to apply the same conflicts of interest and confidentiality conflict rules as your locally admitted colleagues.
- 11.12 If you are proposing to act for two or more clients in relation to a matter but there is no relevant local law or regulation in relation to conflicts of interest, you need to be guided, in light of Overseas Principle 7, by what you consider to be in the best interests of each client in the circumstances. This may result in some circularity. The Code for Solicitors sets out in detail what those practising in England and Wales must achieve if they are to be considered by the SRA to be acting in the best interests of each client. There is also a substantial body of case law and judicial opinion on the subject. Although the common law of England and Wales does not apply directly to those practising outside the territory, it would be unwise for any solicitor of England and Wales to completely disregard that common law when making any judgement about what is in the best interests of their clients. This will be particularly important if either client is located in England and Wales.
- 11.13 Nevertheless, solicitors practising in-house in jurisdictions that have different rules on conflicts of interest may have more flexibility when determining whether to act for clients other than their employers. You may, for example, decide to be guided by the professional rules governing conflicts of interest in the home jurisdiction of your employer, if different from the jurisdiction in which you are practising. You might also be able to place greater reliance on client waivers and consents than is permitted under the domestic Code for Solicitors.

- 11.14 The Overseas Rules apply only to in-house lawyers in their capacity as regulated individuals practising overseas. In contrast with obligations under the Code for Solicitors applicable to in-house lawyers working in England and Wales, in-house lawyers who manage others are not responsible for ensuring that others are competent in their role or that they keep their professional knowledge and skills, as well as their understanding of their legal, ethical and regulatory obligations, up-to-date.
- 11.15 However, manager solicitors practising overseas, or with responsibility for an overseas department, may, depending on the size and make-up of the legal department, still wish to implement systems and controls similar to those described in [paragraph 5, What systems and controls are in place?](#) on a voluntary basis if it would assist each individual solicitor within their department to comply with their personal obligations under the Overseas Principles.
- 11.16 In-house lawyers practising overseas must co-operate with the SRA, other regulators, ombudsmen and those bodies in England and Wales with a role overseeing and supervising the delivery of, or investigating in relation to, legal services.
- 11.17 All in-house lawyers practising overseas must, under Rule 4, Overseas Rules, monitor compliance with these rules and report any serious breach to the SRA when such a breach occurs, or as soon as reasonably practicable thereafter.
- 11.18 In particular, you must notify the SRA promptly if:
- you have been convicted by any court of a criminal offence or become subject to disciplinary action by another regulator;
 - you have reasonable grounds to believe that you are in serious financial difficulty; or
 - you are otherwise required to do so under the Character and Suitability Rules (see [paragraphs 7.2 to 7.6, What duties do I owe my regulator?](#)).

- 11.19 In addition, you must respond promptly to the SRA and provide full and accurate explanations, information and documentation in response to any requests or requirement, and ensure that relevant information which is held by you (or third parties carrying out functions on your behalf) is available for inspection by the SRA.

Practical example

You work overseas in a local law department of a large multinational retail group. You are asked to advise both your employer and its wholly-owned subsidiary, Packingco, on the renegotiation of their supply agreement. You are aware that Packingco is unhappy with a number of key terms but is happy for you to act for them as well as for your employer.

Under Chapter 3, Code for Solicitors a conflict of interests will exist where you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (see [paragraph 3, Do I have a conflict of interest?, Practical example 1.](#)) However, in-house lawyers practising overseas do not need to follow the domestic conflict rules and may be guided instead by local professional rules governing conflicts of interests. This may mean that they are able to act in circumstances where there is a potential conflict under the Code for Solicitors. If no local requirements relating to conflicts of interest exist, you should be guided by what you consider to be in the best interests of each client in the circumstances.

Appendices

Appendix 1: The Principles

You act:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice;
2. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons;
3. with independence;
4. with honesty;
5. with integrity;
6. in a way that encourages equality, diversity and inclusion; and
7. in the best interests of each client.

Appendix 2: The Overseas Principles

You act:

1. in a way that upholds the constitutional principle of the rule of the law and the proper administration of justice in England and Wales;
2. in a way that upholds public trust and confidence in the solicitors' profession of England and Wales and in legal services provided by authorised persons;
3. with independence;
4. with honesty;
5. with integrity;
6. in a way that encourages equality, diversity and inclusion having regard to the legal, regulatory and cultural context in which you are practising overseas; and
7. in the best interests of each client.

Appendix 3: Meaning of “reserved legal activities”

Section 12 and Schedule 2 of the Legal Services Act 2007 define the six separate reserved legal activities as follows:

- the exercise of a right of audience – the right to appear before and address a court, including the right to call and examine witnesses;
- the conduct of litigation – the issuing of proceedings before any court in England and Wales, the commencement, prosecution and defence of such proceedings and the performance of any ancillary functions in relation to such proceedings;
- reserved instrument activities – preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002, making an application or lodging a document for registration under that Act, preparing any other instrument relating to real or personal estate, but excluding wills or testamentary instruments, powers of attorney and most transfers of securities;
- probate activities – preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales;
- notarial activities – in accordance with section 1 of the Public Notaries Act 1801; and
- the administration of oaths – in accordance with the Commissioners for Oaths Acts 1889 and 1891 and the Stamp Duties Management Act 1891.

Appendix 4: Conflicts and confidentiality checklist

Example of a client conflict and confidentiality checklist.

1. **Who are you acting for on this matter?** If you are acting for anyone other than X Plc (employer entity) have you checked with [UK General Counsel] that the department is not also advising X Plc on this matter, or likely to do so in the future?
2. **Are you acting for someone outside of the X Plc group?**
3. **Are you acting for more than one person in relation to the same or a related matter?** If so, would acting for all clients give rise to a conflict of interests or a significant risk of one arising? If so, consider the questions set out in [Appendix 5, Checklist when relying on substantially common interest exception](#).

If you are unsure on this point, speak to [UK General Counsel].

4. **Have the clients agreed that their matter-related information may be shared?** If not, have you varied your duty of disclosure to each client by obtaining their written consent? In the case of non-employer clients, this may be done by sending out the X Plc in-house legal team's terms of business (see [Appendix 6, Precedent terms and conditions for instructing X Plc's legal team](#)).
5. **Are you acting for an individual director or employee of X Plc or another member of X Plc's group?** If so, does the matter you have been asked to advise on arise out of the work for X Plc or the related body? If you are unsure on this point, speak to [UK General Counsel].
6. **Is there any reason why you should not advise on this matter?**
 - Do you have any personal/other connection to the other party in the matter? For example, are you related to them?

- Do you personally have anything to gain or lose from the proposed matter?
- Are you in possession of any information which is material to this matter but which you cannot disclose because you owe a duty of confidentiality to a previous employer or client?

7. If so, you will need to declare your interest (but without disclosing any confidential information) to [UK General Counsel] who may decide that you are unable to work on this matter.

Appendix 5: Checklist when relying on substantially common interest exception

1. **Are the interests of X Plc and your other clients aligned?** Is the matter something that benefits them both or is one party imposing it on the other? Do the parties have equal bargaining power?
2. **What is the rationale for using you as sole adviser?** Is it primarily to save money? Or is it because the matter has already been agreed and the steps that need to be taken have already been discussed and agreed upon?
3. **Have the parties agreed to this arrangement and have you made a written record of this?**
4. **Have you explained what the consequences are if a conflict of interest arises after you start acting?** Your ability to act for more than one client relying on the substantially common interest exemption means that you must ensure not only that you have the consent of all clients but that you have put in place effective safeguards to protect your clients' confidential information (see point 5 below) and that you are satisfied that it is reasonable for you to act for all the clients. If a conflict emerges, do the clients understand that you may not be able to continue acting for some (or in extreme circumstances all) of them? What would the consequences of you ceasing to act be on any particular client? Have you discussed the likely scenarios where this may occur? Have you made a note of your conversation?

5. **Have you explained to each client how their confidential information will be treated?** In the in-house context it may not be practical to segregate client information within the in-house team. Nevertheless, is it understood within your team what information may be shared freely between clients and what information must be kept secure only for the benefit of the main operating company and your employer? Do all the clients understand that the in-house department will hold confidential information about your employer/ the main operating company, which may be of interest on the matter, but which you will not be able to disclose to them or use for their benefit? Have the clients agreed that any duty you owe to X Plc overrides any duty you may have to disclose such information and that, therefore, your duty of disclosure to these clients has been modified? Have you made a written record of your conversation?
6. **Have your clients agreed to the sharing of their confidential information with X Plc?** Do your other clients agree/understand that you will be disclosing all relevant information on your matter to X Plc? Is it reasonable for you to do so?

Appendix 6: Precedent terms and conditions for instructing X Plc's legal team

This letter has been drafted primarily for use by in-house lawyers practising in England and Wales.

Thank you for instructing X Plc's legal team. Because there may be other occasions on which members of X Plc in-house legal team assist you, it seems sensible to lay down a framework that will apply whenever one of us does so.

1. The team

- 1.1 [], as [General Counsel of X Plc], will be the lawyer responsible for the overall supervision of the work we do for you. If [he/she] should be unavailable for any reason, please speak to [].
- 1.2 We will discuss and agree with you, at the outset of a matter, who will be handling your work.

During the course of a matter, other lawyers and professional staff may be introduced to you and work on your matter where we think the demands of the matter require it.

2. Our services

- 2.1 [The legal services we provide to you will be carried out or supervised by solicitors regulated by the Solicitors Regulation Authority.]
- 2.2 At the outset of a matter, we will discuss and agree with you the nature and scope of the legal services to be provided by us. They may be varied, by agreement, during the course of a matter.
- 2.3 To enable us to perform our services, we will need you to supply us with instructions and the information that we consider necessary as promptly as possible.
- 2.4 Our instructions will be taken from you or from any other person whom we reasonably believe to have been authorised by you to give instructions to us.

3. Conflicts of interest

We will not act in relation to a matter where there is a conflict of interest in relation to that matter, or a related matter, or there is a significant risk that there is a conflict of this kind, unless we are permitted to do so by the professional rules from time to time of the Solicitors Regulation Authority or other applicable law or regulation and, where required, with your consent.

4. Confidential information

- 4.1 We will keep information about your business and affairs confidential and will not disclose it without your consent except (a) to X Plc, (b) to your other advisers, (c) where disclosure is required or permitted by the law or regulation of any relevant jurisdiction, (d) to any body which represents or regulates us in any jurisdiction, (e) (in confidence only) to selected third parties providing services relevant to our work for you, (f) (in confidence

only) to our advisers, insurers, brokers or auditors, or (g) to defend ourselves in relation to actual or threatened legal or regulatory proceedings, regardless of whether brought or threatened by you or any other person.

- 4.2 You agree that we will not be required to disclose to you, or use on your behalf or for your benefit, any documents or information in our possession in relation to which we owe a duty of confidentiality to X Plc, any other existing or former client, or any other person. You therefore acknowledge that any duty of confidentiality that we owe to X Plc, any other existing or former client, or any other person overrides any duty we might have to disclose information to you which is, or might be, relevant to a matter on which we are acting for you and any duty which we might have to disclose such information to you is modified accordingly.

5. Complaints

- 5.1 If you wish to make a complaint about any aspect of a matter we are handling or have handled for you, please contact [], the [UK General Counsel] of X Plc.
- 5.2 If that is felt to be inappropriate, or if you feel that the response of the [General Counsel] is inadequate, you can write to [Global Head of Legal] at X Plc.
- 5.3 We would hope to resolve any problem to your satisfaction. If we do not, you may be able to ask the Legal Ombudsman (“LeO”) to help you resolve your complaint. Normally you would need to contact LeO within six months of our final response to your complaint. You can do so by telephone on 0300 555 0333, by email at enquiries@legalombudsman.org.uk or by post at PO Box 6806, Wolverhampton WV1 9WJ.

Appendix 7: Cases involving in-house lawyers

The Solicitors Regulation Authority v Main [2018] EWHC 3666 (Admin)

The facts

On 3 January 2017, Alastair Main, an in-house lawyer, was convicted in a magistrate’s court of offences of sexual assault contrary to section 3 of the Sexual Offenders Act 2003, and racially aggravated assault by beating, contrary to section 29 of the Crime and Disorder Act 1998. On 26 January 2017 he was made subject to a community order with a requirement that he complete 200 hours of unpaid work within 12 months. He was made subject to a restraining order pursuant to section 5 of the Protection from Harassment Act 1997 to prevent him from having contact with the victim. As a consequence of his conviction of sexual assault and the sentence imposed he was also required to comply with the notification requirements under the Sexual Offences Act 2003 for a period of five years.

The facts leading up to the conviction were that, on 16 December 2015, Main attended the Christmas dinner of a rowing club of which he was a member. Also present was the victim, a former girlfriend of Main. During the course of the evening Main became drunk and then angry with the victim when she refused his request for a hug. He poured the contents of his glass of beer over her. He then followed her into the ladies’ lavatory, where he called her an “Aussie slut” and slapped her bottom repeatedly. At trial, Main admitted he was drunk and that he had slapped the victim’s bottom but denied that he had called her “Aussie” or that there was any sexual aspect to his actions.

The SDT proceedings

The SRA brought disciplinary proceedings against Main alleging breaches of Principles 1, 2 and 6 of the SRA Handbook 2011. These culminated in a hearing before the SDT on 23 January 2018. Main admitted that he had breached Principle 2 (acting with integrity) and Principle

6 (behaving in a way that maintains the trust the public places in you and in the provision of legal services). The third allegation, that he had breached Principle 1 (upholding the rule of law and the administration of justice), was disputed.

The arguments put forward on Main's behalf were that, although Main did breach the law, he did not fail to uphold it. Upholding the rule of law, it was asserted, does not equate to complying with the law. Rather, it is equivalent to a duty to the court (and therefore something that happens in a professional capacity). The SDT ultimately concluded that Principle 1 could encompass actions and behaviour outside work but that it was limited to a duty to the court to uphold the rule of law (rather than extending to an overreaching requirement not to break the law). Breaking the law, however, could amount to a breach of Principle 6 (behaving in a way that maintains the trust the public places in you and in the provision of legal services) and Principle 2 (acting with integrity). The SDT ordered that Main be suspended from practice as a solicitor for a period of two years.

The High Court's decision

The SRA appealed against the SDT decision as to sanction, contending that it was unduly lenient. Among the arguments presented by the SRA was that, although a two year suspension was appropriate, the SDT had wrongly decided that, since Main had not worked as a solicitor for the 12 months prior to the SDT hearing, they would deduct that period and only order his suspension to run for a further 11 months from the date of the decision. The High Court agreed and ordered that the suspension should run for two years from the date of the SDT hearing.

Brett v Solicitors Regulation Authority [2014] EWHC 2974

The facts

This case stems from the identification of the award winning, anonymous police blogger "NightJack", who was revealed by The Times to be a Detective Constable,

Richard Horton, in the Lancashire Police, in June 2009.

It became clear much later, during the Leveson Inquiry in 2012, that Horton had been identified because Patrick Foster, a junior reporter at the newspaper, had gained unauthorised access to his email account.

On 20 May 2009, before the piece was published, Foster requested an "off the record" conversation with Alastair Brett, legal manager at Times Newspapers Limited ("TNL"), during which he confessed the true source of his story. Brett made it clear that Foster's conduct was unacceptable and went on to say that the story was not publishable unless Horton's identity could be ascertained through publicly available sources. Foster argued that Horton's apparent use of confidential police information and breaches of police regulations made his exposure a matter of public interest. Brett subsequently investigated the possibility of a public interest defence to section 55 of the Data Protection Act 1998 ("DPA"), which otherwise makes knowingly or recklessly obtaining personal data without consent an offence.

Foster then sought to verify that Horton was "NightJack" by a process of deduction known as "jigsaw identification" using publicly available information (made possible, of course, because he already had the answer). Once he had succeeded, he contacted Horton on 27 May 2009 to "front up" about his plan to reveal his identity. Horton's solicitors then sought an injunction preventing publication.

Prior to the 4 June 2009 injunction hearing, Horton's solicitors requested an explanation as to how Foster had identified Horton "largely" by a process of deduction, and in particular how he had ascertained details of Horton's home address, mobile number and literary agent. They also requested confirmation that Foster had not made unauthorised access to Horton's email account in light of them discovering that Foster had been rusticated when a student at Oxford for hacking into the university's email account. At this stage, Brett became aware of the relevance of section 1 of the Computer Misuse Act 1990, which prohibits making unauthorised access to computer material and which, unlike section 55 DPA, has no public interest defence.

Brett responded to the suggestion that Foster had a history of hacking into email accounts by asserting it was a “baseless allegation”. He also referred to Foster’s witness statement as evidence of Foster’s deductive abilities. He did not explain that it contained an account of what could be revealed by a jigsaw investigation, and not a chronological account of what had actually been done.

Horton’s solicitors pressed for Foster’s witness statement to state explicitly that Foster had managed to identify DC Horton solely by deduction. Counsel representing TNL at the hearing, and unaware of the hacking, submitted a skeleton argument stating that Foster had established Horton’s identity using “publicly available materials, patience and simple deduction”, but the witness statement itself remained unchanged.

Horton’s counsel conceded that his identity could have been deduced without a breach of confidence at the hearing in front of Mr Justice Eady. The application for an injunction then proceeded solely on privacy grounds but was dismissed, with Mr Justice Eady concluding that “blogging is essentially a public rather than a private activity”. The Times subsequently printed their article on 17 June 2009.

The SDT proceedings

Nothing further may have happened had it not been for the obligations of TNL in connection with the Leveson Inquiry. Details of the hacking were disclosed as part of that and Brett himself gave evidence before Leveson on 15 March 2012. The SRA then brought proceedings against Brett before the SDT. Although Brett was not accused of deceit and there was therefore no finding of dishonesty, the SDT found, in December 2013, that he had breached SRA rules by failing to act with integrity and knowingly allowing the court to be misled in the conduct of litigation. A costs order was also made against him and he was suspended from practice as a solicitor for six months.

Brett’s assertion to Horton’s solicitors that it was a “baseless allegation” that Foster had a “history of making unauthorised access to email accounts” and his allowing Foster’s witness statement to be served were criticised for creating a misleading impression as to the facts. Failing to

inform TNL’s counsel team of the true position also meant that Brett had failed in his duty as an officer of the court. It had put that team in the invidious position of conducting litigation without full knowledge of the facts, which in turn led to them unwittingly misleading the court.

Brett appealed against the findings of breach by the SDT and on costs. He argued that the SDT had not given due regard to the relationship between himself as the in-house legal manager of TNL and Foster as an employee of TNL, and in particular his duties as regards confidentiality and legal privilege. He also argued that his honestly held beliefs about his professional obligations to TNL and Foster were not given sufficient weight and that there had been excessive reliance on hindsight.

The High Court’s decision

Mr Justice Wilkie heard the appeal. Although he noted that there was no duty on Brett to disclose information revealed to him if that information was privileged, he concluded that the central issue was that Brett had caused the court to be misled by allowing a misleading witness statement to be served and relied on and by allowing the court to proceed on an incorrect assumption of the facts.

The duty not to mislead the court is not incompatible with the duty of confidentiality and options were open to Brett to safeguard privilege without misleading the court. For example, he could have obtained Foster’s agreement to waive privilege; corrected the witness statement (to say that Foster could have deduced DC Horton’s identity in this way, rather than that he did); disclosed the true position to his instructed counsel so that they would not have inadvertently misled the court; or abandoned defending the application entirely.

Mr Justice Wilkie concluded that Brett had misled the court but that the SDT was wrong to conclude that he had done so “knowingly” – this was not possible given that the SRA had not wanted to allege deceit or dishonesty. Mr Justice Wilkie therefore concluded that Brett had acted only “recklessly”. Nevertheless, as previously, he found Brett had failed to act with integrity and the costs order remained unchanged.

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