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Investigating the Decision-making process in Large Law Firms when Addressing Conflicts of Interest in Legal Transactions in Light of Outcomes-Focused Regulation

by

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A thesis submitted in partial fulfilment of the requirements for the degree of

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Table of Contents

		Page
List of Tables & Diagrams		vii
Table of Cases & Legislation		viii
List of Abbreviations		xv
Acknowledgments		xvii
Abstract		xviii
Declaration		xx
Chapter 1	**Introduction**	1
1.1	Introduction	1
1.2	Approach	2
1.2.1	Large Law Firms	3
1.2.2	Outcomes Focused Regulation	7
1.2.3	The Compliance Officer for Legal Practice and General Counsel	8
1.2.4	Literature Reviews	11
1.2.5	Methodology & Analysis	12
1.3	Contribution to Existing Knowledge	13
1.4	Conclusion	15
Chapter 2	**The Regulation of Large Law Firms and Solicitors in England & Wales**	16
2.1	Introduction	16
2.2	The Growth & Diversification of Large Firms and Solicitors in England & Wales	16
2.3	Practice at the Turn of the 21st Century	19

2.4	Blair Government Intervention by the Early Noughties – Protecting Consumers	21
2.5	Decentring and Intra-firm Self-regulation	24
2.6	Decentring Regulation: Risk Based Regulation	27
2.7	De-centring Legal Services Regulation – The SRA's Regulatory Mandate	30
2.8	Designing a New Model of Intra-firm Self-Regulation	33
2.9	The Birth of Outcomes-Focused Regulation	39
2.9.1	The Smedley Review of the Regulation of Corporate Work	41
2.9.2	The Architecture of Change 2010 (OFR Mark I): Intra-firm Self-Regulation	43
2.10	Looking to the Future – Flexibility and Public Protection 2017 (OFR Mark II)	47
2.11	Reporting Obligations and COLPs	49
2.12	Systems & Controls	54
2.13	Conclusion – The Aim to be Addressed: Is SRA OFR Effective as a Model of Regulation for COI in Large Law Firms	57
Chapter 3	**Conflicts of Interest**	61
3.1	Introduction	61
3.2	A Fiduciary Duty of Undivided Loyalty	62
3.3	COI and the Duty of Confidentiality	67
3.4	To Whom are Duties Owe in Complex Transactional Situations – Contractual Negotiation over Harms	71
3.5	Powerful Sophisticated Clients	73
3.6	Lawyer Independence and Hostage	75

	Taking	
3.7	The SRA Codes of Conduct on Conflicts of Interest, and Large Law Firms	79
3.8	Exceptions to Not Acting under the SRA's Codes of Conduct	83
3.8.1	Substantially Common Interest	83
3.8.2	Competing for the Same Objective	84
3.9	Informed Consent to Acting – Duty of Confidentiality v Duty of Disclosure	86
3.10	The Use of Advance Waivers	90
3.11	Compliance and Business Systems	93
3.12	Information Barriers	95
3.13	Duo Deontological Webs	98
3.14	Placing the Chapter 2 Issues in the Context of the Literature on Conflicts of Interest	101
3.15	Conclusion	103
Chapter 4	**Decision-making in Large Law Firms**	105
4.1	Introduction	105
4.2	The Role of Culture and Norms	106
4.3	Recognising Conflicts of Interest Norms in Practice	108
4.3.1	Legal Conflicts	109
4.3.1.1	Personal Conflicts	109
4.3.1.2	Same Matter Conflicts	109
4.3.1.3	Simultaneous Matter Conflicts	110
4.3.1.4	Former Client Matter Conflicts	111
4.3.2	Positional and Commercial Conflicts	111
4.4	Individual Decision-Making – Deliberative and Parallel Theory	113
4.4.1	The Bounded Rationality Problem	116

4.4.2	Managing Individual Decision-making	118
4.5	Decision-making under OFR	121
4.6	Determining Which Standards to Follow in Respect of COI and Duo-Deontology	123
4.7	In Light of Intra-firm Self-Regulation, what do Systems to Manage Decision-making Look Like in Respect of COI?	127
4.8	Conclusion	128
Chapter 5	**Methodology**	129
5.1	Introduction and Key Questions	129
5.2	A Generic Inductive Qualitative Model	130
5.3	Purposive Sampling	131
5.4	Purposefully Sampling Large Law Firms	132
5.5	Sample Size	136
5.6	Access to Research Subjects	138
5.7	Conducting the Interviews	139
5.8	Conclusion	142
Chapter 6	**Analysis**	145
6.1	Introduction	145
6.2	The Sub-questions	146
6.3	Summary of the Key Themes Emerging from Thematic Analysis in Appendix C	151
6.4	Addressing the Key Questions in Support of the Main Aim	172
6.4.1	Key Question 1: How do Large Law Firms Determine What Standards to Follow in Respect of COI?	172
6.4.2	Key Question 2: In Light of Devolved Regulation to Law Firms, what do Systems to Manage Decision-making	177

	look like in respect of COI?	
6.4.3	Key Question 3: How are Conflicts Between the SRA's Rules on COI and other Local Rules Reconciled?	179
6.5	Conclusion	180
Chapter 7	**Conclusion**	183
7.1	Is OFR an Effective Model of Regulation for COI in Large Law Firm Practice?	183
Bibliography		192
Appendices		
A	Correspondence with the SRA dated 16 June 2020	210
B	Field Notes	213
C	Thematic Analysis	278

List of Tables & Diagrams

Chapter 2 The Regulation of Large Law Firms and Solicitors in England & Wales

		Page
Table A	The LSA 2007 s1 Regulatory Objectives	32
Diagram 1	The SRAs Original OFR System Post-consultation	45
Table B	The SRAs Original Mandatory Principles	46
Table C	The SRAs Code of Conduct for Firms: Rule 2 Compliance and Business Systems	55

Chapter 5 Methodology

		Page
Table A	The Lawyer Top 50 Firms by Revenue 2019	134
Table B	Banding by Revenue among the Top 50 UK Firms	137
Table C	Research Subject Coding	137
Table D	Interview Guide	141

Table of Cases & Legislation

Cases	**Page**
Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd [2005] NSWSC 550	111
Boardman v Phipps [1967] 2AC 46; [1966] 3 All ER 721	65, 109
Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606	87
Canadian National Railway Co v McKercher LLP 2013 SCC 39	66
CenTra Inc. et al. v Estrin et al. No. 07-1680 United States Court of Appeals Sixth Circuit	88
City of Atlantic City v Zachirias Trupos, et al. 25 N.J. Tax 108 (J.J. Tax 2009)	110
Clark Boyce v Mouat [1994] 1 A.C. 428	87
Conway v Ratiu [2005] EWCA Civ 1302	66, 67
Donoghue v Stevenson [1932] UKHL 100	19
Fullwood v Hurley [1928] I K.B. 498, 502	87
Galderma Laboratories, L.P., Galderma Research & Development, SNC v Actavis Mid Atlantic LLC (2013) United States District Court of Texas, Dallas Division 927 F. Supp.2d 390 (2013) No 3:12-cv-2038-K	91, 92
GCT Canada Limited Partnership v Vancouver Fraser Port Authority [2019] FC 1147	70

Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94	82, 90, 92, 97, 102, 124, 151
Glencairn IP Holdings Ltd & Anor v Product Specialities Inc & Ors [2020] EWCA Civ 609	70
Hedley Byrne v Heller & Partners Ltd [1964] AC 465	19
Hilton v Parker Booth & Eastwood [2005] UKHL 8	89, 159
Kirk v First American Title Ins. Co., 183 Cal. App. 4th 776, 809-10 (2010)	96
Koch Shipping Inc v Richards Butler (A Firm) [2002] EWCA Civ 1280	94, 169
Longstaff v Birtles [2001] EWCA Civ 1219; [2002] 1 WLR 470	67
Marks & Spencer Plc. and another v Freshfields Bruckhaus Deringer [2004] EWCA 1337 and [2004] EWCA Civ 741	82, 96, 97, 110, 163
Moody v Lox & Hatt [1917] 2 Ch 71 at 81	89
Mothew (t/a Stapley & Co) v Bristol & West Building Society [1996] EWCA Civ 533	63, 64, 65, 69, 70, 82, 89, 126, 148
Prince Jefri Bolkiah v KPMG (A Firm) [1999] 2 WLR 215; [1999] 2 AC 222	68, 69, 70, 82, 95, 96, 97
Rakusen v Ellis, Munday & Clarke [1912] I Ch. 831	68, 70
Re a Firm of Solicitors [1992] 1 All ER 353	95
Regal (Hastings) Ltd v Gulliver and Others [1942] 1 All ER 378	65
RevoLaze LLC v Dentons US LLP et al 1:2016-cv-01080	2, 4, 177, 184, 191
Ross v Caunters [1979]] 2 AER 580	19
Singla v Stockler & Anor [2012] EWCH 1176 (Ch)	72, 93

Spincode Pty Ltd v Look Software Pty Ltd [2001] VSCA 248	67, 111
Swain v Law Society [1983] 1 AC 598	17
Western Sugar Coop., et al. v Archer-Daniels-Midland Co. et al. (2015) No. CV 11-3473 United States District Court for the Central District of California	91
Winters v Mishcon de Reya [2008] EWHC 2419 (Ch)	72, 93
Young and Irby v Rhodes and Attwood [1999] EWHC Ch 242	96

Legislation **Page**

Companies Act 1967 c.81 s120(1)	17
Consumer Rights Act 2015 c.15 s2(3)	74
Financial Services and Markets Act 2000 (Prospectus Regulations) 2019 SI 2019 No.1043	85
Legal Services Act 2007 c.29	
S1(1)(a)	7; 189
S1(1)(b)	7
S1(1)(c)	7
S1(1)(d)	7
S1(1)(e)	7
S1(1)(f)	7; 189
S1(1)(g)	7
S1(1)(h)	7; 189

S1(2)(f)	7
S1(2)(g)	7
S1(3)(a) Part 5	32
S112-122	33
S12(1)	31
S20	32
S21	51
S27	33
S28	32
S180	33
Sch 4 para 19	32
Legislative and Regulatory Reform Act 2006 c.51	27; 29
Solicitors Act 1974 c.47 s46	17; 18

Professional Rules

ABA Model Rule 1.0(e)	88
ABA Model Rule 1.10	109
ABA Model Rule 1.6	153; 172
ABA Model Rule 1.7	90
ABA Model Rule 1.9	100
ABA Model Rule 8.5	50; 98; 100

CCBE Code of Conduct for European Lawyers (2013)	99; 172; 190
Principle (a)	99
Principle (b)	99
Principle (c)	99
Principle (e)	99
Law Society Solicitors Practice Rules 1990 Rule 6	79
Law Society Solicitors Practice (Confidentiality and Disclosure) Amendment Rule 2004	67
SRA Code of Conduct 2007 Chapter 3	79

SRA Code of Conduct 2011

IB (3.6)	84
O (3.1)	93
O (3.2)	93
O (3.3)	93
O (3.6) (b)	84
O (3.6) (c)	84
O (3.6) (d)	84
O (3.7) (a)	85
O (3.7) (b)	85
O (3.7) (c)	85
O (3.7) (d)	85
O (3.7) (e)	85
O (10.3)	50

O (10.4)	51
O (10.12)	51

Solicitors Code of Conduct for Firms 2019

Rule 2.1(a)	94; 103; 127; 150
Rule 2.1(b)	94; 103; 121; 127; 150
Rule 2.1(d)	121
Rule 3.10	101; 121; 124; 148
Rule 3.9	54, 121
Rule 6.1(a)	84
Rule 6.2(b)(i)	84, 85
Rule 6.2(b)(ii)	93
Rule 6.2(b)(iii)	86
Rule 6.3	93; 82
Rule 6.4	81; 93; 126; 149
Rule 6.5(a)	97
Rule 6.5(b)	97
Rule 7.12	54; 101; 124; 148
Rule 7.7	53; 54; 101; 124; 148
Rule 9.1(d)	54
Rule 9.1(e)	54

Solicitors Code of Conduct for Solicitors, RELs and RFLs 2019

Rule 6.1(a)	84

Rule 6.2(b)(i)	84; 85
Rule 6.2(b)(ii)	93
Rule 6.2(b)(iii)	86
Rule 6.3	93; 82
Rule 6.4	81; 93; 126; 149
Rule 6.5(a)	97
Rule 6.5(b)	97
Rule 7.12	54; 101; 124; 148
Rule 7.7	53; 54; 101; 124; 148
SRA Overseas and Cross Border Practice Rules 2018 Rule 1.3	99
SRA Practice Framework Rules 2011 Rule 6	56
SRA Practice Framework Rules 2011 Rule 7	56
SRA Principles 2011	46
SRA Solicitors Practice (Conflict) Amendment Rule 2004 Rule 16D(3)(a)(i)	67; 83
SRA Solicitors Practice (Conflict) Amendment Rule 2004 Rule 16D(3)(a)(ii)	67; 83
SRA Solicitors Practice (Conflict) Amendment Rule 2004 Rule 16D(3)(b)	67; 83
SRA Solicitors Practice (Conflict) Amendment Rule 2004 Rule 16E (6)	68
SRA Solicitors Authorisation Rules 2011 Rule 8.5(c)(ii)(A)	51
SRA Solicitors Authorisation Rules 2011 Rule 8.5(c)(ii)(B)	51
SRA Solicitors Authorisation Rules 2011 Rule 8.5(x)	51
SRA Standards and Regulations 2019 Principle 3	75

List of Abbreviations

AIM	Alternative Investment Market
CLLS	City of London Law Society
COI	Conflict of Interest
COFA	Compliance Officer for Finance and Administration
COLP	Compliance Officer for Legal Practice
DCA	Department for Constitutional Affairs
FCA	Financial Conduct Authority
FSA	Financial Services Authority
HoLP	Head of Legal Practice
HoFA	Head of Finance & Administration
LSA	Legal Services Act 2007
LSB	Legal Services Board
OCG	Outside Counsel Guidelines
OFR	Outcomes Focused Regulation
OFT	Office of Fair Trading
PBR	Principles Based Regulation
PEP	Profits per Equity Partner
RBR	Risk Based Regulation
SDT	Solicitors Disciplinary Tribunal

SRA	Solicitors Regulation Authority
SRA OFR Mark I	SRA Outcomes-focused Regulation Mark I (2011)
SRA OFR Mark II	SRA Outcomes-focused Regulation Mark II (2019)

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Abstract

Outcomes-Focused Regulation (OFR) was introduced to the solicitors' branch of the legal services market in October 2011 by the Solicitors Regulation Authority (SRA) to meet regulatory reforms introduced by the Legal Services Act 2007. Pursuant to this, responsibility for regulating solicitors and law firms was licensed to the SRA by the Legal Services Board (LSB), the new oversight regulator for the legal services market in England & Wales. In turn, the SRA devolved regulation to law firms under a system of outcomes-focused regulation (OFR). Firms must report "serious breaches" of the SRA's Codes of Conduct to the SRA, and develop effective systems & controls to ensure compliance within their particular fields of practice. The Codes of Conduct are fundamental tools for the operation of OFR, as these outline the broadly-worded overarching ethical Principles, as well as the outcomes that must be achieved in order to demonstrate compliance with the Principles.

This empirical research contributes to the assessment of the effectiveness of OFR as a method of regulating solicitors the largest law firms in England and Wales, by specifically considering whether OFR is an effective model of regulation for conflicts of interest. There is currently very limited evidence for this in literature, case law, or Solicitors Disciplinary Tribunal authority. Conflicts of interest (COI) forms the lens through which to analyse this, given that COI are recognised as a frequent challenge for large law firms operating at the global level. This research therefore analyses qualitative data obtained from interviews conducted with General Counsel, (in-house ethics specialists), at twenty of the UK's largest law firms in order to address 3 Key Research Questions:

1) How do large law firms determine what standards to follow in respect of conflicts of interest?

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of conflicts of interest?

3) How are conflicts between the SRA's rules on conflicts of interest and other conflicts rules in foreign jurisdictions reconciled?

The findings suggest that SRA OFR is not an effective model of regulation for conflicts of interest in large law firms for a variety of reasons. In particular, conflicts of interest are

perceived as a global issue, and not merely a domestic one. They are identified and tracked at a global level by centralised conflicts centres, and decision-making has recently been removed from solicitors in large law firms to be managed by this centralised compliance function. This has been driven in no small part by powerful sophisticated clients who can determine what at COI is through the use of Outside Counsel Guidelines (OCGs). These bear no relationship to rules governing COI under SRA OFR.

In any event, SRA OFR is regarded as lacking the required degree of clarity and certainty to be of any value at the global level by General Counsel, and especially in instances where there is conflict between COI regimes when conducting cross-jurisdictional work. Therefore, SRA OFR is not being followed in respect of COI, and in place of the SRA's enforcement regime, law firms and their clients operate privately negotiated enforcement mechanisms under Outside Counsel Guidelines (OCGs). These can specify a range of 'soft' contractual sanctions that do not require external enforcement. However, this raise concerns around transparency and accountability under the UK's decentred system of legal services regulation, and especially given that breaches of COI are not being reported to the SRA by law firms, and could also be shielded by the doctrines of privity of contract and client confidentiality.

Declaration

I confirm that the work in this thesis is my own except where indicated by reference in the text.

This thesis has not been presented to any other institution for examination either in the United Kingdom or Overseas.

This thesis has been submitted subject to the University of Warwick's electronic submission procedure operating in light of the Covid-19 Pandemic.

Michael Webster

May 2021

Chapter 1 Introduction

"I've been with the firm since the late 1970s believe it or not. Back then, when I was an Articled Clerk, a client had to apply to be a client of the firm. We'd ask around and do our due diligence on them, which could take up to a couple of weeks even. As for conflict checks, we'd keep a list of clients in a bound leather binder under lock and key in a filing cabinet at the end of the hall. The notion that clients can now dictate their terms of engagement to us, and that we should have a centralised team of people, non-lawyers, using a global computer database to track conflicts blows my mind, even though I've been a major part of its development"[1].

1.1 Introduction

The quote above serves to illustrate how in recent years the large law firm lawyer-client relationship has changed, from a relationship underpinned by contractual retainers drafted by solicitors, and expressly limiting the extent of the duty owed to a client in respect of conflicts of interest (COI); to one where it appears to be becoming a norm for sophisticated corporate clients with access to large in-house advisors, to dictate their terms of business to large law firms through the use of 'Outside Counsel Guidelines' (OCGs). This research reveals that the Solicitors Regulation Authority's (SRA) outcomes-focused Codes of Conduct, introduced ten years ago and which purport to govern the ethical duties that solicitors and firms owe to their clients, including COI, play no role in informing decision-making around COI at this client-governed global level. Furthermore, the SRA's outcomes-focused regulatory model is regarded as lacking sufficient clarity or guidance to be of any value in any event. The regulatory void is filled instead by the private enforcement mechanisms dictated by the OCGs. These contain the bespoke, client-drafted terms, which can even bind SRA-regulated firms to the COI rules of other jurisdictions, such as the American Bar Association's (ABA's) prescriptively-drafted conduct rules instead. They can also afford clients an opportunity to bind law firms to very extensive duties of loyalty towards them as well. Furthermore, this research highlights that the use of OCGs, which originated with clients in the banking and financial services industry, has now spread to clients in other sectors of the economy.

[1] General Counsel participating in this research

Law firms have historically responded to the challenges of managing ethics at a global level through the use of structures such as Swiss Vereins, which were once believed to 'firewall' the activities of law firms operating as a part of a global network under one brand. However, this is no-longer a certainty, in light of a successful legal challenge to the effectiveness of verein structures in relation to COI in the United States in 2016[2]. The subsequent response has been to design systems & controls which centralise conflicts checking across all of global operations, and to take decision-making around COI out of the hands of solicitors, making it a matter for centralised conflict centres. In this respect, the SRA's OFR-based regulatory regime, does include outcomes relating to the effectiveness of systems and controls in order to identify and manage COI, however there is no evidence that these have actually provided any impetus for decision-making behaviour at all. Furthermore, the SRA itself is not regarded as having the expertise to regulate COI at this global level, and there is evidence that General Counsel (GC) who oversee COI, along with other ethical matters, are choosing not to report breaches of COI to the SRA for this reason. This research has identified that it is now clients who act as regulator for COI at this level, and so future research must therefore investigate the transparency of a regime that operates behind a curtain of privity of contract, and is shielded from external scrutiny by the duty of confidentiality itself. This chapter therefore explains the approach that was taken to investigating the original 'broad' thesis title and its disparate component parts, to enable these findings to be made.

1.2 Approach

By way of background, the title to this thesis: *'Investigating the Decision-making process in Large Law Firms when Addressing Conflicts of Interest in Legal Transactions in Light of Outcomes-Focused Regulation'* was originally set by the Legal Services Board, the legal services oversight regulator for England & Wales. The first consideration was to address a very broad working title, encompassing several disparate topics, and to suggest a more focused aim capable of analysis. In terms of rationale, COI (considered in Chapter 3) are recognised as one of the most frequently encountered ethical issues in practice for large law firms, and so this did appear to be an appropriate lens through which to examine the effectiveness of the SRA's relatively recent OFR regime introduced in 2011, and subjected to a regulatory review in 2019. I started by taking each component of the title, beginning

[2] RevoLaze LLC v Dentons US LLP et al 1:2016-cv-01080 (Court of Common Pleas, Cuyahoga County Ohio)

with the use of the expression "large law firm", and attempting to paint a contemporaneous picture of the market within which these firms operate.

1.2.1 Large Law Firms

Law firms can be categorised by what Sherer referred to as their 'strategic group', a cohort of competitors that most closely resembling each other, and share defining qualities[3]. These attributes can include for example: the number of lawyers, total revenues, clients represented, and internal characteristics such as organisational structure, and global office locations[4]. In so far as the largest US/UK law firms are concerned therefore, peer recognition is signalled through a league table published annually by the established industry magazine 'The Lawyer' as the 'Top 200 Law Firms'[5]. The league table is a hierarchical index, ranking law firms on the basis of revenue and profits per equity partner (PEP)[6]. The Lawyer Top 200 continues to re-enforce and promote the hierarchy under which strategic groups also happen to reflect the nature of work firms undertake in terms of scale and complexity, and as such it forms a useful starting point for an analysis of this market.

The legal press, which includes The Lawyer, started to classify law firms by reference to this index during the 1990s, when the index remained relatively consistent in terms of positioning firms. Until the growth of Swiss verein structures after the Financial Crisis, the largest firms by revenue and PEP were referred to as "the Magic Circle"[7], and most of these firms usually occupied the top 10 positions in the Top 200. These firms were set-apart from the rest of the Top 200 by revenue and PEP by some margin. However, in recent years the position of 'Magic Circle' firms towards the top of the index has become increasingly

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[3] Sherer, P.D. (2007) *Your Competitors: Mapping the Competitive Space of Large US Law Firms: A Strategic Group Perspective* Chapter 8 in Empson, L. ed. *Managing the Modern Law Firm: New Challenges, New Perspectives* Oxford University Press., p.162

[4] Ibid., p.167 citing research by McGee, J. and Thomas, H. (1986) *Strategic Group: Theory, Research and Taxonomy* Strategic Management Journal 7(2), pp. 141-160

[5] The Lawyer Magazine *'The Lawyer Top 200 Law Firms 2019'* Available at: http://www.thelawyer.com/firms-and-the-bar/uk-200-1-to-50/ [Accessed 20 July 2020]

[6] Ibid.

[7] The term "Magic Circle" was first coined by legal journalists in the 1990s including the Law Gazette see for example https://www.lawgazette.co.uk/news/its-a-kind-of-magic/42082.article. The group included Allen & Overy, Clifford Change, Freshfields Bruckhaus Deringer, Linklaters and Slaughter & May.

fragmented owing to the emergence of global law firm networks, such as Dentons[8], DLA Piper, and Hogan Lovells. These all operate under one brand name, but are operationally organised as Swiss vereins. This presented an attractive operational structure initially, in order to shield liabilities such as COI from each firm within the network. However, since 2016, the effectiveness of firewalling in relation to COI has been cast into doubt. In RevoLaze LLC v Dentons US LLP (2016)[9], the Court of Common Pleas, Cuyahoga County Ohio held that there was no effective firewall between Denton's US and Canadian entities emerging by virtue of the verein structure. The court disqualified Dentons (the world's largest law firm network) from acting in a patent case against RevoLaze where its Canadian entity had previously advised RevoLaze on patent issues material to the litigation. The court took the view that RevoLaze was entitled to expect that 'one brand' equated to 'one firm', and US $32 million in damages were awarded against Dentons, an amount roughly equivalent to the entire annual revenue of large law firms towards the bottom of the top 100 firms in The Lawyer's index. I discovered during the course of this research that this judgment of the Cuyahoga County Court had sent shockwaves around the global large law firm market, forcing networks of firms to completely rethink their global compliance strategies. It is therefore important to recognise that a centralised global approach is now taken towards COI by large law firms, which can be taken to include networks of firms (including vereins), City firms with branch offices overseas, and more traditional London-based partnerships serving clients overseas.

In the aftermath of RevoLaze the existing verein structures were not abandoned, given that the judgment related specifically to the treatment of COI, and so vereins still serve a useful purpose. The Top 10 firms are vereins, and other forms of global networks. In terms of size, they can be characterised as having workforces of approximately 500 partners and 5000 staff spread across at least 30 country locations[10], and revenues in the region of £1bn a year for financial year 2018/19[11]. They are also "full-service" in that they have legal services capability across a wide-range of transactional fields including real estate, general commercial law, corporate, commercial dispute resolution and employment (and their sub-sectors), but also niche specialisms in highly lucrative corporate fields such as capital

[8] Ivens, F. (9 July 2015) *Dentons approves Second Merger in Three Months* Legal Week, Available at: http://www.legalweek.com/legal-week/news/2403264 Legal Week 09/04/15 [Accessed 10 July 2020]

[9] RevoLaze LLC v Dentons US LLP et al 1:2016-cv-01080 (Court of Common Pleas, Cuyahoga County Ohio)

[10] The Student Lawyer (2019), Guildford, University of Law

[11] Ibid.

markets and public companies law. The Top 10 firms have historically competed with their US "White Shoe" firm rivals for the same client base, for example Faulconbridge and Muzio commenting in 2008 that London and New York still stood out as the prime centres of service as they had done since the 1980s[12]; also Flood, who recognised that these firms had managed to entrench a US/UK global hegemony through their role in drafting the documentation in transactions, and foundation of organisations such as the International Swaps and Derivatives Association[13].

For the tier behind the Top 10, the phrase 'Silver Circle' is still in current usage, a term originally coined by The Lawyer Magazine in 2007[14]. Each firm falling within this strategic group can still boast an average profit per equity partner (PEP) of over £500K per annum. These firms share many of the Top 10 characteristics, and often compete against Top 10 firms in fields of work. However, they are specialists in slightly smaller scale transactions in corporate fields such as Initial Public Offerings (IPOs), where they deal with clients not substantial enough to trade as Main Market London Stock Market Listings, but rather on the smaller, and potentially riskier, London Alternative Investment Market (AIM) instead. Firms within this group drew-in annual revenues in the region of £600m in the financial year 2018/19[15]. Firms within this tier, and those below include a number of firms that are the product of a recent spate of UK/US Transatlantic mergers in the years that have followed the Financial Crisis of 2008.[16]

The remaining Top 50 Firms, falling outside the 'Silver Circle' are more loosely referred to as the 'Mid-tier'[17]. This strategic group includes firms such as Stephenson Harwood LLP and Osborne Clark LLP. These firms typically commanded revenues in the region of £300m for

[12] Faulconbridge, J. and Muzio, D. (2008) *Organizational Professionalism in Globalising Law Firms* 22 Journal of Work, Employment and Society 1

[13] Flood, J. (2012) *Transnational Lawyering: Lawyers in Practice: Ethical Decision-making in Context* Chicago University Press

[14] The Lawyer Magazine (8 September 2007*) 'Silver Circle'* Available at: http://www.thelawyer.com/silver-circle/128316.article [Accessed 12 July 2020]

[15] The Lawyer op. cit., n.5

[16] Womble Bond Dickinson provides a good example of this process. is the UK provincial firm Bond Pearce used to occupy a position towards the very bottom of the Top 100, before its merger with regional firm Dickinson Dees in 2013. This accelerated its revenue to position it as a Top 50 firm. It subsequently merged under one brand with a mid-level US firm Womble Carlyle in 2017 and now operates as a Top 20 firm.

[17] Chambers Student Guide (2019), Guilford, The University of Law

the financial year 2018/19[18], and most boast an international presence with offices located between 15 – 40 different jurisdictions. Unlike smaller firms in the Top 200, the members of this group do not tend to be reliant upon 'best friends' networks of local firms to conduct cross-jurisdictional work. Firms in the mid-tier are approximately half the size of the Top 10 in terms of revenue and PEP, but also maintain full-service portfolios, and might also compete for the same financial services clients as the Top 10 and Silver Circle, but for smaller, more cost-effective and slightly less – complex transactions. The mid-tier has faced not just greater competition through globalisation, but also in the form of the 'Big 4' accountancy firms[19]. These were for many years already engaged in 'Turf Wars' over areas such as tax and insolvency practice[20]. The SRA began to grant licences to ABSs in 2012 to permit them to offer legal services to the public, and by June 2018 all members of the Big 4 had obtained one[21].

The Big 4 have historically grown their legal offerings by 'poaching' expertise from firms within the mid-tier, but have more recently also begun to poach partners from Top 10 backgrounds[22]. They have competed with large law firms in a targeted manner, building upon niche strengths related to their traditional tax and auditing businesses.[23] As a result, by 2019 the Big 4 were recognised as falling within the Top 10 firms by revenue in France, Italy, Russia and Spain, and globally PwC had expanded its operations to comprise 3.600 lawyers in 98 countries; EY 2,200 lawyers in 81 countries; Deloitte 2,400 lawyers in 80 countries; and KPMG 1,800 lawyers in 75 countries.[24] Therefore, although The Lawyer Top 200 makes no refence to these ABSs, focusing instead on law firms, the competitive threat

[18] The Lawyer op. cit., n.5

[19] Collectively the four largest global accounting networks in the world: Deloitte, EY, KPMG and PwC – considered broadly comparable in terms of revenue and workforce.

[20] Sherer op. cit., n.3

[21] Connelly, T. (22 June 2018) *Accountancy Giant Deloitte Enters Legal Services Market* Legal Cheek, Available at https://www.legalcheek.com/2018/06/accountancy-giant-deloitte-enters-legal-services-market/ [Accessed 2 May 2021]

[22] EY Press Release (11 August 2020*) EYs UK Law Practice Announces Further Expansion with Legal Managed Services and Energy Appointments* EY, Available at: https://www.ey.com/en_uk/news/2020/08/ey-uk-law-practice-announces-further-expansion-with-legal-managed-services-and-energy-appointments [Accessed 3 May 2021]

[23] McNichol, H. (2019) *The Hard Sell,* The Legal 500, Available at: The Legal 500 Hamish Mchttps://www.inhouselawyer.co.uk/feature/the-hard-sell/

[24] Coates, H. (12 July 2019) *The Big Four: Are they a Threat to the Legal Sector?* Flex Legal Blog, Available at https://flex.legal/blog/the-big-four-are-they-a-threat-to-the-legal-sector [Accessed 3 May 2021]

that they present to several strategic groups cannot be ignored, and so the Big 4 ABSs have also been incorporated within the scope of this research on 'large law firms' to provide an interesting comparative perspective on how they manage COI in light of SRA OFR.

1.2.2 Outcomes Focused Regulation

Having established what a contemporaneous 'large law firm' looks like, the next consideration was to gain a working knowledge of the SRA's Outcomes-Focused Regulatory regime, before considering its rationale and what it originally sought to achieve as a measurement of success. Outcomes-Focused Regulation (OFR) is therefore considered in more detail in Chapter 2, along with the context that brought it about. However, essentially it was introduced to the solicitors' branch of the legal services market in October 2011 by the Solicitors Regulation Authority (SRA). This was in response to a legal services regulatory landscape that had been overhauled by the UK government to accommodate greater competition and innovation among legal services providers, and to provide an enhanced focus on consumer protection. This followed an increase in consumer complaints against solicitors during the 1990s for poor service.

SRA OFR marked a radical departure from the prescriptive form of rules-based regulation that preceded it. Instead, solicitors and the entities that they worked for (including large law firms) became subject to a series of overarching ethical Principles and broadly drafted rules, originally referred to as "outcomes". These were designed to be sufficiently flexible to accommodate all practice contexts, including large law firms. In terms of its enforcement of OFR, the SRA adopts a purportedly risk-based approach, by focusing its resources on areas of thematic risk identified in relation to a series of regulatory objectives contained within s1 Legal Services Act 2007 (LSA)[25] (also considered in Chapter 2 of this thesis). The SRA implemented an updated version of OFR in November 2019, which I refer to as 'OFR Mark II'. This was motivated by a perceived a need within the SRA to reduce the volume of the Solicitors Handbook containing the codes of conduct underpinning OFR, and to also split the provisions of the Solicitors Code of Conduct into separate codes to more clearly articulate the SRAs recognition of individual and entity accountability for

[25] Legal Services Act 2007, c. 29. Available at: https://www.legislation.gov.uk/ukpga/2007/29/contents [Accessed 4 May 2021] in particular s1(1) (a) protecting and promoting the public interest; (b)supporting the constitutional principle of the rule of law; (c)improving access to justice; (d)protecting and promoting the interests of consumers; (e)promoting competition in the provision of services within subsection (2); (f)encouraging an independent, strong, diverse and effective legal profession; (g)increasing public understanding of the citizen's legal rights and duties; (h)promoting and maintaining adherence to the professional principles.

professional conduct. However, under OFR Mark II the SRA removed a large volume of guidance from the Codes of Conduct, and this research highlights that this "rule-reduction" exercise, which might not even have been motivated by OFR, has in fact been extremely counterproductive, and harmed the credibility of the SRA and SRA OFR at the global level.

1.2.3 The Compliance Officer for Legal Practice and General Counsel

Having gained a working appreciation of SRA OFR, the next consideration was to attempt to determine from the literature who was responsible for decision-making around COI in large law firms, with a view to approaching the relevant individuals for the purposes of fieldwork. This led to the discovery of a body of US literature which had started to emerge during the mid-1990s. Elizabeth Chambliss and David Wilkins were among the first to recognise the increasing 'professionalisation' of the roles of ethics advisors, general counsel and other compliance specialists in large law firms[26]. This appears to have been a response to increasing complexity of professional regulation, the number of claims against lawyers,[27] and the need for a single person to work with the firm's insurer to reduce the fees paid to outside counsel[28]. Chambliss and Nelson considered that such individuals would shape the future of law firm regulation,[29] and later research by Chambliss appears to support this. However, one of the earliest developments in terms of the recognition and professionalisation of the role of in-house law firm ethics advisor appears to have been in the establishment of a professional identity, and in particular, an identifying job title.

In their 2002 study Chambliss and Wilkins sought to discover the most popular terminology for broadly conceived "in-house compliance specialists", and of their 32 respondents, the most popular titles were "firm counsel", "general counsel" or "counsel to the firm", and to a lesser extent "ethics partner", "ethics advisor" or "professional responsibility advisor"[30]. The notion of a profession in its infancy was highlighted by a sharp divide between full-

[26] Chambliss, E. (2006) *The Professionalization of Law Firm In-House Counsel,* North Carolina Law Review 84, p.1517 refers to 'professionalization' as the process by which an occupational group becomes increasingly specialised, organised and autonomous, developing distinct knowledge claims, titles, associations and career tracks.

[27] Chambliss, E. and Wilkins, D.B. (2002) *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms* Arizona Law Review 44, p.559

[28] Saab Fortney, S. (2005) *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer* Kansas Law Review 53, p.836

[29] Chambliss and Wilkins (2002) p. 561

[30] Chambliss and Wilkins (2002) pp. 565-566

time and part-time ethics specialists, the latter usually being partners juggling the role with fee-earning responsibilities, and questioning whether full-time, non-fee earning specialists could ever maintain their credibility with practicing partners, one respondent stating: "*They're not down in the trenches and that's what some lawyers are always talking about"*[31]. However, in a slightly later study published by Chambliss in 2006 she recognised that infact there had been a very rapid institutionalisation of the role within firms, coalescing around the title "General Counsel", and that there was an increasing trend for creating formal, full-time, remunerated in-house positions[32]. Importantly, she predicted that virtually all major US firms would have a designated general counsel within a few years, with the same prediction being made for "top London firms" as well.[33]

Contemporaneous research by Susan Saab Fortney published in 2005 supports Chambliss' findings, with the term "General Counsel" being clearly identified as an in-house lawyer who advised the firm and its lawyers regarding the firm's general legal concerns, albeit not necessarily limited to ethics matter, and that firms which had recently incorporated as Limited Liability Partnerships now required a designated lawyer to oversee and monitor compliance with applicable legislation across all jurisdictions that the firm operated in[34]. The most frequent issues that these "General Counsel" dealt with were COI[35]. By this stage in the early noughties, US law firms were looking at their internal compliance infrastructure to meet the demands of 21st century practice, and in 2003 Chambliss and Wilkins suggested that there ought to be a new framework for law firm discipline which recognised the case for internal ethical infrastructure given that lawyers increasingly practiced in large, multi-jurisdictional firms; with professional regulation increasingly dependent upon structural controls within firms hampered by flawed conflicts detection systems[36], and the

[31] Chambliss and Wilkins (2002) pp 580 -581

[32] Chambliss (2006) p.1519

[33] Chambliss (2006) p.1531 referring to a contemporaneous article by Mullually, M. (8 May 2004), *The Advisor to the Advisors,* Legal Week, Available at: http://www.legalweek.com/ViewItem.asp?id=20987 [accessed 2 April 2021]

[34] Saab Fortney (2005) pp.837-841

[35] Chambliss and Wilkins (2002) pp 574 and p. 584

[36] Chambliss and Wilkins (2003) *A New Framework for Law Firm Discipline* Georgetown Journal of Legal Ethics 16, p.342 referring to earlier empirical work by Pizzimenti, L. A, (1997) Screen Veritie: *Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?* University of Miami Law Review 52 p.305
and Shapiro, S, (2002) Tangled Loyalties: Conflicts of Interest in Legal Practice

need for a more *"concrete and readily measurable standard"* for compliance, so that designated individuals could monitor the quality of the firm's systems and controls[37].

Some twenty years later, and a key feature of the SRA OFR in England & Wales, is its reliance upon intra-firm self-regulation and internal systems & controls, and a mandatory requirement for all SRA regulated law firms to appoint a 'Compliance Officer for Legal Practice' (COLP). The COLP should be *"instrumental in creating a culture of compliance throughout a firm, becoming its focal point for the identification of risk under OFR, and 'a key point of contact for the SRA"*.[38] Very little empirical evidence has examined the role and effectiveness of COLPs in practice though, or how their roles differ, or overlap with General Counsel. Of the little research that does exist, a study of 25 law firms published in 2018 by Aulakh and Loughrey concluded that COLPs play a critical role in "constructing the meaning of OFR", and promoting and supporting professional values in the face of commercial pressures, and that an important difference between a COLP and a General Counsel was that COLPs could afford to be more robust, given the existence of an external regulatory framework, [39] which they could refer to in order to safeguard their positions, unlike General Counsel who had to be carefully deferential to persuade partners to comply[40].

The problem though with Aulakh and Loughrey's analysis is not only in the historical nature of the research on General Counsel referred to, but also the ability to extrapolate and scale these findings up to large international law firms, and to the field of global COI specifically. Of the 25 participants, only 11 were "large" by reference to the number of solicitors being "81" or more, and then in fact only 2 of these fell within the category of "international"[41]. It was only at the point of approaching my research subjects at the outset of my own data collection (Chapter 5) that I discovered that COI within my large law firm subjects fell squarely within the domain of the General Counsel, given that COI were treated as a global issue, rather than a domestic matter for the English COLP.

[37] Chambliss and Wilkins (2003) pp 344 - 345

[38] SRA (2017*) 'COLPs and COFAs'* Available at: http://www.sra.org.uk/complianceofficers/ [Accessed 4 May 2021]

[39] Alulakh, S. and Loughrey, J. (2018) *Regulating Law Firms from the Inside: The Role of Compliance Officers for Legal Practice in England and Wales* Journal of Law and Society 45(2), pp. 259-260

[40] Ibid., p269

[41] Ibid., p258

1.2.4 Literature Reviews

Having established what a 'large law firm' is by reference to The Lawyer Top 200's Top 50 firms; also gained a working understanding of SRA OFR, and determined which individuals might potentially have overall responsibility for implementing decision-making around COI, the other elements of the thesis title were considered with a view to forming a more focused aim capable of investigation through the development of Key Research Questions. A consecutive sequence of three literature reviews were undertaken (Chapters 2-4) across which the Key Questions were developed from scratch, and led to the selection of an appropriate research methodology in Chapter 5.

Chapter 2 (The Regulation of Large Law Firms and Solicitors in England & Wales) therefore seeks to understand how and why large law firms and solicitors in England & Wales became subject to an outcomes-focused regime overseen by the SRA. It examines the historical context behind this regulatory innovation, and establishes an overall aim for this research. This is to consider whether SRA OFR is an effective method of regulation for COI in large law firms. Several themes emerge as a starting point for the development of the Key Questions through Chapter 2, including the difficulty in actually identifying its theoretical basis for the purpose of analysis, and the challenges of implementing an abstract regulatory concept such as OFR in the real-life. For example, a key element of OFR Mark I was the need for "senior managers" to take greater responsibility for creating the right culture for OFR to work effectively[42], and so the original OFR Mark I model was built around a fundamental tenet of COLPs reporting "material breaches" to the SRA. However, by OFR Mark II this appeared to be being interpreted very narrowly.[43] Furthermore, since 2011 the reporting threshold has not only been watered down by the SRA and afforded no clear guidance; the senior managers responsible for overall compliance are choosing not to report matters to the SRA anyway. An important consideration therefore is how the key safeguards contained within the SRA's rules on COI are being interpreted and followed by large law firms in respect of COI.

[42] SRA (2010) *Achieving the Right Outcomes*, Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/achieving-right-outcomes-consultation-paper.pdf?version=4a1ae5 para 7.1

[43] SRA (2018) *Reporting Concerns Consultation*, Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-consultation.pdf?version=4a1abf para 32

Chapter 3 (Conflicts of Interest) follows this consideration of the underpinning regulatory theory, and serves to provide a lens through which to examine decision-making by large law firms in light of SRA OFR. Conflicts of interest is a very common ethical issue to confront large law firms, and can be understood in different ways. Chapter 3 seeks to develop several Key Questions based on the issues identified in Chapter 2. It therefore describes what a COI is, and the particular issues that they present in large law firm practice, including the rare instances in which breaches of COI have actually reached court. Chapter 3 also considers the use of contact by law firms in fettering the underpinning a fiduciary obligation: the duty of loyalty, and the bespoke interpretation of COI afforded to COI under the SRA's rules, which have their origins in drafting by the City of London Law Society twenty years ago. Chapter 3 therefore arrives at two Key Questions: how do large law firms determine what standards to follow in respect of COI; and how the SRA's rules on COI are interpreted in the large firm context.

Chapter 4 is the third and final in the sequence of three literature reviews, and develops the literature review in Chapter 3 by considering the role that firm culture, norms and systems and controls play in determining the outcome of decisions on COI, and why systems and controls are perceived as necessary by firms in light of the inherent inconsistency between individuals in decision-making, and also the constraints imposed by limited time and information in a transactional situation. Under SRA OFR there is an emphasis on firms developing appropriate systems and controls to detect and manage COI. Chapter 4 therefore considers what systems to manage decision-making actually look like in respect of COI, with particular regard to who is actually involved, and what happens as a transaction progresses to detect and manage COI. Chapter 4 the applies this knowledge to the Key Questions arrived at in Chapter 3, to consider how large law firms might determine what standards to follow in respect of COI, and how conflicts between the SRA's rules on COI, and other rules reconciled. It proposes a further Key Question, which is therefore to consider what systems to manage decision-making actually look like in respect of COI, with particular regard to who is actually involved, and what happens as a transaction progresses to detect and manage COI.

1.2.5 Methodology & Analysis

Three Key Questions were therefore formulated as a result of the three consecutive literature reviews, together with supporting sub-questions. Chapter 5 (Methodology) begins by reiterating these:

1. How do large law firms determine what standards to follow in respect of COI?
2. In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
3. How are conflicts between the SRA's rules on COI and other "local" rules reconciled?

Chapter 5 explains the methodological assumptions and research methods adopted by this research, explaining the choice of qualitative methods for the fieldwork undertaken, and sampling. It also describes how access was gained to research subjects in large law firms, tasked with leadership of decision-making around COI. Chapter 5 also describes how these individuals were interviewed, including the interview framework used, and the issues encountered. Essentially, the methodology reflects the aim for this study, to consider whether SRA OFR is an effective method of regulating COI in large law firms. Chapter 5 describes the generic inductive qualitative model adopted by this research, recognising that a considerable amount of flexibility and adaptivity was required to accommodate the challenges in sampling, and sensitivities in interviewing and analysis, and also the need to enhance the level of trust and confidence in this piece of qualitative research. Care was therefore taken in the development of the Interview Guide to which a 'thematic analysis' was applied to data gathered through twenty interviews and recorded in Appendix B to this thesis. This leads into Chapter 6 (Analysis) which provides an analysis of the data. A qualitative thematic analysis was undertaken, appearing in Appendix C. Chapter 6 summarises the key themes to emerge from this through each sub-question, and how they each address the Key Questions posed, before ultimately addressing the aim of this research. Finally, Chapter 7 (Conclusion) concludes by considering what the findings of this research might indicate about the effectiveness in practice of the underpinning regulatory theory; the future for regulation of large law firms in respect of COI; the SRA's OFR project, and research that should therefore be carried out subsequently.

1.3 Contribution to Existing Knowledge

In terms of contribution to existing knowledge therefore, this research makes the first contribution to the literature on the effectiveness of SRA OFR in respect of COI, and it also considers that any future research in this area needs to recognise the emergence of the 'contractual conflict', as a result terms dictated by powerful and sophisticated under Counsel Guidelines (OCGs). Under OCGs even the very notion of a "client" can be defined broadly; down to the partial beneficial ownership of affiliates within jurisdictions that do

not even concern a particular matter. Importantly, under OCGs, clients can also determine the scope and extent of the duty of loyalty owed to them on a global basis. This extends the duty of loyalty and the potential for COIs well beyond that envisaged by the SRA's OFR regime. Furthermore, the terms of an OCG can adopt a client's entirely bespoke rules on COI, however where they do adopt professional rules on COI, then this is likely to be the ABA's Model Rules, because the SRA's OFR COI rules are not regarded as having sufficient clarity or guidance to be of use at this global level, and especially where a clear benchmark is required to guide parties through navigating the complex duo deontological issues at this global level.

This research also discovered that COI in large law firms is not the responsibility or domain of the English COLP, and several GC respondents were candid about not reporting to the SRA anyway because of its perceived lack of expertise. In any event, breaches of COI were defined by contract, and subject to a contractually agreed private enforcement mechanism under which law firms could be penalised by the client by reference to expected service levels and key performance indicators. These include 'softer' sanctions such as the reimbursement of fees for example, rather than damages claimed under repudiatory breaches of contract. Partly as a result of this, GCs did not equate the sort of breaches that required reporting to the SRA as likely to encompass COI. This means that breaches of COI are not reaching the SRA, and that a key tenet in its monitoring and risk-based approach to regulation is simply not working.

Finally, this research provides an updated perspective on a growing OCG-governed landscape, whereby law firms have had to adapt to the complexities now presented by OCGs, coupled with the removal of the protection that verein structures were once thought to afford firms operating within global networks, by establishing centralised COI centres on a global basis, overseen by the GC. Perhaps most significantly, lawyers are now being prevented from decision-making on COI, although firms have argued that this shift enhanced ethicality because it meant that COI teams could be more objective, and not tied-up with inter-firm politics and matters of protecting confidentiality and disclosure as between fee-earners. Nevertheless, this significant infrastructural shift was not driven by the SRA's OFR regime, and, remarkably, it renders the SRA's Code of Conduct relating to solicitors largely obsolete in respect of COI. In terms of the main aim to consider to consider whether SRA OFR is an effective model of regulation for COI in large law firms, this research contributes to the literature on the effectiveness of SRA OFR in practice by considering that it is not effective at all.

1.4 Conclusion

This first chapter has introduced the original 'broad' title devised by the Legal Services Board, and described how it was necessary to devise a workable aim from which three Key Questions capable of analysis were developed. In terms of approach, three consecutive literature reviews were undertaken in a logical sequence, firstly considering with the relevant regulatory theory and context to identify SRA OFR and what it sought to achieve (Chapter 1); then a lens though which to analyse SRA OFR (Chapter 2); and finally, the literature on decision-making in large law firms to enhance the proto Key Questions (Chapter 3). The main aim of this research also formulated at the end of Chapter 2 on the basis of the regulatory literature. The Key Questions developed by the end of Chapter 4 were then applied to a suitable methodology (Chapter 5), and data was then collected through twenty interviews, and assessed using a thematic analysis, summarised in Chapter 6. Finally, the main aim was revisited, and the implications of this research considered more widely in Chapter 7 (Conclusion). This Chapter 1 has therefore briefly outlined the key contributions made by this research to existing knowledge, and in terms of next steps therefore, Chapter 2 (The Regulation of Large Law Firms and Solicitors in England & Wales) commences the three-step consecutive literature review process, by considering the historical context behind OFR and what it originally sought to address. It also establishes several important themes which serve as the starting point for the further development of the Key Questions across Chapters 3 and 4.

Chapter 2 The Regulation of Large Law Firms and Solicitors in England & Wales

2.1 Introduction

This chapter is the first in a sequence of three consecutive literature reviews, which starts by seeking to understand how and why large law firms and solicitors in England & Wales became subject to an outcomes-focused, intra-firm regulatory regime overseen by the SRA, and what it sought to achieve. SRA OFR was a radical departure from the previous regime which, by the early noughties was being criticised as no-longer fit for purpose by the government, and so was subjected to a radical re-design during an era of wider government intervention in industry regulation that embraced 'risk-based', 'decentred' and 'consumer protection-focused' regulatory reform agendas[44]. The regulation of COI in large law firms has purportedly been subject to the SRA's outcomes-focused regulatory approach since 2011, with a more recent re-design by the SRA in November 2019. This chapter formulates an overall aim for this research which is to consider whether SRA OFR as conceived by the SRA under its LSA 2007 licensed regulatory mandate is effective for large law firms dealing with COI. This assessment can be made logically by reference to the underpinning rationale and regulatory theory identified in this chapter, and then also Chapters 3 and 4 which follow, and serve to develop sub-questions in response to the aim with specific regard to earlier literature on COI (the ethical issue 'lens'), and internal systems and controls developed, given their fundamental significance to the operation of the SRA's regulatory model.

2.2 The Growth & Diversification in Legal Services

Hanlon noted how during the 1960s City firms based in London in particular began to shift from private client work, typically comprised of trusts, probate and tax, towards

[44] These concepts are explained in this chapter

commercial and corporate work[45], a process facilitated by the Companies Act 1967, which removed the prohibition on the formation of law firm partnerships of more than 20 members[46], thereby enabling firms to expand their operations, and undertake far more complex matters. Well-established City firms such Freshfields and Slaughter & May also started to internationalise, forming "best friends" alliances with firms in continental Europe following the UK's accession to the European Economic Community in 1973, which had given rise to new specialisms in fields such as competition law[47]. The response from the government was tighter control over self-regulation. Whereas the Law Society had principally operated self-regulation on the basis of a Royal Charter granted in 1831, legislation was introduced in the form of the Solicitors Act 1974[48], which now expressly stipulated the Law Society's powers in relation to drafting rules of professional practice, conduct and discipline,[49] and re-set the bars for admission, qualification and training.[50]

The relationship between the Solicitors Act 1974 and the provisions contained within the code of conduct (forming part of the Guide at the time) was therefore established as an arms-length one. The 1974 Act, which is still in force today, established a more prescriptive statutory footing for self-regulation, but did not go so far as to prescribe the rules of professional conduct. In years since this has left some such as Salzedo and Hollander to consider whether, theoretically, the code of conduct might have the same status as a statutory instrument[51], citing Lord Diplock's obiter statement in *Swain v Law Society* (1983)[52] that a breach of the Code might potentially give rise to public law remedies.[53] However the point has never been tested, and it remains moot. However, the 1974 Act enabled the Law Society to deal with more minor offences under the professional rules, but in relation to the most severe cases of misconduct, the Government ensured that there

[45] Hanlon, G. (1997) A Profession in Transition? Lawyers, The Market and Significant Others (1997) *Modern Law Review* 60, p. 801

[46] Companies Act 1967 c. 81 s120(1) Available at: https://www.legislation.gov.uk/ukpga/1967/81/enacted [Accessed 4 May 2021], but note that it is no longer in force.

[47] Lee, R.G. (1992) *From Profession to Business: The Rise and Rise of the City Law Firm* Journal of Law and Society 19

[48] Solicitors Act 1974 c. 47 Available at: https://www.legislation.gov.uk/primary+secondary?title=solicitors%20act%201974 [Accessed 4 May 2021]

[49] Ibid. Part II

[50] Ibid. Part I

[51] Hollander, C. and Salzedo, S. (2008) *Conflicts of Interest* London Sweet & Maxwell, p.282

[52] Swain v Law Society [1983] 1 AC 598

[53] Hollander and Salzedo op. cit., p.282

would from then on be a mechanism falling outside of Law Society self-regulation to hold errant solicitors to account. This still exists today as the Solicitors Disciplinary Tribunal (SDT), with the remit to adjudicate upon allegations of misconduct by solicitors, and constituted as a Statutory Tribunal under s46 of the 1974 Act.[54]

By the 1980s, the Thatcher Government's neoliberal economic policies saw further permanent liberalisation and fragmentation of the legal services market through the introduction of greater competition, with attempts to end several traditional monopolies, notably that held over conveyancing by solicitors, by the creation of more affordable licensed conveyancers. However, in return, the Courts and Legal Services Act 1990 s17 sweetened the pill by providing solicitors with Higher Rights of Audience that had been the preserve of barristers since the 17th century, (and in return, barristers were also able to take instructions from other professionals aside from solicitors)[55]. In so far as the City firms were specifically concerned though, Lee observed how the Thatcher government's economic policies provided a considerable catalyst for their growth. These firms were well-located and able to substantially expand their legal service provisions in the wake of the deregulation of the London Stock Exchange on 27 October 1986[56], which in turn followed a process of deregulation of the city of London's banks in 1983, and the work generated off the back of the privatisation of infrastructural utilities. During this era London's presence as a global financial centre was cemented, and the UK became a very attractive prospect for inward investor clients based in the United States and Japan in particular[57]. However, these processes also hastened a fragmentation within the solicitors' profession, and as Heinz and Laumann had similarly observed within the Illinois Bar in the late 1970s,[58] a growing divergence between corporate and retail hemispheres of legal practice, reflecting the nature of the work undertaken, and the level of remuneration provided for it.[59]

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[54] Solicitors Act 1974 s46

[55] Boon, A. (2010) Professionalism Under the Legal Services Act 2007 *International Journal of the Legal Profession* 17, p. 197

[56] Occasionally referred to as "The Big Bang"

[57] See for example Lee, R.G. (1992) *From Profession to Business: The Rise and Rise of the City Law Firm* Journal of Law and Society 31, p.19

[58] Heinz, J.P., Laumann, E.O., Nelson, R.L. and Michelson, E. (1998) *The Changing Character of Lawyers Work*: Law and Society 32

[59] See for example Abel, R. (1995) *England and Wales: A Comparison of the Professional Projects of Solicitors and Barristers*, in Abel, R., and Lewis, P. (eds) *Lawyers in Society: An Overview.,* University of California Press. 67; http://www.chambersstudent.co.uk/law-firms/types-of-law-firm/high-street-firms.

2.3 Practice at the Turn of the 21st Century

By the latter part of the 20th century, it might be argued that the Government, through legislation, and the Courts, though the development of the doctrine of professional negligence against solicitors[60], had diminished the Law Society's original 1831 grant to self-regulate the profession. However, contemporary evidence would suggest that the profession had not helped itself very much either. The Law Society appeared to have fallen out of touch with both its membership and consumer expectations, with contemporary research suggesting that by the 1990s practitioners no longer regarded the Law Society's Guide as fit for purpose, and that it was being ignored by solicitors and most damming of all, that the Law Society was failing to deal credibly or effectively with complaints against members.[61]

As for large law firms, a rare historical snapshot of legal practice in England & Wales during the late 1990s was provided by Janine Griffiths-Baker in "*Serving Two Masters: Conflicts of Interest in the Modern Law Firm"*[62]. Griffiths-Baker had conducted a series of 17 interviews with practitioners during Spring 1997, and several of her City law firm participants appeared to be very dissatisfied with the status quo between the nature of their practice, and the Law Society's professional rules[63]. On the topic of COI especially, the Law Society at the time prohibited individual solicitors from acting in concurrent or successive COI[64], yet City practitioners openly admitted to Griffiths-Baker that they disregarded the rules as unsuitable to their type of practice, and suggested that they had been devised in another era and with smaller firms in mind.[65] These practitioners did not appear to be concerned by threat of regulatory enforcement action by the Law Society.

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[60] See further Donoghue v Stevenson [1932] UKHL 100, a landmark case establishing the general principles of negligence including the general duty of care, and its subsequent application in Hedley Byrne v Heller & Partners Ltd [1964] AC 465. This established that a duty of care is owed irrespective of contract where one party relies on the special skill of another; also, the specific application of this professional negligence standard in Ross v Caunters [1979]] 2 AER 580 to solicitors. This established that solicitors owe a duty of care to their clients and 3rd parties who suffer loss and damage as a result of negligent advice.

[61] See for example Seneviratne, M. (1999) *The Legal Profession: regulation and the consumer,* London, Sweet & Maxwell

[62] See further Griffiths-Baker, J. (2002) *Serving Two Masters: Conflicts of Interest in the Modern Law Firm*, Oxford, Hart Publishing

[63] Ibid.

[64] The Law Society (1990) *The Guide to the professional conduct of solicitors* London, Law Society

[65] Griffiths-Baker op. cit., p.260

Other contemporary commentators including Davies[66] drew particular attention to the failure of the then regulatory model to police large law firms in particular, arguing that there was a "regulatory crisis" because the professional model was geared up to individuals, and to an era in which individual lawyers had a high degree of professional autonomy. However, this overlooked the fact that a majority of solicitors were by then, working in law firm settings where they had restricted individual power, and were obliged to demonstrate appropriate organisational loyalty if they were to maximise their career prospects[67]. In other words, they had their hands tied by bureaucratic firm structures, and Davies also noted the absence of large firms from Law Society disciplinary processes, suggesting that this particular group of firms were more adept at acting quickly to remedy damage, avoiding escalations into formal complaints, and thereby keeping them from falling within the regulatory view, which was in any event poorly equipped to control their activities[68]. It also appeared that the type of clients that these large law firms tended to represent were sophisticated and usually had their own in-house lawyers who could oversee and monitor the work undertaken for them by external counsel, with a greater motivation to seek financial redress directly from the firm, rather than invoke the Law Society's disciplinary mechanisms[69]. Rather than being ethical per se, the impression provided by Davies was that large firms and their lawyers were experienced in managing issues to avoid brand damage[70].

By contrast, in the wider market, solicitors were generating a considerable number of complaints for poor service and professional misconduct to the Law Society. In 2005 the Law Society had received over 17,000 complaints against solicitors related to conduct issues[71], and that year 'Which Magazine' reported that a third of consumers that it had surveyed considered that they had received poor service from their lawyer[72]. However, coupled with a rise in complaints, it also appeared that the Law Society was failing to

[66] Davies, M. (2003) The Regulatory Crisis in the Solicitor's Profession, *Legal Ethics* 6, p. 194

[67] Ibid., p. 196

[68] Ibid., p. 197

[69] Ibid., p. 198

[70] Ibid., p. 198

[71] The Guardian (26 October 2006) *Soliciting Sound Legal Advice* Available at: http://www.guardian.co.uk/money/2006/oct/26/yourrights.legal [Accessed: 7 September 2020)

[72] Which? (21 March 2005) *Which? Wants Law Regulation* Available at: http://www.which.co.uk/about-which/press/press-releases/campaign-press-resleases/consumer-markets/2005/03/which-wants-law-regulation [Accessed 7 September 2020]

provide a speedy and efficient resolution of straightforward low-level complaints, and that it was also failing to get to grips with the fundamental principles of the regulatory and disciplinary process[73]. This level of consumer dissatisfaction with solicitors led to Government intervention. This considered the functioning of the entire legal services market, and placed "consumers" firmly at its heart. Regardless of hemispheres of practice, this ultimately had ramifications for the entire legal services market in the UK.

2.4 Blair Government Intervention in the Early Noughties – Protecting Consumers

If the seeds for the professional re-regulation of solicitors had been sown over the course of the past 50 years, then this was the era in which they came to fruition. Changes in the UK political economy associated since the 1980s with a neoliberal administration and an accompanying resurgence in neo-classical market economics, placed professional services and their restrictive practices under the twin spotlights of (to adopt Flood's terms) an "anti-monopoly sentiment" and powerful consumer lobbies.[74] These would seek to ensure competitiveness throughout the entire market as a means of enhancing quality in the provision of services, and enable innovation in service provision as a means of meeting unmet need. Furthermore, despite their different hemisphere of practice, large Law firms would not be immune from scrutiny as part of these "consumer" driven reforms, through a recognition that a new regulatory model would need to hold not just individuals, but also the entities that they were employed by, accountable and thus entirely re-configuring the regulation of solicitors.

The opening salvo was the Office of Fair Trading's (OFT) 2001 report into competition in the professions generally.[75] This report was part of what became a European and, indeed, global movement focussed on ensuring the competitiveness of professional services markets.[76] It considered the legal profession's monopoly on legal services, and concluded

[73] Davies, op.cit., p. 194

[74] Flood, J. (2011) *The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation* Current Sociology 59 at p.510; see also Boon, A. (2017) *Innovation and Change in the Regulation of Legal Services*, in Boon, A. (ed) *International Perspectives on the Regulation of Lawyers and Legal Services*, Oxford: Hart Publishing, pp. 242-3, 247.

[75] Office of Fair Trading (2001) *Report into Competition in the Professions* Available at: http://webarchive.nationalarchives.gov.uk/20140402172414/https//oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf [Accessed: 7 September 2020]

[76] Terry, L. (2009) *The European Commission Project Regarding Competition in Professional Services*, Northwestern Journal of International Law & Business 1; and Terry, L. (2008) *The Future Regulation of the Legal*

that the professional rules, including the solicitors Code of Conduct, were in fact anti-competitive[77] for several reasons. These included: that they enforced a "dual" structure of the legal profession (solicitors and barristers) which added unnecessary costs for consumers[78]; that there were indirect entry restrictions imposed on Multi-Disciplinary Practices which had the potential to provide consumers with greater choice of service provider more cheaply[79]; that it imposed restrictions on employed solicitors acting for third parties[80]; and that in some fields of practice such as conveyancing, solicitors still dominated 95% of the market.[81]

The OFT therefore recommended to the Government that competition law should apply to the professions, which would provide the OFT with the ability to ensure that markets for professional services worked well, and that consumers would benefit from it[82]. In relation to the solicitors' branch of the legal profession, the OFT acknowledged that the Law Society had by this stage established a working party to review the rules of professional conduct applicable to solicitors, with a view to simplifying them without jeopardising client protection[83]. However, the OFT added its wider concern over the continuing use of the doctrine of legal privilege, because although it recognised that there were fundamental arguments for protecting exchanges between clients and their legal advisors, if the subject of that exchange was advice that could equally be provided by a member of another profession, then there was either a need for a reduction in the scope of privilege, or a limited extension of the privilege to others.[84]

The OFR report was followed by a Department of Constitutional Affairs (DCA) review of the legal services market, "Competition and Regulation in the Legal Services Market", which included the results of a public consultation and concluded that the regulatory framework governing practice in England & Wales was "outdated, inflexible, over-complex and

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Profession: The Impact of Treating the Legal Profession as "Service Providers Journal of the Professional Lawyer 18, pp. 205-9

[77] OFT op. cit., n. 94, pp. 12-13

[78] Ibid., para 49

[79] Ibid., para 50

[80] Ibid., para 50

[81] Ibid., p. 17

[82] Ibid., para 56

[83] Ibid., p. 50

[84] Ibid., para 47

insufficiently accountable or transparent"[85]. In turn the DCA's findings prompted the government to commission the Clementi Review into the Regulatory Framework for Legal Services in England & Wales. The Clementi terms of reference were to consider what regulatory framework would work best to promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector that represented the public and consumer interest.[86] Clementi's final report was published in December 2004.[87]

Clementi largely agreed with the findings of the earlier DCA report, and suggested several regulatory models to accommodate the introduction of new legal services providers; to deal with a perceived lack of independence between the regulator and regulated community, and an inconsistency in disciplinary outcomes.[88] Clementi's proposals formed the basis of a DCA White Paper in 2005 "The Future of Legal Services: Putting Consumers First",[89] which was essentially an agenda of the Government's plans for reforming the delivery of legal services and creating a new regulatory framework. The cornerstones of the DCA's White Paper encompassed the introduction of oversight regulation for the regulated legal services sector, and anticipated the potential for regulatory competition between frontline regulators. To this end it considered how to liberalise the ownership of legal services providers through the introduction of 'Alternative Business Structures'(ABSs). The regulatory risks associated with the introduction of outside ownership would, it was anticipated, be addressed by a focus on internal systems and controls, including a 'fitness to own test', and the introduction of a Head of Legal Practice (HOLP) and Head of Finance and Administration (HOFA) into the ABS structure .[90] Ultimately the DCA's white paper was adopted into the form of the Draft Legal Services Bill published in May 2006, which

[85] Department of Constitutional Affairs (2003) *Competition and Regulation in the Legal Services Market – A Report Following the Consultation "In the Public Interest?"* Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272192/6679.pdf [Accessed 7 September 2020]

[86] Clementi, D. (2004) *Review of the Regulatory Framework for Legal Services in England and Wales* Available at:http://www.avocatsparis.org/Presence_Internationale/driot_homme/PDF/Rapport_Clementi.pdf [Accessed 7 September 2020)

[87] Ibid.

[88] Ibid., para 2.5

[89] Department of Constitutional Affairs the Future of Legal Services: *Putting Consumers First* Available at: https://webarchive.nationalarchives.gov.uk/+http:/www.dca.gov.uk/Legalsys/folwp.pdf

[90]Ibid., para 6.30

subsequently came into force as the LSA, providing a new framework for the regulation of the legal services market, considered below.

2.5 Decentring and Intra-firm Self-regulation

The proposed re-modelling of the regulatory landscape was driven not only by government consumer protection and better-regulation agendas, but also more widely, as the consequence of an on-going shift in governance and accountability away from "the regulatory state", towards a system of combining state oversight with the delegation of authority to a wide range of public and private sector actors. Scott for example recognised how this trend had begun in the mid-1980s as the result of the Thatcher government's privatisation of state utilities, and the increasing burden of providing public services upon the public purse, leading to the beginnings of the transformation of the UK's public sector from one characterizable as the "regulatory state" concerned largely with the direct provision of public services under the welfare state to citizens, towards a 'post-regulatory state', characterised by the loosening of the sharp distinction between state, markets and public and private. [91] Accompanying this trend was the need for new forms of regulation designed to hold a range of non-public actors accountable, Julia Black for example also recognising the shift in the locus of the activity of 'regulating' from the state to other, multiple, locations as a process of decentring regulation[92]. In terms of holding this new range of actors accountable, Scott considered how traditional forms of 'accountability' needed to shift. Whereas traditionally this had entailed holding public actors to democratic will, and promoting fairness and rationality in administrative decision-making through 'upwards' mechanisms of accountability to ministers, Parliament and courts,[93] the delegation of authority required the recognition of additional or extended mechanisms to supplement or displacing traditional accountability functions. Scott therefore deployed the concept of 'extended accountability' and the recognition of more complex accountability networks[94], often characterised by the extensive use by non-state actors of contractual

[91] Scott, C. (2004) *Regulation in the Age of Governance: The Rise of the Post-Regulatory State* in Jordana, J. and Levi-Flaur, D. eds., *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, Cheltenham: Edward-Elgar

[92] Black, J. (2001) *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World* Current Legal Problems 103, p.112

[93] Scott, C. (2000) *Accountability in the Regulatory State* Journal of Law and Society 27

[94] Scott, op. cit., pp. 49-50

rules in collectivised and individuated forms to make binding self-regulatory regimes, which could incorporate industry norms [95].

One particular form of decentred regulatory strategy according to Black is 'self-regulation'[96], although the concept might appear to suffer from something of an identity crisis; Black recognising that it is hard to pin down any particular uniform definition for self-regulation[97]. Nevertheless, for the purposes of this research, the form of self-regulation most relevant to the solicitors branch of legal services market is what Black considers to be labelled variously as "enforced self-regulation", or 'mandated" or "partially mandated regulation", under which an internal regulatory process is induced by the government[98], and then sub-contracted to an "intra-firm" level, whereby a single organisation, usually a firm, is responsible for the design and operation of systems and regulation inside of it, and for exercising a regulatory function under oversight of a state-sanctioned regulatory body[99]. Black argues that 'enforced intra-firm self-regulation' can still find a place in a decentred analysis of 'self-regulation', even though any notion of voluntariness that 'self' might imply is absent, because it still illustrates the independencies between government and other social actors in the co-production of regulation, essentially equating to a form of private contracting[100].Furthermore, 'enforced self-regulation' still presents a different approach from upward forms of state-centred regulation, manifestly represented by traditional accountability mechanism of 'Command and Control' – the State exercise of influence through standards backed by public law sanctions, usually the setting of rules and standards through primary or secondary legislation, rather than private contractual sanctions.[101]

The move away from command-and-control is intended to present a move away from a regulatory model typically criticised for its focus upon poorly targeted rules, rigidity, under-

[95] Ibid., pp. 49-50

[96] Black, op. cit., p.104

[97] Ibid., pp. 115 – 124

[98] Ibid., referring to Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Regulation Debate* Oxford University Press; and Rees, J. (1988) *Reforming the Workplace: A Study of Self-Regulation in Occupational Health and Safety* Philadelphia, Penn

[99] Ibid., pp. 119-120

[100] Ibid., p.122

[101] For a definition of "Command and Control" see Baldwin, R., Cave, M., and Lodge, M. (2012) *Understanding Regulation: Theory, Strategy and Practice* Oxford University Press, pp. 106-107

or over enforcement, unintended consequences,[102] and an information asymmetry between regulator and regulated, in which the regulated community has the upper hand in terms of skills and knowledge. [103] Scott for example also noted that self-regulatory bodies were regarded more frequently as much more "complete regulators" than the State, in the sense that they could combine rule-making, monitoring and sanctioning powers within a single organisation, something which is rare for state regulatory entities[104]. However, the extent to which "intra-firm" self-regulation does provide a better overall solution to command and control should be treated with caution. Black for example noted how by contrast to command and control, self-regulation could potentially be far more responsive, flexible, informed, targeted, for the purposes of promoting greater compliance, that it also risked becoming self-serving, self-interested, lacking in sanctions, beset with free rider problems, and simply a sham where there is no effective oversight.[105] Specifically, Black considered that the success of intra-firm self-regulation was in practice dependent rather more upon the quality of the relationship between a firm's compliance department to the rest of the organisation[106], in its ability to acquire knowledge, capacity and motivation in the same way that government regulation is assumed to do for its effectiveness.[107] Essentially, the same problems are merely commuted then to the intra-firm level.

The issue then is that no system appears to be without its flaws, but where then do we draw a line in an intra-firm OFR context, to determine what constitutes 'regulatory failure'. Baldwin, Cave and Lodge for example have suggested that regulators 'failed' when they were unable to produce (at reasonable cost) the outcomes that are stipulated in their mandates, or when they did not serve procedural or representative values properly.[108] However, they also recognised that under decentred regulatory regimes, the issue of regulatory failure was rendered more complex, and that although regulatory failure ought to be distinguished from the organisational failures of regulated parties, the boundaries between regulatory and organisational performance were increasingly blurred when

[102] Black, op. cit., p. 105

[103] Ibid., p. 107

[104] Scott, C. (2002) *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance* Journal of Law and Society 29, pp.56-76

[105] Black, op. cit., p. 115

[106] Ibid., p. 123

[107] Ibid., p. 124

[108] Baldwin, R., Cave, M., and Lodge, M. (2012) *Understanding Regulation: Theory, Strategy and Practice* Oxford University Press, pp. 69

regulatory activities were "pushed inside" private organisations as part of systems of enforced self-regulation.[109] In this respect, the focus of this research is centred upon the effectiveness of the SRA's OFR model, which requires firms to have in place systems and controls at the firm level in respect of COI, and so presumably there is regulatory failure when a firm's compliance function is lacks the resources or credibility to regulate its community or, logically, where there is a complete breakdown in regulatory oversight because the regulator lacks competency, and/or because the devolved rules are routinely ignored because they have been usurped by other norms. Furthermore, it should be noted that this research does focus for pragmatic reasons upon SRA OFR, however this does not provide the complete de-centred regulatory picture, as it does not take into account the risk-based mechanism of oversight regulation that sits above the intra-firm self-regulatory level, and that ought to determine the SRA's approach to enforcement against its regulated community of solicitors and law firms. It is important because this thesis considers that the SRA has not adequately addressed the threat of regulatory failure at the intra-firm level in respect of COI, despite its 'risk-based' approach.

2.6 Decentring Regulation: Risk Based Regulation

In parallel to the Clementi Review and DCA's 2005 Report, the Government had been considering more generally the regulatory burden imposed upon businesses. In 2004 HM Treasury commissioned Sir Philip Hampton's 'Reducing Administrative Burden's Effective Inspection and Enforcement' Review', published in 2005[110]. This considered the UK's entire regulatory sector, sampling 63 national regulators. Hampton's recommendations comprised Principles of Inspection and Enforcement and became known as "The Hampton Principles". These required regulatory bodies to adopt a comprehensive risk assessment strategy to reduce the regulatory burden imposed upon regulated communities, and to concentrate regulatory resources upon the areas that needed them most.[111]

The Hampton Principles were adopted by the Government in the Legislative and Regulatory Reform Act 2006[112], and in the form of the Better Regulation Principles of

[109] Ibid. pp. 71-72

[110] Hampton, P. (2005) *Reducing Administrative Burdens Effective Inspection and Enforcement* Available at: https://webarchive.nationalarchives.gov.uk/20121205081213/http://www.bis.gov.uk/files/file22988.pdf [Accessed 20 July 2020]

[111] Ibid., p. 7 Para 23 Box E2: Principles of Inspection and Enforcement

[112] Legislative and Regulatory Reform Act 2006 c. 51 Available at: https://www.legislation.gov.uk/ukpga/2006/51/contents

proportionality, accountability, consistency, transparency and targeting[113], together with the establishment of a 'Better Regulation Executive' (BRE) to monitor them. The Government therefore endorsed a new public risk-management based regulatory approach by all UK regulatory bodies in future.[114] Consequently, although no legal services regulators had been included in the Hampton review, when the SRA published its first Enforcement Strategy in January 2011, the SRA was obliged to adopt an RBR framework.

As with self-regulation, RBR appears to lack a uniform definition. Julia Black characterises RBR as recognisable through several traits. These include that it is at the operational level that key choices are made as to how a regulatory body will translate and operationalise its objectives; what a regulator will and will not do in pursuit of them; where the regulator will focus its resources, and where it will not. She considered that these were effectively decisions as to which types of failures an organisation would be willing to tolerate, and those which it would not[115]. Similarly, Baldwin, Cave and Lodge considered that RBR frameworks have several central elements, including that the regulator should clearly identify its objectives and the risks that the regulated organisations may present to the achieving of those objectives, and that the regulatory should develop a system for assessing such risks and scoring them as a means to focus the allocation of resources.[116]

In line with these traits, the SRA's first Enforcement Strategy published in 2011 was referenced to a highly complex Regulatory Risk Framework, and to support this, a central 'Risk Centre' accumulated information on regulated entities and individuals from a wide range of sources. Thematic risks could then be identified and published in an annual Regulatory Risk Outlook. This consistently highlighted breach of confidentiality and COI as high impact risks, because in so far as the SRA was concerned these were always caused by 'operational risk' related to ineffective systems and controls at the level of the firm.[117] The Risk Centre also ascribed a numerical proxy "risk score" for a law firm's potential impact upon regulatory objectives set out in the Legal Services Act 2007 (considered below), and

[113] HM Treasury (2006) *Implementing Hampton from Enforcement to Compliance* Available at: https://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/hampton_compliance281106.pdf [Accessed 23 July 2020]

[114] Black, J. (2005) *The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom* Public Law 510

[115] Ibid., p. 511

[116] Baldwin, R. et al. (2012) op. cit., n.127, pp.281-282

[117] SRA (2014) *Regulatory Risk Index March 2014*

upon which its regulatory mandate continues to be based upon. The risk score was based upon attributes such as firm turnover, client money held, number of fee earners and type of work undertaken[118]. Typically, large law firms were ascribed high risk scores, although these were never published or disclosed to the firms concerned.[119]

However, less than four year later in Autumn 2015 the SRA had begun to completely review its enforcement strategy again in its "Question of Trust" consultation, as part of which it engaged with 5000 individual solicitors and members of the public[120]. The broad remit of the consultation was to seek the views of lawyers and members of the public on what they considered acceptable behaviour for a solicitor or individual regulated by the SRA, and what sanctions they thought should be applied. Following a further round of consultation in 2017, the SRA published a revised Enforcement Strategy in February 2019.[121] The revised Enforcement Strategy should be noted for the extent of what was omitted from its original project. Significantly, the SRA abandoned its Risk Framework and risk-scoring mechanism entirely, although this has not been widely recognised. Consequently, in separate correspondence between the author and SRA to clarify its approach to enforcement, and the apparent omission of 'Risk Scoring' or a Risk Framework from its latest Enforcement Strategy, the SRA replied that it now takes an approach which focuses on *"the principles of good regulation set out in the Legislative and Regulatory Reform Act 2006. That is to be: proportionate, accountable, consistent, transparent and targeted (PACTT). We track and evaluate our performance against these principles".*[122] Furthermore, that instead of risk-scoring entities, that it would *"consider the facts of any matter of misconduct reported to us on its own merits, on an objective analysis of the facts and in accordance with the Enforcement Strategy and supporting guidance".*[123]

My interpretation of this statement in light of the SRA's original approach is that RBR, which was imposed upon the SRA by the government, might recently have been

[118] SRA (2016) *Risk Q&A* Available at: http://www.sra.org.uk/risk/risk-questions-and-answers.page [Accessed 12 May 2017] (Note – no longer available)

[119] Confirmed during a meeting between the author and SRA in London, June 2014

[120] SRA (2015) *Consultation A Question of Trust* Available at: www.sra.org.uk/sra/consultations/consultation-listing/question-trust/ [Accessed 21 May 2020]

[121] SRA (2019) *Enforcement Strategy February 2019* Available at: www.sra.org.uk/corporate-strategy/sub-strategies/sra-enforcement-strategy/ [Accessed 25 May 2020]

[122] Appendix A Doc 1 Letter dated 16 June 2020

[123] Ibid.

'mischievously' re-imagined considerably more broadly, and, effectively in a non-risk-based manner, while still purporting to make PACTT a central tenet of its approach. It would be an interesting topic for further study to consider the extent to which this has also constituted a regulatory failure in the SRA's RBR approach, and given that it is supposed to underpin oversight of the SRA's OFR regime. Especially as Julia Black for example considered that RBR and intra-firm self-regulation could never fit together completely, because the definition of "risk" that each employed could often be distinct.[124] They are a poor pairing. Black also noted that RBR effectively introduced a new "politics of accountability", because in risk-based frameworks regulators were always attempting to define what, to their minds, were the acceptable limits of their responsibility, and hence accountability.[125] Similarly, Baldwin, Cave and Lodge also considered that one of the challenges of RBR was that it placed too much emphasis on individual sites (or 'silos' of 'risk'), and that it could be slow to come to terms with systemic and cumulating risks.[126]

As far as this research is concerned though, a defective regulatory oversight strategy must surely vest an even greater level trust and responsibility upon the regulated community under a decentred self-regulatory approach, and the manner in which firm's compliance functions are interpreting the SRA's OFR rules at the intra-firm level. Ten years on from the introduction of OFR by the SRA[127], and the best part of twenty since RBR, it might be considered whether, despite the consumerist reforms and regulatory innovations of the early noughties, that large law firms are now freer than ever before to regulate ethical issues such as COI, but the risk is – absolutely entirely as they see fit.

2.7 Decentring Legal Services Regulation – The SRA's Regulatory Mandate

As noted in Chapter 1, Baldwin, Cave and Lodge consider that regulatory action deserves support when it is authorised by Parliament[128], and under a decentred self-regulatory regime this would appear subject to extension through regulators, and even sub-regulatory bodies. In the case of the legal services market, the LSA provides the legislative authority under which the market's oversight regulator, the Legal Services Board derives its power to

[124] Black, J. (2005) op. cit, p. 511

[125] Ibid. pp. 511 - 512

[126] Baldwin, R. et al. (2012) op. cit., n.127, p.283

[127] SRA (2010) *Outcomes-Focused Regulation Transforming the SRA's Regulation of Legal Services May 2010* Annex A para 5-10

[128] See further Baldwin, R., et al. (2012) op. cit., n.127, p.27

uphold the LSA's Regulatory Objectives for the benefit of consumers, and which in turn licenses front-line regulatory bodies. Boon described the LSA as an ambitious attempt to reconcile consumerism and some notion of 'professionalism'[129]. For Boon the LSA promised to enshrine professional aspirations and principles in legislation, while tightening control of professional bodies, influencing the professional agenda and shaping the market through competition, whilst curtailing the immunity from interference that had once been afforded by the State[130].

However, it is probably more accurate to describe the introduction of the LSA as a re-calibration of a state permitted model of self-regulation which had been operating in some form for solicitors since 1831, when the Law Society was first granted a Royal Charter. In fact, in a decision entirely consistent with the notion of the decentring of the regulatory state, the Government stopped short of disbanding the existing regulatory framework of professional bodies overseeing each branch of the "legal profession", and retained existing legislation governing admission to the solicitors' branch of the profession under the Solicitors Act 1974 in force for example. This reflected Clementi's original recommendations, given the extremely resource intensive exercise that would be required were the Government to have directly regulated professionals[131]. Instead, the DCA in its 2005 report opted for a single oversight regulator, the Legal Services Board (LSB), a second-tier public agency overseeing the front-line regulatory bodies by laying down minimum quality standards.[132] Furthermore, and contrary to the OFTs recommendations in 2001, the LSA retained legal professional privilege to all individuals providing Reserved Activities,[133] provided they were Authorised Persons under the Act.[134]

Section 3 of the LSA placed the LSB under an obligation to promote eight Regulatory Objectives set out in the LSA s1 (Table A), and an equivalent obligation to promote the

[129] Boon, A. (2010) *Professionalism under the Legal Services Act 2007* International Journal of the Legal Profession 17 pp. 195-199

[130] Ibid.

[131] Davies, M. (2003) op. cit., p. 205

[132] Ogus, A. (1995) *Re-thinking self-regulation* Oxford Journal of Legal Studies 15

[133] LSA 2007 s12(1) a "reserved legal activity" means: (a)the exercise of a right of audience; (b)the conduct of litigation; (c)reserved instrument activities; (d)probate activities; (e)notarial activities; (f)the administration of oaths.

[134] LSA 2007 s18(1)(a) – essentially, a person who has been authorised to carry out the reserved legal activity by a relevant approved regulator (such as the SRA), or (b) a licensable body (such as an ABS) authorised to carry on the relevant activity by a licensing authority in relation to a reserved activity

objectives was imposed on front-line regulators under s.28, essentially their regulatory mandate. These bodies would in turn have to be licensed by the LSB to continue to perform their regulatory functions as "Approved Regulators".[135] Essentially, this placed them under a statutory duty to promote the regulatory objectives,[136] and paved the way for the introduction and regulation of new forms of legal services provider[137] The Regulatory Objectives were hailed as a significant innovation in legal services regulation,[138] and reflect two potentially contradictory themes in legal services regulation according to Boon, the objectives support legalism and independent professions, versus public-facing obligations which promote a consumerist agenda.[139]

Table A the LSA 2007 s1 Regulatory Objectives

a) protecting and promoting the public interest;
b) supporting the constitutional principles of the rule of law;
c) improving access to justice;
d) protecting and promoting the interests of consumers;
e) promoting competition in the provision of services;
f) encouraging an independent, strong, diverse and effective legal profession;
g) increasing public understanding of the citizen's legal rights and duties;
h) *promoting and maintaining adherence to the professional principles.*

The scope of the regulatory mandate also required pursuant to LSA Schedule 4 para 19[140] that any amendments to an Approved Regulators professional rules would also need to be approved by the LSB. This means that any changes to the professional rules governing solicitors and their firms require LSB approval.

A further condition imposed upon the SRA's jurisdiction exists in the relationship between Authorised Persons and Reserved Activities with the limited range of Reserved Activities, being prescribed in LSA Schedule 2. Individuals wishing to undertake a Reserved Activity

[135] LSA 2007 s20

[136] LSA 2007 s28

[137] LSA 2007 Part 5

[138] Terry, L., Mark, S., Gordon, T. (2012) *Adopting Regulatory Objectives for the Legal Profession* Fordham Law Review 80, p. 2685

[139] Boon, A. (2017) *The Regulation of Lawyers and Legal Services*, in Boon, A. (ed.) *International Perspectives on the Regulation of Lawyers and Legal Services* (Hart Publishing. 2017), pp. 212-3

[140] LSA 2007 Sch 4 para 19

must be Authorised Persons, a status obtained by meeting the educational and continuing practice requirements set by an approved (front-line) regulator, such as the SRA. However, from a decentring perspective, this does mean that there is a large range of legal work which can be undertaken by individuals who are subject to no state or regulatory control whatsoever. Strictly speaking therefore, the Law Society was licensed by the LSB as the Approved Regulator for solicitors, able to licence Authorised Persons. However, in light of the recommendations made by Clementi and the DCA regarding the perceived lack of impartiality when dealing with complaints about lawyers, the Law Society split its regulatory and representative functions in 2007,[141] and the Solicitors Regulation Authority (SRA) was established as a new, operationally autonomous regulatory entity, with responsibility for meeting and performing the LSA's Regulatory Objectives.

Today the SRA performs its delegated regulatory function independent from the Law Society, despite continuing to receive its funding through it. It is also the SRA that is now responsible for exercising the statutory functions stipulated in Parts I and II of the Solicitors Act 1974, including drafting and enforcing rules of professional practice for solicitors qualified in England & Wales. It will therefore refer serious cases of misconduct to the independent SDT for prosecution (which can impose sanctions such as fines and strike-off the Roll of Membership for solicitors, and within disciplinary functions expressly recognised by the LSA s180.[142]) . Finally, for complaints about poor service, as opposed to professional conduct, the LSA established a separate Legal Ombudsman regime, independent from the SRA and Law Society, and which is more specifically targeted towards consumers, meaning members of the public, small businesses and charities, pursuant to LSA Part 6,[143] rather than large sophisticated commercial clients. Nevertheless, and most significantly, the LSA left the design of a regulatory model for intra-firm self-regulation open to the SRA to determine.

2.8 Designing a New Model of Intra-firm Self-Regulation

In the aftermath of the reforms made to the regulatory landscape by the LSA, the Law Society commissioned two reviews into the solicitors' branch of the legal services market.

[141] LSA 2007 s27

[142] LSA 2007 s180

[143] LSA 2007 s112-122

Firstly, The Hunt Review[144] considered a new model of regulation to be overseen by the SRA, that would regulate individuals, entities, and ABSs, and also work within the regulatory framework expected by the Government. A second, the Smedley Review[145], focused on the regulation of corporate law firms specifically, and was intended to feed into the Hunt Review. This would consider whether corporate law firms should be subject to their own separate body of professional conduct rules, although Hunt would make the final recommendations. In many respects the Hunt Review reads like a sales pitch in parts, selling a radical new model of regulation to the solicitors' branch of the legal services market, which had little choice in the matter, and which had been used to an extensive prescriptive rules-based Guide for over 40 years. Hunt opened his Review with a plea to solicitors, in which he appeared to acknowledge the limitations of the 2005 Hampton Review, by acknowledging that regulating a profession was a different matter from "*regulating a utility or natural monopoly*"[146], and under which the legal services had not formed any part of the review.

The Law Society's prescriptive-rules based Handbook contained the rules of professional conduct "The Guide to Professional Conduct". It could be characterised in enforcement terms by the command and control by the Law Society of certain behaviours, a strategy that worked through the deterrence by either disciplinary action or negative publicity, and addressing any issues ex post the event.[147] Now however, the risk-based regulatory Better Regulation Principles instigated by the Hampton Review, and the regulatory mandate now laid down by the LSA ,[148] meant that command and control was no-longer considered fit for purpose by Hunt, although he acknowledged that the Solicitors Code of Conduct should still be the *"foundational stone"* for a new mode of regulation[149], Hunt being drawn in particular to Principles Based Regulation (PBR).

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[144] Hunt, D. (2009) *Review of the Regulation of Legal Services* Available at: http://www.legalregulationreview.com/site.php?s=1 [Accessed 7 September 2020]

[145] Smedley, N. (2009) *Review of the Regulation of Corporate Legal Work* Available at: https://www.sra.org.uk/sra/consultations/consultation-responses/response-review-regulation-corporate-legal-work-june-2009/ [Accessed 7 September 2020]

[146] Ibid., p.3

[147] Scholtz, J.T. (1984) *Voluntary Compliance and Regulatory Enforcement* (1984) Law & Policy 6, p. 385.

[148] See for example, the Legal Services Board (2013) *Overseeing Regulation* Available at: https://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2013/2030611 in which the LSB set out its approach to overseeing regulation

[149] Hunt Recommendation 10, p.6

PBR might be thought of, less as a series of prescriptive rules, and more of a concept. By way of analogy, if PBR walked down the street, you might recognise it more by its shadow than by its face. Julia Black considered that it had no clear definition either[150]. In work contemporaneous to the introduction of PBR to the UK's financial services markets in the early noughties, she considered that in general terms PBR was a regulatory approach which presented a move away from a reliance on detailed, prescriptive rules, and instead high-level, broadly stated principles which could in turn be used to the set the standards by which regulated firms must conduct business.[151] Principles could be drafted at a high level of generality, so that they could form overarching requirements that could be applied flexibly to an industry with a diverse range of actors for example.[152] As such, Black characterised the Financial Services Authority's (FSAs) principles for example as qualitative not quantitative; using evaluative terms such as "fair", "reasonable", "suitable"; and that they were concerned with behavioural standards, concerned with, for example the "integrity", "skill, care and diligence" and "reasonable care", with which authorised firms or approved persons conducted and organised their business.[153] Similarly, Boon considered that although the substantive features of PBR could vary greatly, that they usually involved a regulatory focus on the suitability of the firm's management systems and controls for ensuring compliance with the regulatory outcomes[154], and Teubner also described the focus of PBR as being upon procedural norms which regulate processes and the distribution of rights and competencies, rather than detailed formal rules.

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[150] Black, J. (2011) *The Rise, Fall and Fate of Principles-Based Regulation* Chapter 1 in Alexander, K., and Moloney, N. Eds *Law Reform and Financial Markets* Cheltenham, Edward Elgar, p.4

[151] Black, J. (2007) *Making a Success of Principles-based regulation* Law and Financial Markets Review, p.191

[152] Ibid. p.192

[153] Black, J. (2007) op. cit., p. 192 the example of bright line rules provided by Black included "within two business days", "turnover of "£20m". Note also that in slightly later work Black considered that it was possible to identify four variations of PBR: formal, substantive, dyadic and polycentric although the helpfulness of using such categorisations is debateable as Black admits, in practice the distinctions among the categories are not always clear cut, and have been developed for the purpose of distinguishing what the rule books look like from how regulation actually operates in practice. Suffice it to say that it is arguable the extent to which the SRA's OFR regime actually "maps onto" each of these. see further Black, J. *The Rise, Fall and Fate of Principles-based regulation* Chapter 1 in Alexander, K., and Moloney, N. eds *Law Reform and Financial Markets* Cheltenham, Edward Elgar, pp.6 - 14

[154] Boon, A. (2010) *Professionalism Under the Legal Services Act 2007* (2010) International Journal of the Legal Profession 17, p. 207

From a decision-making perspective, in the late 1990s Nicolson and Webb argued that principles were capable of reflecting professional aspirations and ideals, which was more effective than traditional command and control regulation for promoting ethical conduct. They considered that by contrast, detailed rules actually served to replace individual ethical decision-making with mindless conformity, "cocooning" lawyers from looking to their own conscience and sense of right, and reducing issues of ethical judgement down to a matter of risk analysis and risk management. This then prevented the development of deeply felt ethical commitments necessary to enable lawyers to resist institutional pressures to act in an upright fashion.[155] Similarly, Black considered that principles could address some of the concerns associated with prescriptive command and control based rules, which although they might provide some certainty, were inflexible, and therefore prone to "creative compliance".[156] Furthermore Black considered that the interpretive dimension provided the opportunity to engage senior management in the regulatory process through the development of engaged firm-level approaches which could mitigate against "box-ticking" compliance.[157]

Essentially the rationale behind PBR therefore is to encourage individuals to reflect on their decision-making, through the design and implementation of self-regulatory mechanisms.[158] Regulatory control is therefore indirect, establishing only the organisational and procedural foundations of future action.[159] The aim of this is, as Davies states, to "mobilise" the "self-referential capacities of institutions" to enable them to best shape their own response to complex problems,[160] and to learn and continuously reflect upon appropriate behaviour and activity[161]. In terms of its practical application, Davies heralded the introduction of PBR originally by the FSA in the early noughties as "ground-breaking", as it appeared to contain the necessary characteristics of reflexivity, self-regulation, and afforded senior personnel the relative regulatory freedom to interpret the Principles, yet remaining accountable for major regulatory breaches.[162] The problems though with the FSA's PBR model became all

[155] Nicolson, N and Webb, J. (1999) *Professional Legal Ethics: Critical Interrogations* Oxford University Press, p.112

[156] Black, J. (2007) op. cit., p. 193 Using the letter of the law to defeat its spirit, considered in Chapter 4 below

[157] Ibid., p.195

[158] Teubner, G. (1983) Substantive *and Reflexive Elements in Modern Law,* Law & Society Review 17, pp.254-255

[159] Davies, M. (2003) *The Regulatory Crisis in the Solicitor's Profession* Legal Ethics 6, p. 206

[160] Ibid.

[161] Ibid.

[162] Davies, M. (2003) op. cit., p. 211

too quickly apparent. These were however being identified by Julia Black as early as 2003, and this included the lack of certainty that could potentially arise in terms of the shared understanding between those applying the rule as to its meaning and application.[163] Significantly, Black considered "critical success factors" [164] for a successful PBR-based model of regulation, and this included developing and maintaining a constructive dialogue between regulator and regulated firm as to the expectations and responsibilities of each in interpreting and applying the principles.[165] Fundamentally therefore, when senior managers choose not to do this, the regulatory system fails.

By 2009, in the immediate aftermath of the Financial Crisis Lord Hunt, who happened to be considering an appropriate model of regulation for solicitors and law firms was forced to deal with the accusation that PBR had been a 'soft-touch'. Acknowledging that PBR had *"taken quite a battering",*[166] Hunt nevertheless denied that PBR per se was the culprit, rather that senior managers were, and that too many firms in the financial services sector had ignored the principles entirely, and that some aspects of enforcement by the FSA were inadequate or ineffective,[167] stating that "*If we discount the hyperbole promoted by the credit crunch, we can find valuable lessons not about why principles-based regulation is doomed to failure, but about how mistakes can be avoided as we adapt principles to craft that appropriate legal regulation".*[168] It is a view that might find sympathy with Baldwin, Cave and Lodge, who considered that the deficiencies of PBR might have been exaggerated, and that *"a regulatory tool that can be used astutely or crudely and, as with all tools, its utility turns on its manner of application – on how it is implemented and on such matters as the institutional context which surrounds it"*.[169] Nevertheless, as Black would later observe, after the Financial Crisis, the FSA had to withdraw its PBR model from the market, and re-launch it as "Outcomes-Focused Regulation", the only difference being

[163] Ibid., p. 196

[164] Ibid., p. 197

[165] Ibid., p. 203

[166] Hunt, p. 37

[167] Black, J. (2011) *OFR: The Historical Context* in Hopper, A. and Treverton-Jones, G. (eds), *Outcomes-Focused Regulation: A Practical Guide* London, The Law Society, p. 10

[168] Hunt, p.37

[169] Baldwin, R. et al. (2012) op. cit., n.127, p.302

a far more pro-active supervisory regime "bolted on" which would monitor outcomes, and not just systems supporting the principles[170].

When Lord Hunt was, contemporaneously confronted, with recommending a regulatory model to the solicitors branch of the legal services market therefore, his recommendation and justification for a PBR-based approach in a legal services context was based rather less upon it as a glowing example of regulation for the financial services market, and rather more upon empirical evidence published in a report produced jointly by Melbourne University Law School and the Office of the New South Wales Legal Services Commissioner in 2008,[171] which related to the adoption of Management-based Regulation (MBR) by incorporated legal practices in NSW.[172] Historically MBR held a synergy with PBR to the extent that it also presented a move way from prescriptive "command and control" based regulation. However, it also varied from PBR in that, at that time, it could be characterised as placing a greater focus on process rather than principles, by requiring managers to engage in planning and internal management processes with the objective of achieving broadly stated public goals.[173] The NSW research appeared to reveal that since the adoption of MBR, the number of complaints against incorporated legal practices had fallen by around two thirds.[174] Hunt's solution therefore was to bolt this dimension of MBR onto PBR, with the broadly stated public goals being outcomes supporting the principles. Nevertheless, Boon has subsequently queried the validity of the NSW findings by considering that on a closer reading, the greatest improvement in complaints records was actually rather more likely to have been the result of a local requirement for managers to complete separate self-assessment forms against indicative criteria[175], rather than the creation of management systems per se.[176] Consequently, the accusation made against the Hunt Review is that the basis for the recommendation of PBR to the SRA was flawed

[170] Black, J. (2011) op. cit., p. 5

[171]Parker, C., Mark, S, and Gordon, T., (2008) Assessing *the Impact of Management-based Regulation on NSW Incorporated Legal Practices*, Melbourne Law School, Available at: https://www.olsc.nsw.gov.au/Documents/research_report_ilps.pdf [Accessed 7 May 2021]

[172] Incorporated Legal Practices are essentially legal practices with external shareholder ownership.

[173] See further Coglianese, C. and Laser, D. (2003) *Management-based regulation: Prescribing Private Management to Achieve Public Goals'* Law & Society Review 37, pp. 692-694

[174] Parker, C., et al, (2008) op. cit.

[175] Boon, A. (2010) *Professionalism Under the Legal Services Act 2007*International Journal of the Legal Profession 17, p.212

[176] Ibid., p. 213

anyway; being based upon a large degree of faith that outcomes could solve its earlier failure to effectively regulate the UK's financial services sector.[177]

In fact, Hunt did not regard PBR as a magic pill[178], and he only cautiously recommend it, stating that lessons would need to be learnt for the SRA to be able to sub-contract compliance monitoring to its regulated community, with firms being required to demonstrate to the SRA that governance and risk processes were robust enough, and contained sufficient checks and balances. Furthermore, that regulatory systems would need to distinguish between individual lapses and problems consequent upon systematic failures within the structure of a firm.[179] Hunt believed that this would negate the need for the SRA to have to employ a significant team of auditors to enforce the rules, and that the compliance and enforcement duties and costs should be borne by the firm. The SRA would however need to be pro-active in its primary functions of establishing that the systems and controls were appropriate; verifying the independence of firms' internal compliance functions; and regularly auditing the compliance function for its efficiency and robustness.[180]

2.9 The Birth of Outcomes-Focused Regulation

The model of "PBR" that the FSA ultimately present to its regulated community for further consultation appeared to draw from 'lessons learnt' published shortly before the Hunt Review in the FSA commissioned the Turner Review: 'A Regulatory Response to the Global Banking Crisis' published March 2009[181]. This was also accompanied by an FSA Discussion Paper[182] in which the FSA's PBR approach was essentially re-calibrated so that the FSA would become an "outcomes-focused" regulator in future. The FSA's PBR re-branding 'tagline' considered that:

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[177] Ibid., p.212

[178] Ibid.

[179] Hunt, p.75

[180] Ibid.

[181] Financial Services Authority (2009) *The Turner Review 'A Regulatory Response to the Global Banking Crisis* Available at: https://webarchive.nationalarchives.gov.uk/20090320232953/http://www.fsa.gov.uk/pubs/other/turner_review.pdf [Accessed 18 April 2021]

[182] FSA (2009) Discussion Paper 09/2: *A Regulatory Response to the Global Banking Crisis,* para 11.8 Available at: https://webarchive.nationalarchives.gov.uk/20090320234750/http://www.fsa.gov.uk/pubs/discussion/dp09_02.pdf [Accessed 18 April 2021]

"The focus is not on the principles themselves but on judging the results of the actions of the firms and the individuals that the FSA supervisors. In this way, a better articulation of the FSA's philosophy is that it is an outcomes-focussed regulator, firmly committed to a risk-based and proportionate approach."[183]

The publication of the Turner Review and Discussion Paper was accompanied by a speech by Hector Sants, Chief Executive Officer of the FSA to the Reuters news agency on 12 March 2009. Sants offered a clearer exposition of the limitations of the FSA's original PBR model, and the need to re-frame its regulatory approach to being outcomes-focused, stating that:

"a principles-based approach does not work with individuals who have no principles…what really matters is not than any particular box has been ticked but rather that when making decisions, executives know that they will be judged on the consequences – the results of those actions…the FSA, when it supervises, needs to supervise to a philosophy that says "it will judge firms on the outcomes and consequences of their actions not on the compliance with any given individual rule. Given this philosophy, a better strap-line is outcomes-focused regulation"[184]

Hunt considered Sant's statement in the Hunt Review and broadly agreed[185], but he also recognised the new challenges likely to be encountered by law firms operating in a future PBR manner, including the design and operation of systems and controls necessary to ensure consistency of interpretation across the whole of the organisation, and the need to record how its rules and decisions take into account compliance with regulatory principles. Hunt also envisaged and accepted differences in approach to PBR, stating that a regulator would be able to take a relatively relaxed view of a diverse range of compliance methods across the sector *"so long as firms adopt transparent decision-making systems – and such decisions should not be left to the compliance function alone. Senior management needs to be involved and supportive".*[186]

Hunt left it up to the SRA to design its own version of PBR stating that: *"the SRA should produce and promulgate a clear exposition of how it intended to implement and continue*

[183] Ibid., para 1.64

[184] Hunt, p.39

[185] Hunt, p.39

[186] Hunt, p.39

to develop PBR"[187]. The decision to develop an OFR regime from scratch was thus the SRA's alone, albeit supported by the LSB, which saw it as intended to facilitate the development of more efficient and flexible local processes for achieving outcomes that reduce costs and increase compliance.[188] As Black has described, OFR has consequently become "a natural concomitant to PBR", used as the mode of regulation by both the SRA and the Financial Conduct Authority (FCA[189]), and with the terminology 'PBR' and 'OFR' sometimes being used interchangeably.[190] However, the success of OFR as a successor-derivative of PBR would depend on the SRA's ability to test whether firms could deliver the right regulatory outcomes, rather than merely demonstrate that they have the right compliance systems in place.[191]

2.9.1 The Smedley Review of the Regulation of Corporate Work

The Hunt Review also drew input from the Smedley Review, commissioned by the Law Society in 2008 as part of the wider review into the SRA's model of regulation. Smedley had a different remit to Hunt. While Hunt considered all solicitors and firms, Smedley specifically reviewed the existing regulation of corporate firms and corporate legal services by the SRA to determine whether corporate law firms should be separately regulated from the rest of the market. However, Hunt had the final say on recommendations. Both reports dismissed the setting up of a separate bespoke regulator for corporate legal services, different from the SRA[192]. However, there were several areas of disagreement, and ultimately a number of Smedley's recommendations were not followed by Hunt. It is still worth considering Smedley's Review however, as representative of the views of large law firms at the time, and their perceptions of how the regulatory system should work in future, and the report's conclusion that corporate firms should be separately regulated from the rest of the market by the SRA because of the nature of their sophisticated client base and the complexity of the corporate work often undertaken.

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[187] Hunt, p.38

[188] Legal Services Board (2010)*ABS: Approaches to Licensing, Consultation Paper,* Available at: https://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/abs_guidance_on_licensing_rules_summary_of_consultation_and_response.pdf [Accessed 7 May 2021]

[189] The Financial Conduct Authority (FCA) succeeded the Financial Services Authority (FSA) in April 2013

[190] Black, J. (2011) *The Historical Context* op. cit. n. 201, p.14

[191] Black, J. (2011) *The Rise and Fall of Principle-based Regulation* op. cit. n.176, pp. 21-24 4

[192] Hunt, p. 71

By contrast to Smedley, Hunt believed that the wording of the LSA should be respected, with the community being regulated upon the basis of regulated services, rather than specific client needs. He also dismissed the categorisation of clients purchasing corporate legal services, having their own in-house counsel, and regular experience of dealing with lawyers as necessarily "sophisticated" across the board.[193] Hunt and Smedley also differed on the definition of "corporate law firm" itself, which Hunt considered too heavily weighted in favour of the model of the City of London major firms.[194]

On the topic of COI specifically though, both Smedley and Hunt agreed that this was an area of particular concern for corporate law firm respondents, and Hunt equated the risk to firms not being able to provide fully objective advice.[195] Smedley had identified the Law Society's prohibition on acting in simultaneous or successive conflict situations as problematic. This presented two issues for corporate law firms as Smedley defined them. Firstly, in some cases of simultaneous conflict, they argued that some commercial clients were in fact happy for firms to save costs by acting for both sides, subject to preserving confidentiality and consent. Secondly, in cases of successive representation conflicts, firms argued that their vast scale, and the frequent movement of personnel between them, and also shopping around by clients, made the Law Society's longstanding prohibition unworkable.[196]

Smedley argued that there was no need for a fundamental rewrite of the existing rules which had already been relaxed by the SRA in 2007 on the basis of an earlier 2001 consultation, which had actually had input from the City of London Law Society,[197] to permit working in certain circumstances subject to conditions. However, there did appear to be a need for more flexibility and expertise in assessing the scope for waivers in

[193] Hunt, p. 71

[194] The Smedley Review op. cit., n. 171 at p.iii defined "corporate legal work" as all work carried out for corporate clients. Including, for example, mergers and acquisitions, oil and gas, insolvency and re-structuring of corporations, intellectual property, banking and financial services, changes in a corporate client's assets and securities, and. or ownership, commercial property, tax, employment and pensions, sometimes, senior executive pay arrangements, competition law, commercial litigation, arbitration and other forms of dispute resolution in areas of corporate work

[195] Hunt, p. 77 referring to the Smedley Review 2009, para. 2.23

[196] Boon, A. (2010) op. cit. n.209., p. 218

[197] The Law Society (2001) *Conflicts of Interest A Consultation Document from the Regulation Review Working Party of the Law Society of England and Wales* London, Law Society

appropriate cases,[198] this was especially where it would be efficient and desirable to do so in the interests of the client.[199] Hunt though disagreed with this on the grounds that what the larger firms were actually arguing was that "complexity" ought to be sufficient grounds for introducing a more flexible approach to dealing with COI.[200] Hunt did however recommend that in light of PBR, the SRA should, in partnership with the Law Society:

"*establish a clear set of principles governing potential or possible conflicts, that will serve both to protect the interest of clients and also address the concerns of firms engaged in complex and/or multi-faceted corporate work*"[201].

2.9.2 The Architecture of Change 2010 (OFR Mark I): Intra-firm Self-Regulation

The ball was therefore in the SRA's court following the Hunt and Smedley Reviews in terms of designing a PBR-based approach the met the needs of a very diverse regulated community, and it published its first strategy paper 'Achieving the Right Outcomes' in January 2010.[202] The SRA stated its intention to adopt the Hunt recommendations based on an OFR model of regulation which it claimed was *"designed to give flexibility by avoiding unnecessary prescriptive rules on process, while giving clear guidance on what it is that firms must achieve for their clients".*[203] It confirmed that OFR would apply to all types of law firm, and ABSs,[204] and indicated a commitment to managing OFR in a risk-based (RBR) manner,[205] recognising that it was bound by the Better Regulation Principles.[206] Baldwin et al. define RBR as the prioritisation of regulatory actions in accordance with an assessment of the risks that parties will present to the regulatory bodies achieving its objectives,[207] and the elements of a risk-based framework therefore look principally to control regulatory risks and not to secure compliance with sets of rules. This approach was consistent with relatively normalised regulatory design theory at the time. Black has suggested that both

[198] Hunt p.77 referring to the Smedley Review 2009 para 3.31

[199]Ibid., para 3.29

[200] Hunt, p.77

[201] Hunt recommendation 43 at p.9

[202] SRA (2010) *Achieving the Right Outcomes* Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/achieving-right-outcomes-consultation-paper.pdf?version=4a1ae5 [Accessed 24 June 2020]

[203] Ibid., para. 2a.

[204] Ibid., para 4

[205] Ibid., para 3

[206] Ibid., para 5

[207] Baldwin, R., et. At. (2011) op. cit., n.127, p. 281

PBR and OFR can be linked in practice to RBR, with PBR and OFR setting the broad outcomes to be achieved, and RBR providing the system for a regulator to use to determine how much regulatory effort would be required to ensure that the principles are being achieved by the regulated community.[208]

The SRA hoped that, by contrast to the previous prescriptive-rules based system of regulation, OFR, in being based more on Principles and supported by Outcomes would give rise to a greater focus within firms on quality assurance and professional principles,[209] leading to a reduction in the cost of regulatory compliance,[210] and accommodating a greater range of business models.[211] Nevertheless, it envisaged that firms would have to confront a number of challenges in adapting to OFR, not least the fact that senior managers would need to take greater responsibility for creating the right culture for OFR to work effectively.[212] Its greater flexibility, while providing opportunities for innovation, also presented challenges for firms in determining for themselves the approach to delivering the right outcomes for clients.[213]

The support to be provided to firms by the SRA was thus critical, and outlined in its consultation paper "Outcomes-Focused Regulation: Transforming the SRA's Regulation of Legal Services" in May 2010. Here, the SRA confirmed that in future there would be more proactive engagement with firms,[214] to enable it to sub-contract compliance to them,[215] and that in-line with RBR, it intended to direct less supervisory attention to areas of a firm's business the SRA considered to be low risk. Consequently, more intensive attention would be paid to high-risk areas.[216] It admitted that this would entail a "high degree of confidence between us and the firms and individuals we regulate".[217]

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[208] Black, J. (2011) *The Historical Context* op. cit. n.201, p. 19

[209] SRA Achieving the Right Outcomes, para 6a

[210] Ibid, para 6b

[211] Ibid., para 6c

[212] Ibid., para 7.1

[213] Ibid., para 7.2

[214] SRA (2010) *Outcomes-Focused Regulation Transforming the SRA's Regulation of Legal Services,* para 22 Available at: https://www.sra.org.uk/sra/consultations/OFR-consultation [Accessed 23 May 2020]

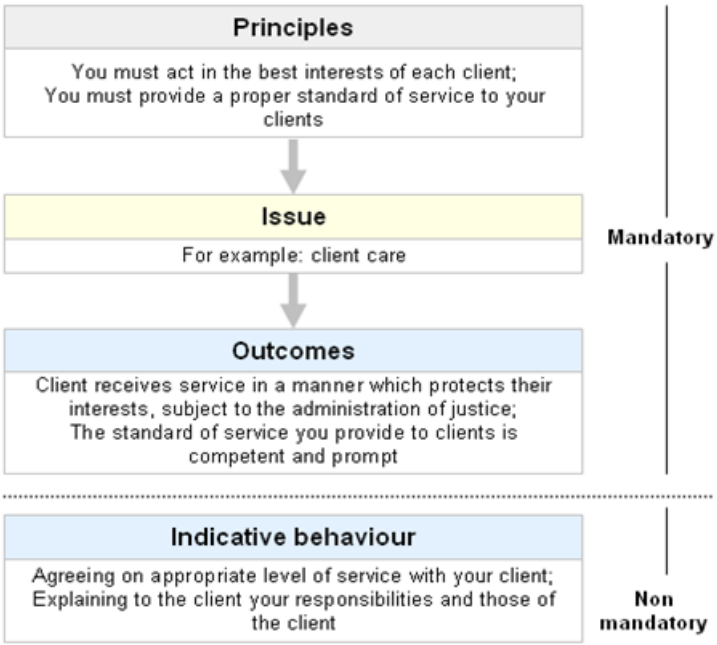
[215] Ibid., para 23

[216] Ibid., para 26

[217] Ibid., para 24

A central tool in the SRA's OFR regime would be a new Handbook, bringing the Code of Conduct, Accounts Rules, and practising licensing rules into one place. In line with PBR, there would be a set of high-level Principles governing the activities of all firms and individuals. In turn the Principles would be supplemented by defined mandatory Outcomes that the SRA expected firms to achieve, and supported by two forms of non-mandatory material: Indicative Behaviours and, originally, Guidance Material setting out non-exhaustive, illustrative possibilities for how the firms might deliver the outcomes.[218]

Diagram 1 The SRA's Original OFR System Post-Consultation[219]



In line with Hunt Recommendation 43,[220] the SRA consulted on the rules governing COI, in recognition of the potential for a greater diversity of legal services provider, and noting that conflicts rules were "*essential to client protection, and vital that clear limits are set for firms*".[221]The SRA acknowledged regulation in this area had been evolving incrementally, referring specifically to the Law Society's 2006 amendment of the narrow policy that firms

[218] Ibid., para 33-37

[219] Diagram 1 adapted with permission from https://www.sra.org.uk/sra/consultation/OFR-consultation

[220] Hunt recommendation 43, p.9.

[221] SRA (2010) *The Architecture of Change: the SRA's new Handbook* Consultation Paper, para 52 Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/handbook/october-consultation-paper.pdf [Accessed 7 September 2020]

should not act where there was a conflict, or significant risk of one arising, thereby permitting firms to act where clients had a "substantially common interest" or where the clients are competing for the same asset.[222]

The May 2010 consultation closed in August 2010, and the 83 responses were analysed and published in October 2010[223] in the form of "The Architecture of Change Part 2 – the new SRA Handbook Feedback and Further Consultation". By this stage the SRA decided to add several Principles that were based, less on ethical standards, and more to the effective management of firms, preventing discrimination and protecting client money and assets[224] (Table 2). As for COI the SRA confirmed that on the basis of feedback, it would retain requirements similar to the 2006 rules, because many respondents felt that it was not the time for significant change.

Table B: The SRA's Original Mandatory Principles

You must:

1. *uphold the rule of law and the proper administration of justice;*
2. *act with integrity;*
3. *not allow your independence to be compromised;*
4. *act in the best interest of each client;*
5. *provide a proper standard of service to your clients;*
6. *behave in a way that maintains the trust the public places in you and in the provision of legal services;*
7. *comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner;*
8. *run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;*
9. *run your business or carry out your role in the business in a way that encourages equality of opportunity and respect for diversity;*
10. *protect client money and assets*

[222] Ibid., para 50

[223] SRA (2010) *The Architecture of Change Part 2 – the new SRA Handbook – analysis of responses to May 2010 Consultation* Available at: https://www.sra.org.uk/sra/consultations/consultation-listing/ofr-handbook-october/?s=c [Accessed 7 September 2020]

[224] SRA (2010) op. cit. n. 260., para 34

A second, October 2010, Consultation followed, which sought to test some of the reformulated regulatory detail. Responses to this were published in April 2011. In relation to COI, the October Consultation invited comments specifically on an appended draft chapter.[225] Two main concerns were raised with the SRA at this stage:

That by removing the detailed rules (in particular relating to conveyancing) there would be a lack of clarity and less protection of firms against lenders; and

That firms would not understand in what circumstances they might act for buyers and sellers.[226]

This was met with the response that the position regarding acting for buyers and lenders had not changed. However, the SRA did confirm that in line with the sub-contracting of compliance to firms, under OFR, rather than provide guidance, it would expect firms to exercise their own judgement as to whether it would be proper to act in a particular situation.[227] Nevertheless this would be subject to the SRA's Enforcement Strategy.

2.10 Looking to the Future – Flexibility and Public Protection 2017 (OFR Mark II)

OFR Mark I was in force 6 October 2011 – 25 November 2019. The SRA initiated reform itself, motivated by concerns over both the continuing length of the Handbook,[228] and the possible competitive disadvantage solicitors faced vis-a-vis alternative (unregulated) providers when providing services in the non-reserved activities sector.[229] The SRA proposed a wholesale review in two phases. Phase I would consider reducing the length of the Handbook by removing content, and the introduction of two shortened codes, one specifically for "Individuals" and the other for "Firms". The SRA described the benefits of its reforms under Phase I as providing shorter, more focused codes, which clearly defined the boundary between individual and entity regulation, which it described as "*[applying] with only limited distinction to individuals, solicitors, SRA regulated businesses and managers*

[225] Ibid., para 73

[226] Ibid., para 73

[227] Ibid., para 75

[228] SRA (2015) *Handbook Reforms* Available at: https://www.sra.org.uk/home/hot-topics/Handbook-reforms.page [Accessed 14 November 2019]

[229] SRA (2016) *Looking to the Future – Flexibility and Public Protection* June 2016 Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/code-of-conduct-consultation.pdf?version=4alad4

Para 7-10 [Accessed 20 May 2020]

and employees from those firms. We think the current code is long, confusing and complicated[230]. The SRA believed that this would reduce the cost of regulatory compliance on firms and individuals in the longer term[231]. Phase II would review the Accounts Rules, and the enforcement strategy, again with the objective of reducing *"unnecessary bureaucracy".*[232] The notion of enhancing ethical behaviour appeared to have been secondary on this occasion to cost of compliance and a bureaucratic paper reduction exercise.

In terms of Phase I, dealing with the Codes of Conduct specifically, the SRA proposed shorter codes with a greater range of supporting material. Given it had unilaterally abandoned supporting Guidance shortly after the May 2010 consultations, and had been averse to safe-harbouring, this appeared to be something of a U-turn. The SRA now proposed to provide guidance, and even a wide-range of case studies to show how certain proposed obligations and requirements might be met in various scenarios. Its Consultation asked for suggestions as to specific areas where respondents felt that guidance or case studies would be of particular benefit in supporting compliance.[233] It also proposed to remove the Indicative Behaviours, which had been seen as a critical and innovative feature of OFR Mark I.

The SRA received over 400 responses to its Phase I consultation, and stated that, in its view, there was broad support for the overall approach of simplifying the Handbook. However, in terms of substantive content, consultees' views were diverse.[234] Some respondents, including the SDT, found the new codes to be "short, focused, clear and easy to understand", while others expressed concern about the use of language which they believed to be "imprecise". A small number of respondents also expressed concerns regarding overlap between both Codes of Conduct, as it was not clear which would take precedence in enforcement.[235]

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[230] Ibid., Para 48

[231] Ibid., Para 14

[232] SRA Handbook Reforms op. cit., n. 276

[233] SRA*, Looking to the Future* Op. cit.,

Paras 55-56

[234] SRA (2017) *Our Response to Consultation: Looking to the Future – Flexibility and Public Protection June 2017* Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/lttf-our-response.pdf?version=4alacc [accessed 21 May 2020]

[235] Ibid., Responses to Question 9, p.38

In its response, the SRA affirmed its commitment to a contextual and situational interpretation of its Codes. Rather than see its provisions as imprecise, its approach was to give flexibility in applying the Codes in any given situation, as would be best judged by the solicitor or firm involved.[236] The SRA did not respond to the priority concerns in its initial response. However, in its Enforcement Strategy updated 25 November 2019, it confirmed that during any investigation, the SRA would consider the position of both the firm and the individuals working within that firm in order to reach an informed decision as to whom it should enforce against.[237] The SRA also found support for the removal of Indicative Behaviours, and agreement that their status, which had always been expressed as non-mandatory, was unclear[238]. Furthermore, the SRA's request for feedback on areas in which Guidance was required also generated a range of responses. Notably, given the subject matter of this thesis, complex situations involving COI, the use of information safeguards, and the principles of informed and continuing consent were prominent.[239] Significantly, the SRA did not contest that position, though, in acknowledging the minority view, it stated that "it remained open to more significant change to the conflict provisions in the future"[240].

2.11 Reporting Obligations and COLPS

A key element in the sub-contracting of compliance under OFR Mark I was the need for senior level individuals to engender a culture of ethical compliance, liaise with the SRA, and report any material breaches to it. This reflected and extended to all regulated entities as the Hunt Review's recommendation that ABSs should appoint Heads of Legal Practice (HoLPs) and Heads of Finance & Administration (HoFAs), subject to a "fit and proper" person test. Consequently, under OFR, Compliance Officers for Legal Practice (COLPs) and Compliance Officers for Finance & Administration (COFAs) had to be appointed by law firms as part of internal systems & controls, and subject to SRA Authorisation Rules which

[236] Ibid., paras 82-83

[237] SRA (2019) *Enforcement Strategy 25 November 2019*, para 3 Available at: https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/sra-enforcement-strategy/ [Accessed 23 May 2020]

[238] Ibid., para 99

[239] Ibid., para 103

[240] Ibid., para 95

included the need for individuals to be at a particular level of seniority within the firm in order to engender a culture of compliance around them.[241]

Phase I of the Looking to the Future Consultation invited views on retaining the COLP role for regulated entities[242]. The SRA explained that discussions with stakeholders had highlighted the fact that some felt there was too much responsibility on the COLP, and felt that it worked best in smaller firms, where COLPs were also more closely involved in the firm's activities. In large firms, there could be a range of different role holders with management responsibility for a range of functions, and having a compliance officer could allow others to abdicate responsibility.[243] In response to the consultation, respondents working within larger firms supported the view that compliance officer roles worked better for smaller firms than they did for internationals, which had well-developed compliance and risk team functions, meaning that the COLP rarely had day-to-day responsibility for actual compliance work [244]. Some respondents stated that the main weakness of the compliance officer role was more likely to be found in medium sized firms where there was a perceived risk of being a "go to" single resource[245].

Concerns had also been expressed by COLPs since relatively early on in the introduction of OFR Mark I regarding a lack of clarity in their reporting obligations to the SRA. The Code of Conduct 2011, Chapter 10, contained rules relating to co-operation with the SRA. In particular Outcome 10.3 required that the SRA be notified promptly of any "material changes" to relevant information, which included *"serious failure to comply with or achieve the Principles, rules, outcomes and other requirements of the Handbook".*[246]. Outcome 10.4, also imposed a requirement to report to the SRA *"promptly, serious misconduct by any person or firm authorised by the SRA, or any employee, manager or owner of any such firm (taking into account, where necessary, your duty of confidentiality to your client)".*[247] This was then underpinned by strict personal responsibility on COLPs in Outcome 10.12:

[241] SRA (2010) *The Architecture of Change Part 2 – the new SRA Handbook – analysis of responses to October 2010 Consultation,* para 109 Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/handbook/october-consultation-paper.pdf [Accessed 7 September 2020]

[242] SRA Authorisation Rules 2011 Rule 8.5

[243] SRA (2016) *Looking to the Future* op. cit., n.281, para. 74

[244] Ibid.

[245] SRA (2017) *Our Response to Consultation* op. cit., n. 282, Response to Question 14 pp. 39-40

[246] SRA Code of Conduct 2011 Outcome (10.3)

[247] Ibid., O (10.4)

"you do not attempt to abrogate to any third party your regulatory responsibilities in the Handbook, including the role of Compliance Officer for Legal Practice (COLP)"[248]. However, of even more concern to COLPs were the further requirements contained within the SRA Authorisation Rules, also found in the Handbook.

Rule 8.5(c)(ii)(A)[249] required that COLPs report as soon as reasonably practicable *"non-material failures"*, the logic being under Rule 8.5(c)(ii)(B)[250] that a failure could be material either taken on its own or as part of a pattern of failures to comply. Although the SRA provided some further clarification on what would constitute a *"material"* failure in Rule 8.5(x),[251] it appeared that, either way, the obligation to report breaches by COLPs could extent to all and any failures, coupled with personal liability under Outcome 10.12 as above. It was a deeply unpopular requirement with firms, and by March 2013 the SRA had been forced to concede that the burden of reporting non-material breaches under Rule 8.5(c)(ii)(A) was not proportionate to the risks.[252], and by October 2013, the requirement to report non-material breaches had been dropped by the SRA, although COLPs would still be expected to record these internally and provide this information to the SRA if asked.[253] Furthermore, this did not affect ABSs given that they were still required to report both material and non-material breaches to the SRA under the provisions of the LSA.[254]

In its Looking to the Future 2017 Consultation, the SRA considered revised reporting obligations in light of the proposed dual Codes of Conduct, and it became clear to the SRA that the obligation to report serious breaches had evolved, and was being construed in very different ways. Rather than accept this as an evolution of OFR, the SRA became concerned that its rules were not sufficiently clear. It had a particular concern with large law firms where compliance officers suggested that the obligation to report only arose when any misconduct or breach had been investigated internally and proven to their

[248] Ibid., O (10.12)

[249] SRA Authorisation Rules 2011 Rule 8.5(c)(ii)(A)

[250] Ibid., Rule 8.5(c)(ii)(B)

[251] Ibid., Rule 8.5(x)

[252] Law Society Gazette (11 March 2013) *SRA to relax rules on reporting breaches* Available at: https://www.lawgazette.co.uk/news/sra-to-relax-rules-on-reporting-breaches/69925.article [Accessed 7 September 2020]

[253] LSA 2007 s21

[254] Ibid.

satisfaction, as to do otherwise would be to act on mere rumour or suspicion.[255] By contrast, other respondents believed that the obligation to report could be triggered earlier, where there was sufficient information to suggest a serious breach might have occurred.[256] In response the SRA determined that all solicitors and firms should have a clear and consistent view of what was expected of them, and when they should report[257]. It therefore launched its Reporting Concerns Consultation 2018[258], which would feed, along with its Looking to the Future Consultation, into new SRA Standards and Regulations, which it envisaged would replace the Handbook.

There were only 29 responses to the Reporting Concerns consultation, however this did include the City of London Law Society, so that the views of some large firms were captured.[259] Despite its need for a *"clear and consistent view,"*[260] the SRA determined in its Reporting Concerns post-consultation response that it did not consider it "*desirable to define the term "serious breach" in the Codes, as we are concerned that any attempt to crystallise this in an exhaustive way in a rule, will risk proving inflexible and becoming outdated. However, the wording itself clearly seeks to express that a mere breach is not in and of itself reportable: it must be "serious".*[261] Consequently, in the absence of a definition of "serious breach", the SRA now expects individuals and firms to read its Enforcement Strategy to formulate their own notions.[262] This includes evaluating whether a breach was serious, including the detriment, or risk of detriment to clients, the extent of any risk of loss of confidence in the practice or in the provision of legal services, the scale of the issue, and the overall impact on the practice, its clients and third parties.[263] There is a risk then

[255] SRA (2018) *Reporting Concerns Consultation August 2018* Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-consultation.pdf?version=4a1abf, para 32

[256] Ibid., para 33

[257] SRA (2019) *Reporting Concerns: Our Post-consultation Position January 2019* Available at: http://www.sra.org.uk/globalassets/documents/sra/comnsultations/reporting-concerns-post-consultation-position.pdf?version=4a1abb, para 14

[258] Op. cit. n. 303

[259] Op. cit. n. 305, para 23

[260] Ibid., para 14

[261] Ibid., para 17

[262] Ibid., para 18

[263] Law Society (2019) *Practice Directive Recording and Reporting Requirements* Available at: lawsociety.org.uk/topics/business-management/compliance-officers [Accessed 07.07.20]

that the issue might not yet have been resolved, and that the SRA's concerns over lack of consistency may continue.

In relation to the issue of *when* to report a potentially serious breach, the SRA did not agree with large law firms who had suggested that they only needed to report when any misconduct or breach had been investigated internally and proven to their satisfaction.[264] The SRA was categorical that it required the reporting of facts of matters which "could" comprise a serious breach, rather than allegations identifying specific and conclusively determined breaches[265]. Also clarifying that it was keen for firms to engage at an early stage in their internal investigative process, and keep it updated on progress and outcomes, because it might wish to investigate a matter (or aspect of a matter) itself.[266]

The risk then is that firms could be left in the original OFR Mark I position of reporting all matters, as there is no definition of "serious breach", and also a lack of clarity in the terms of the threshold for reporting. Several tests were proposed during the consultation, with the City of London Law Society for example preferring the introduction of an objective standard, as to whether the facts gave rise to a belief which a "reasonable bystander would conclude shows that a serious breach is likely to have occurred"[267]. In response the SRA agreed with an objective test, but refused to define the standard of "reasonableness", instead stating that it would be developing a range of case studies to demonstrate how the reporting obligation would be applied in a range of circumstances[268].

The OFR Mark II provisions around reporting are now split in the SRA's Regulations and Standards between the two Codes of Conduct. In relation to individuals, Rule 7.7 is a requirement to inform the SRA promptly of any facts or matters that you "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.[269] A mirror provision appears in the Code of Conduct for Firms at Rule 3.10, which, confusingly appears to be an outcome falling upon the firm generally, not

[264] Ibid., para 32

[265] Ibid., para 26

[266] Ibid., para 30

[267] Ibid., para 71

[268] Ibid., para 32

[269] SRA Code of Conduct for Solicitors, RELs and RFLs 2019 Rule 7.7 Available at: https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/ [Accessed 4 May 2021]

merely the COLP.[270] Under Rule 7.12 of the Code for individuals the reporting obligation is satisfied by providing information to the firm's COLP.[271]

For COLPs there is an additional layer of rules relating to Compliance Officers specifically in the Code of Conduct for Firms under Rule 9, 'Compliance Officers'. This includes Rule 9.1(d) which requires the COLP to ensure that a prompt report is made to the SRA of any facts or matters that *"you reasonably believe are capable of amounting to a serious breach of the terms and conditions of your firm's authorisation, or the SRA's regulatory arrangements which apply to your firm, managers and employees"*[272] and Rule 9.1(e) *"you ensure that the SRA is informed promptly of any facts or matters that you 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"* [273].

2.12 Systems & Controls

Aside from COLPs, another feature of OFR Mark I was the start of a regulatory shift towards recognition of the role that entities or "firms" play in the delivery of legal services. This marked a sea-change in strategy; a move from exclusively individual-based regulation, built among other things, upon equitable fiduciary duties to a client, and underpinning doctrines such as COI, towards recognising that *firms* needed to be held accountable to professional standards as well with firm structures and management practices being co-opted into improving compliance with regulatory objectives.[274] Some commentators such as Schneyer have argued that entity regulation is necessary because of the organisational influence that firms exercise over the behaviour and thinking of their lawyers, and that putting 'ethical infrastructure' in place could therefore remove organisational incentives for unethical conduct.[275] Others disagree, arguing that entity regulation would undermine individual accountability because it would be easier for regulators to hold firms

[270] SRA Code of Conduct for Firms Rule 3.9 Available at: https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/ [Accessed 4 May 2021]

[271] SRA Code of Conduct for Solicitors, RELs and RFLs 2019 Rule 7.12

[272] SRA Code of Conduct for Firms Rule 9.1(d)

[273] SRA Code of Conduct for Firms Rule 9.1(e)

[274] Loughrey, J. (2014) *Accountability and the Regulation of the Large Law Firm Lawyer.* The Modern Law Review 77(5), p.744

[275] See, e.g., Schneyer, T. (1991) *Professional Discipline for Law Firms?* Cornell Law Review 77(1); Chambliss E and Wilkins, D. (2003) *A New Framework for Law Firm Discipline* Georgetown Journal of Legal Ethics 16, p. 335.

accountable than investigate individuals responsible for unethical behaviour.[276] Loughrey considered that the extent to which this fear would be realised under OFR would depend on the nature of the breach and the SRA's attitude, speculating that the larger the firm, the more difficult it might be to identify which senior individuals are responsible and hold them accountable for acting in a conflict situation for example.[277]

The Code of Conduct 2011 was thus an internationally significant attempt to hold firms accountable by evaluating the adequacy of their systems & controls, and provisions relating to this was scattered throughout the Code, intermingled with the obligations upon individuals. For example, Chapter 3 dealing with COI at Outcomes 3.1 – 3.3 applied to "you", meaning either an individual or firm, and required effective systems and controls in place to enable the identification and assessment of potential COIs, and as appropriate to the size and complexity of the firm and the nature of the work undertaken. OFR Mark II by contrast introduced an over-arching Rule 2 covering 'Compliance and Business Systems' inserted into Code of Conduct for Firms (Table 3):

Table C: SRA Code of Conduct for Firms: Rule 2 Compliance and Business Systems[278]

2.1 You have effective governance structures, arrangements, systems and controls in place that ensure:

(a) you comply with all the SRA regulatory arrangements as well as with other regulatory and legislative requirements, which apply to you;

(b) your managers and employees comply with the SRA's regulatory arrangements which apply to them;

(c) your managers and interest holders and those you employ or contract with do not cause or substantially contribute to a breach of the SRA's regulatory arrangements by you or your managers or employees;

(d) your compliance officers are able to discharge their duties under paragraph 9.1 and 9.2 below

[276] O'Sullivan, J.R. (2002) *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal* Georgetown Journal of Legal Ethics 16(1)

[277] Loughrey, J. op. cit., p.745

[278] SRA Code of Conduct for Firms op. cit., Rule 2/

The onus then has been moved from *"you"* to more specifically encompass a wider range of other staff, and also recognising the risk that third parties working for the firm can pose to compliance. The SRA Practice Framework Rules 2011 Rule 6 and 7[279] also recognised for the first time that, in addition to COLPs and Compliance Officers, law firms were likely to engage a range of other non-SRA authorised individuals, some working under supervision of solicitors. Consequently, the SRA's "Guidance on how we regulate non-authorised persons", clarifies that the SRAs Standards and Regulations 2019 also apply to such staff. In fact, the scope of potential enforcement against non-authorised individuals can extend to the investigation and discipline of a non-SRA authorised person,[280] and in some circumstances to conduct outside of legal work.[281]

In the context of technological and other market innovations, the formalisation of controls over non-authorised staff, beyond the more traditional functions of secretaries, bookkeepers and paralegals is not insignificant. Law firms today are increasingly multi-disciplinary organisations, involving a wide and possibly growing range of new project and risk management, technology and systems design and processing related roles.[282] As for identifying and managing COI therefore, the potential need for legal technology would seem considerable in large law firms in particular, given that they typically operate across multiple jurisdictions, advise large clients on complex transactions, and engage hundreds of lawyers *and* support staff. However, quite what infrastructure looks like; precisely which staff are involved; to what extent this might have developed in response to OFR; and how this has impacted on traditional "English" understandings and expectations around COI, remains to be explored.

[279] SRA Practice Framework Rules 2011 Rule 6: Managers and Employees Authorised by Another Approved Regulator, and Rule 7: Managers and Employees who are not Lawyers

[280] SRA Guidance on how we regulate non-authorised persons 3.2. Available at: https://www.sra.org.uk/sra/decision-making/guidance/general-regulation-non-authorised-persons [Accessed 7 April 2020]

[281] Ibid.

[282] Susskind, R. (2013) *Tomorrow's Lawyers: An Introduction to Your Future*, Oxford University Press at Chapter 11

2.13 Conclusion – The Aim to be Addressed: Is SRA OFR Effective as a Model of Regulation for COI in Large Law Firms?

Both Smedley and Hunt agreed that COI were an area of particular concern for corporate law firm respondents, Hunt equating the risk of firms acting where there were COI to not being able to provide fully objective legal advice.[283] The need for an effective regulatory model that could also cater for the sophisticated client base and the complexity of the corporate work often undertaken by such firms was therefore really imperative. As such, Smedley had considered that "corporate" law firms ought to be separately regulated with a more flexible regime for COI, including a waiver regime,[284] especially where it would be efficient and desirable to do so in the interests of the client.[285] However, Hunt disagreed arguing that "complexity" was not sufficient grounds for establishing a separate regime for corporate law firms, so effectively committing large law firms to the one-size fits all PBR approach.[286] The issue now therefore is the legacy of this, as ultimately, large law firms today are still considered by the SRA to be subject to its one size fits all OFR COI regime.

In light of this, several themes have emerged through the literature review in this Chapter 2 which serve to inform the chapters which follow. Aside from the wider Blair-era regulatory agendas that informed the development of SRA OFR, this chapter also recognises that large law firms were for some years prior to SRA OFR becoming increasingly multi-disciplinary organisations, developing and operating a range of risk management compliance systems, processing related roles and "ethics specialists' in the delivery of legal services.[287] As a regulatory project therefore, SRA OFR marked a late sea-change in strategy; a move away from a traditional focus upon individual-based regulation, based upon equitable fiduciary duties owed to a client, and underpinning doctrines such as COI, towards recognising that *firms* were increasingly responsible for the professional standards of the individual solicitors employed by them. This move to entity-based regulation had been strongly mooted in academic literature, but had not been widely

[283] Hunt, p. 77 referring to Smedley Review, 2009, para. 2.23. Note that Hunt was referring to legal conflicts as regulated by the SRA, and no other forms recognised by practitioners, and as considered in Chapter 4 of this work.

[284] Hunt, p.77 referring to Smedley Review, 2009 para 3.31

[285] Hunt, p.77 referring to Smedley Review, 2009, para 3.29

[286] Ibid.

[287] Ibid.

adopted in practice.[288] The SRA's Code of Conduct 2011 was therefore a rare and internationally significant attempt to hold firms accountable by evaluating the adequacy of their systems & controls, while also recognised the risk that both solicitors and non-solicitors working for a firm could pose to compliance.

Nevertheless, this Chapter illustrates that SRA OFR is not without its potential drawbacks, although very little empirical evidence on the effectiveness of SRA OFR actually exists at this point in time. The overall aim of this research therefore is to consider whether SRA's OFR is an effective model of regulation for COI in large law firms, while recognising that this research also has the potential to cast light on the SRA's wider OFR project as well. The aim of this research has to be considered in light of what the SRA originally sought to achieve by adopting this PBR derivative, and not overlooking the fact that SRA OFR is already in its second and current iteration (OFR Mark II). However, this chapter has described the difficulty though in actually identifying what SRA OFR's underpinning PBR basis actually looks like for the purpose of analysis, especially as this is required for any meaningful analysis of success or failure. Some illumination was discovered in work by Black and Teubner for example, who recognised PBR's characteristic 'signature' in procedural norms rather than detailed rules, and a regulatory focus on the design and implementation of self-regulatory mechanisms to achieve socially desirable outcomes.[289] Also, Davies who considered that in order for a PBR-based system to be effective, it needed to internalise structures and procedures within organisations for continual learning and reflection.[290] As for the Principles themselves, Nicolson and Webb for example speculated that as ideals they should be far more effective than prescriptive-based rules in promoting ethical conduct by individuals, who might otherwise display mindless conformity to rules at the level of risk analysis and risk management.[291]

This being said though, this chapter also considered the difficulties in implementing an abstract regulatory concept in the real-life. For example, regardless of any optimism that PBR might have heralded, and as the FSA's PBR approach demonstrated, an overly 'light touch' approach could still have extremely catastrophic consequences for the public. Hunt

[288] See, eg, Schneyer, T. (1991) *Professional Discipline for Law Firms?* Cornell Law Review 77(1); Chambliss E and Wilkins, D. (2003) *A New Framework for Law Firm Discipline* Georgetown Journal of Legal Ethics 16, p. 335.

[289] Teubner, G. (1983) Substantive *and Reflexive Elements in Modern Law*, Law & Society Review 17, pp. 254-255

[290] Ibid.

[291] Nicolson, N and Webb, J. (1999) *Professional Legal Ethics: Critical Interrogations* Oxford University Press, at p.112

therefore recognised the challenges likely to be encountered by firms in the design and operation of systems and controls, and was cautiously content to accept that the regulator could take a relaxed view over the different styles likely to emerge among institutions *"so long as firms adopt transparent decision-making systems – and such decisions should not be left to the compliance function alone. Senior management needs to be involved and supportive".*[292] So this poses the question, which members of the regulated community are actually involved in decision-making, because in order to create the reflexive learning opportunities that academics such as Davis considered fundamental to effective PBR, this would appear to break-down if fee-earning solicitors who are actually engaged in the day-to-day running of client matters are not actually making mistakes and learning from decision-making on COI.

In this respect as well, a key element of intra-firm compliance under OFR Mark I and which followed Hunt was the need for "senior managers" to take greater responsibility for creating the right culture for OFR to work effectively.[293] The original OFR Mark I model had been built around the fundamental tenet of COLPs reporting "material breaches", however by OFR Mark II the SRA had discovered as a result of its Reporting Concerns Consultation, that large law firm COLPs were interpreting this narrowly as an obligation to report only where misconduct had been investigated internally and proven to their satisfaction.[294] It is interesting that the SRA disagreed with the approach being adopted by large law firms, but nevertheless decided to increase the threshold required for reporting to "serious breaches" only under OFR Mark II, furthermore refusing to define what this actually meant, and stating that it expected firms to formulate their own notions.[295] As a compromise the City of London Law Society (CLLS) indicated at the consultation stage that it preferred an objective standard to determining a "serious breach",[296] however, it is unclear whether this has subsequently become a market standard, or what this might mean in the context of COI.

These issues have the potential to fundamentally undermine the SRA's OFR project, and I also argue in Chapter 3, that in relation to COI specifically, the SRA risk scoring a home-goal as a result of its more recent OFR Mark II reforms, motivated by its desire to provide

[292] Hunt, p.39

[293] SRA Achieving the Right Outcomes op. cit. n. 241, para 7.1

[294] SRA (2018) *Reporting Concerns Consultation* op. cit., n. 303, para 32

[295] Ibid., para 18

[296] Ibid., para 71

shorter, more focused codes, to clearly define the boundary between individual and entity regulation,[297] and its perceived need to reduce *"unnecessary bureaucracy".*[298] While this might have been the SRA's good intention, it could also pave the way for unintended consequences. Several key OFR Mark I safeguards appear to have been materially dumbed down. This is especially given that at the time of writing,[299] the SRA has yet to generate the more 'bespoke guidance' for COI on the use of information safeguards, and the principles of informed and continuing consent which it promised in its Looking to the Future Consultation.[300] Furthermore, it has dispensed with the Indicative Behaviours, the non-mandatory guidance which were a cornerstone feature of OFR Mark I's intra-firm self-regulation operation. Presumably this now leaves large law firms either in the hands of the SRA's Ethics Helpline, specialist advisors, or General Counsel to determine. The SRA is now placing considerable trust in the regulated community, and so the questions arise, how have the sophisticated clients of large law firms responded to OFR in respect of COI, and what norms have developed among large law firms to address the lack of guidance from the SRA when addressing COI?

In terms of next steps therefore, the aim of this thesis is to consider to whether SRA OFR is an effective model of regulation for COI in large law firms. Towards this end, Chapter 2 has examined OFR's underpinning rationale and heritage, along with existing critiques of PBR from which SRA OFR was derived, and developed by the SRA in light of the FSA's PBR-critical Turner Review. This chapter has therefore identified several important themes which inform two further literature reviews: Chapter 3 (Conflicts of Interest) and Chapter 4 (Decision-making in Large Law firms). These will each develop several key research questions in support of the aim. Chapter 3 will consider earlier literature on the broad topic of COI in a large law firm context, with COI providing an ethical issue 'lens' through which OFR can be considered. Additionally, Chapter 4 will develop the Key Questions by considering the existing literature on individual decision-making and systems & controls, especially in light of the SRA's intra-firm self-regulatory approach. These Key Questions will then be applied to an appropriate empirical research methodology in Chapter 5.

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[297] SRA (2016) *Looking to the Future* op. cit., n. 281

Para 48

[298] SRA (2015) *Handbook Reforms* Available at: https://www.sra.org.uk/home/hot-topics/Handbook-reforms.page

[299] May 2021

[300] Op. cit., n.281

Chapter 3 Conflicts of Interest

3.1 Introduction

COI provide the lens through which this thesis examines decision-making in light of SRA OFR. This chapter highlights that COI is a common ethical issue to confront large law firms, and it also builds upon Chapter 2, which confirmed that the overall aim of this research is to consider whether SRA OFR is an effective model of regulation for COI in large law firms. Several regulatory considerations were therefore identified as a result of the Chapter 2 literature review in this respect. For example, Lord Hunt's important recommendation for implementation by the SRA; that firms need to design and operate their own systems and controls in support of ethical decision-making. This acknowledged that there were likely to be considerable challenges in doing so: *"firms need to adopt transparent decision-making systems and as such decisions should not be left to the compliance function alone. Senior management needs to be involved and supportive".*[301] So this poses at least two fundamental questions: who is now involved in decision-making around COI in law firms, and what do the decision-making systems and controls actually look like?

Chapter 2 also considered some of the recent changes made by the SRA to its OFR approach under OFR Mark II together with its enforcement strategy. This appears to have left the threshold for reporting "serious breaches" unclear, and it is not known what threshold, if any, large law firms are actually applying in relation to COI issues specifically. This therefore needs to be established. Furthermore, Chapter 3 must also take into account the SRA's more recent drive in 2019 to cut-out "unnecessary bureaucracy" from the Codes of Conduct by removing wording and the Indicative Behaviours.[302] The significance of this cannot be overlooked, given that the Indicative Behaviours (IBs) were once a cornerstone of OFR Mark I, and that the removal of these, and other wording from the Codes of Conduct, appears to have had the unintended consequence of materially changing the meaning of the rules governing COI, but in particular around some of the

[301] Hunt, D. (2009) *Review of the Regulation of Legal Services*, Available at: http://www.legalregulationreview.com/site.php?s=1 [Accessed 7 September 2020] at p.39

[302] SRA News Release (1 June 2016*) Shorter, Sharper, Clearer Handbook Will Benefit Consumers and Solicitors* Available at: https://www.sra.org.uk/sra/news/press/2016/handbook-benefit-consumers-solicitors/ [Accessed 5 May 2021]

original safeguards. Furthermore, despite the SRA's promise to introduce bespoke guidance and case studies to support the more 'slimmed down' rules, this has still not occurred to any notable degree. This would appear to leave large law firms at the mercy of the SRA's Ethics Helpline, or to determine more complex COI issues for themselves, or to incur the additional regulatory expense of engaging external counsel.

This chapter therefore seeks to develop several Key Questions to examine the key issues identified in Chapter 2, and that are suitable for an appropriate methodology to be applied in support of the main aim of this research. In order to achieve this, it is necessary to first understand what COI actually are, and the particular issues that they present in large law firm practice specifically, including the rare instances in which large law firms have actually ended up in court. This chapter therefore starts by considering the fundamental underpinning fiduciary obligation of loyalty upon which COI have traditionally been modelled, but which has traditionally been fettered away by law firm-drafted contractual retainer agreements, and also law-firm mechanisms to identify and "manage" them. Large law firms have also historically been assisted by the bespoke "narrow" interpretation afforded to COI under the SRA's rules. These have their origin in rules drafted by the City of London Law Society for the Law Society of England & Wales at the turn of the 21st century, some twenty years ago.

3.2 A Fiduciary Duty of Undivided Loyalty

The general fiduciary law governing COI remains fundamental to understanding the legal boundaries of law firm conduct, as it should be viewed in the context of the scope of professional duties under the SRA's OFR COI rules, and contractual retainers. Historically, professional conduct relating to COI was interpreted directly in line with the common law standards, as evidenced by English case law authority which refenced the underpinning fiduciary duties such as loyalty and confidence. This avoided the risk of disjuncture between the normative standards applied within the common law, and those to be applied to solicitors within the disciplinary jurisdiction of the Law Society at the time. However, the scope of the duty was curtailed within the Law Society's disciplinary jurisdiction in 2006, when rules governing COI were introduced to the Solicitors Code of Conduct for the first time. These changes were originally informed by City of London Law Society lobbying in the

1990s, which culminated in a Law Society Working Group Review on Conflicts of Interest in 2001[303].

The SRA's current rules governing COI under SRA OFR Mark II continue to retain the substantive rules in the form originally drafted by the CLLS. However, they are now devoid of all their original supporting guidance, which was removed by the SRA as part of its OFR Mark I project referred to in Chapter 2 of this thesis. The SRA's rules on COI make no express reference to any of the underpinning fiduciary duties raised, for example, in the leading English law case authority of Mothew for example, which adopted the position that where duties of loyalty owed to each client were in actual conflict, they were irreconcilable, and a solicitor should not act[304]. By comparison, under the SRA's rules situations under which COI arise can be tightly defined as in "*the same or related matters"*[305]. This appears to be narrower than the duty of loyalty which could apply more broadly to matters which are unrelated but run simultaneously, or consecutively but which still put the duty of loyalty at risk. However, unlike in earlier versions of the rules, there is no guidance or definition as to the extent of the relationship required in "same or related matters". With no definition or even guidance under the SRA rules, whether a COI arises or not is left open for law firms to interpret as they see fit, and not necessarily by any reference to the duty of loyalty at all. I would therefore suggest that the threshold for professional disciplinary action under the SRA's rules since 2011, when OFR was introduced, is potentially more difficult to prove than the common law standard.

To understand why this "watering down" of the duty of loyalty by the SRA's rule on COI is significant, it is important to understand the rationale for the duty of loyalty underpinning COI as it goes to the heart of the lawyer and client relationship. Boon and Levin for example express the traditional rationale for the relationship between lawyer and client as a lawyer acting as their client's mouthpiece in the legal system, doing what a client would have done for themselves, but for not having the necessary knowledge, skills or time.[306] Valsan also focuses on the differential in knowledge and skills, characterising the relationship between a solicitor and client as built on a form of information asymmetry

[303] Law Society (2001) *Working Group Review on Conflicts of Interest March 2001* London, Law Society

[304] Mothew (t/a Stapley & Co) v Bristol & West Building Society [1996] EWCA Civ 533 per Millett LJ at pp9-10

[305] SRA Code of Conduct 2019 Rule 6.2

[306] Boon, A. and Levin, J. (2008) *The Ethics and Conduct of Lawyers in England and Wales,* 2nd Ed, Oxford, Hart Publishing, p. 197

between the parties.[307] As a consequence, the client is obliged to place their trust and confidence in their lawyer not to take advantage of their position. It is, at least arguably,[308] this quality of trust that, in equity, makes the solicitor-client relationship in part "fiduciary"[309] in nature, underpinned by duties that attract particular consequences that differ from other normal duties.[310] Among the fiduciary duties that have been recognised over time, the fiduciary duty of undivided loyalty is the most characteristic feature of the relationship:

"*a fiduciary who acted for two or more principals with potentially conflicting interests, but without informed consent from both, would be in breach of the obligation of undivided loyalty underpinned by a non-exhaustive range of duties. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary".*[311]

Millett LJ did not consider the list to be exhaustive, and, for example, Nicolson and Webb described the most commonly referred to as loyalty, good faith, diligence and confidentiality.[312] A COI arises because of an actual or potential inability on the part of the lawyer to comply with these duties owed to each client when they compete[313], and the risk

[307] Valsan, R. (2012) *Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law*, McGill University, p. 12

[308] Fiduciary law theory has struggled, largely unsuccessfully, to agree a single core quality of fiduciary relationships/fiduciary liability, but contrasting theories that focus on the fiduciary's power over, or conversely the other party's reliance on or vulnerability to the fiduciary all point to at least a contingent need for trust: see further Harding, M. (2013) *Trust and Fiduciary Law*, Oxford Journal of Legal Studies 33, p. 81.

[309] Fiduciary" Latin origin meaning "good faith"

[310] Mothew (t/a Stapley & Co) v Bristol & West Building Society [1996] EWCA Civ 533 per Millett LJ at pp9-10

[311] Ibid., per Millett LJ at 18

[312] See further Nicolson, D. and Webb, J. (1999) *Professional Ethics: Critical Interrogations* Oxford University Press, pp. 104-5, 151. Though it might be better argued that confidentiality is a distinct equitable obligation, given that most commentators see fiduciary obligations as restricted to the term of the retainer.

[313] See e.g Holland, S., Heenan, S. Harris, M., Whewell, E. and Worthington, J. (2000) *Conflicts of Interest Time for a Change?* Legal Ethics 3, p. 134

in continuing to act is that they will represent one client less vigorously than the other because of their divided loyalties.[314] It is as Salzedo and Hollander considered, probably more accurate to describe COI as "conflict of duties"[315]. In fact, where the duties are irreconcilable, Millett LJ in Mothew described this as the "actual conflict rule", under which a lawyer had no alternative but to cease to act for at least one, and preferably both clients.[316]

At the other end of the conflict scale, not all COI give rise to quite such adverse situations. It is commonly accepted, for example, that unless lawyers are representing their clients on a pro bono basis, they will almost always have a personal financial interest in any given matter, May suggests that this is not necessarily problematic unless the balance is tipped by some form of duplicitous behaviour infringing the client's autonomy in the relationship.[317] However, the position in English common law in this respect is ambiguous. In Boardman v Phipps (1967) the House of Lords upheld the duty to account for profits made by reason of a fiduciary's position,[318] finding that the duty was strict and did not depend on fraud or absence of good faith.[319]At the same time, a fiduciary was entitled to "*payment on a liberal scale"* in respect of the work and skill employed in obtaining the shares and the profits,[320] thereby leaving open the interpretation of 'liberal' to abuse.

Ethically speaking, loyalty is both critical and, as Markovits observes, by itself *"not enough to fix the lawyer's professional duties in a meaningful way"*.[321] Loyalty describes a *means* of representation, but to give substance to the duty it is necessary also to identify the *end* to which it is attached. The ethical norms do this narrowly by constructing a 'client-first' ethic which, Markovits asserts, focuses on the client's objectives over and above any wider,

[314] Ibid. p. 133

[315] Hollander, C. and Salzedo, S. (2008) *Conflicts of Interest*, London, Sweet & Maxwell p. 282

[316] Mothew per Millet LJ, p.12

[317] May, L. (1996) *The Socially Responsive Self: Social Theory and Professional Ethics*, Chicago University Press, pp.125-137

[318] Boardman v Phipps [1967] 2AC 46; [1966] 3 All ER 721, Lord Cohen at p20 citing Regal (Hastings) Ltd v Gulliver and Others [1942] 1 All ER 378; Regal (Hastings) Ltd v Gulliver and Others (1942) approved (despite a very different factual context)

[319] Boardman v Phipps [1967] 2AC 46; [1966] 3 All ER 721 per Lord Guest at para 27

[320] Ibid., per Lord Hodson at pp25-26

[321] Markovits, D. (2011) *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age,* Princeton University Press, p. 28

more justice-centred or -mediated notion of loyalty.[322] This is also reflected in both de facto and de jure expectations that, consistent with the agency basis of the relationship, clients exercise control over their lawyers.[323]

These features combine to make loyalty a double-edged sword. On the one hand, they do offer a basic promise of lawyer fidelity and client autonomy, instantiated (amongst other things) by the formal COI rules. On the other, commitments to lawyer zeal on behalf of clients may also operate self-servingly to advance lawyer interests over those of their clients or certain categories of client. Dare, for example, thus refers to the dangers of "hyper-zeal", a form of 'milking of a matter' in favour of the lawyer's personal financial interests.[324] Even in England & Wales, where there is no formal requirement for "zeal", Moorhead has argued that commercial lawyers in particular are more likely to use the notion of adversarial zeal to place their commercial imperative to make a profit ahead of their ethical obligation to promote their client's interests over their own.[325] Concerns that lawyers may try inappropriately to manage conflictual relationships in ways that benefit their financial interests, through (e.g.) permissive client consents, information barriers, and the management of potentially conflicting retainers, all highlight that the ethically important question is precisely *how* lawyers respond to these tensions and conflicting loyalties when they do arise.[326]

The duty of undivided loyalty can also be curtailed contractually, and attempting to re-define its scope by reference to contractual agreement between parties to a legal transaction has given rise to significant public arguments in other common law jurisdictions. In Canada for example, the source of the duty of loyalty now flows from the retainer itself since the case of McKercher[327]. Whereas in England & Wales, Conway v Ratiu (2005) confirmed that although a solicitor's duty to his client would normally be engendered by the retainer, it remained distinct from the fiduciary obligations owed under

[322] Ibid, p.29. It is arguable that client-centredness is more mediated in the English than the US context by the clearer weighting of duties to the administration of justice over duties to the client. However, duties to the administration of justice may themselves seem remote in the transactional settings where many of the serious COI problems arise.

[323] Luban, D. (1988) *Lawyers and Justice: An Ethical Study*, Princeton University Press, p. 325.

[324] Dare, T. (2004) *Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers,* Legal Ethics 7(1), pp.24-38,

[325] Moorhead, R. (2011) *Filthy Lucre: Lawyer's Fees and Lawyer's Ethics – what is Wrong with Informed Consent?* Legal Studies 31, pp. 346 - 348

[326] Parker, C. and Evans, A. (2018) *Inside Lawyers Ethics* 3rd Ed, Cambridge University Press, p.219.

[327] Canadian National Railway Co v McKercher LLP 2013 SCC 39

it, because it arises out of the wider relationship of trust and confidence, as per Mothew.[328] The English position also recognises that contractual duties and fiduciary duties are not to be conflated.

The rationale though for restricting the scope of the duty is that in modern legal practice, a contract acts as a surrogate mechanism to express what duties are owed by each party to the engagement in situations of great complexity, even if this has effectively subverted the fiduciary model.[329] A lawyer's retainer therefore has become a negotiated bargain over the extent of ethical harms arising from diligence, disclosure, confidentiality and accounting for profit instead.[330]

3.3 COI and the Duty of Confidentiality

The SRA's rules related to duty of confidentiality were split from COI under the 2006 reforms. This reflected and reinforced the position at English common law, that the duty of loyalty comes to an end upon termination of the retainer, and that only the duty of confidentiality survives[331]. The advantage then to lawyers in a client being turned "current" into "former" has been recognised in other jurisdictions such as the US, where it is known colloquially as the "hot potato doctrine". Under this the client is simply dropped to get the benefit of more lenient COI rules.[332] Furthermore, it is possible then to mitigate further against this continuing risk of the duty of confidentiality by using information barriers to

[328] Conway v Ratiu [2005] EWCA Civ 1302. See also the controversial Australian case of Spincode Pty Ltd v Look Software Pty Ltd (2001) 4 VR 501, where the fiduciary duty of loyalty was opined, in limited circumstances, to continue in respect of a former client, in addition to the duty of confidentiality. See also Longstaff v Birtles [2001] EWCA Civ 1219; [2002] 1 WLR 470 per Mummery LJ at para 1 "*The source of the [fiduciary] duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency. As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party and his personal interest … may conflict*"

[329] Anon. (1981) *Developments – Conflicts of Interest in the Legal Profession* Harvard Law Review 98, p. 1260

[330] Ibid., p. 1270

[331] Solicitors' Practice (Confidentiality and Disclosure) Amendment Rule 2004

[332] Leubsdorf, J. (2011) *Conflicts of Interest: Slicing the Hot Potato Doctrine* San Diego Law Review 48, p. 251

protect the confidential information of former clients on transactions[333], and also in lateral hire and firm merger situations[334].

Nevertheless, the duty of confidentiality continues to be a particular risk for large law firms given that the law clearly recognises the scope of the duty and fact that it can subsist beyond the scope of a retainer and is therefore applicable to former clients. The rationale for this in England was stated in Bolkiah v KPMG (1999), Lord Millett recognised that the duty of confidentiality was of such "*overriding importance for the proper administration of justice, that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance".*[335] Boon and Levin also highlight the duty's increasing fundamental importance, and argue that confidentiality actually 'belongs' to the client and is not for the lawyer to deny in view of the reasons for their original fiduciary relationship.[336]

In fact, it could be argued the position in English law has become more draconian since Bolkiah. For over 80 years the Court's jurisdiction was founded on the test in Rakusen v Ellis, Munday & Clarke (1912).[337] Cozens-Hardy M.R clarified that there was no general principle in English law that a solicitor who had acted for a client in a particular matter could not under any circumstances act for the opposite party in the same matter.[338] This it was said "*would work great hardship in small towns where there were few solicitors, especially if the retainer of one partner is considered equivalent to the retainer of the firm".*[339] It is an argument that might still appeal to large law firms, especially because the test was very much in favour of the solicitor. A court had to be *"satisfied that real mischief and real prejudice will in all human possibility result if the solicitor is allowed to act".*[340] By the late 1990's, however, the bounds of "human possibility" were being challenged by technology that could not have been envisaged in 1912. Firms were considerably larger and technology had become available to help manage the risk of disclosure. In Bolkiah,

[333] Solicitor's Practice (Conflict) Amendment Rule 2004 Rule 16E (6)

[334] Law Society (2006), *Practice Rules 16D and 16E: Conflict, Confidentiality and Disclosure, Questions, Answers and Examples*, London, Law Society, p. 21

[335] Prince Jefri Bolkiah v KPMG (A Firm) [1999] 2 WLR 215; [1999] 2 AC 222 at p.528

[336] Boon and Levin op. cit., n.367, pp. 219-220

[337] Rakusen v Ellis, Munday & Clarke [1912] I Ch. 831

[338] Ibid., p. 833

[339] Ibid., p. 833

[340] Ibid., p. 835

Lord Millett recognised that individuals now worked in teams on matters, and so he extended the application of fiduciary duties from individuals, to the firms that they worked for as well: *"a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position"*[341].

Lord Millett also offered an entirely different starting point for the duty of confidentiality, namely *"that unless special measures are taken, information moves within a firm"*[342]. This created a presumption. Lord Millett considered that a solicitor should not accept a retainer to act adversely to a former client in a matter that was *"closely related"* to the work he did for that client. In such circumstances the former client need not prove the likelihood of a misuse of his confidential information.[343] It is merely that they have been exposed to the risk of careless, inadvertent or negligent disclosure of the information to the new client by the solicitor or his partners in the firm, its employees, or anyone else for whose acts the solicitor is responsible.[344] The standard for granting an injunction, moreover is not high: *the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial*".[345]

Thus, what was now important was that a client was entitled to be protected, not just against an actual breach of the duty of confidentiality, but also *the risk* of one, provided that it was a risk which was not fanciful.[346] However, confusingly, Lord Millett appeared to dismiss the notion that the duty of confidentiality was relevant in a concurrent client situation:

"a man cannot act at the same time both for and against the same client while his partner is acting for another, in the opposite interest. His disqualification has nothing to do with the confidentiality of the client information. It is based on the inescapable conflict of interest which is inherent in the situation".

This does not sit comfortably with Millett LJ's[347] earlier judgment in Mothew, where he listed underlying duties to the duty of undivided loyalty, and expressed his view that the

[341] Bolkiah op. cit., n.396, p. 234

[342] Ibid., p. 237

[343] Ibid., p. 225

[344] Ibid., per Craighead LJ p.227

[345] Ibid., per Lord Millett at p.237

[346] Ibid., per Lord Millett at p225

[347] As Lord Millett then was

list was non-exhaustive.[348] I would suggest that had Bolkiah considered a current, rather than a former client of KPMG, that the fiduciary duties of confidentiality and disclosure would have been drawn sharply into contrast with each other in the context of two separate matters, one of which was a fraud investigation that encompassed matters in the other. There was clearly a large degree of relationship between the two matters, and potentially an irreconcilable conflict between two current clients.

In light of Rakusen being replaced by Lord Millett's more draconian test, and the presumption that information moves within a firm *"unless special measures are taken"*[349], arguments over what special measures should be taken have, inevitably, been the focus of large law firms in defending claims for breach of the duty of confidentiality. More fundamentally, contract can still be used as a mechanism to restrict liability in relation to the duty of confidentiality as well. The key question in who is a party to a retainer agreement, as this is inferential of whether a party can be regarded as a former client or not. Recent case law in E&W has been very strict in the application of the duty of confidentiality to parties that were not party to a retainer agreement, regardless of the circumstances, and also by contrast to other jurisdictions.

In Glencairn IP Holdings Ltd v Product Specialities (2020) for example, the respondent law firm had acquired knowledge of Glencairn's confidential settlement strategy by virtue of having acted against it in unrelated proceedings which were subject to a confidential settlement agreement between the client parties. Nevertheless, despite the respondent law firm acting as agent to one of the parties bound, the Court held that there was no risk of disclosure, purely on the basis of the absence of a contractual retainer with the respondent.[350] This conflict with contemporaneous Canadian authority determined on similar facts. In the case of GCT Canada Limited Partnership v Vancouver Fraser Port (2019), for example, solicitors were disqualified from acting against the applicant, even though they had not previously been subject to a retainer, simply because they had been privy to its confidential information in the course of undertaking a due diligence exercise for another client.[351]

[348] See Mothew, p. 18

[349] Bolkiah per Lord Millett, p.237

[350] Glencairn IP Holdings Ltd & Anor v Product Specialities Inc & Ors [2020] EWCA Civ 609

[351] GCT Canada Limited Partnership v Vancouver Fraser Port Authority [2019] FC 1147

3.4 To Whom are Duties Owed in Complex Transactional Situations – Contractual Negotiation over Harms

Limiting the scope of fiduciary duties and restricting the parties within a retainer agreement could be particularly prevalent in particular fields of practice such as corporate transactional work. Identifying quite who is the client, and which parties to a transaction ought to be made party to a retainer agreement, and to who duties are therefore owed, is not straightforward for the lawyer given the complexities involved. In fact, as Jonas recognised "the client" might not even be a 'natural person' given that a company has a separate legal personality.[352] Consequently, the lawyer will be dealing with the company officers, directors, or even shareholders as decision-makers[353]. In relation to the structure of a transaction as well, Shapiro (2002) recognised there were often systems of third-party payment that created a form of triangular relationship, and that it might be the interests of those who footed the bill who dictated where the balance lay. A case of "*he who pays the piper plays the tune*"[354].

Flood recognised that in particular fields of corporate practice such as capital markets, transactions revolved around sets of enduring relationships between lawyers and investment banks,[355] where a "client bank" might be responsible for introducing a "borrower client" who would be responsible for paying the lawyer's advisory fees. His research offered a slightly different perspective to Shapiro's earlier findings, in that a greater degree of loyalty appeared to be afforded to the bank rather than the payee, because it was the repeat player, referring business to the firm on a regular and on-going basis.[356] Hazard, who variously used terms "quasi-client", "relevant other", and "derivative client"[357] considered that within these forms of 'triangular' relationships, the exact

[352] Jonas, R. (1988) *Who is the Client? The Corporate Lawyer's Dilemma* Hastings Law Journal 39, pp. 617-622

[353] Ibid.

[354] Shapiro. S. (2002) *Tangled Loyalties: Conflicts of Interest in Legal Practice*, American Bar Association, Michigan, p. 446

[355] Flood, J. (2012) *Transnational Lawyering: Clients, Ethics and Regulation* in Mather, L & Levin, L (eds.), *Lawyers in Practice: Ethical Decision Making in Context,* University of Chicago Press

[356] Ibid.

[357] Hazard, G. (1987) *Triangular Lawyer Relationships An Exploratory Analysis* Georgetown Journal of Legal Ethics 1(15), pp. 31-32; also the term "derivative client" is used by Patterson, L., Metzloff, T.B., Bender, M. (1989) *Legal Ethics: The Law of Professional Responsibility* , University of California Press; and see also Vaughan, S. and Coe, C. (2015) *Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms*, pp. 59-61 they adopt the term 'shadow client' to describe the same.

placement of the duty of loyalty by a lawyer appeared to hinge on specific boundaries, including, for example the degree to which the parties were operating at "arms-length" from each other, or the extent of adversity between them[358]. The SRA's Independence, Representation and Risk Report recognised that large law firm respondents were reporting a greater instance of banks coming into deals with the choice of legal advisor having already been determined by powerful borrowers, who, because they were paying the bank's legal fees, felt justified in determining to whom duties were owed, and to what extent, through the use of their own external counsel guidelines.[359]

For large law firms one possible solution to managing 'triangular' relationships has been through the use of joint-retainer agreements. These have become acceptable industry practice. In Winters v Mishcon de Reya (2008) Henderson J considered the impact of a joint-retainer agreement on the duties owed to each of the parties bound by it:

"*it is in my judgment clear that in circumstances where there is a joint retainer, or where the same solicitors act for two clients in related matters in which they have a common interest, neither client can claim professional privilege against the other in relation to documents which come into existence or communications which pass between them and the solicitors, within the scope of the joint retainer or matter of common interest concerned*"[360].

This has arguably been expanded in more recent English case law through the notion of a 'common interest' between the parties which displaces the duty of confidentiality through necessary implication, and in the absence of a written joint-retainer. Singla v Stockler & Stockler (2012),[361] for example, concerned a third-party funding arrangement in which there was no formal written retainer agreement. Stephenson Harwood LLP acted for the liquidator in a liquidation funded by a creditor, and the arrangement resulted in the disclosure of confidential information between the parties. Stephenson Harwood LLP later sought to act against the liquidator in separate proceedings, and the liquidator sought to restrain it. Briggs J however considered that the nature of the earlier co-operation had "displaced" the ordinary duty of confidentiality:

[358] Ibid., p.33

[359] Ibid., pp. 59-61

[360] Winters v Mishcon de Reya [2008] EWHC 2419 Ch per Henderson J at paras 80-81

[361] Singla v Stockler & Anor [2012] EWCH 1176 (Ch)

"occasionally it happens that there exists such a community of interest between a litigant (A) and a third party to that litigation (B) that A's solicitor is under no obligation to keep confidential from B information arising in the performance of that retainer, even though B is not his client in that litigation…. it may also arise by way of necessary implication from the circumstances about the relationship between A and B in connection with the litigation… Furthermore, a conclusion (after the event) that the relationship necessarily involved such a release of the solicitor from any obligation of confidence to A as against B may arise by way of inference from evidence as to their mutual conduct"[362].

The problem is that none of these measures really address instances in which there is an inequality in bargaining power between the parties, and even more so, instances where it is the lawyer who is the weakest party in the room. Rather than acting in the best interests of the weakest client, or levelling the playing field out, these contracts are reflections of the existing power relations. It could be that where the duty of loyalty itself falls really boils down to who wins between lawyer, client and quasi-client in the battle over negotiated harms. To understand the practical problems that arise in the operation of the law and the conduct rules, we therefore need to take these practical questions of client power and its impact on legal work seriously.

3.5 Powerful Sophisticated Clients

Chapter 2 recognised that the practice of law had long been fragmented into particular "hemispheres of practice" with the Hunt and Smedley Reviews recognising the significant difference in the type of clients represented by large "corporate" law firms.[363] Since, as Mather and Levin have observed, practice areas develop their own particular norms and cultures, shaped not just by substantive procedural and ethical legal rules, but by client practice, economics and culture,[364] The impact of clientele on the ethos of corporate practice also needs to be addressed.

The term "sophisticated client" is used frequently in literature, and originally in OFR Mark I, but finding a precise, or widely adopted definition for the term is notably hard. It could be that this degree of flexibility, or rather ambiguity suits large law firms. Smedley for example

[362] Singla v Stockler & Anor [2012] EWCH 1176 (Ch) per Briggs J at para 11

[363] Smedley, N. (2009*) Review of the Regulation of Corporate Legal Work*, p. 27 Available at http://www.citigroup.org.uk/uk/images/file/report_smedley_final_310309.pdf [Accessed 10 June 2020]

[364] Mather, L. and Leslie, C. (2012) *Introducing Perspectives on Ethics in Context: Why Context Matters* in Mather, L. & Leslie, C. eds. *Lawyers in Practice Ethical Decision Making in Context,* University of Chicago

recognised that a large FTSE 100 company might well have access to internal legal advisors with some level of expertise within particular legal fields, however the extent to which those advisors have 'sophisticated' knowledge of other particular fields might be debateable[365]. This being the case, the relationship with a legal advisor is still a scenario that imposes a fiduciary relationship on the provision of the legal advice. Nevertheless, this does not mean that they are not a "powerful" principal to the lawyer.

Shapiro drew together particular traits that lawyers recognised as client "sophistication", including whether a client was represented by an in-house legal department, how much business they sent to the firm, the density of the relationship, and how long it had lasted, and in what areas the firm provided advice to the client.[366] Smedley considered that "sophisticated" clients were often corporate purchasers of legal services who were well able to negotiate in terms of price and level of service, and who would move elsewhere if they were dissatisfied with performance.[367] The expression "sophisticated client" was also used in the SRA's OFR Mark I rules without definition in connection with the 'competing for the same objective' exception under the COI rules. However, notably, it appears to have disappeared from use in OFR Mark II, presumably indicating that lawyers can now use this exemption against a wider range, and in fact, all clients.

The consistent theme running through the literature then is that "sophisticated clients" are usually companies or corporates, who are experienced users of legal services and might even employ their own in-house legal team. It remains a useful descriptor, which serves to differentiate the corporate clients served by large law firms, as opposed to the "consumers" of legal services[368], often individual natural persons who were in fact the main focus of the reforms to the legal services market occurring during the 2000s. However, a limited range of research has explored sophisticated clients' attitudes to COI in the last twenty years as well. Shapiro identified that some appeared to recognise the benefits of waiving a COI in terms of skills and experience that this might bring,[369] and Le Mire and Parker for example discovered that others had in fact become very familiar with

[365] Smedley op. cit., n.424

[366] Shapiro op. cit. n. 415, p. 440

[367] Smedley op. cit. n.424

[368] See Consumer Rights Act 2015 s2(3) for a contemporary definition of a consumer as "Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

[369] Shapiro, op. cit., pp. 432-436

the COI situations presented by their legal advisors, and even had protocols for dealing with them. In fact, clients with in-house lawyers supervised and monitored the services provided by their external legal advisors.[370] On the other hand, other clients viewed the efforts by lawyers to act in COI situations as a betrayal, some using blanket policies to refuse to waive COI, thereby forcing law firms to resign from representation. Others simply blacklisted law firms if they had ever acted on an opposing side to them,[371] not necessarily contingent on actual adversity on any given matter, but strategically to stifle the prospect of any adverse litigation or commercial competition.

3.6 Lawyer Independence and Hostage Taking Clients

A particular ethical issue arising in the context of sophisticated clients is the risk, where a client's bargaining power in the relationship exceeds the lawyer's fiduciary position, to traditional notions of lawyer independence. These clients appear able to seize control of the retainer, issuing their own as the basis for the scope of duties owed by the lawyer to them, and impose a scope of duties exceeding the scope of the professional rules. 'Independence' is regarded as a fundamental principle of practice, on paper at least. Maintaining independence is an SRA Principle[372], and also one of the LSA's eight Regulatory Objectives.[373] Its definition can be slippery. For present purposes, it is sufficient to follow Boon in accepting that, in most common law jurisdictions, it means independence from third parties (including the State), so that lawyers could be devoted to client interests, and also independence from clients themselves, so that practitioners can observe wider duties, for example to the administration of justice.[374] This is in fact broadly echoed in the LSB's definition as well.:

"independent primarily means independent from government and other unwarranted influence. A client should be confident that his/her lawyer will advise and act without fear that the state will penalise through regulation. Similarly, a client should be confident that his/her lawyer will advise and act without being prejudiced by other factors or interests

[370] Evans, A, Haller, L., Parker, C., Mortensen, R. (2008) *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policies and Behaviour* University of New South Wales 31(1) pp. 158 - 188

[371] Shapiro, op. cit., pp. -440

[372] SRA Standards & Regulations 2019 Principle 3 'You act with Independence' Available at: https://www.sra.org.uk/solicitors/standards-regulations/principles/

[373] LSA 2007 s1(3)(a) that Authorised Persons should act with independence and integrity

[374] Boon, A. (2017) *The Regulation of Lawyers and Legal Services* in Boon (ed.) *International Perspectives on the Regulation of Lawyers and Legal Services,* London, Hart Publishing, p. 10

other than the overriding professional responsibility to the Court – their advice should be independent of inappropriate influence. (Similarly, lawyers should be confident that their independence as officers of the Court is not constrained by their relationship with their client).[375]

Financial services clients, including major banks have received particular criticism from government for undermining lawyer independence. The Tomlinson Report 2013 into the Royal Bank of Scotland's treatment of SME's in distress made a range of serious allegations against the bank over its treatment of customers.[376] Specifically, Tomlinson identified how RBS had restricted the ability of businesses to take legal action against it, by taking tactical advantage of the rules on COI.[377] This included imposing restrictive retainer agreements on the large law firms with banking expertise on its advisory panel, which in turn prevented them from acting for clients in adverse matters.[378] The scale of the issue appeared serious. At the time RBS retained a large panel of sixty law firms,[379] following a 40% reduction in 2012.[380].

Tomlinson was followed by a Treasury Select Committee investigation during which the Business Secretary Vince Cable MP criticised the "*cosy*" relationship between banks and leading law firms, and asserted that this was preventing businesses from taking legal action to protect themselves from being forced unfairly into bankruptcy.[381] In the words of an insolvency practitioner quoted in the Tomlinson Report: *"we in the insolvency industry have been complicit, collaborative and have completely failed in what our true roles should*

[375] LSB, *The Regulatory Objectives – Legal Services Act 2007,* p. 11 Available at: https://www.legalservicesboard.org.uk/lawyers/handbook/handbookprinciples/content.page

[376] The Tomlinson Report (25 November 2013) Available at: http://www.tomlinson_report.com/docs/tomlinsonreport.pdf [Accessed 20 July 2020]

[377] Ibid., pp.13-17

[378] Ibid.

[379] Ibid.

[380] Newman, A. (26 November 2013) *CC Appointed to RBS Inquiry into SME lending allegations* http://www.legalweek.com/legal-week/news/2309143/cc-appointed-to-rbs-inquiry-into-sme-lending-allegations, Legal Week [Accessed 13 July 2014]

[381] Conflicted firms unable to act against banks, City regulators told Cross, M. and Hyde, J. The Law Society Gazette 25 November 2013 https://www.lawgazette.co.uk/practice/conflicted-firms-unable-to-act-against-banks/5038933.article

be. Almost everyone in our industry has effectively been "bought off by the banks".[382] The FCA in its final summary of findings in 2017, supported many of the Tomlinson Report's original findings.[383] However, notwithstanding its consideration of the relationships that RBS had with advisory parties in the financial sector, the "cosy relationship" with law firms did not specifically feature.

In the midst of this process, the SRA commissioned its own report 'Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationship by Large Law Firms (2015)', based on 53 interviews with corporate and finance lawyers at large law firms.[384] This confirmed that major corporate and financial institutions were imposing their own terms of engagement upon law firms, and that large law firm lawyers considered that these imposed conflict provisions that went beyond regulatory requirements.[385] The impression provided by large law firm respondents was not so much of a "cosy" relationship, but more one of hostage taking by the client. There were also contemporaneous accusations in the legal media that some banks had adopted policies of blacklisting legal advisors that had acted for competitors against their business interests, even where there might not have been any existing or former client relationship between them.[386] In particular, the SRA's report highlighted that US banks were developing sophisticated terms of engagement for their legal services providers in England & Wales, and that around three quarters of respondents considered that they had been forced to accept increasingly more onerous terms of engagement with little room for discussion.[387]

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[382] Hansard House of Commons Debate 17 December 2013 Cols 151-152 WH per Guto Bebb MP Available at http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131217/halltext/13 [Accessed 13 July 2014]

[383] FCA, (28 November 2017) FCA Publishes Final Summary of RBS's Treatment of SME Customers Referred to its Global Restructuring Group, Available at: https://www.fca.org.uk/news/press-releases/fca-publishes-final-summary-rbs-treatment-sme-customers [Accessed 7 May 2021]

[384] Vaughan and Coe, op. cit.

[385] Ibid., p.19

[386] Legal Week for example reported how in 2008 JPMorgan publicly blacklisted the law firm Linklaters from its advisory panel while Linklaters was suing its acquisition Bear Stearns on behalf of BarclaysCaptial. This was despite the fact that Linklaters had agreed to take on the retainer several months before JPMorgan agreed to buy Bear Stearns, and had kept JPMorgan in the loop throughout: Newman, A.(16 January 2014) *Drawing the Battle Lines – Assessing the Impact Client Conflicts Have on Top Law Firms* Available at: http://www.legalweek.com/legal-week/analysis/2323314/drawing-the-battle-lines-assessing-the-impact-client-conflicts-have-on-leading-law-firms [Accessed 24 July 2020]

[387] Vaughan and Coe, op. cit., pp. 21-22

In response to the findings of its report, the SRA featured "Independence" as a thematic risk factor in its annual Risk Outlook report for the next three years. However, it did not, for example, propose any particular solutions to the threat, and it is unclear to what extent the remodelling of OFR more recently has addressed concerns around a lack of independence. If anything, the approach taken under OFR Mark II has been to "slim down" the wording on the rules, affording large law firms the flexibility that they might need to skirt around the threat to independence posed by powerful client demands, rather than providing a positive framework to counteract it. The question should also be considered whether this laissez-faire approach by the regulator is effectively facilitating the establishment of privately negotiated contractual regulatory regimes between a powerful sophisticated client, almost certainly operating at a global level, and large panels or communities of large law firms.

While there is a risk that "hostage taking" of the client's lawyers could connote a desire by the client to tactically abuse the rules on COI, this is not the only plausible account. First, a softer form of capture might reflect more legitimate purposes by powerful sophisticated clients, motivated by the need to ensure that large law firms observe traditional fiduciary duties owed to them, including the duty of loyalty. As we will see later in this chapter, there is a strong argument that the City of London Law Society (CLLS) for example, has been increasingly successful over time in its bid to re-draft the rules of professional conduct in favour of large law firm economic interests, and Davies, for example, considered that it was sophisticated clients who were better able to monitor professional misconduct than even the profession's own regulatory system, given the asymmetries of knowledge between the regulator and regulated community[388]. Nevertheless, whether it is wise for the SRA to leave monitoring and enforcement increasingly at the doorstep of the regulated community, given the role that powerful sophisticated clients appear to be having in intentionally determining lawyer independence in either of these instances is questionable.

Secondly, it may also be argued that the notion of lawyers being held contractually hostage by clients provides a misleading impression of the situation. The phenomenon of "client capture", recognised by Gunz and Gunz,[389] would suggest that the threat to independence can be driven more by a ready willingness on the lawyer's part to be captured. Variables determining the extent of capture included for example the amount of revenue that a

[388] Davies, M. (2003) *The Regulatory Crisis in the Solicitor's Profession* Legal Ethics6(2), p. 198

[389] Gunz, H. and Gunz, J. (2014) *Unpacking Client Capture: Evidence from Corporate Law Firms*, Journal of Professions and Organization 1(2), p. 99

particular client generated for a firm, the length of term of the matter, the amount of potential future work, valuable brand names, and even preference given to small but rising star companies, and those that typically provided good quality work.[390] Nevertheless, this form of "capture" also serves to undermine the core of the fiduciary relationship. For example, research on litigation lawyers conducted by Kirkland, considered the situation in which an autonomous fiduciary might have made at least a cursory effort at moral suasion if they had felt that their client was wrong. Yet in the relationships that she observed, lawyers remained passive, merely acting as agents to achieving the client's ends, and not in an autonomous fiduciary capacity.[391] In relation to the retainer therefore, the extent to which lawyers might accept their own client's terms might be inferential of capture, but regardless of this, as Kirkland highlights, what is also important is the manner in which lawyers actually identify and exercise their duties in practice.[392]

3.7 The SRA Codes of Conduct on Conflicts of Interest, and Large Law Firms

In the late 1990s, at the time that Janine Griffiths-Baker conducted her research into fiduciary duties in "modern law firms",[393] the Solicitors Practice Rules 1990 were in force. In so far as they related to COI at all, these were concerned with domestic conveyancing and the circumstances in which a firm could act for both buyer and seller, as well as for lender and borrower.[394] Other than this, the implication was that the wider fiduciary duty of loyalty still held, and solicitors were prevented from acting for both parties in most circumstances of actual conflict.[395] In 2000 the CLLS convinced the Law Society to establish a Working Party to prepare a report on COI to look into the needs of City law firms in supporting the needs of "sophisticated clients" in particular. Loughrey has noted though that the CLLS's subsequent recommendations did not receive unqualified support from the clients that the CLLS purported to speak for. The Legal Services Consultative Panel in particular pointed to the fact that there was no evidence that sophisticated clients actually

[390] Ibid., pp.709-714

[391] Kirkland, K. (2005) *Ethics in Large Law Firms: The Principle of Pragmatism* University of Memphis Law Review 35, p. 718

[392] See also Vaughan, S. and Oakley, E. (2016) *'Gorilla Exceptions' and the Ethically Apathetic Corporate Lawyer, Legal* Ethics 19, p. 50

[393] Griffiths-Baker, J. (2002) *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* Oxford, Hart Publishing

[394] Solicitors Practice Rules 1990 Rule 6

[395] See further Hopper, A. and Treverton-Jones, G. (2011) *Outcomes-Focused Regulation A Practical Guide*, London, The Law Society, pp. 50-51

wanted the changes the CLLS proposed, or that the definition of COI was too narrow and prescriptive.[396] Nevertheless, the CLLSs proposals were largely adopted by the Law Society, and took effect in 2006, subsequently being incorporated into the SRA's Code of Conduct in 2007.[397]

A chance arose to review the rules on COI following the Hunt and Smedley Reviews, and the SRA's Architecture of Change consultation in 2010, and the SRA proposed several different models for COI. However, both the Law Society and the CLLS had originally been against adopting an outcomes-focused approach to COI, expressing concerns around the need for clarity in relation to COI obligations[398]. Ultimately what featured was a compromise. The SRA abandoned its proposed models, and chose to accommodate the 2006 rules instead without much substantive change, citing the fact that respondents had felt that now was not the time for a significant change to the rules[399]. However, it felt that to not accommodate an OFR approach would undermine the integrity of its wider OFR project, despite the absence of any particular empirical evidence on the matter[400]. The main difference therefore between the 2006 Rules (absorbed into the 2007 Code), and OFR Mark I was that the rules had been largely lifted, re-branded as "Outcomes", slotted into the OFR regime, but stripped of guidance that had appeared in the 2007 Solicitors Code of Conduct. In place of the guidance were non-mandatory indicative behaviours and overarching Principles.

In terms of interpreting the rules, the SRA confirmed that in line with its intra-firm self-regulation approach, it would expect firms to exercise their own judgement as to whether it would be proper to act in a particular situation, rather than the SRA Handbook specifying the circumstances where it is appropriate to do so[401]. The Law Society's response therefore was to publish a practical guide for practitioners authored by two leading QCs in the

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[396] See further Loughrey, J. (2011) *Large Law Firms, Sophisticated Clients, and the Regulation of Conflicts of Interest in England and Wales*, Legal Ethics14(3), pp.216-217

[397] SRA Code of Conduct 2007 Chapter 3

[398] SRA (2010) *The Architecture of Change: the SRA's new Handbook May 2010 Consultation Paper Responses,* para 83 – 85 Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/handbook/october-consultation-paper.pdf

[399] Ibid.

[400] Ibid.

[401] SRA (2010) *The Architecture of Change Part 2 – the new SRA Handbook – analysis of responses to October 2010 Consultation.* para 75 Available at: https://www.sra.org.uk/sra/consultations/consultations-closed/?page=9

regulatory field[402], the advice being that, by following the historical guidance contained within the old 2007 Code, there would be no failure to comply with the new Code[403]. It is possible then that this Law Society guidance provided a green light to create a new norm among practitioners in relation to decision-making around COI in an OFR context[404].

The SRA's definition of "conflicts of interest" does appear, as early critics claimed, to be very narrow. It first appeared in the 2006 rules: "*where your separate duties to act in the best interest of two or more clients in relation to the same or related matters conflict"*[405]. Originally the definition did not expressly refer to an own interest conflict scenario. This was only incorporated into the Code of Conduct under OFR Mark I. It was also defined tightly when introduced in 2011 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 interest in relation to that or a related matter".*[406] The reason for the delay is not clear, but from the perspective of a law firm, not having the definition in the rules at all would potentially negate liability under the professional rules for conflicts arising through, for example lateral hire or merger scenarios.

OFR Mark II came into effect from 25 November 2019. The rules for COI and confidentiality (Rules 6.1 – 6.5) are now split across two separate Codes: one for Firms; the other for and Solicitors, RELs[407] and RFLs.[408] Furthermore, the 'Outcomes' have been re-badged as 'Rules', although the reason for this is unclear given that they remain drafted in the form of outcomes. Across the two new Codes of Conduct, the provisions for COI mirror each other identically for firms and solicitors, and as noted in Chapter 2, the CLLS's 2006 rules still form the substantive rules under OFR Mark II. However, the definition of "Own Interest Conflict" has also been extracted again from the main definition of "Conflict of Interest" under OFR Mark II, so that, strictly speaking, the SRA now defines *"conflicts of interest"* as purely client-to-client instances, arising only in *"same or related matters".*[409]

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[402] Hopper and Treverton-Jones op. cit. n. 456

[403] Ibid., p. 53

[404] A colloquial expression among contemporary practitioners to refer to the 2007 Code.

[405] SRA Code of Conduct for Firms 2019 and also SRA Code of Conduct for Solicitors, RELs and RFLs Rule 6.2

[406] Ibid., Rule 6.1

[407] Registered European Lawyers licensed to practice in England & Wales

[408] Ibid.

[409] Op. cit. n.467

As with OFR Mark I there is still no definition or guidance around what can constitute *"related matters"* either, leaving the issue to be assessed by analogy to the general law. This reflects more generally a pragmatic approach to the topic of COI. The rules do not, for example, specifically refer to the duty of loyalty, or to the non-exhaustive range of underpinning fiduciary duties recognised by Millet LJ in Mothew, with the exception of duty of confidentiality and, briefly, disclosure in the same breath[410]. Nor do they remind lawyers of the fiduciary nature of trust and confidence in the relationship between lawyer and client, from which the duties derive, or even Millet LJ's definition of an *"actual conflict of interest"* in Mothew[411], that there are instances where COI's might be so adverse as to be irreconcilable and ideally a lawyer should stop acting for one, or both clients.

A further dimension to this disassembled duty of loyalty has been the splitting out of the duty of confidentiality as well. This had been a feature of the Code of Conduct prior to the incorporation of rules pertaining to COI, however, legal practice has determined that of all of the fiduciary or fiduciary-like duties, the duty of confidentiality has become one of the most significant before the courts. As Mark Brindle QC, counsel for Freshfields pointed out before the Court of Appeal in Marks & Spencer v Freshfields (2004), most of the English cases *"deal with the confidential information aspect, with many fewer on conflicts of interest".* [412] Cases pleaded on the basis of breaches of other COI appear to still be eclipsed by the volume of cases founded on breaches of duty of confidentiality owed to existing and former clients, the context being the need to grant urgent injunctive relief. Arguments that focus on the risk of inadvertent breach of the duty of confidentiality are required to found the injunctive jurisdiction of the Court[413]. As a consequence, in the limited case law relating to large law firms, it now appears to fall to the SDT to uphold broader COI infringements, and then usefully only in the aftermath of successful applications for injunctive relief around the duty of confidentiality.[414]

The most immediately apparent difference though between OFR Mark I and OFR Mark II as discussed in Chapter 2 has been in the abandonment of the non-mandatory Indicative

[410] SRA Code of Conduct for Firms 2019 and SRA Code of Conduct for Solicitors, RELs and RFLS Rule 6.6.3-6.5

[411] Mothew per Millet LJ at p.12

[412] Marks and Spencer Group Plc & Anor v Freshfields Bruckhuas Deringer [2004] EWCA Civ 741 at para 5

[413] See Bolkiah v KPMG

[414] Separate Solicitors Disciplinary Tribunal prosecutions were brought against the firms and solicitors responsible for breaching the SRA's rules on conflicts of interest and also confidentiality following both the M&S v Freshfields (2004), and Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94

Behaviours in favour of guidance and toolkits, the inference being that these would be left to evolve over time. At the time of writing, there still appears to be very limited practice area specific guidance. For example, *"one way to remove the risk of a conflict of interest, or potential conflict, will be to restrict your retainer in a matter"* [415] is quite general, and the guidance does not, for example, recognise, or suggest mechanisms to deal with the impact that powerful sophisticated clients might be posing to independence through the use of strict external counsel guidelines, something that the SRA has in fact been aware of since its Independence, Representation and Risk report was published in 2015.[416]

3.8 Exceptions to Not Acting under the SRA's Codes of Conduct

Two exceptions permit solicitors and firms to act in the SRA's same or related matter conflict situation. These originate from the 2006 rules, where: 1) the clients had a substantially common interest in the matter[417], or 2) were competing for the same asset[418]. In a further amendment to OFR Mark I though, reflected through into OFR Mark II, solicitors and firms are now permitted to act for clients who are competing for "the same objective" rather than "the same asset". This appears to provide yet further wider scope for interpretation. It could be argued that there have also been some extremely subtle, yet material "watering down" of the conditions originally required in the operation of the COI rules under OFR Mark I, and concerningly, perhaps, these amendments were represented by the SRA as merely administrative, in line with its drive to reduce the overall word length of the Codes.[419] It is worth exploring what has occurred here:

3.8.1 Substantially Common Interest

A "substantially common interest" was defined under OFR Mark I for the purposes of O(3.6)as *"as a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the clients and a strong consensus on how it is to be*

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[415] SRA Guidance on Conflicts of Interest 29 October 2019 Updated 2 March 2020 Available at: https://www.sra.org.uk/solicitors/guidance/ethics-guidance/conflicts-interest/ [Accessed 28/07/20]

[416] Vaughan and Coe. op. cit., n.418

[417] Solicitor's Practice (Conflict) Amendment Rule 2004 Rule 16D(3)(a)(i) and (ii)

[418] Ibid., 16D(3)(b)

[419] SRA's drive to remove bureaucratic wording SRA Consultation Looking to the Future – Flexibility and Public Protection June 2016 Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/code-of-conduct-consultation.pdf?version=4alad4

Para 7-10 [accessed 20 May 2020]

achieved and the client conflict is peripheral to this common purpose".[420] OFR Mark II Rule6.1 (a) has now reduced the wording to *"a situation where there is a clear common purpose between the clients and a strong consensus on how it is to be achieved".*[421] It could be argued that something now considered extraneous wording by the SRA, was in fact a relevant operative part of the provision, one that guided solicitors and firms to act where another conflict was in fact only "peripheral". The question of degree has thus been opened wide-up to interpretation by the change. Also gone are the caveats that "*you have explained all the relevant issues and risks to the clients and you have a reasonable belief that they understand those issues and risks";*[422] "*you are satisfied that it is reasonable for you to act for all the clients and that it is in their best interests";*[423] and *"you are satisfied that the benefits to the clients of your doing so outweigh the risks".*[424] In fact, all that remains in terms of caveats to the operation of the "substantially common interest" exemption is that *"all the clients have given informed consent, given or evidenced in writing, to you acting",*[425] and that an advisor only needs to be *"satisfied that it is reasonable to act for all the clients".*[426]

3.8.2 Competing for the Same Objective

The original supporting Indicative Behaviours under OFR Mark I indicated that the "competing for the same objective" exception could be achieved *"only where clients are 'sophisticated users of legal services"*[427]. The Indicative Behaviours having been removed; this guidance is no longer expressly stated anywhere. The implication may therefore be drawn that the exemption can now be applied to any client. A subtle but significant change has also been made to the wording of the exemption itself. Under OFR Mark I "competing for the same objective" referred to *"any situation in which one or more clients are competing for an 'objective' which, if attained by one client will make that 'objective' unattainable to the other client or clients* and 'objective' *means, an asset, contract or*

[420] SRA Code of Conduct 2011 O (3.6) and Chapter 14 Interpretation

[421] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELS and RFLs 2019 Rule 6.1(a) in each

[422] Solicitors Code of Conduct 2011, O (3.6) (b)

[423] Ibid., O (3.6) (c)

[424] Ibid., O (3.6) (d)

[425] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELs and RFLs 2019 Rule 6.2(b)(i) mirrors the previous Solicitors Code of Conduct 2011 O (3.6) (b)

[426] Solicitors Code of Conduct 2011 O (3.6) (c)

[427] Ibid., IB (3.6)

business opportunity which two or more clients are seeking to acquire or recover through a liquidation (or some other form of insolvency process) or by means of an auction or tender process of or a bid or offer which is not public."[428]. The last sentence has subsequently been amended under OFR Mark II so that *"a bid or offer which is not public"* has become *"but not a public takeover".*[429] This is more than just a tightening up of the provision. In fact, it 'de-protects' a very large area of work for corporate lawyers in particular.

What did not fall within the scope of the exception previously were Initial Public Offerings (IPOs), in other words the initial flotation of shares on public stock exchanges. Now however, law firms can act for multiple private bidders, regardless of their competing interests with informed consent. This is especially prevalent during the due diligence phase of IPOs where, on the basis of the statutorily required Investor Prospectus,[430] clarificatory questions are posed by bidders, usually relying on the advice of their professional legal advisors. Whether this is actually in the best interests of each client is a moot point because, as with the substantially common interest exemption, several conditions attached to the operation of the condition have been removed under the auspices of reducing the bureaucratic burden. This included, as with the substantially common interest exemption, the requirement for lawyers to explain the relevant issues and risks to the clients, and to have a reasonable belief that the issues and risks were understood[431]. Also removed was the requirement that *"the clients have confirmed in writing that they want you to act, in the knowledge that you act, or may act, for one or more other clients who are competing for the same objective".*[432] This was reduced to *"all the clients have given informed consent, given or evidence in writing, to you acting".*[433]

Also entirely removed under the OFR Mark II reforms was the condition that *"there is no other client conflict in relation to that matter",*[434] and *"unless clients specifically agree, no individual acts, or is responsible for the supervision of work done for more than one of the*

[428] Ibid., Chapter 14 Interpretation

[429] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELS and RFLs 2019 Rule 6.1(b) in each

[430] The Financial Services and Markets Act 2000 (Prospectus Regulations) 2019 set out the requirements for prospectuses

[431] SRA Solicitors Code of Conduct 2011 O (3.7) (a)

[432]Ibid., O (3.7) (b)

[433] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELS and RFLs 2019 Rule 6.2(b)(i)

[434] SRA Code of Conduct 2011 O (3.7) (c)

clients in that matter".[435] These removals might appear to recognise some of the more 'triangular' client relationships, and possibly also practical limitations upon internal expertise and workload capacity. Instead, 'simplified' drafting appears that *"you are satisfied it is reasonable for you to act for all the clients",*[436] and that in doing so *"the benefits to the clients of you doing so outweigh the risks".*[437]

Thus, the issue with the recent amendments is that collectively they do appear appreciably to reduce client safeguards. For example, all that is now required in terms of both exemptions is that the law firm or lawyer satisfy itself, that *it has provided* sufficient information to achieve informed consent, rather than ensuring that it has provided sufficient to satisfy itself that *the client* has *actually understood* what has been disclosed. This is a far more lenient standard in favour of the law firm. I would argue that these are material changes, not merely bureaucratic ones, and they do afford considerably more favourable scope for interpretation to large law firms, and far less explicit onus on them to consider the client's actual knowledge, and in particular, its *understanding* of a conflict.

3.9 Informed Consent to Acting – Duty of Confidentiality v Duty of Disclosure

Both of the relevant SRA exemptions for COI require informed consent from clients to permit acting. Informed consent can be an acceptable and useful mechanism in situations of COI, Wong for example stressed the public interest in enabling a client's free choice as to his or her legal advisor.[438] Also, at the transactional level, consent could be fundamental to the smooth running and administration of the transaction. Wong illustrated this with the example of a surety who might not be able to assess the extent of her potential liability unless information pertaining to the debtor's existing borrowings and the current facility is made available to her.[439] However, the quality of the informed consent provided by a client, is clearly dependent on the quality of what is disclosed to them by the lawyer. In Wong's example, conflict could arise between the lawyer's duty of disclosure to the surety on the one hand, and confidentiality to the debtor on the other[440], and in law the double-

[435] Ibid., O (3.7) (d)

[436] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELS and RFLs 2019 Rule 6.2(b)(iii)

[437] SRA Code of Conduct 2011 O (3.7) (e)

[438] Wong, S. (1998) *No Man Can Serve Two Masters: Independent Legal Advice and Solicitor's Duty of Confidentiality* Conveyancer and Property Lawyer 457

[439] Ibid., p.463

[440] Boon and Levin op. cit., n.367, pp.174-186

employment rule, per Scrutton LJ in Fullwood v Hurley (1928), imposes a prima facie high standard:

"No agent who has accepted an employment from one principal can in law accept an engagement inconsistent with his duty to the first principal from a second principal, unless he makes the fullest disclosure to each principal of his interest, and obtained the consent of each principal to the double employment"[441].

Furthermore, McKendrick considered that consent ought not be limited simply to the fact of the lawyer's double employment, but also sufficient to appraise each client in turn as to the extent to which the fiduciary's exertions on his behalf will or may be qualified or compromised.[442] This is the level of understanding that the SRA's existing rules appear to have buried. McKendrick suggested that this might even require a projection into the future to anticipate possible future conflicts. McKendrick also argued that, should an actual conflict later arise within the scope of the double engagement, then all material facts bearing on that conflict should be disclosed.[443]. However, the Privy Council test set out by Clark Boyce v Mouat (1993) [444] does not quite go this far, Lord Jauncey confirming that although there was no general rule in English law that a solicitor could never act for both parties where their interests might conflict:

"Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from given advice to one party which conflicts with the interests of the other. If the parties are content to proceed on this basis the solicitor may properly act"[445].

[441] Fullwood v Hurley [1928] I K.B. 498, 502 per Scrutton L.J.

[442] McKendrick, E. (1992) *Commercial Aspects of Trusts and Fiduciary Obligations* Oxford University Press, pp.24-25

[443] Ibid., pp.24-25

[444] Clark Boyce v Mouat [1994] 1 A.C. 428

[445] Ibid., p. 435 per Lord Jauncey. Also, although not strictly relevant to "sophisticated clients" in relation to the client's capacity, Lord Jauncey confirmed Upjohn LJ in Boulting v Association of Cinematograph, Television and Allied Technicians (1963) that *"informed consent could only be provided by an individual of full age, sui juris and fully understand not only what he is going but also what his legal rights are, and that he is in part surrendering them"* Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606 at p.636 per Upjohn LJ cited by Lord Jauncey in Clarke Boyce at pp. 435-436

It makes no specific reference to the standard of knowledge, contrary to McKendrick, and to the fact that in other jurisdictions, definitions of "informed consent" appear to be more sophisticated. In the United States for example, ABA Model Rule 1.0 (e) requires a lawyer to disclose *"adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct".*[446]

US case law has also been somewhat more explicit about precisely what is required for informed consent. In CenTra Inc. v Estrin (2008) the US Court of Appeals interpreted the ABA and Restatement rules on the topic in light of representations made to a client by the international law firm Gowlings LLP,[447] and decided that it was not sufficient to leave a client to infer the nature of a conflict from *"bits and pieces of actual or constructive knowledge"*. Rather, a lawyer must explain to them the nature of the conflict in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel. Furthermore, knowledge of earlier conflicts is not sufficient either. "The informed part of the consent is tied to knowledge of the conflict in question, not different conflicts". Nevertheless, the Court considered that inferred consent might be possible, but only provided there had been "*active participation by a client who has reasonably adequate information about the material risks of the representation".*[448]

Of course, what lawyers and law firms actually do in practice might be another matter entirely. In empirical research by Shapiro in the US, some respondents were very candid in discussing their reluctance to disclose any information about actual or potential conflicts to clients where they had determined that a conflict was too trivial.[449] More concerningly, others admitted to not seeking a waiver or disclosing relevant facts where conflicts were only potential rather than actual. Instead, they were prepared to take the risk that a conflict might 'detonate' at a later stage, and then turn to late disclosure and consent only as a damage limitation exercise.[450] In fact, they admitted that even where measures existed within a firm to detect actual or potential conflicts, the level of information actually disclosed to clients was so poor that it might not actually enable a client to give informed consent.[451] One of the motivating factors appeared to be a reluctance to even put

[446] ABA Model Rule 1.0(e)

[447] Merged with the UK's Wragge & Co LLP in 2016

[448] CenTra Inc. et al. v Estrin et al. No. 07-1680 United States Court of Appeals Sixth Circuit pp.9-14

[449] Shapiro op. cit.., n.415, p.390

[450] Ibid., p. 384

[451] Ibid., p. 420

procedures in place to stay appraised of conflicts as they arose over time, so as to be able to turn a blind eye to any issues.[452]

However, on completely the other side of the spectrum of disclosure though, Cain et al offered another pessimistic view as to why lawyers in fact felt more comfortable disclosing and obtaining consent, because having done so, they regarded themselves as having been granted a "moral licence" to act as they saw fit from that point on in a transaction, and that as a consequence, they became more inclined to take unethical decisions.[453]

A particular risk to clients then is the "actual conflict of interest" circumstances referred to by Millet LJ in Mothew, conflicts that make it impossible for a solicitor to be able to perform and discharge the duties owed to both clients.[454] Where scenarios of these nature either are, or ought to be identified, whether or not a lawyer actually discloses this to their clients is quite another matter entirely. On the basis of Shapiro's evidence, not all lawyers can therefore be trusted to disclose the existence of such adverse interests, and the same can be said in England. In Hilton v Parker Booth & Eastwood (2005),[455] for example, this should have been obvious. A solicitor acting for both the buyer and seller on a property transaction chose not to disclose to the buyer the fact that the seller had a criminal conviction for fraud. The transaction then collapsed by reason of the seller's fraud, and the solicitor sought to justify the failure to disclose the material fact of the seller's earlier fraud to the buyer on the basis of the duty of confidentiality owed to the seller. In the House of Lords Lord Scott considered that the interests of confidentiality and disclosure owed to each client were irreconcilable, and incapable of being managed by informed consent, and had that information been disclosed to the buyer they almost certainly would not have provided informed consent.[456] A risk therefore in large law firm practice is in avoiding disclosure, or limiting disclosure and over-relying on mechanisms such as information barriers to manage conflicts, no matter how irreconcilable.

What is therefore all the more concerning in light of this is the SRA's continued drive towards devolution of regulation, and in particular the relaxation of the reporting

[452] Ibid., p. 325

[453] Cain, D.M., Loewenstein, G., and Moore, D.A. (2011) *When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interest* Journal of Consumer Research 37(5), pp. 836-857

[454] Moody v Lox & Hatt [1917] 2 Ch 71 at 81

[455] Hilton v Parker Booth & Eastwood [2005] UKHL, 8

[456] Ibid., per Lord Scott at para. 7

requirements since OFR was introduced. It could be argued that this reflects a U-turn on one of the most distinguishing features between OFR and its failed PBR parent, one that originally sought to assess not just the mechanisms behind compliance, but also its outcomes. As Chapter 2 discussed, originally the SRA's Authorisation Rules required "material" and "non-material" breaches of the rules to be reported by COLPs to the SRA[457]. However, the requirement to report breaches has been steadily diluted, so that by 2019, the requirement to report even "material" breaches had been, arguably, downgraded to "serious breaches" only. Furthermore, the very definition of "serious breaches" has now been left in the hands of large law firms by the SRA[458]. Whether COI are even regarded as serious breaches by large law firms is now a moot point therefore, or whether, given the range of measures that exist to "manage" them, this would be the approach taken as a matter of course instead.

3.10 The use of Advance Waivers

Perhaps the holy grail in escaping liability and avoiding having to report breaches to the SRA, serious or otherwise, would, if it was a feature of the law in England and Wales, be the use of advance waivers. In essence, this permits a client to consent to the future possibility of COI. These are a feature of the law in other jurisdictions such as the United States, although there is some evidence, gleaned from the factual background in English case law, that the London branch offices of US firms might be embracing the use of advance waivers anyhow.[459] This would be a concerning development as Shapiro questioned whether informed consent could ever really be provided in instances where there were still so many unknowns.[460] Nevertheless, advance waivers have been permitted by ABA Model Rule 1.7 since 2003, and their effectiveness is generally determined by the *"extent to which the client reasonably understands the material risks that the wavier entails",*[461]provided that the client is an experienced user of legal services, and that in

[457] SRA Authorisation Rules (2011) Rule 8 on "non-material breaches" and "material breaches"

[458] SRA (2019) *Reporting Concerns: Our Post-Consultation Position January 2019* para 17, pp.5 -6 the SRA did not consider it desirable to define the term "serious breach" in the Codes, as it was "concerned that any attempt to crystallise this in an exhaustive way in a rule will risk proving inflexible and becoming outdated" Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-post-consultation-position.pdf?version=4a1abb [Accessed 6 May 2021]

[459] See for example Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94 at para 17 per Field J

[460] Shapiro op. cit., n415., p.398

[461] ABA Model Rule 1.7

giving the consent, they are independently represented by other counsel.[462] Cooper has recognised that, since 2003, their use has been on the rise.[463] From an English perspective, the question is, obviously, why?

Postnikova has considered why sophisticated clients consented, despite the fact that advance waivers appear counterintuitive. Reasons include that it has helped to protect them from losing counsel's expertise when they needed it the most,[464] and that they would be very closely involved in the decision-making process on their matters anyway, by virtue of their sophisticated knowledge of the likely risks involved.[465] It appears to be a risk that some clients are willing to take, although, presumably a powerful sophisticated client might possibly be able to mount some sort of push-back if they had the bargaining power of a panel of firms to choose from. Nevertheless, advanced waivers do not appear to be watertight, and the issue of disclosure and unreasonably wide drafting might come back to haunt lawyers down the line, although the US case law on this topic is inconsistent.

In Western Sugar Coop v Archer-Daniels-Midland Co. (2011) for example Squire Pattern Boggs was disqualified from acting for Western Sugar following a law firm merger under which clients appeared to have been issued with an advance waiver, criticised by the District Court for the Central District of California for 'lacking specificity, in purporting to waive conflicts in any matter not substantially related, indefinitely, and did not identify a particular adverse client, or the types of potential conflict[466]. This was far too broad, even for a sophisticated client to consent to. However, by contrast, in the Texan District Court case of Galderma Laboratories v Actavis Mid Atlantic LLC (2013)[467] an advanced waiver clause which the Court held to be clearly too broad, was enforceable nevertheless because

[462] Ibid.

[463] Cooper, B.P. (2015) The Curious Case of Advance Conflict Waivers Legal Ethics 18(2), pp. 199-202

[464] Postnikova, E. (2015) *Conflict Waivers That Do Not Cure Conflicts Apparently Inconsistency in the Jurisprudence Governing Advance Waivers and How These Waivers Can Become More Effective,* Georgetown Journal of Legal Ethics 28, pp. 844-845

[465] Ibid., pp. 852-853

[466] Western Sugar Coop., et al. v Archer-Daniels-Midland Co. et al. (2015) No. CV 11-3473 United States District Court for the Central District of California

[467] Galderma Laboratories, L.P., Galderma Research & Development, SNC v Actavis Mid Atlantic LLC (2013) United States District Court of Texas, Dallas Division 927 F. Supp.2d 390 (2013) No 3:12-cv-2038-K

the client was *"highly sophisticated in both legal matters generally and in making decisions to retain large national firms".*[468]

There could be inferential evidence of creep of advanced waivers "across the pond" in the case of Georgian Alloys v White & Case (2014) for example, where a separate matter conflict situation arose between the London and New York offices of the firm relating to the same client, and a significant part of the internal decision-making disclosed in Court, and the reason why both London and New York decided to proceed nevertheless, was the fact that a US style advanced waiver had been provided in the firm's standard engagement letter to the clients through London:

"We represent a large number of clients in many offices throughout the world. It is possible that during the course of this or any other representation by us, other clients or new clients may seek to assert or protect interests which are averse to or different to yours. These may constitute conflicts of interest which could prevent or otherwise inhibit our ability to represent those clients or new clients or you. Given that possibility and in order to be fair to those others and you, as a condition to our undertaking this representation, it is agreed that we may continue to represent or undertake to represent existing or new clients even if those clients' interests are directly averse to or different from your or your affiliates, related entities or persons, including litigation or arbitration and any other related matter regardless of its magnitude or other importance. No attorney or staff member working on this engagement shall be involved in such an adverse representation."[469]

In the High Court, Field J's view of this advanced waiver was dismissive:

"Realistically, it has not been contended on behalf of White & Case that the waiver contained in this paragraph would defeat the Claimant's application for an injunction if, as a matter of English law, the Claimant would otherwise be entitled to the relief they seek."[470]

Nevertheless, the risk is that where such an advanced waiver is contained within a letter of engagement that has US jurisdiction and governing law clauses, presumably the fact that it is not actionable in an English Court would be irrelevant where its purpose is to be enforced in the US against a client either domiciled or with assets in that jurisdiction. This is the appearance of US principles via the backdoor in England. The threat that advanced

[468] Galderma (2013), p. 7

[469] Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94, para 16

[470] Ibid., para 17

waivers could pose to English legal practice lies in the failure, described earlier by Shapiro for lawyers to actually disclose information in downstream conflict situations,[471] coupled with what Cain suggests, is a perception of informed consent or "waiver" as a form a licence to act with impunity.[472]

3.11 Compliance and Business Systems

. The requirements for compliance and business systems were re-drafted under OFR Mark II, purportedly to reflect the new split between the Codes of Conduct dealing with firms, and individuals. Originally, OFR Mark I's Chapter 3 O(3.1) required *"effective systems and controls"* to enable the identification and assessment of potential COI.[473] Furthermore, this was supported by relatively detailed Outcomes that specified that the systems and controls in place should, in relation to own interest conflicts O(3.2) and client conflicts (O(3.3), be *"appropriate to the size and complexity of the firm and that nature of the work undertaken to enable… assessment in all the relevant circumstances".*[474] This did leave some discretion to firms and individuals to demonstrate the manner in which their systems and controls met the relevant Outcomes. However, requirements under OFR Mark II have been drafted very differently.

Confusingly, Rules 6.1-6.2 dealing with COI contain their own provision dealing with confidentiality, standing separate from the outcomes dealing with the duty of confidentiality (6.3-6.5). There is a subtle, but potentially significant difference between them. Under the COI heading, Rule 6.2(iii) states *"where appropriate, you put in place effective safeguards to protect your client's confidential information"*[475]. The inclusion of the phrase *"where appropriate"* appears to add a degree of flexibility in interpretation, which could accommodate joint-retainers where confidentiality might be lawfully displaced, as per Singla v Stockler (2012)[476] and Winters v Mishcon de Reya (2008)[477]. However, on the other hand, the risk is that this might also be interpreted provide as a recognition that in an increasingly social-media orientated and interconnected workplace

[471] Shapiro op.cit., n. 415

[472]Cain, D.M. et al. op. cit., n.514, pp. 836-857

[473] SRA Code of Conduct 2011 O (3.1)

[474] Ibid., O (3.2) and O (3.3)

[475] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELS and RFLs 2019 Rule 6.2(b)(ii)

[476] Singla v Stockler & Stockler Brunton [2012] EWHC 1176 (Ch)

[477] Winters v Mischcon de Reya [2008] EWHC 2419 (Ch)

that the potential for disclosure and circulation of confidential information is an increased, but excusable risk. This would extend existing case law such as Koch v Richards Butler (2005),[478]

Where although an injunction had been granted at first instance on the basis of the risk of inadvertent disclosure of confidential information by virtue of a solicitor having socialised with colleagues (who were, essentially her former opponents, this was overturned by the Court of Appeal which was satisfied by witness evidence from a senior partner, who admitted that, not only was there absolutely no infrastructure in place to detect such conflicts, but that it would be unreasonable to expect such:

"*it is fair to assume that qualified solicitors joining this firm will be aware of their professional duties and will avoid making such disclosure, or allowing such disclosure to happen in a casual way… [the] use of professional common sense is a much safer way of maintaining professional standards than imposing formal organisational structures*"[479]. The Court of Appeal was willing to accept this, together with post-event written affidavits as adequate proof to rebut the suggestion that there was a more than fanciful risks that confidential information could be inadvertently disclosed.

The contemporary issue now though is that, in so far as the identification and management of COI are concerned, the SRA has shifted the burden almost entirely onto the firm itself in a further devolution of regulation to the firm level. The Code of Conduct for Firms now contains Rule2: 'Compliance and Business Systems', an umbrella provision replacing COI specific rules that appeared under OFR Mark I. Those required *"systems and controls appropriate to the size and complexity of the firm and the nature of the work undertaken".*[480], This has been broadly re-drafted to *"effective governance structure, arrangements, systems and controls in place to ensure: a) you comply with all the SRA as well as other regulation and legislative requirements, which apply to you"*[481]. Furthermore, the firm is responsible for ensuring that *"managers and employees comply with the SRA regulations which apply to them."*[482]

[478] Koch Shipping Inc v Richards Butler [2002] EWCA Civ 1280

[479] Ibid., p. 8

[480] SRA code of Conduct for Solicitors 2011 O (3.1)

[481] SRA Code of Conduct for Firms 2019 Rule 2.1(a)

[482] Ibid., Rule 2.1(b)

It might be argued that this imposes a greater level of liability upon law firms, however, it could also be argued that this level of devolution also affords firms a far greater licence to systematically control individual behaviours on grounds that have little to do with ethics. In respect of "effective safeguards", OFR Mark II heralds not just devolution, but potentially a two-tier system in which individual accountability becomes a matter of compliance with the firm's own systems and controls, crushing independent and autonomous individual decision-making around COI, and undermining the enhanced individual ethical deliberation that OFR originally sought to engender. From the perspective of mitigating liability, it is the individual who fails to comply with the firm's systems and controls who is the "rogue" at fault.

3.12 Information Barriers

A common example of a compliance system is the information barrier, available to manage the duty of confidentiality. The term "Information Barrier" appears to have been first used in English case law by Staughton LJ in Re a Firm of Solicitors as a response to the imprecision of the term "Chinese Wall".[483] Nevertheless, it has been used interchangeably along with the US preferred "ethical screens/barriers" and "ethical cones". In Bolkiah, Lord Millett considered that, in relation to the duty of confidentiality

"it is insufficient for a solicitor to show that reasonable steps had been taken to protect it, rather no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest".[484]

However, a lawyer *"might be able to discharge this high burden by showing that effective internal measures are in place which will prevent disclosure".*[485]To meet this the measures needed to be an established part of the organisational structure of the firm,[486] *"not created ad hoc, nor dependent on the acceptance of staff undertakings".*[487]Arguably even stricter

[483] Re a Firm of Solicitors [1992] 1 All ER 353, p. 367

[484] Bolkiah per Lord Millett, pp. 238-239

[485] Ibid.

[486] Ibid.

[487] Ibid.

standards exist for information barriers in other jurisdictions.[488] Bolkiah was arguably a high-water mark in English case law. Lord Woolf in the Court of Appeal had considered that anything more onerous than "reasonable efforts" would *"set an unrealistic standard for the protection of confidential information"* and create *"unjustified impediments"* in the way large international firms conducted their business.[489] This attitude was to be reflected by other judges. Within a year of Bolkiah, Laddie J in Young v Robson Rhodes (A Firm) (1999)[490] watered-down Lord Millett's "organisational structure" as not a requirement, but a suggestion that it was *"more likely to work than those artificially put in place to meet a one-off problem"*[491]. This was rendered purely academic by the events in M&S v Freshfields (2004), [492] where commercial lawyers simply ignored the Bolkiah test anyway. In this matter Freshfields found itself in the Court of Appeal, appealing against an injunction granted against it for breach of the duty of confidentiality. The conflict arose because Freshfields had decided to represent a consortium being led by Philip Green in the potential purchase of M&S, while still subject to a general retainer for the provision of commercial law advice to M&S. Inevitably, the sale and purchase of the business required itself required a due diligence exercise, under which the confidential information obtained in delivering the commercial law advice was materially relevant.

Remarkably, Freshfields attempted to plead that it had owed no duty of confidentiality to M&S, by playing down the scope of adversity between its two clients. This drew upon a suggestion that commercial negotiations were not situations of adversity. Freshfields argued that it was not *"acting against"* M&S because in a takeover situation there might well be a *"friendly arrangement"*[493]. Had this been accepted it would have created an extremely flexible precedent for large law firms, but it was rejected by Pill LJ, reasoning that *"it was not right that a solicitor should be entitled to wait in a takeover situation until*

[488] See for example Kirk v First American Title Ins. Co., 183 Cal. App. 4th 776, 809-10 (2010): *"an effective wall involves the imposition of preventative measures to guarantee that information will not be conveyed*."

[489] Ibid., p.233

[490] Young and Irby v Rhodes and Attwood [1999] EWHC Ch 242

[491] Ibid., per Mr Justice Laddie at (iii) Approach and Conclusions para 2

[492] Marks & Spencer Plc. and another v Freshfields Bruckhaus Deringer [2004] EWCA 1337 and [2004] EWCA Civ 741 per Pill L.J., para. 11

[493] Ibid., para. 15.

it was clear whether the bid was going to be friendly or hostile before deciding whether or not to act".[494]

Next, Pill LJ turned his attention to the effectiveness of the 'information barrier' that Freshfields had hastily erected. He held that this had been applied as a matter of remedial action (essentially, ad hoc)[495] and, just as with KPMG in Bolkiah, the reality was that the spread of information within the firm had already taken place by the time it was erected.[496] However, perhaps one of the most intriguing elements of Freshfield's application was its argument that the conflict had not been flagged by the firm's conflicts checking systems. This prompted Pill LJ to express his surprise that the matter had only been identified as part of the company acquisition due diligence process[497], rather than at matter inception having advised in a substantial way on the matter[498].

The question now is what the response has been, if any, to OFR in more recent times by large law firms, with regard to the compliance systems required to identify and manage COI. OFR Mark II Rule 6.5 requires that where a client *"has an interest adverse to the interests of another current or former client for whom you hold confidential information which is material to that matter, unless[499]: a) effective measures have been taken which result in their being no real risk of disclosure of the confidential information[500]; or b) the current of former client whose information you hold has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information[501]".*It is notable for example that a decade after M&S v Freshfields, in the OFR-era case of Georgian American Alloys v White & Case (2014),[502] the firm's conflicts checking system had in fact been so sophisticated that it could detect a COI arising out of an arms-length beneficial ownership of a company affecting matters in two different jurisdictions, yet the decision-making process had actually been found wanting at the stage where the

[494] ibid., para. 16

[495] Marks & Spencer v Freshfields [2004] EWCA Civ 741 per Pill LJ., paras 24-26

[496] Ibid., para 35

[497] Ibid., para 26

[498] Ibid.

[499] SRA Code of Conduct for Firms 2019, and SRA Code of Conduct for Solicitors, RELS and RFLs 2019 Rule 6.5

[500] Ibid., Rule 6.5(a)

[501] Ibid., Rule 6.5(b)

[502] Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94

COI was discussed between the relevant partners and the firm's General Counsel in New York, and the decision was made to continue acting[503].

3.13 Duo Deontological Webs

Another issue relevant to large law firms when dealing with COI arises out of the transnational nature of their practice. Greenwood, commenting on how the sheer scale and geographical scope of modern law firms had weakened the regulatory ability of their professional associations, argues that law firms had outgrown the boundaries of existing regulatory agencies.[504] The problem as Vagts describes is that on any given international business transaction there might be several lawyers involved, finding themselves governed by the rules of the jurisdiction in which a contract is being negotiated, then performed, and also the rules from where they happened to have been admitted to practice.[505] In fact, lawyers are not only concerned with the ethical rules embodied in codes, but also statutes, public law, private law[506], and even the tangible impact upon decision-making made by insurance policies. This myriad of rules is what Boon and Flood referred to as a 'duo deontological' problem.[507] The Smedley Review expressed a consensus among corporate practitioners that providing services into a number of different jurisdictions was confusing and burdensome[508]. Whether OFR has addressed this adequately is debateable even on a reading of the rules themselves, because aside from considerations around the lawyer's home jurisdiction, in terms of the jurisdiction into which the legal services are being delivered, at least three potential scenarios exist by implication. These are highlighted below:

1) The solicitor or firm is providing professional services from England & Wales, or rather, "the UK" into a CCBE Member State.

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[503] Ibid., para 17

[504] Greenwood, R. (2007) *Your Ethics – Redefining Professionalism? The Impact of Management Change* in Empson, L. ed. *'Managing the Modern Law Firm: New Challenges, New Perspectives'* Oxford University Press, p.194

[505] Vagts, D. (2000) *Professional Responsibility in Transborder Practice: Conflict and Resolution* Georgetown. Journal of Legal Ethics 13, p.692

[506] Rogers, C. (2009) *Lawyers Without Borders* University of Pennsylvania Journal of International Law 30, pp.1052-1053, and also see ABA Model Rule 8.5 which deals with Choice of Law

[507] Boon, A. and Flood, J. (1999) *Globalization of Professional Ethics? The Significance of Lawyer's International Codes of Conduct* Legal Ethics 2(1), pp.37-38

[508] Smedley Review op. cit., n.424, p.66

In this case the SRA's "Cross-Border Practice Rules" apply. Specifically, Rule 5.3 specifies that when engaged in European cross-border practice you must ensure that you comply with any applicable provisions of the CCBE's Code of Conduct for European Lawyers, which includes its own COI principles. These appear to cover a wider range of duties than OFR, including the independence of the lawyer, and the freedom of the lawyer to pursue the client's case[509]; the right and duty of the lawyer to keep client's matters confidential and to respect professional secrecy[510]; avoidance of COI, between different clients or between the client and the lawyer[511]; and finally, loyalty to the client[512].

2) The solicitor or firm is established overseas as a representative, or branch office of an authorised firm, providing services outside of England & Wales.

In this case the SRA's Overseas Practice Rules apply[513]. In respect of COI there are no specific provisions in these rules in the Overseas Practice Rules, and so the assumption must be that the SRA's normal COI provisions apply, in so far as these do not conflict with local rules. Overseas Practice Rule 1.2 specifies that if there is any conflict between the Overseas Rules and any requirements the local law or regulation must prevail[514].

3) The solicitor or firm is based in England & Wales and providing services in a jurisdiction not falling within the CCBE Member States[515] (essentially, to the rest of the world)

The solicitor must follow the SRA's rules on COI for Firms and Solicitors. However, this still leaves open the possibility of conflicts between the SRA's COI rules and those of a foreign jurisdiction. The onus is then upon the solicitor and/or their firm to undertake some negotiation in an attempt to either harmonize competing standards and rules or afford the SRA's rules priority.

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[509] CCBE Code of Conduct for European Lawyers (Edition 2013) Principle (a)

[510] Ibid., Principle (b)

[511] Ibid., Principle (c)

[512] Ibid., Principle (e)

[513] SRA Overseas and Cross-Border Practice Rules (2018) Part A: Overseas Rules Available at: https://www.sra.org.uk/solicitors/standards-regulations/overseas-cross-border-practice-rules/ [Accessed 27/07/20]

[514] Ibid., However, see also the SRA Overseas Practice Rules (2019) Rule 1.3 which states that were the practice "predominantly" comprises the provision of legal services to clients within England & Wales, or in relation to assets located in located in England & Wales, the SRA Code for Individuals applies

[515] The CCBE is an association from 32 countries in Europe (comprising the European Union, Economic Area and Switzerland), and an additional 11 associate and observer members.

In fact, for these purposes the US and E&W approaches to COI since 2012 can be contrasted, Griffiths-Baker and Moore (2012) considering particular distinctions between the ABA Model Rules and the SRA's OFR Mark I Code of Conduct[516]. Most significantly, they identified the US doctrine of imputed conflicts, which is not a feature of the common law in E&W[517], or the SRA's Codes of Conduct. This is of potentially great relevance in light of US/UK firm mergers. It would seem that the ABA's approach to addressing conflicts between the US and E&W rules is more prescriptive, straight-forward and client protective as a result of ABA Model Rule 8.5 which now permits lawyers and clients to agree that their relationship concerning a matter can be governed by the conflict rules of a particular jurisdiction, provided that the client provides informed written consent to a choice of law agreement, with the desirability of seeking independent counsel advice clearly expressed. The laws then to be applied are those of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction will be applied[518].

By contrast, approaching the same issue from the E&W perspective requires reference to scenario 3) above, and under this the solicitor and firm appear to be bound to follow the SRA's rules on COI. This presents a prima facie automatic clash, with the onus presumably falling upon the solicitor/law firm to negotiate between clients, overseas regulatory bodies and the SRA to harmonize competing standards and rules as required. However, the client does not have to be advised of the value of obtaining independent advice. As Flood suggested, where a choice of law is required, the ultimate choice might not necessarily be governed by any particular ethical concern, but by perceived commercial advantages.[519]. The suggestion is that commercial concerns are what will be the main driving force in any discussions and decision-making by the law firm. Arguably, the scope for interpretation under the SRA's COI Rules exacerbates decision-making along primarily commercial as opposed to ethical lines.

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[516]Griffiths-Baker, J. and Moore, N.J. (2012) *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?* Fordham Law Review 80, p. 2541

[517] ABA Model Rule 1.9

[518] ABA Model Rule 8.5(b)(2)

[519] Flood, J. (1996) *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice* International Journal of the Legal Profession 3(1), p.178 and also Flood, J. (2012) *Transnational Lawyering: Clients, Ethics and Regulation* Chapter 9 in Mather, L. & Levin, L. *Lawyers in Practice: Ethical Decision Making in Context*, University of Chicago Press, pp.176-196

3.14 Placing the Chapter 2 Issues in Context of the Literature on Conflicts of Interest

As this chapter highlights, the CLLS played a considerable role in crafting the SRA's rules governing COI as a result of lobbying in the early 2000's. This is still reflected in the recognition of COI under the existing SRA rules, which make no direct reference to the duty of loyalty; and which also limit COI to same and related matters for example. The CLLS also authored the two exceptions under which the regulated community can act in the situations of COI. However, these rules and exceptions were also originally designed with accompanying prescriptive guidance when they were originally introduced in 2006. The risk now is that the OFR system into which they have been transplanted, and stripped of guidance, could potentially exacerbate an ethical "downgrading" by virtue of already CLLS-bespoke rules, coupled with greater scope for interpretation, and sub-contracting of compliance to the regulated community itself. As Chapter 2 considered, an effective PBR system still requires some effective external regulatory safeguards and monitoring. However, the extent to which there are effective safeguards and monitoring is questionable. For example, in terms of reporting obligations under OFR Mark II, only the most "serious breaches"[520] now need to be disclosed to the SRA[521].

Given the wide interpretive scope afforded to law firms to determine this regulatory enforcement standard of "serious breach" for themselves, quite what they might regard as "serious" in relation to COI is still unclear as a result of this literature review, and in particular whether this might even recognise acting where duties are irreconcilable and in fact un-waivable. It is also unclear how large law firms are interpreting the residual safeguards around the operation of the two exemptions, including an adequate level of disclosure for informed consent by clients, and what might satisfy a firm or lawyer that it is "reasonable" to act for all clients. Above all, not only were material phrases removed from the Codes of Conduct between OFR Mark I and OFR Mark II as part of the SRA's drive to reduce the number of words contained in the Codes, this was also accompanied by the removal of the indicative behaviours, which had been a fundamental feature of OFR Mark I. Yet, this had been conditional upon the introduction of practice context specific guidance and case studies in their place, something that has still not occurred to any noticeable degree in a large law firm practice context.

[520] SRA Code of Conduct for Firms (2019) Rule 3.10 mirrored by SRA Code of Conduct for Solicitors (2019) Rule 7.7, although Rule 7.12 considers that an individual's responsibility is fulfilled by informing the COLP

[521] SRA (2019) op. cit., n. 519

The issue under OFR Mark II is therefore a potential lack of transparency and accountability around the regulation of COI, and historical literature in the form of the SRA's Independence, Representation and Risk study[522] (contemporaneous with OFR Mark I), revealed that financial services clients were already imposing their own retainers upon their legal advisors, although the reasons identified for this were largely to do with the strategic removal of competition[523]. The question being posed five years later therefore is, what does the situation look like now? Has the practice of client-imposed retainers offering an alternative to the SRA's rules on COI grown, and is it only financial services clients who engage in this form of "independence-threatening" behaviour?

Either way, there is surely a need for the SRA to recognise client-drafted retainers as a mechanism of imposed or negotiated displacement or enhancement of duties that might completely circumvent its regulatory regime. This is especially as Greenwood highlighted, that the sheer scale and geographical scope of modern law firms might have weakened the regulatory ability of their professional association, and outgrown the boundaries of existing regulatory agencies[524]. COI is not just an English problem at this level, but a global one. Yet, as this chapter revealed, the SRA's approach towards the issue of duo-deontology also appears to reveal some significant limitations in cross-border scenarios, and unhelpfully it is devoid of any supportive guidance. As the post-OFR Georgian American Alloys v White & Case in 2014[525] served to highlight, the void might potentially be being filled by US practice instead, including the use of advance waivers. This would be an encroachment into the English legal services market by means of contract, and despite any lack of recognition of concepts such as advance waivers in English law, or under the SRA's rules. A picture might emerge as a result of data collection that the SRA's COI regime is not the regime of choice at the international level for large law firms.

Consideration also needs to be afforded to the compliance and business systems that law firms are now expected to operate pursuant to the Code of Conduct for Firms Rule 2: 'Compliance and Business Systems'. This is an umbrella provision requiring *"effective governance structure, arrangements, systems and controls in place to ensure: a) you*

[522] Vaughan and Coe op. cit., n. 418

[523] Ibid.

[524] Greenwood, R. (2007) Your *Ethics – Redefining Professionalism? The Impact of Management Change* Chapter 9 in Empson, L. ed. *Managing the Modern Law Firm: New Challenges, New Perspectives* (Oxford University Press, p. 194

[525] Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94

comply with all the SRA as well as other regulation and legislative requirements, which apply to you"[526]. Furthermore, the firm is responsible for ensuring that *"managers and employees comply with the SRA regulations which apply to them*[527]". However, what is effective has to be considered within the context of the firm itself. Chapter 4 of this thesis therefore considers a range of factors that might influence decision-making in large law firms around COI generally, and including who, and what, might be engaged in this process. This is because as considered in Chapter 2, OFR's PBR-heritage requires a regulatory focus on the design and implementation of self-regulatory mechanisms to achieve socially desirable outcomes[528]; reflexive internalised structures and procedures within organisations for continual learning and reflection[529] and as Hunt expected; *"transparent decision-making systems – and such decisions should not be left to the compliance function alone".*[530]

3.15 Conclusion

This chapter has provided COI as a lens through which to examine decision-making in light of SRA OFR, in order to support the main aim to investigate whether SRA OFR is an effective model of regulation for COI in large law firms. The key regulatory issues identified as important to determining the success or failure of SRA OFR in Chapter 2 have been placed within a COI context. As a starting point, this chapter considered the fiduciary origins of COI, and how the common law understanding of what a COI is has been 'bespoked' by the SRA's rules, and then further narrowed down in practice through the use of law firm-drafted contractual retainers. It also identified the considerable scope for interpretation that the SRA's OFR Mark II rules on COI now appear to afford law firms. In particular this goes to how they might recognise COI as arising, and when they might decide to act for a client in the event of an actual or potential COI actually being recognised. This chapter also considered the very high level of trust that has been vested in the regulated community around decision-making on COI, because of a further 'watering down' of the SRA OFR rules governing COI since SRA OFR Mark II, and that in areas such as

[526] SRA Code of Conduct for Firms 2019 Rule 2.1(a)

[527] Ibid., Rule 2.1(b)

[528] Teubner, G. (1983) Substantive and Reflexive Elements in Modern Law & Society Review 17, pp. 254-255

[529] Davies, M. (2003) *The Regulatory Crisis in the Solicitor's Profession* Legal Ethics 6, p. 194

[530] Hunt, D. (2009) *Review of the Regulation of Legal Services*, p.39 Available at: http://www.legalregulationreview.com/site.php?s=1 [Accessed 7 September 2020]

determining duo-deontological conflict for example, there is still very little specific guidance to assist large law firms in decision-making at all.

In light of the issues raised, it is necessary to determine what norms have actually arisen among large law firms in response to a lack of SRA guidance and the uncertainty created by SRA OFR, while also placing decision-making in its wider global context. This research therefore tentatively recognises the impact that powerful and sophisticated global clients might be having upon decision-making by large law firms around COI at this stage as well, regardless of the SRA's rules. Existing evidence referred to in this chapter suggests that powerful banking and financial services clients might seek to impose their own COI terms upon large law firms, entailing stricter duties of loyalty going beyond what large law firms believe is reasonable under the SRA's rules on COI. I would therefore expect to find that decision-making around COI by large law firms might be influenced by powerful clients to some extent, and perhaps even at the expense of the SRA's rules. However, it might be possible to consider how wide spread this practice actually has become among large law firms. In this respect, it has also been possible to detect through very limited English case and Solicitors Disciplinary Tribunal authority dealing with breach of the duty of confidentiality, that US COI doctrine might even be being imported into SRA regulated large law firms to govern decision-making around COI.

This chapter has therefore started to develop several Key Questions, building upon the key regulatory issues identified in Chapter 2. Specifically, how large law firms determine what standards to follow in respect of COI, including what factors are key in the private contractual negotiation over COI between parties; how the SRA's rules on COI are interpreted in the large firm context with particular regard to what is recognised as an "irreconcilable COI", a "serious breach"; also the degree of relationship between matters, and the use of the two relevant exemptions under the SRA's COI rules: "substantially common interest" and "competing for the same objective"; and how conflicts between the SRA's rules on COI and other local rules are reconciled. This might indicate whether, rather than a process of decentred intra-firm self-regulation, the SRA has in fact lost oversight of its large law firm regulated community in respect of COI instead. As a next step, these 'proto Key Questions' will be enhanced by the final literature review in Chapter 4. This considers the role likely to be played by norms of practice, and firm systems and controls in identifying and managing COI, given the significance of these processes to any effective system of intra-firm self-regulation under the SRA's OFR regime.

Chapter 4 Decision-Making in Large Law Firms

"in my 30 years in practice I never saw unethical behaviour at my firm, I dealt with at least 50 other English law firms and never saw unethical behaviour, and I would also add I spent a lot of my career running around the world practising English law…as a profession we've done a great job in selling that overseas…we wouldn't have done that if we had a profession that was riddled with bad ethics and bad morals, and not to say that there aren't people out there that are unethical, and of course there are bad apples in every crop"[531]

4.1 Introduction

The quote above was supplied by Nick Eastwell the SRA's 'City Advisor' at the time and former Managing Partner of the law firm Linklaters, while addressing the floor at a recent conference for COLPs and COFAs at the NEC Birmingham. The conference was attended by the author and also broadcast on YouTube by the SRA. The quote struck me as quite profound, largely because of what it omitted. The denial that the profession was riddled with bad ethics, and that this has been a great selling point overseas, adopts a very traditional narrative by reducing the threat down to individual solicitors, acting as rogue "bad apples" in an otherwise noble profession. It overlooks the negative impact that just one very large law firm can make, on just one occasion as the result of a decision that must surely have been considered at a collective level within the firm in question.

This statement happens to overlook the role that Linklaters itself played in the infamous Repo 105 Transactions, by furnishing Lehman Brothers with the English law legal opinion that it required to move approximately $53 billion of bad debt (equivalent to the entire GDP of Costa Rica) to an offshore entity incorporated in the BVI. Essentially, this eye-watering loss was relocated to within the BVI's less onerous transparency requirements for company filings and auditing, giving the impression to auditors, regulators and the public that Lehman Brothers was a somewhat more solvent institution than it actually was. Notably, this English law opinion was provided despite the fact that two US White Shoe

[531] Nick Eastwell (November, 2014) addressing *The SRA COLP and COFA Conference*. Available at: https://www.youtube.com/watch?v=niT59XMJ9Hw&feature=youtube[Accessed 4 May 2021]

firms had already refused to do the same.[532] The statement, made by the individual who was Linklaters Managing Partner at the time, and subsequently SRA City Advisor, made me consider what actually does pass for 'unethical behaviour', and how is this standard determined within a law firm in view of the SRA's intra-firm self-regulatory regime.

This chapter therefore builds on the literature review in Chapter 3 by considering the role that firm culture, norms and systems and controls all play determining the outcome of a decision around COI, and why systems and controls are, regardless of SRA OFR, perceived as necessary by firms because of inconsistencies in individual decision-making, and the constraints imposed by limited time and information on transactions. This is relevant because under the SRA's OFR intra-firm self-regulatory model, there is an obligation under the Code of Conduct for Firms Rule 2 for firms to develop appropriate systems and controls to detect and manage COI. This chapter therefore supports the aim of this research, to consider whether SRA OFR is an effective model of regulation for COI in large law firms by developing a further Key Question based upon the literature review in Chapter 3. This focuses on what systems to manage decision-making actually look like in respect of COI, with particular regard to who is actually involved, and what happens as a transaction progresses to detect and manage COI. Chapter 4 also recognises the role that systems might also play in respect of the Key Questions already arrived at in Chapter 3, especially, how do large law firms determine what standards to follow in respect of COI, and how conflicts between the SRA's rules on COI, and other rules are reconciled.

4.2 The Role of Culture and Norms

Nelson and Trubeck considered that there could be multiple visions of what might constitute proper behaviour by lawyers, reflecting the arenas and institutional settings in which decision-making takes place[533]. In terms of law firms therefore, Hofstede considered that the culture within a particular law firm or department could have an impact on an individual's perception of ethical situations, behavioural norms, and ethical judgements[534],

[532] Kershaw, D. and Moorhead, R. (2013) *Where Were the Lawyers When Lehman Crashed?* The Times 24 January 2013 Available at: https://www.thetimes.co.uk/article/where-were-the-lawyers-when-lehman-crashed-9p9tdgcgfpx [Accessed 3 May 2021]

[533] Nelson, R. and Trubeck, D. (1992) *Introduction: new problems and new paradigms in studies of the legal profession' in* Nelson, R. Trubeck, D and Solomon, R. (Eds) Lawyers *Ideals / Lawyers Practices* Cornell University Press

[534] Hofstede, G. (1985) *The Interaction Between National and Organizational Value Systems* Journal of Management Studies 22(4), pp. 347-357

and described the shared perception of daily practices as 'organisational culture'[535]. Similarly, Boon and Levin defined a norm in legal practice as the characteristic spirit and beliefs of community, people, system…or person[536], and the behaviour accepted within a group of individuals to the statistical average of characteristics[537], or the unrecognised but persistent behavioural regularities[538]. An individual decision that met norms is therefore one that can be considered both legally and morally acceptable to the community according to Jones[539].

Leslie and Mather suggested that lawyers learn norms of behaviour though a mixture of direct instruction, conversations overheard, and observation of lawyers around them within their "community of practice"[540], and Nelson considered that it was only the most powerful, charismatic partners in the firm that were actually able to determine the norms followed within the range of communities of practice[541]. Kirkland tested this theory in a litigation practice, considering the hierarchical structures and rules that lawyers in large firms developed to negotiate the structures laid down by the dominant partners. She discovered that it was the status derived from a lawyer's role in the client relationship that was key[542], and she categorised individuals as either 'finders', 'binders' and 'minders'[543]. 'Finders' sat at the top of the hierarchy and actually held the client relationship; 'binders' were case managers who cemented and expanded existing relationships, and 'minders' were still dependent on 'finders' for their work. It was therefore the most profitable 'finders' and 'binders' that gained the greatest "moral authority" and created the norms for others to follow[544].

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[535] Hofstede, G. (1994) *Cultures and Organisations* London, HarperCollins Business.

[536] Boon, A. and Levin, J. (2008) *The Ethics and Conduct of Lawyers in England and Wales* 2nd Ed. Oxford, Hart Publishing

[537] Bayles, M.D. (1989) *Professional Ethics*, Belmont, California, Wadsworth Publishing, 2nd Ed.

[538] Posner, E.A. (2000) *Law and Social Norms*, Cambridge, MA, Harvard University Press

[539] Jones, T.M. (1991) *Ethical Decision Making by Individuals in Organisations: An Issue-Contingent Model* Academy of Management Review 16(2) pp. 366-395

[540] Mather, L. and Leslie, C. (2012) *Introducing Perspectives on Ethics in Context: Why Context Matters* in Mather, L. & Leslie, C. eds. *Lawyers in Practice Ethical Decision Making in Context* University of Chicago pp. 15-16

[541] Kirkland. K. (2005) *Ethics in Large Law Firms: The Principle of Pragmatism*, University of Memphis Law Review 4, p. 631

[542] Ibid., pp. 661-666

[543] Ibid., pp. 661-666

[544] Ibid., p. 718

By contrast, Kirkland's "minders" and "finders" were not generating norms of their own, but bound to try and meet their managers' expectations. In instances where they had to choose between norms, Kirkland described how in order to do this they followed self-imposed 'choice of norm' rules[545]. The critical factor was likely to be what they perceived would be which norm that their immediate superior would follow in that situation[546], and emulating decision-making in this way deeply rooted in promotion prospects. Kirkland cited Galanter and Palay's 1994 book 'Tournament of Lawyers' which described how associates were constantly monitored, seeded and tracked by partners in the tournament for promotion[547]. Research by Faulconbridge et al supports this, recognising that a process of 'socialisation' occurred within a Community of Practice**,** and that key to the choice between norms was the question "who am I and how I should act", and "who should they be and how they should act". The eventual outcome was therefore underpinned by power relations including promotion, appraisals, and also training in which the expectations could be more clearly defined[548], and which Somerlad characterised as a process of "experimental learning", but under which technical and cultural practices are modelled *"by the master"* to break individuals down and remake them in the image of the firm[549]. Empson (2007) recognised how 'peer group' or 'collegial control' was a significant means by which partners can signal their displeasure with brethren, and get individual partners to tow the normative line[550].

4.3 Recognising Conflicts of Interest Norms in Practice

The question arises how COI might actually be recognised in practice by lawyers working in large law firms. Essentially, what are the norms that have developed through practice. Chapter 3 considered COI through its fiduciary and legal lenses, and so identified that the

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[545] Ibid., p. 659

[546] Ibid., p. 638

[547] Ibid., p .650 citing Galanter, M. and Palay, T. (1994) *Tournament of Lawyers: The Transformation of the Big Law Firm,* University of Chicago Press

[548] Faulconbridge, J.R., Cook, A. and Muzio, D. (2012) *Learning to be a Lawyer in Transnational Law Firms: Communities of Practice, Institutions and Identity Regulation* Global Networks 12(1), pp. 48-70

[549] Sommerlad, H. (1995) *Managerialism and the Legal Professional: A New Professional Paradigm* International Journal of the Legal Profession 2(2) pp. 159-185. quoted in Mather, L. *How and Why Do Lawyers Misbehave?* Chapter 6 in Cummings, S.L. (ed.) *The Paradox of Professionalism: Lawyers and the Possibility of Justice* Cambridge University Press, New York, pp. 109-132

[550] Empson, L. ed. (2007) *Managing the Modern Law Firm: New Challenges, New Perspectives* (Oxford University Press pp. 21-27

SRA's regulatory regime provided a highly 'bespoked' version of COI. However, existing literature also suggests that lawyers themselves view COI in a variety of subject-matter dependent scenarios. Empirical work by Shapiro gathered from 250 practitioners in Illinois[551] for example considered that decision-making was formulated around the likelihood that "potential" conflicts might become adverse as the result of changing circumstances during the life cycle of a transaction, essentially "downstream". By contrast to "actual" conflicts which were adverse from the outset of a transaction, a failure to disclose the nature or potential existence of a potential COI to a client was justified provided it did not actually "detonate", and the motivation for not telling the client was economic, in not wanting to tell the client that they could not be represented[552]. However, literature also suggests that there might be a range of other classifications by practitioners, reflecting temporal and subject-matter oriented definitions. I therefore hope to detect any norms which have emerged in response to dealing with powerful clients.

4.3.1 Legal Conflicts

4.3.1.1 Personal Conflicts

Salzedo & Hollander defined these as "*in so far as possible"*, for a lawyer to prefer the client's interests to their own[553]. Chapter 3 considered how an appropriate balance and transparency was necessary to avoid the suggestion of breach[554]. These also arise in lateral hiring situations, given that individuals continue to owe duties of confidentiality towards their former clients on moving firm. This can become an issue for the new firm in relation to the duty of confidentiality, and, in particular, in the United States ABA Model Rule 1.10 imposes 'imputed knowledge' on a firm[555].

4.3.1.2 Same Matter Conflicts

A lawyer represents at least two clients at the same time, and owes an undivided duty of loyalty to both or more[556]. The clearest scenario is where two clients appear on either side

[551] Shapiro. S. (2002) *Tangled Loyalties: Conflicts of Interest in Legal Practice* American Bar Association, Michigan p. 446

[552] Ibid., p.420

[553]Hollander, C. and Salzedo, S. (2011) Conflicts *of Interest* London, Sweet & Maxwell, p.3

[554] Boardman v Phipps [1966] UKHL 2

[555]https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule.html [accessed 4 May 2021]

[556] Parker, C. and Evans, A. (2014) *Inside Lawyer's Ethics* 2nd Ed. Cambridge University Press

of a matter[557]. At its simplest, where interests are adverse between clients in an actual or potential COI scenario, the maxim that "no man can serve two masters for he will love one and hate the other"[558] holds true. In other words, that a fiduciary attempting to serve two clients in a matter in which their interests are adverse, or in a matter in which one's loss translates directly into another's gain, is unable to promote the interests of each with loyal vigour[559].

4.3.1.3 Simultaneous Matter Conflicts

Sometimes simultaneous representations in distinct or wholly unrelated matters can make interests adverse or potentially adverse. The primary danger is that a lawyer who represents adverse interests may develop a "sense of loyalty" to one client that will "undermine" his representation of the other. As considered in Chapter 3, under the SRA's Codes for a client to be afforded any protection at all, a firm/solicitor must first consider the situation to be a "same or related matter". If the latter, there is still discretion around interpretation of the degree of relationship. Next, they must recognise an actual conflict, or a "significant risk" of one (a potential one). Finally, even if a lawyer considers that there is an actual or a potential COI, one of the two exceptions to acting might still apply[560].

In relation to the interpretation of "related" and "unrelated", the law under Marks and Spencer v Freshfields (2004) left the issue open:" the *Court must consider what the relationship is between the two transactions concerned"*[561]. By contrast, US authority is more specific, for example the Supreme Court of New Jersey in City of Atlantic City v Zachirias Trupos et al considering that a matter is *"substantially related"* if *"(1) the lawyer for whom the disqualification is sought received confidential information from the former client that can be used against that client in subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation"*[562].

[557] Ibid., p.4

[558] Matthew 6:24, Holy Bible: King James Version

[559] See Developments – Conflicts of Interest in the Legal Profession Harvard Law Review Vol 98 April 1981 No 6 1247 at p. 1296

[560] SRA Code 2019 Rule 6.2

[561] Marks & Spencers v Freshfields [2004] EWCA Civ 741per LJ Pill at para 10-11

[562] City of Atlantic City v Zachirias Trupos, et al. 25 N.J. Tax 108 (N.J. Tax 2009) at para-C

4.3.1.4 Former Client Matter Conflicts

There has been only very limited success by the judiciary in attempting to establish a duty of loyalty to former clients at the end of a contractual retainer outside the jurisdiction of England & Wales. In the New South Wales Supreme Court case of Spincode Pty Ltd v Look Software Pty Ltd (2001)[563], Brooking JA opined that where a firm had acted for two clients on separate matters in the past, and then their interests became adverse in the same matter, but the firm continued to act for both, the firm owed a duty not to prefer one client over the other[564]. Importantly, the duty was not extinguished if the retainer of one of them was ended[565]. The rationale was that a litigant should not be deprived of his choice of counsel through counsel switching-sides during the course of a matter[566]. Spincode has not however become ratio in the 20 years that have followed, and under English law it is the case that no duty of loyalty is afforded to a former client at the end of a retainer. All that subsists is the duty of confidentiality[567].

4.3.2 Positional and Commercial Conflicts

Shapiro described positional conflicts as about business, client relations, intra-firm politics, and how to serve the needs of important clients without undermining or alienating others[568]. It can arise when a law firm takes a position on behalf of one client seeking a result that is directly contrary to the position taken on behalf of another client in a separate, unrelated matter. Positional conflicts would appear to be a fundamental consideration at the outset of a transaction, along with "legal conflicts". Griffiths-Baker's City law firm subjects' rule of thumb in considering the essence of the adversity involved was often whether acting would seriously 'annoy' another client to the extent that they would withdraw business on the basis that they had adverse general commercial interests[569]. It has however been argued that a positional or commercial conflict could

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[563] Spincode Pty Ltd v Look Software Pty Ltd [2001] VSCA 248

[564] in Asia Pactifc Telecommunications Ltd v Optus Networths Pty Ltd [2005] NSWSC 550 at para 37-41, Bergin J distinguished Spincode on its facts, and noted that Brooking JA's observations on the duty of loyalty were obiter

[565] Ibid.

[566] Spincode Pty Ltd v Look Software Pty Ltd [2001] VSCA. 248 at 521-522

[567] Hollander and Salzedo op. cit., n.614, p. 3

[568] Shapiro, S. (2000) *Everests of the Mundane: Conflicts of Interest in Real-World Legal Practice* Fordham Law Review 69(3), pp.1166 – 1167

[569]Griffiths-Baker, J. (2002) *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* Oxford, Hart Publishing, pp. 113-114

nevertheless become a material limitation where a client's position meant that a lawyer was just inclined to pull their punches more for another client[570], and as Salzedo and Hollander considered a 'commercial conflict' might "blend into" the wider fiduciary duty of loyalty[571].

There might also be other broader stakeholder related reasons to recognise a positional conflict. Tenbrunsel et al described how wider reputational concerns were important drivers encouraging legal services to be delivered within the spirit of the law as well as the letter of the law[572]. Nielson and Parker organised stakeholders into three main categories: 1) economic stakeholders who included shareholders, investors, banks and customers who expect that a business meets debt obligations, and offers goods and services that are fit for purpose at a fair price; 2) legal and social stakeholders, including regulators and legislators who have very specific expectations about business compliance with legal standards, and; 3) social stakeholders such as neighbours, activist organisations and the general public who might expect a business to comply with the law, but go beyond compliance to address specific issues[573]. It was this latter category of stakeholder especially that could influence decision-making by effectively publicly shaming an organisation[574]. However, literature would also suggest that a very strong influence also arises from a firm's professional indemnity insurers, Shapiro referring to the fact that insurers took a particular interest in COI, and instituted extensive loss prevention programmes to help law firms to identify them[575]. This study will need to consider whether it is in fact these forms of positional or commercial conflicts that exert a stronger influence over decision-making than legal forms of COI in large law firms.

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[570] Boies Schiller Flexner (18 April 2017) *Counsel to Counsel: Evaluating Positional Conflicts* Available at: https://www.bsfllp.com/news-events/counsel-to-cousnel-evaluating-positional-conflicts [Accessed 7 September 2020]

[571] Ibid.

[572] Tenbrunsel, A.E (1998) *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation,* Academy of Management Journal, 41(3), p. 330

[573] Nielson, V. and Parker, C. (2008) *To What Extent Do Third Parties Influence Business Compliance?* Journal of Law and Society 35(3), pp.309-314

[574] Ibid., pp.313

[575] Shapiro op. cit., n. 615, p.428

4.4 Individual Decision-Making – Deliberative and Parallel Theory

While the subject-matter related definitions of COI, including several influential, but non-legal classifications might be considered as norms of practice that appear to have become established across the industry, this does not mean that they will necessarily be interpreted in the same manner by individuals. This can be dependent on a wider variety of factors. Furthermore, in relation to "legal conflicts", a problem for large law firms in this respect is that OFR Mark II imposes a requirement on law firms to be responsible for compliance with the SRA's rules on COI by individuals[576]. Inconsistency in individual interpretive approaches, and especially across organisations comprising in excess of 1000 fee-earners could pose a considerable regulatory liability. This study does not focus on testing individual decision-making psychology in response to instances of COI, however literature in this area is particularly illuminating and perhaps helps to understand some of the rationales for business and compliance systems as a means to managing, or perhaps even, controlling individual decision-making on ethical issues.

One of the most widely cited linear theories in this respect is Kohlberg's moral development theory. Briefly, this considered that individual decision-making reflected six stages of moral development, which cannot be skipped[577]. The stages increase in sequence of sophistication, moving from the very basic level of pre-conventional level of moral reasoning common in children where reasoners judge the morality of an action by its direct consequences; through to a conventional level of moral reasoning typical of most adolescents and adults, under which we judge the morality of actions by comparing them to society's views and expectations; then at the highest 'principled level', individuals recognise that they are separate entities from society, and that their own perspective may take precedence over society's view. Unfortunately for law firms, the lawyers that they employ are trained not to view rules as absolute dictates that must be obeyed without question. Thus, there is a risk that any internal policies that are implemented around COI might not be followed at all, or potentially become subject to creative compliance defined by McBarnett and Whelan as:

[576] SRA Code 2019 Rule 2

[577] Kohlberg, L. (1973) *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, Journal 70 (18), pp. 630–646

"the practice of using the letter of the law to defeat its spirit, and to do so with impunity[578]".

Similarly, by Baldwin, Cave and Lodge as:

"the process whereby those regulated avoid having to break the rules and do so by circumventing the scope of a rule while still breaching the spirit of the rule2".[579]

Rest extended Kohlberg's six-stage model into a wider contextual setting with his Four-component model[580]. This recognised the significance of the cognitive stages of moral development, but placed them into the context of 4 variables, whereby an individual must (a) actually recognises the moral issue first; then (b) make a moral judgement of their own; (c) resolve to place moral concerns ahead of other concerns; before (d) acting[581]. An individual has to actually recognise a COI as a COI to begin with, so the question for this study is what is the trigger? The latter two components of the test would appear to best reflect the need to act in a client's best interest when making a decision whether or not to act where interests are actually, or potentially adverse to each other. For example, where a lawyer acts despite a personal conflict situation, they fail, very seriously, to put other interests ahead of their own.

Further developments of Rest's Four-component model would suggest that this behaviour reflects a low level of 'moral intensity' under Jones' six-step 'moral intensity model'[582], a construct capturing the issue-related moral imperative in a situation[583]. This includes the extent to which an individual considers: 1) the magnitude of consequences to victims or beneficiaries; 2) the degree of social agreement that a proposed act is evil or good; 3) the probability that the act in question will actually take place and the act in question will actually cause the harm predicted; 4) the length of time between the present and onset of consequences of the moral act in question; 5) the feeling of proximity that the moral agent

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[578578] McBarnett, D. and Whelan, C. (1991) *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control* Modern Law Review 54, p. p848

[579] Baldwin, R., Cave, M., and Lodge, M. (2012) *Understanding Regulation: Theory, Strategy and Practice*, Oxford University Press, p. 232

[580] Craft, J.L. (2013) *A Review of the Empirical Ethical Decision-Making Literature 2004-2011* Journal of Business Ethics 117, pp. 221-259

[581] Rest, J.R. (1986) *Moral development: Advances in Research and Theory* New York, Praeger

[582] Jones, T.M. (1991) *Ethical Decision Making by Individuals in Organisations: An Issue-Contingent Model,* The Academy of Management Review,16(2), pp.366-395

[583] Ibid.

has for victims or beneficiaries of the act in question; and 6) the number of people affected by an act of given magnitude[584]. Notably, the SRA's Enforcement Strategy requires reporting by COLPs where there has been "serious breach", and its accompanying guidance does ask COLPs consider the extent of harm to the "victim"[585]. The extent of moral intensity in decision-making by COLPS in relation to COI might form the basis of a very interesting study in its own right, but does not form part of this study, and in any event more recent literature considers that the issue might well be more complex.

Despite these deliberative approaches, in terms of their outputs, lawyers might be especially adept at the practice of exercising moral disengagement where they need to achieve an outcome that conflicts with their own personal moral values. Bandura considered that individuals might be able to readily disengage with their own personal moral values in order to make a decision that they feel that they ought to, rather than one that they would have done, and in a manner that minimises any personal feelings of guilt that they might have[586]. In the literature on large law firm corporate lawyers there is some support for this, Vaughan and Oakley suggesting that modern-day corporate lawyers are 'ethically apathetic': neither good nor bad, but rather indifferent and unenthusiastic when it comes to the disconnect between personal moral values and actions. This form of disengagement mechanism was also articulated earlier by the "standard conception" of legal ethics, in essence that lawyers consider that it is not for them to judge what their clients do, or be responsible for their actions[587]. This also fits well with the moral licencing theory suggested by Cain, through the obtaining of informed consent or waiver in a COI situation[588].

Recent literature has also challenged the mostly linear, deliberative decision-making approaches. Haidt for example considered that individuals actually reacted emotionally and automatically to ethically charged situations, by forming instant judgements that

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[584] Ibid., pp. 374-378

[585] SRA (2019) *Enforcement Strategy* Available at: https://www.sra.org.uk/sra/corporate-strategy/sub-strategies/sra-enforcement-strategy/ [Accessed 6 September 2020]

[586] Bandura, A. (1999) *Moral disengagement in the preparation of inhumanities*, Personal and Social Psychology Review, 3, pp. 193-209

[587] Vaughan, S. and Oakely, E. (2016) *Gorilla Exceptions and the Ethically Apathetic Corporate Lawyer,* Legal Ethics 19 pp. 50-75

[588] Cain, D.M., Loewenstein, G., and Moore, D.A. (2011) *When Sunlight Fails to Disinfect: Understanding the Perverse Effects of Disclosing Conflicts of Interest,* Journal of Consumer Research 37(5), pp. 836-857

would later be 'post-rationalised'[589]; Robbennolt considered that ethical decision-making actually occurred intuitively[590]; and that rather than taking ethical decisions in a situational vacuum, individuals often simultaneously proceeded through multiple interrelated decision-streams, their progression through one decision stream being influenced by one or more parallel decision-streams[591]. In this respect Robbennolt considered that an individual's past ethical behaviour might even provide the wiggle room necessary to justify current unethical behaviour through the acquisition of ethical or moral credits[592]. This could mean that under pressure, where lawyers are managing several client matter files in parallel, potentially for the same clients, and following similar transactional structures, that these particular nuances give rise to an actual or potential COI that are simply missed, because the recognition of adversity upon which any decision is based, belongs to the circumstances of another transaction.

4.4.1 The Bounded Rationality Problem

The potential for intuitive decision-making processes would appear to be most likely in a practice context at matter inception, because transactions move at a pace dictated by the client, and where there might only be a brief window to consider a COI issue. Bounded rationality recognises the limitations of time, limited information, and limited cognition of individuals available at the time of decision-making'[593]. Kahneman and Tversky for example suggested on the basis of clinical trials that heuristic methods were developed by individuals, sometimes subconsciously, to speed up decision-making, including the development of mental shortcuts, including heuristic anchors around which the eventual outcome could be adjusted[594]. Kahneman considered that the choice of 'anchor' was made on the basis of intuition[595], and Newell and Broder (2008) recognised that individuals might eventually hold collections of simplifying heuristics that could be deployed in a sophisticated way to sample perceived options until sufficient evidence has been gathered

[589] Haidt, J. (2001) *The emotional dog and its rational tail: A social intuitionist approach to moral judgment*, Psychological Review, 108(4), pp. 814–834

[590] Robbennolt, J. (2015) *Annual Review of Law and Social Science* 11, pp. 75-93

[591] Ibid.

[592] Ibid.

[593] Ibid.

[594] Kahneman, D., Slovic, P. and Tversky, A. (1982) *Judgement Under Uncertainty: Heuristics and Biases*, Cambridge University Press

[595] Kahneman, D. (2003) *Maps of Bounded Rationality: Psychology for Behavioural Economics* American Economic Review 95(5), p.1460

to favour one option above the other[596]. According to Nelson (2005) with experience, some individuals might even be able to recognise certain key path characteristics and discriminate between them guided by a form of cognitive map[597].

Importantly, Bamberger (2006) recognised that it was in the interests of organisations to exploit individual heuristics, describing how organisations used 'knowledge structures' to serve as the rules and procedures for making sense of situations and identifying the appropriate response quickly. In essence these structures enabled individuals to identify the type of challenge they faced efficiently, focus their attention on the kind of information needed for that sort of situation, and invoke an applicable rule of behaviour swiftly. Bamberger cited formal rules, embodied in standard operating procedures, handbooks, and organisational charts, and also rules developed on the ground through the evolution of informal routines and rules of thumb[598]. From the perspective of a large law firm, there could be considerable incentive in developing operating procedures to assist individuals in developing the right anchors and psychology. The risk identified by Bamberger though is that predictable decision-making could develop that might not be appropriate for new situations, because it causes the knowledge required for an informed judgement to be omitted from consideration at both an individual and organisational level[599] a sort of "ethical blindness".

Literature supports this; Kahneman recognised that some experienced decision-makers working under pressure rarely chose between different options because only a single option came to mind intuitively rather than rationally[600], and Engel and Giergenzer commented that it might eventually lead to hardly anyone consulting a statute or a casebook before taking actions[601]. In fact, more recent research conducted on large law

[596] Newell, B. R. (2008) *Cognitive Processes, Models and Metaphors in Decision Research,* Judgment and Decision Making 3(3), p.198

[597] Nelson, R. (2005) *Bounded Rationality, Cognitive Maps, and Trial and Error Learning*, Laboratory of Economics and Management Sant'Anna School of Advanced Studies Working Paper, Available at http://www.lem.sssup.it/WPLem/files/2005-28.pdf

[598] Bamberger, K. (2006) *Regulation as Delegation: Private Firms, Decision making, and Accountability in the Administrative State* Duke Law Journal 56(2), pp.414-415

[599] Ibid*.,* p.426

[600] Kahneman op. cit*.,* n.657, p.1454

[601] Engel, C. and Gigerenzer, G. (2006) *Law and Heuristics an Interdisciplinary Venture* Chapter 1 in Gigerenzer, G. and Engel, C. eds. *Heuristics and the Law* MIT Press, p. 12

firm lawyers by Vaughan,[602] detected that individuals appeared to display a lack of knowledge of the SRA's Handbook Principles, some interviewees admitting to not picking up the Handbook at all, and specifically, saw the COLPs as "oracles" to whom they could turn for answers[603], and little justification for not picking up the Handbook because of what they felt was the high quality training that they received from the firm, and having a sense of where the "red lines" were[604].

The concept of a 'risk appetite' or level of acceptable risk among lawyers working in-house was recognised by Moorhead and Vaughan, appearing to emerge from a complex set of business-led commercial and social interactions[605]. They considered that, in general, risk management increased the appetite for taking risks because it increased confidence that risk was both understood and manageable[606]. They also suggested that the appetite for risk was only really reduced by very costly risks such as criminal investigation or sanctions, especially when aimed at senior officers and employees[607]. The whole system appeared to depend upon the existence of 'redlines', which indicated the comfort/discomfort boundary[608], but with no apparent reliance in formulating them on the general ethical principles from the Code of Conduct. The extent to which 'redlines' and 'risk appetite' feature in decision-making around COI, including its legal forms should be recognised in this study as potentially very significant to decision-making under the conditions of large law firm practice, but also a potential threat to the fiduciary relationship.

4.4.2 Managing Individual Decision-making

In particular, organisational strategies that might encourage the development of redlines and risk appetite could, as Messick and Bazerman considered, unduly restrict the

[602] Vaughan, S. (2016) Response to LSUC Consultation paper: Promoting Better Legal Practices CEPLER Working Paper Series, Available at: http://epapers.bham.ac.uk/2121/ [Accessed 7 May 2021]

[603] Ibid. pp.9-10

[604] Ibid. p. 12

[605] Moorhead, R. and Vaughan, S. (2015) *Legal Risk: Definition, Management and Ethics* UCL Centre for Ethics and Law Report, p. 21 Available at: https://www.researchgate.net/publication/314719553_Legal_Risk_Definition_Management_and_Ethics [Accessed 7 May 2021]

[606] Ibid., p. 20

[607] Ibid., p. 28

[608] Ibid., p. 29

complexity of the decision-making process[609] through what Kirkland characterised as organisational pragmatism in place of principled decision-making. The risk is that over time lawyers will be encouraged to become more unethical in their decision-making as a result of bureaucratic and normative processes [610]. An example of this was what she recognised as 'box-ticking ceremonial compliance', an exercise in providing visible indicators of legitimacy and procedure by signalling the appearance of perusing ethical organisational goals, but that fails to address deeper problems inherent in existing routines and structures[611]. The comment made by Hector Sants in the aftermath of the failure of FSA PBR that PBR did not work where individuals did not have principles[612], would seem only partially correct therefore, as it would also seem possible for individuals to adhere to compliance systems as they are expected to, yet the compliance system itself has been structured in such a manner as to make them blind to serious ethical issues.

From a law firm General Counsel's point of view though, it could be a case of compromise given the sheer scale of the global empires that some large law firms have built in the past few years. One of the prevailing philosophies to emerge in recent years to help inform and govern approaches to individual and organisational decision-making is Risk Management[613] which Hubbard defined as the identification, evaluation, and prioritisation of risks, followed by co-ordinated and economical application of resources to minimise, monitor, and control the probability of impact or unfortunate events, or to maximise the realisation of opportunities"[614]. Again, reception from the academic community towards risk management has been mixed. Alfieri for example argued that the increased focus on "risk management" in large law firms had diminished lawyers' appreciation of the moral choices they faced[615], and empirical research conducted by Chambliss appeared to confirm this trend, noting how in-house counsel had started to talk in terms of "risk" and "risk

[609] Messick, D.M. and Bazerman, M.H., (1996) *Ethical Leadership and the Psychology of Decision-Making* MIT Sloan Management Review Available at http://sloanreview.mit.edu/article/ethical-leadership-and-the-psychology-of-decision-making [Accessed 4 May 2020]

[610] Kirkland op. cit., n.602, p. 639

[611] Ibid.

[612] Hunt, D. (2009) *Review of the Regulation of Legal Services* (2009) Available at: http://www.legalregulationreview.com/site.php?s=1 [Accessed 7 September 2020]

[613] Davis, A. (2016) *Risk Management in Law Firms,* International Bar Association

[614] Hubbard, D. (2009) *The Failure of Risk Management: Why It's Broken and How to Fix It.,* John Wiley & Sons., p. 46.

[615] Alfieri, A.V. (2006) *The Fall of Legal Ethics and the Rise of Risk Management* Georgetown Journal of Legal Ethics 94, pp. 1909-1955

management" rather than "ethics"[616], and in her later work she revealed that beyond a mere shift in vocabulary, ethics was being increasingly perceived as a specialism among lawyers[617]. The extent to which this trend might have continued in the intervening 15 years could potentially be detected by this study, and especially in light of the apparent use of redlines and risk appetites among in-house lawyers detected by Vaughan and Moorhead[618].

However, individuals engaged in the provision of consultancy services within the field of professional responsibility to large law firms disagree that risk management has a negative impact on individual ethics. Davis for example argued that it actually enhanced individual ethical deliberation and that, far from undermining individual ethics, it was about instituting ethical values and giving them concrete form[619]. He also argued that where risk management could not provide a solution, individuals would in practice turn to the General Counsel to discuss issues, so learning about ethics in the process[620]. The problem with this argument though arises where decision-making has been taken entirely out of the hands of fee-earning lawyers, so that no ethical deliberation can take place and, in direct contravention to how Hunt originally envisaged PBR as working, is left to the compliance function to manage alone[621]. In this respect, Alfieri responding to Davis, argued that risk management systems are not really designed to "cultivate" independent moral judgment and individual social responsibility[622], and similar views were expressed by Flood and Muzio, who argued that lawyers inside international firms were no-longer even thinking about cross-border ethical issues because of their intrinsic complexity and pressures of work. He noted that Allen & Overy for example had at least 15 General Counsel who dealt

[616] Chambliss, E. (2006) *The Professionalization of Law Firm In-House Counsel* North Carolina Law Review 84, pp. 1516-1576

[617] Chambliss, E. (2012) *Whose Ethics? The Benchmark Problem in Legal Ethics Research: Why Context Matters* Chapter 3 in Mather & Leslie eds. '*Lawyers in Practice Ethical Decision Making in Context*, University of Chicago, p.57

[618] Moorhead, R. and Vaughan, S. (2015) Op. Cit., n.666, p. 29

[619] Davis, A.E. (2008) *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation,* Georgetown Journal of Legal Ethics 21, p.95)

[620] Ibid. p. 114

[621] Hunt, p.39

[622] Alfieri, A.V. (2011*) Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity* Georgetown Journal of Legal Ethics 24, p p.994

with rules and general compliance[623]. This study will seek to identify who and what systems are involved in decision-making around COI in large law firms, and in particular, the extent to which fee-earners are engaged in it at all levels of the law firm hierarchy.

4.5 Decision-making under OFR

The size of Allen & Overy's GC team highlights the fact that Law firms not only have to accommodate a diversity of different individual approaches to decision-making, but also develop compliance structures that will fit their particular operating form. The term 'ethical infrastructure' was coined by Ted Schneyer to describe the internal management efforts that law firms made that were often backed by disciplinary sanctions to ensure ethical conduct by individuals[624]. Work by Chambliss and Wilkins expanded upon this to include the organisational policies, procedures and incentives for promoting compliance with ethical values[625], and similarly Parker et al considered that ethical infrastructure did not just ensure compliance with bureaucratic standards, but actively promoted ethical culture[626]. Schneyer revisited his original definition twenty years later in 2011, broadening it to refer to the policies, procedures, systems, and structures that ensured lawyers in their firm complied with their ethical duties, but also that non-lawyers associated with the firm behave in a manner consistent with the lawyer's duties[627]. In respect of ethical infrastructure, OFR Mark II explicitly recognises duties as owed by the firm, solicitors, and the managers and other individuals who work for them[628], and originally envisaged the role of COLP as engendering an ethical culture throughout the rest of the firm[629].

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[623] Flood, J. and Muzio, D. (2012) Flood, J. and Muzio, D. (2012) Entrepreneurship, Managerialism and Professionalism in Action: The Caw of the Legal Profession in England & Wales in Reihlen, M. and Werr, A. (eds.) Handbook of Research on Entrepreneurship in Professional Services (Cheltenham, Edward Elgar), pp. 319 - 386

[624] Schneyer, T. (1991) *Professional discipline for law firms* Cornell Law Rev 77(1)

[625] Chambliss, E. and Wilkins, D. (2002) *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting,* Hofstra Law Review 30(3), p.692

[626] Parker, C. et al. (2008) op. cit., n.634, p. 3

[627] Schneyer, T. (2011) *On Further Reflection: How "Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firm Management* Arizona Law Review 53, p.577

[628] SRA Code of Conduct for Firms 2019 Rule 2 'Compliance and Business Systems' requires a firm to have in place *"effective governance structures, arrangements, systems and controls in place that ensure";* Specifically, Rule 2.1(b) *"managers and employees comply with the SRA regulatory arrangements that apply to them"* SRA Code of Conduct for Firms ; Rule 2.1(c) *"you employ or contract with do not cause or substantially contribute to a breach of the SRA's regulatory arrangements by your or your managers or employees";* Rule 2.1(d) *"your compliance officers are able to discharge their duties under paragraphs 9.1 and 9.2";* Rules 3.9 and 3.10 imposes a duty on

Aulakh and Loughrey suggested on the basis of interviews conducted at 11 large firms that lawyers were, in line with Davies, using COLPs as sounding boards, which indicated that they were more alert to, and concerned about ethical problems[630]. *However*, this was for the reason that individual practitioners appeared less aware of their ethical and regulatory duties, and had a limited knowledge of the SRA Handbook[631], confirming contemporaneous findings by Vaughan and Oakley.[632] Whether the same issues will be identified as part of a slightly larger sample more specifically focused on COI remains to be seen. Furthermore, it might also be possible to draw some delineation between the roles of COLP and GC in large law firms in terms of responsibilities. As Aulakh and Loughrey recognised, the COLP is mandated by regulation to fulfil their duties under the SRA code[633], and so by contrast to the GC, the COLP has particular brief in reporting requirements to the SRA regarding the "serious breaches"[634]. However, it is unclear whether it is the COLP, or the GC who has responsibility for COI matters in the largest firms, given that, as Chapter 3 highlighted COI are not necessarily a local issue to England & Wales.

A further feature of a GC's role within the ethical infrastructure, by contrast to the COLP who is mandated by regulation, is that historically, GC's have struggled to secure their credibility among fee-earning lawyers. Gabarro commented that lawyers tended to view functional staff roles or non-producing managers as useless overheads'[635]. Similarly, Chambliss reported that levels of engagement and the weight afforded to the advice that they provided depended on several factors[636]. In particular, advice provided by in-house counsel might only be afforded weight if they themselves still held a certain amount of

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the firm to promptly report and facts or matters that it *"reasonably believes"* are capable of amounting to a serious breach https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/

[629] SRA Authorisation Rules 2011 Rule 8.5

[630] Aulakh, S. and Loughrey, J. (2018*) Regulating Law Firms from the Inside: The Role of Compliance Officers for Legal Practice in England & Wales* Journal of Law and Society 45(2) p.277

[631] Ibid., p.275

[632] Vaughan and Oakley, op. cit., n.648 identified that lawyers were not referring to the SRA's Handbook containing the Code of Practice

[633] SRA Code of Conduct for Firms 2019 Rule 9.1 Compliance Officers Available at: https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/

[634] Aulakh, S. and Loughrey, J. op. cit., pp. 254-281

[635] Gabarro, J. (2007) Prologue in Empson, L. ed. *Managing the Modern Law Firm: New Challenges, New Perspectives* Oxford University Press, p.xxiii

[636] Chambliss, E. (2006) *The Professionalization of Law Firm In-House Counsel* North Carolina Law Review, 84, p. 1515

credibility in practice. One of Chambliss' respondents commented: "*they're not down in the trenches and that's what some lawyers are always talking about*"[637], and another of her respondents indicated that being an equity partner helped because a significant book of business behind an individual gave them a voice at that level[638]. Jarvis and Fucile also offered a personal perspective as GC's working within a medium-sized US law firm[639], admitting that it was still fairly common for a lawyer to ask members of their compliance team to justify a decision that they had already reached[640]. This study will seek to identify who is responsible for decision-making on COI in its various different forms, and the extent to which ethical decision-making around COI might have to be taken out of the hands of fee-earning lawyers in response to OFR, or any other significant influences, *by the ethical infrastructure itself*, and as potentially indicated by recent studies which reveal a lack of basic knowledge among fee-earners of the SRA's rules more widely.

4.6 Determining Which Standards to Follow in Respect of COI and Duo-Deontology

This Chapter is the third of a sequence of three literature reviews. As such it develops the Key Questions derived from the literature review in Chapter 3, which built on the key issues identified in Chapter 2. Dealing with the issue of how do large law firms determine what standards to follow in respect of COI, as considered in Chapter 3, the rules governing COI are modelled around a limited definition of COI, largely as a result of their CLLS-drafted ancestry, and the fact that they have been re-adopted on each successive consultation around the SRA's wider regulatory regime. This means that they have been largely transplanted, stripped of their original guidance, into OFR. Furthermore, whereas under OFR Mark I the rules on COI were supported by indicative behaviours, these were removed under OFR Mark II, and not replaced with any context-specific guidance. Consequently, there is considerably greater scope for interpretation at the level of the large law firm in light of the sub-contracting of compliance to the regulated community itself. Furthermore, as Chapter 2 considered, an effective PBR system still requires some effective external regulatory safeguards and monitoring, however in terms of reporting obligations under

[637] Ibid., p. 1449

[638] Chambliss (2006) op. cit., p.1556

[639] Jarvis, P. and Fucile, M (2012) *Inside an In-house legal ethics practice* Notre Dame Journal of Law, Ethics and Public Policy 14(1), p. 113

[640] Ibid.

OFR Mark II, only the most "serious breaches"[641] now need to be disclosed to the SRA[642], and yet these are also undefined. However, more fundamentally, a potentially determinative factor in relation to each decision around COI, relates to whether or not they are even recognised as such in the first place. The fact that the SRA's separate Codes of Conduct for entities and individuals both define a COI as "arising in the same of related matters"[643]. I will therefore seek to identify any norms that reflect how large law firms determine the 'prerequisite' degree of relationship between matters.

Chapter 3 also recognised that OFR needs to be situated in an international client context. In particular, I will seek to identify how the SRA's rules on COI under the OFR regime, and local conflicts rules and duties are actually reconciled, including who takes decisions on this, and what the process of reconciling these rules actually looks like. As mentioned in Chapter 3, the SRA's approach towards the issue of duo-deontology reveals some significant limitations in cross-border scenarios, and is unhelpfully devoid of any supportive guidance. There is also some inferential evidence from case law that US rules might be standing in as surrogate to fill any uncertainty caused by OFR[644], and that it is possible that the SRA's COI regime is not the regime of choice at the international level for large law firms. There might even be industry norms emerging around decision-making towards conflicts between the SRA's rules on COI and other local conflicts rules or duties.

In addition to issues of duo-deontology identified in Chapter 3 between local rules on COI, literature in the form of the SRA's Independence, Representation and Risk study[645] (contemporaneous with OFR Mark I), revealed that some financial services clients, and in particular banks, are imposing their own strict retainers upon legal advisors. The explanations provided by lawyers for this were largely along the lines that these powerful clients were unfairly attempting to control access to legal advisors though the use of broad panel agreements, and onerous COI provisions[646]. Either way, the SRA's OFR regime might

[641] SRA Code of Conduct for Firms 2019 Rule 3.10 is mirrored by SRA Code of Conduct for Solicitors 2019 Rule 7.7, although Rule 7.12 considers that an individual's responsibility is fulfilled by informing the COLP

[642] SRA (2019*) Reporting Concerns: Our Post-Consultation Position January 2019* Available at: http://www.sra.org.uk/globalassets/documents/sra/comnsultations/reporting-concerns-post-consultation-position.pdf?version=4a1abb

[643] SRA Code of Conduct 2019 Rule 6.1

[644] Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94 at para. 16

[645] Vaughan, S. and Coe, C. (2015) *Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms* (Birmingham, SRA)

[646] Ibid.

not be perceived as offering very much clarity or assurance to clients that their duties are going to be adequately protected under the SRA's 'subject-to-interpretation' regime. This research provides an opportunity to consider whether this practice continues, and indeed whether it has increased among sophisticated clients, perhaps even beyond the financial services sphere.

In light of this chapter though, where COI is effectively governed by private contract drafted and enforced by the client, this research will attempt to identify any key themes, or "norms" emerging in the formulation of these contractual COI duties by negotiation, and whether they do in fact completely circumvent the SRA's OFR regime? A starting point for analysis is to consider what is important to law firms in negotiations around drafting retainer agreements, including how are the "ethical" standards to be adhered to, arrived at. This might be gained for example by asking firms where they "push-back" on client-drafted terms relating to COI, because this will expose their starting point, or base line in negotiations, and in particular what this derives from. The base line might include, for example, ethical duties, the SRA's Codes of Conduct, other contextually important considerations, and including where the "redlines" and "risk appetites" highlighted in this chapter.

However, research also recognises though that not all clients will necessarily seek, or have the bargaining power to impose their own contracts governing COI. It is therefore still important to try to understand how particular key provisions in the SRA's rules relating to COI are being interpreted in a large law form context, especially where there is a substantial lack of SRA guidance. Chapter 2 noted how the SRA's 'Reporting Concerns Consultation' recognised that large law firm COLPs were interpreting the reporting obligation narrowly, as an obligation to report only where misconduct had been investigated internally and proven to the COLPs satisfaction, whereas the SRA felt that a report should be made anyway so that it could decide this.[647] Nevertheless, the outcome of the consultation was that the SRA altered the standard required for reporting from a "material" to "serious breach", and this now features as part of its enforcement strategy in connection to OFR Mark II[648]. Nevertheless, it has refused to define "serious", expecting

[647] SRA (2018) *Reporting Concerns Consultation* August 2018 Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-consultation.pdf?version=4a1abf, para 32

[648] SRA Code of Conduct 2019 Rule 6

firms to formulate their own norms,[649] before reporting issues to it. In response to the consultation, the City of London Law Society (CLLS) indicated that an objective approach to the term could be adopted, which the SRA was positive towards.[650] However, this was not adopted in SRA guidance, and so it is now unclear in what standard large law firms have adopted to in relation to COI.

A further issue highlighted in Chapter 3 related to the notion of the irreconcilable COI, a conflict that cannot be waived, or consented to by a client. In Mothew, Millett LJ considered that this should be regarded as an "actual" COI that ca be waived according to the legal standard, referring to an irreconcilable conflict that has actually arisen between the duty of loyalty owed to each client.[651] The SRA's rules on COI are not drafted to approach COI in this way though, and as Chapter 3 recognised, the starting point under these CLLS drafted rules is a determination by the solicitor or firm as to whether a matter is the 'same or related', followed an application of the exemptions. In light of the removal of the Indicative Behaviours under SRA OFR Mark II, and the absence of any further guidance on the issue, I will seek to identify what norms might have developed if any to determine, what firms actually recognise as an "irreconcilable" COI. This could be ascertained by asking respondents under what circumstances they have, or would, decide that they cannot act for a client, and also leave it entirely open for respondents to choose how to address the question. This will hopefully identify whether the SRA's rules actually govern their thinking, or what actually does.

On the related topic of the SRA's exemptions to not acting in a COI situation as well, I will also try to identify whether any norms have arisen around what constitutes an adequate level of disclosure for a client's informed consent in relation to *"substantially common interest"*[652] and *"competing for the same objective"*[653], and what is taken into account by decision-makers in satisfying the safeguard to the operation of both exemptions, that it is *"reasonable to act for all clients[654]"*?

[649] SRA Reporting Concerns: Our Post-consultation position (2019) op. cit., n.703, para 18

[650] Ibid., para 71

[651] Which incidentally, Millett LJ sitting in the Court of Appeal in Mothew v Bristol & West Building Society [1998] EWCA Civ. 533, referred to as an "actual conflict" to emphasise the clash between the duties of loyalty owed to each client.

[652] SRA Code of Conduct 2019 Rule 6.2

[653] Ibid., Rule 6.3

[654] Ibid., Rule 6.4

4.7 In light of Intra-firm Self-regulation, what do Systems to Manage Decision-making Look Like in Respect of COI?

As a result of the literature review in this chapter, this research will also consider who is involved in decision-making around COI in large law firms, and whether, given the complexity of COI issues in these firms, decision-making has been taken out of the hands of individual fee-earners, and what the systems developed to "facilitate" this process look like and do. It is worth noting that these systems might even be geared-up to operate in a wider context than SRA OFR, Law firms are expected to operate 'Compliance and Business Systems' pursuant to the Code of Conduct for Firms Rule 2, an umbrella provision requiring *"effective governance structure, arrangements, systems and controls in place to ensure: a) you comply with all the SRA as well as other regulation and legislative requirements, which apply to you"*[655]. The firm is therefore responsible for ensuring that *"managers and employees comply with the SRA regulations which apply to them*[656]*"*.

A further consideration emerging from the literature review in this chapter is who is "allowed" to be involved in decision making dependent on their position in the law firm hierarchy? OFR's PBR-heritage requires a regulatory focus on the design and implementation of self-regulatory mechanisms to achieve socially desirable outcomes[657]; including reflexive internalised structures and procedures within organisations for continual learning and reflection,[658] and as Hunt expected; *"transparent decision-making systems – and such decisions should not be left to the compliance function alone. Senior Management needs to be involved and supportive".*[659] In particular, I am keen to determine the role of the COLP in determining COI, and especially given that at the large law firm level, given that as Chapter 3 identified, COI are not merely an English consideration, but a global one, posing cross-jurisdictional ethical dimensions. In this context it could be determined who has the greatest moral authority to set the norms of decision making, and whether this is the most successful 'rainmakers' globally, [660] or the compliance function.

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[655] SRA Code of Conduct for Firms 2019 Rule 2.1(a)

[656] SRA Code of Conduct for Firms 2019 Rule 2.1(b)

[657] Teubner, G. (1983) *Substantive and Reflexive Elements in Modern Law* & Society Review 17, pp 254-255

[658] Davis, A.E. (2008) *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation* Georgetown Journal of Legal Ethics 21 p. 95

[659] Hunt, p.39

[660] Kirkland. K. (2005) *Ethics in Large Law Firms: The Principle of Pragmatism* University of Memphis Law Review 4, p.631

4.8 Conclusion

Chapter 2 provided an overall aim for this research, that being to determine whether SRA OFR is an effective model of regulation for COI in large law firms, and also the regulatory context around SRA OFR, identifying particular issues upon which success or failure depends. Chapter 3 then provided a lens through which this could be analysed in the form of COI, and developing the key regulatory issues into Key Questions. This chapter enhances the proto Key Questions emerging through Chapter 3 by exploring the decision-making literature with an emphasis on the role played by systems at the entity level given the SRA's intra-firm self-regulatory approach, and therefore how large law firms might determine what standards to follow in respect of COI, and how conflicts between the SRA's rules on COI, and other local rules are reconciled. It therefore also proposes a further Key Question which is to consider, in light of intra-firm self-regulation, what do systems to manage decision-making actually look like in respect of COI, with particular regard to who is actually involved, and what happens as a transaction progresses to detect and manage COI. Chapter 5 'Methodology' will consider these Key Questions in support of the overall aim by selecting an appropriate empirical approach to their analysis.

Finally, in relation to the main aim, and as highlighted in Chapter 2, it is worth re-emphasising at this stage again that the Smedley Review considered that "corporate" law firms ought to be separately regulated, potentially even including a flexible waiver regime for COI,[661] and especially where in the interests of the client.[662] In arguing for this Smedley took into account large law firm culture, the complexity of work undertaken, and the nature of the sophisticated clients that they served. However, at the time Hunt considered that "complexity" was not sufficient grounds for a separate regime.[663] The issue now is the legacy of this, as firms continue to grow[664]. Surely, no mode of PBR-based regulation can be considered so elastic and principles-based so as not to fail.

[661] Hunt, p.77 referring to Smedley Review, 2009 para 3.31

[662] Ibid. p.77 referring to Smedley para 3.29

[663] Ibid. p.77

[664] Greenwood, R. (2007) *Your Ethics – Redefining Professionalism? The Impact of Management Change* Chapter 9 in Empson, L. ed *Managing the Modern Law Firm: New Challenges, New Perspectives* Oxford University Press, p.194

Chapter 5 Methodology

5.1 Introduction and Key Questions

This chapter sets out to explain the methodological assumptions and research methods adopted by this project. It explains the choice of qualitative methods for the fieldwork undertaken, based on a generic inductive qualitative model, and a purposive sampling frame. It also describes how access was gained to research subjects in large law firms, tasked with leadership of decision-making around COI. This chapter also describes how these individuals were interviewed, including the interview framework used, and the issues encountered. Finally, it considers the approach taken towards the analysis of the interview data; a thematic analysis of three key research questions and their accompanying sub-questions identified in Chapter 4.

The methodology inevitably reflects the aim for this study. This is to contribute to the assessment of the effectiveness of OFR as a method of regulating solicitors in large law firms in England and Wales, but specifically whether OFR is an effective model of regulation for COI in large law firms. The role of OFR in COI decision-making was further identified as a specific area of investigation, given, as Chapter 3 recognised, its known importance in large law firm legal practice. The focus on effectiveness in practice indicated the desirability of empirical research. However, in order to make the aim more focused, the three literature reviews preceding this chapter were undertaken. The first (Chapter 2) on legal services regulation, specifically leading to the adoption of OFR by the SRA; the second (Chapter 3) on the topic of COI to provide the lens through which to consider the success or failure of OFR; and the third (Chapter 4), which enhanced the Key Questions emerging through Chapter 3 by considering the role played by systems at the entity level (given the SRA's intra-firm self-regulatory approach), and therefore how large law firms might determine what standards to follow in respect of COI; and also how conflicts between the SRA's rules on COI and other local rules are reconciled. Chapter 4 proposed a further Key Question; to identify what systems to manage decision-making actually look like in respect of COI, with particular regard to who is actually involved, and what happens as a transaction progresses to detect and manage COI. Therefore, the objectives are to provide answers to the following three Key Questions, supported by sub-questions identified as important in Chapter 4. These will be analysed in Chapter 6:

1. How do large law firms determine what standards to follow in respect of COI?
2. In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
3. How are conflicts between the SRA's rules on COI and other "local" rules reconciled?

5.2 A Generic Inductive Qualitative Model

A generic inductive qualitative model was adopted quite early on in the research, recognising that a considerable amount of flexibility and adaptivity would be required to accommodate challenges in sampling, and sensitivities in interviewing and analysis. This need became apparent as research subjects were in several instances slightly sceptical of the value of this work in an 'if it ain't broke don't fix it' manner, or commented that they were unwilling to participate having already contributed to other studies, which appeared to have had little impact, or, if willing to participate, they were unwilling to provide further "snowball" access to their organisations. Above all, none of the research subjects were willing to be recorded, and several only agreed to take part on the condition that they were not, and that conversations took place "off the record". More than half of the interviews were held off-site at the interviewees request, often in pubs, bars, and cafes near to their place of work outside of the working day.

Methodological approaches such as grounded theory, did not seem appropriate. As Hood recognised there is a tendency for researchers to identify all things qualitative with "grounded theory",[665] which he defined as a systematic methodology in the social sciences involving the construction of theories through methodical gathering and analysis of data.[666] The aim of this research though was always to examine a phenomenon, in essence: responses to OFR to determine its effectiveness, rather than to create theory. By contrast, the main advantage of a generic qualitative model is as Creswell recognised, methodological flexibility, in not being guided by any established qualitative methodologies, such as grounded theory, phenomenology, ethnography, narrative research or case study.[667] There is therefore flexibility in the methods that can be chosen

[665] Hood, J.C. (2007) *Orthodoxy vs. Power: The Defining Traits of Grounded Theory*, in A. Bryant and K. Charmaz (eds), *The SAGE Handbook of Grounded Theory* California, SAGE, p. 152

[666] Martin, P. Y. and Turner, B.A, (1986) *Grounded Theory and Organizational Research, The Journal of Applied Behavioral Science*22(2), p.141.

[667] Creswell, J. (2009) *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* 3rd ed., California, SAGE

for analysis and sampling, important given the limitations imposed by the sensitivity of the research, and the (relatively) 'elite' character of subjects in this study.

5.3 Purposive Sampling

Nevertheless, attention was paid to issues of reliability and validity in sampling. This is recognised as a difficult issue for qualitative research. For example, Guba and Lincoln (1994) considered validity and reliability as an oddity in qualitative research by contrast to more measured quantitative methods, in that by contrast to quantitative approaches it tends to be much less structured, making the validity and reliability of measurement of key concepts less reliable, and potentially making it impossible to make generalisations about populations. They argue that reliability and validity in qualitative studies is a relative concept, given that social contexts do not remain frozen, and results might never be precisely replicated again in terms of results. Nevertheless, they proposed several criteria to enhance the level of "trust and confidence" that could be held by the research community in a piece of qualitative research:

- Credibility – ensuring research is carried out according to the canons of good practice
- Transferability – whether findings hold in some other context, or even in the same context at some other time, is an empirical issue through thick description – a database for making judgments about the possible transferability of findings to other settings.
- Dependability – ensuring complete records are kept of all phases of the research process
- Confirmability – it should be apparent that a researcher has not overtly allowed personal values or theoretical inclinations to manifestly sway the conduct of the research and the findings derived from it.[668]

Taking this into account in my approach to sampling therefore, Bryman considered that in line with the generic inductive qualitative model, purposive sampling could be used, the aim of which is to sample participants in a strategic way, relevant to the research questions being posed, and to ensure that there is a good deal of variety in the resulting sample in

[668] Guba, E.G. and Lincoln, Y.S. (1994) *Competing Paradigms in Qualitative Research*, in N.K. Denzin and Y.S. Lincoln (eds), *Handbook of Qualitative Research* California, SAGE

terms of key characteristics, regardless of the fact that sampling is not random[669]. The researcher establishes the criteria for the types of cases needed to address the research questions, then identifies those appropriate groups of cases, and then samples from those that have been identified. Among the sample groups, there can be generic theme, but also variation is permitted[670]. The advantages considered by Cohen et al are that by enabling researchers to handpick the cases to be included in the sample meant that they could, in theory, be ample in terms of their typicality and ensure a good level of response[671]. Also, as Creswell considered, selecting participants intentionally allows the central phenomenon to be understood, however, importantly selection can be specifically applied by reference to site locations as well as individuals.[672] This is useful given that selection is, primarily driven by large law firms first, and secondarily the individuals that happen to "come with" that firm. By using purposeful selection this research seeks to generate trust and confidence in the eventual findings, but also to enable the phenomenon of decision-making in response to OFR among a wider population of large law firms to be understood, and yet not every large law firm will be alike either in terms of its structure (for example global partnership or verein), or in terms of the diversity of individuals who take decisions within it, and this is a possibility within what that firm might recognise as its strategic group as well.[673]

5.4 Purposefully Sampling Large Law Firms

The primary task in sampling was to settle on appropriate indicators for defining a 'large' law firm for the purposes of this research. As noted in Chapter 1, large law firms have historically been categorised into revenue and Profit per Equity Partner (PEP) bandings, and recognised by the industry in terms of strategic groups, such as the 'Magic Circle', 'Silver Circle' and 'Mid-tier'. Anecdotally, several research subjects at what, would have historically been referred to as 'Magic Circle' firms[674], considered that these expressions were heard far less often today, the old order having been disrupted by a spate of recent

[669] Bryman, A. (2012) *Social Research Methods* 4th ed. Oxford University Press, p. 418

[670] Ibid., p. 422

[671] Cohen, L., Manion, L. & Morrison, K. (2000) *Research Methods in Education* 5th Ed) London, Routledge, p.103

[672] Creswell, J.W (2002) *Educational Research: Planning, Conducting and Evaluating Quantitative and Qualitative Research* New Jersey, Merrill Prentice Hall, p. 194

[673] The concept of the strategic group was considered in Chapter 1, but see also Sherer, P.D. (2007) *Your Competitors: Mapping the Competitive Space of Large US Law Firms: A Strategic Group Perspective* in Empson, L. (ed.) *Managing the Modern Law Firm: New Challenges, New Perspectives* Oxford University Press, p. 162

[674] See Chapter 1 Introduction

firm mergers. Nevertheless, although the legal services market has opened up to greater competition and mergers since the Financial Crisis, The Lawyer Top 200 publication still fulfils a useful guide for fixed sampling purposes, and it was decided that The Lawyer Top 50 provided a sound basis for sampling, on the following criteria:

- *Revenue and PEP:* on a website-based search, all of the law firms in the Top 50 have office locations globally, and command the largest revenues exceeding at least £70m per annum, and, as a group, higher PEP than firms in the bottom half of the table.[675]
- *Geographical presence/international outlook:* was an important criterion given the need to assess decision-making in relation to OFR in an international context, and in particular issues of duo deontology. Firms with revenue below £70m per annum tended to be more domestic in outlook

However, the Top 50 does not necessarily reflect the range of potential ownership structures that now exist which could include a degree of foreign ownership and decision-making influence. Particularly notable in this regard is the exclusion of the 'Big Four' Accountancy Practice ABS's[676] from the Top 200 "law firms". Consequently, in order to broaden the organisational base of the sample, the decision was taken to include the Big Four. Later confirmation from research subjects indicated that, had these entities been recognised as "law firms" by The Lawyer publication, they would likely feature in the Top 50 (Table A below), following an aggressive strategy of lateral hiring from the mid-tier, and an existing global client base considered in Chapter 1.

In terms of selection criteria, aside from revenue, and global client bases[677], it was important to ensure that all of the firms sampled practised banking law, commercial law and corporate transactional work. Both Chapters 2 and 3 recognised the impact that sophisticated commercial and corporate clients, and especially financial services clients might have upon decision-making on COI in areas of practice such as mergers & acquisitions and banking law. It is important to capture a range of large law firms undertaking corporate transactional work for different clients at different levels of what is

[675] However, within the Top 50 itself, law firm revenue is not necessarily a reliable indicator or predictor of size of PEP, and vice-versa, per firm. The only statement that can accurately be made in this respect is that all of the firms in the Top 50 PEP tended to exceed £300,000 per annum.

[676] Ernst & Young (EY), Deloitte, KMPG, PricewaterhouseCoopers (PwC) as referred to in Chapter 1

[677] Stated on their websites

still very much a revenue-driven hierarchy. An internet search was therefore conducted of the websites of every law firm appearing in the Top 100 firms, not only to identify potential contacts, but also to establish in which firms work of this nature was undertaken. I established that within the Top 100 firms, this was true for every firm in the Top 50, and also the Big Four ABS's, but not necessarily so for all of those law firms appearing in the bottom half of the Top 100.

Table A the Lawyer Top 50 UK Law Firms by Revenue 2019[678]

Rank	Firm	Revenue (£m)
1	DLA Piper	1,946.8
2	Clifford Chance	1,693.0
3	Linklaters	1,628.7
4	Allen & Overy	1,627.0
5	Hogan Lovells	1,596.0
6	Norton Rose Fulbright	1,501.0
7	Freshfields Bruckhaus Deringer	1,472.0
8	CMS	1,203.7
9	HSF Herbert Smith Freehills	965.7
10	Eversheds Sutherland	895.6
11	BCLP	675.7
12	Ashurst	641.0
13	Clyde & Co	611.0
14	Slaughter and May	501.3
15	Pinsent Masons	482.0
16	Gowling WLG	461.7
17	Simmons & Simmons	374.4
18	Bird & Bird	361.0
19	Womble Bond Dickinson	359.8
20	Taylor Wessing	339.7

21	Addleshaw Goddard	275.4
22	DWF	272.4
23	Osborne Clarke	268.6
24	Irwin Mitchell	263.0
25	DAC Beachcroft	242.7
26	Fieldfisher	242.0
27	Macfarlanes	217.0
28	Kennedys	216.0
29	Stephenson Harwood	213.0
30	Withers	193.2
31	HFW	178.1
32	Mishcon de Reya	177.8
33	Watson Farley & Williams	172.3
34	Travers Smith	162.5
35	Slater and Gordon	155.9
36	Charles Russell Speechlys	154.3
37	Shoosmiths	137.6
38	Mills & Reeve	110.9
39	RPC	108.6
40	BLM	106.4
41	Trowers & Hamlins	105.2
42	Gateley	103.5
43	Weightmans	97.3
44	Burges Salmon	94.6
45	Hill Dickinson	90.5
46	Freeths	89.8
47	TLT	87.6
48	Keoghs	82.0
49	Penningtons Manches	79.5
50	Browne Jacobson	77.6

5.5 Sample Size

Having identified revenue, office locations and fields of work as criteria for selection, a sufficient size of sample had to be determined, so as to enable a balanced comparison to be made between the law firms. Warren for example suggested that a sample size of between twenty and thirty is a minimum level of credibility where work is to be published.[679] Alternatively, Onwuegbuzie and Collins recommended that a sample should not be so large that it is difficult to undertake a deep, case-oriented analysis,[680] and commentators such as Crouch and McKenzie considered that samples of fewer than twenty increased the qualitative researcher's chances of getting close involvement with their participants in interview-based studies, and generating fine-grained data.[681] The picture revealed by the literature was thus a confusing one, and bearing in mind Guba and Lincoln's trust and confidence 'credibility' criteria in particular,[682] it was decided to sub-divide my purposeful sampling down among the Top 50 firm population to band firms together in terms of revenue. I recognised that boundaries could in fact be quite clearly delineated by fairly significant "step-ups" in revenue. Overall, within the Top 50 there is in fact a considerable range from £70m to nearly £2bn, and, for example, no firms occupying the middle of the £500m - £600m band at all (Table B).

The overall size of the sample group therefore was determined by the number of firms that could be successfully targeted within each band range. For reasons of validity, I targeted at least 3 firms within each band (containing 4-6 firms), to try and ensure an adequate level of response reflecting the entire Top 50 population, and acutely aware that not every firm would necessarily respond.

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[679] Warren, C.A.B (2002) *Qualitative Interviewing*, in J.F. Gubrium and J.A. Holstein (eds), *Handbook of Interview Research: Context and Method* California, Sage, p.99

[680] Onwuegbuzie, A. J. and Collins, K.M.T. (2007) *A Typology of Mixed Methods Sampling Designs in Social Sciences Research,* The Qualitative Report 12, p. 281Available at: www.nova.edu/sss/QR/QR12-2/onwuegbuzie2.pdf p289 [Accessed 24.08.20]

[681] Crouch, M. and McKenzie, H. (2006) *The Logic of Small Samples in Interview-Based Qualitative Research* Social Science Information 45, p. 483

[682] Guba, E.G. and Lincoln, Y.S. (1994) *Competing Paradigms in Qualitative Research*, in N.K. Denzin and Y.S. Lincoln (eds), *Handbook of Qualitative Research* California, Sage

Table B Banding by Revenue among the Top 50 UK Law Firms

Band	Approx. Revenue (£m)
A	1600 – 2000
B	1000 – 1599
C	600 – 999
D	350 – 500
E	250 – 349
F	200 – 249
G	150 – 199
H	100 – 149
I	75 – 99

None of the firms in Band I (£75m – £99) responded to my initial approach by email. Furthermore, only one respondent replied from Band H. The lack of take-up from the smaller large law firms within these bands was striking, and I speculate as to whether this might reflect a situation, expressed in the SRA's Looking to the Future Consultation, that COLP roles in smaller mid-sized large law firms are simply doing too much. Consequently, given the absence of Band I, the "smallest" large law firm within my sample had a revenue close to £100m, and of the approaches made to the Big Four ABSs, two responded positively. The sample group therefore comprised 20 firms, and 22 individuals attended interviews, although two of these were unexpected. In both instances they were in line to succeed research subjects who were retiring imminently. As such, they largely attended in the role of observers. Therefore, meaningful data could only be obtained from 21 individuals in light of the extremely limited responses that these "additional" individuals also contributed. The following coding has been applied to the analysis in Chapter 6.

Table C Research Subject Coding

Band	Firm
A	1
A	2
B	1

B	2
C	1
C	2
C	3
D	1
D	2
E	1
E	2
E	3
F	1
F	2
G	1
G	2
G	3
H	1
ABS	1
ABS	2

5.6 Access to Research Subjects

Ethical approval for this research was granted by the University of Warwick Law School's Ethics Officer on 13 August 2019. Between October 2019 – December 2019 I approached law firms within the sample on an unsolicited basis in the majority of instances using details obtained from the firm websites, but where possible, also drawing from my own personal contacts. These contacts had known me since my days in legal practice in the City of London and now held relatively senior fee-earning roles in their respective firms. They were able to act as initial "gatekeepers", individuals in a position to 'permit' access to others for the purpose of interviewing[683] or rather to introduce or direct me to the individuals designated with the leadership of decision-making around COI. I found that making approaches through contacts was a far more fruitful exercise than those which were entirely unsolicited. As I had expected, in light of the research conducted by

[683] Mauthner, M., Birch, M., Jessup, J. and Millar, T. (2008*) Ethics in Qualitative Research* California, Sage, pp. 55-63

Chambliss and Wilkins[684], these individuals were mainly described as "General Counsel" with the exception of one "Conflicts Manager", who worked directly for the General Counsel. The General Counsel were all dedicated full-time roles with a global overview of COI. It became very apparent at this early stage that COI were clearly being treated as a global rather than a local "English" or purely SRA-regulatory matter, and that the GC's, even of verein-based global networks of firms, oversaw a linked-up global strategy in relation to COI. As a result, it appeared that the locus of decision-making around COI did not lie with the COLP in these large law firms.

Each potential research subject confirmed during access negotiations over email or by phone that they were responsible for directing their firm's strategies regarding COI. In three instances, I was asked to supply my interview guide (Table D below) beforehand, and in two instances, GC's that I have been introduced to via contacts subsequently refused to permit access, specifically citing the fact that they had already taken part in earlier studies with "academics", and did not feel that it had ultimately achieved much. I considered that they might only have agreed to discuss my research preliminarily as a favour to their colleague (my gatekeeping contact). In other instances, GCs were happy to be interviewed, but refused to permit access to other staff, citing the disruption that this might cause or that decision-making around COIs by fee-earners was restricted to 'commercial conflicts', and then only to client relationship partners, who would be too busy in any event.[685]. However, a very common reason provided was that they saw no major issue with the SRA's rules on COI, although it should be noted that it does not necessarily follow that the SRA's rules were those actually being applied in practice. For research subjects willing to participate, I recorded their consent using the University of Warwick's Research & impact Services standard research ethics consent form at the outset of their interview.

5.7 Conducting the Interviews

Moorhead et al. considered that interviews could potentially reveal descriptive information that might help to build a picture of ethical practice, and, for example, reveal the rationalisations and justifications that interviewees use to convince themselves that they are doing the right thing, although an inherent risk is that they reflect what a practitioner

[684] See for example Chambliss, E. (2006) *The Professionalization of Law Firm In-House Counsel* North Carolina Law Review 84, p.1517, and Chambliss, E. and Wilkins, D.B. (2002) *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms* Arizona Law Review 44 p. 559

[685] For a definition of "commercial conflict" see Chapter 4

says they do, rather than what they might actually do.[686] Essentially, as Reissman described, they would present their preferred identities in interview[687]. To mitigate against this, I needed to develop some additional skills in empirical interviewing techniques, and so I undertook a Diploma in Social Sciences Research at the University of Warwick, and in light of the fact that I had no prior Masters-level research experience. Using my Key research questions as a starting point, I developed an interview guide (Table D) which facilitated a semi-structured interview, enabling some leeway to capture what the interviewee really viewed as important in explaining and understanding events, patterns and forms of behaviour, and across a framework that could facilitate thematic triangulation between individual responses, and those of other research subjects. For example, under the Key Question 1 'How do large law firms determine what standards to follow in respect of COI?', is supported by several sub-questions which are posed differently, but provide a degree of overlap, for example "what would you recognise as an irreconcilable COI?", bears a degree of relationship with the sub-question "what would satisfy you that it is reasonable to act for all clients?" posed at a later stage in the interview.

In terms of interviewing style, I drew upon work by Kvale,[688] Cresswell[689] and Charmaz,[690] so that the interview guide contained a range of open-ended rather than closed questions, and I kept to the exact formulations with each of my respondents. However, each question provided the respondents some scope to create their own response possibilities, which could be focused and enhanced by the addition of further 'intermediate' or 'probing' follow-up questions. On the basis of suggestions made during training, a first draft of the interview guide was piloted with two members of staff lecturing on the Legal Practice Course at the University of Law's Birmingham branch where I happened to be employed as a visiting lecturer at the time, given that they had only recently left large law firm practice

[686] Moorhead, R., Hinchley, V., Parker, C., Kershaw, D., Holm, S., (2012) *Designing Ethics Indicators for Legal Services Provision* UCL, Available at: https://legalservicesboard.org.uk/wp-content/media/designing_ethics_indicators_for_legal_services_provision_lsb_report_sep_2012.pdf [Accessed 7 May 2021]

[687] Riessman, C.K. (2002) *Analysis of Personal Narratives* in Gubrium, J.F. and Holstein, J.A. (Eds) *Handbook of Interview Research, Context and Method* California, Sage

[688] Kvale, S (1996) *Interviews: An Introduction to Qualitative Research Interviewing* California, Sage

[689] Creswell, J.W (2202*) Educational Research: Planning, Conducting and Evaluating Quantitative and Qualitative Research*, New Jersey, Merrill Prentice Hall, pp. 203-204

[690] Charmaz, K. (2002) *Qualitative Interviewing and Grounded Theory Analysis*, in J.F. Gubrium and J.A. Holstein (eds), *Handbook of Interview Research: Context and Method* California, Sage

themselves. This enabled substantial refinements to be made to the interview guide, notably in terms of the feasibility of timing, and it also highlighted several areas where it would be useful for me to address limitations in my own background knowledge of, for example, private acquisitions law, to facilitate any analysis of triangular COI situations. Further revisions also to be made to the interview guide to reflect developments in the form of OFR Mark II when this was introduced in November 2019, and interviews were conducted in the period November 2019 – February 2020.

Table D Interview Guide

Key Question 1) How do large law firms determine what standards to follow in respect of COI?
a) What factors are key in the private contractual negotiation over COI between parties: • In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI? b) Understanding how the SRA's COI rules are interpreted in the large law firm context: What do law firms and lawyers recognise as an irreconcilable COI? • Under what circumstances have you, or would you decide that you could not act for a client where there is a COI? What is a serious breach re COI? • What would you consider to be a "serious breach" in a COI context? What are related/unrelated matters: • How do you determine the degree of relationship between matters?

How do they interpret substantially common interest" and "competing for the same objective"? • What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption? • What would satisfy you that it is reasonable to act for all clients?
Key Question 2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
• Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like? • What happens as a transaction progresses, and how are emerging conflicts managed?
Key Question 3) How are conflicts between the SRA's rules on COI and other local rules reconciled?

5.8 Conclusion

This chapter has taken the three key research questions developed as the result of a sequential three-stage literature review (Chapters 2 – 4), and applied a logical research methodology for their analysis, which strikes a balance between being sufficiently flexible in light of the challenges presented by the research subjects outlined in the Generic Inductive Qualitative Model selection, but that also enhances the level of trust and confidence in this piece of qualitative research. This chapter also explained the purposive sampling strategy applied to try and ensure that there was randomisation within the

sample bands, especially given that in the case of large law firms specifically there is a need to recognise and capture a range of different business structures in the data, including English law-based Limited Liability Partnerships, verein-based global networks, and forms of ABS competing in the same market as considered in Chapter 1 (Introduction).

The Lawyer 200 Law Firms index offered a sensible starting basis for purposive sampling, given its hierarchical ranking of firms by the key variables including revenue and PEP, and which reflected the industry understanding of 'Magic Circle, 'Silver Circle' and 'Mid-tier' peer-groupings considered in Chapter 1. However, this Chapter 5 recognises that it is not all encompassing. For the purposes of sampling, firms were arranged into peer-group bands, delineated by steps-up in revenue. This enabled me to target each band for purposive sampling purposes, with a view to securing at least 3 respondents in each band. However, I was also conscious that, for example, the Big 4 ABSs did not feature in The Lawyer 200 Law Firms index, and yet they were being increasingly regarded by the legal press as direct competitors to large law firms. I decided in Chapter 1 that they needed to be reflected in the purposive sampling exercise as well.

In relation to the individual research subjects interviewed, this chapter confirms that I was able to reach the appropriate individuals for the purposes of addressing my key research questions. Not only did they confirm that they were responsible for COI in their organisations during negotiations for access, but I was also either directed to them by internal contacts having outlined my research to them, or where unsolicited approaches were made, then I found that my initial approach was forwarded on to the relevant individual. At this early stage it also became clear that COI was regarded not as a local, but as a global issue by my research subjects, evidenced by the fact that responsibility for COI was overseen by firm General Counsel, and only in one instance, a Conflicts Manager working directly for the General Counsel. This did not fall within the domain of the COLP.

In terms of the next stage (Chapter 6 Analysis) therefore, care was taken in the development of the Interview Guide for this purpose. The interview questions were piloted, and the potential for the "halo effect" under which research subjects provide answers that they think ought to be provided, was mitigated against through the triangulation of sub-questions in order to increase the reliability of the analysis applied to the interview data. A 'thematic analysis' approach has been applied to the interview data gathered from twenty interviews. It has been selected as the literature would also appear to suggest that it is more forgiving and offers greater flexibility than some grounded theory

approaches in light of the limitations of data collection, including, for example, the absence of recorded data essential for approaches such as conversation or discourse analysis. Bryman and Burgess describe the thematic analysis approach adopted in Chapter 6 as the identification of the frequency of themes, for example in the occurrence of certain incidents, words and phrases[691], and Ryan and Bernard expand this by suggesting that not only does it consider repetitions, but also missing data, thereby equally reflecting on what is not in the data just as much as in it.[692] The interview data from the 20 interviews is considered next in Chapter 6, which adopts a matrix-based framework based around the three Key Questions, in order to more easily synthesise thematic (non-codified) data.

[691] Bryman, A and Burgess, R.G. (1994) *Reflections on Qualitative Data Analysis*, in Bryman, A. and R.G. Burgess (eds), *Analyzing Qualitative Data* London, Routledge

[692] Ryan, G. W., and Bernard, H.R. (2003) *Techniques to Identify Themes* Field Methods 15 p. 85

Chapter 6 Analysis

6.1 Introduction

This chapter provides an analysis of the data obtained from the research subject interviews recorded in Appendix B to this thesis. As described in Chapter 5 (Methodology), a generic qualitative inductive approach was taken to data collection, and a qualitative thematic analysis has been applied to the data in Appendix C. The interviews were structured around the three Key questions supported by sub-questions developed through the Chapter 2 – 4 literature reviews:

> Key Question 1 How do large law firms determine what standards to follow in respect of conflicts of interest?
>
> Key Question 2 In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
>
> Key Question 3 How are conflicts between the SRA's rules on COI and other local rules reconciled?

The Key Questions were each designed to support the aim arrived at in Chapter 2 on the regulatory context, which is to determine whether SRA OFR is an effective model of regulation for COI in large law firms. The aim is intended to provide a workable focus for the thesis title, by drawing together several disparate topics: *'Investigating the Decision-making Process in Large Law Firms when Addressing Conflicts of Interest in Legal Transactions in Light of Outcomes-focused Regulation'*. Chapter 3 then examined the COI lens through which to consider the success or failure of OFR, and formulated Key Questions 1 and 3, which were subsequently enhanced by the literature review undertaken in Chapter 4. This considered the role played by systems and controls at the entity level, and posited Key Question 2. In terms of the structure of Chapter 6 therefore, this reiterates the Key Questions again, but also explains the basis for their supporting sub-questions. It then assimilates the significant themes identified though the qualitative thematic analysis against each Sub-question from Appendix B (Field Notes) and C (Thematic Analysis), and then interprets the themes identified in light of the Key Questions, and in support of the overall aim.

6.2 The Sub-questions

Key Question 1 How do large law firms determine what standards to follow in respect of COI?

The definition of a COI was kept open to interpretation by research subjects in order to determine where, if at all, the SRA's OFR regime was relevant in decision-making. Chapter 4 recognised that lawyers appeared to normatively recognise COI as falling within several categories: 'legal conflicts' which originate in fiduciary law, common law, and the codes of conduct; and 'positional' or 'commercial' conflicts. Shapiro described positional conflicts as about business, client relations, intra-firm politics, and how to serve the needs of important clients without undermining or alienating others[693]. They arise when a law firm takes a position on behalf of one client seeking a result that is directly contrary to the position taken on behalf of another client in a separate, unrelated matter, or as Griffiths-Baker's 1990s City law firm subjects considered, where the level of adversity involved was whether acting would 'annoy' another client to the extent that they would withdraw business on the basis that they had adverse general commercial interests[694]. It was argued that these could become a material limitation where a client's position meant that a lawyer was inclined to pull their punches more for another client[695], and so Salzedo and Hollander considered that a 'commercial conflict' could "blend into" the wider fiduciary duty of loyalty[696].

However, Chapter 3 also considered that decision-making around COI appeared to be governed by means of contractual negotiation. This enabled law firms to determine the scope of duties that they were willing to afford clients, but also enabled powerful sophisticated clients to determine the extent of the duty of loyalty owed to them. In 2015, the SRA's Independence, Representation and Risk study[697] revealed that some financial services clients, and in particular banks, were imposing their own strict retainers upon legal

[693] Shapiro, S. (2000) *Everests of the Mundane: Conflicts of Interest in Real-World Legal Practice* Fordham Law Review 69(3), pp. 1166 – 1167

[694]Griffiths-Baker, J. (2002) *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* Oxford, Hart Publishing, pp.113-114

[695] Counsel to Counsel: Evaluating Positional Conflicts Boies Schiller Flexner https://www.bsfllp.com/news-events/counsel-to-cousnel-evaluating-positional-conflicts 18 April 2017

[696] Ibid.

[697] Vaughan, S. and Coe, C. (2015) *Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms*, Birmingham, SRA

advisors through the use of broad panel agreements, and, what lawyers regarded as onerous COI provisions[698]. This had still not been recognised in the academic literature to any extent, and yet it is significant because it could mark the emergence of a form of COI which arises because of the imposition of 'bespoked' conflict rules *by the client*, and expressly set-out for example in 'Outside Counsel Guidelines' (OCGs). There is also evidence in relatively recent English case law of the possible importation of foreign COI conduct rules into the retainer. I would argue that in addition to the categories of COI previously recognised, that this would present forms of 'contractually-imposed conflicts', and could arise as the result of the duty of loyalty extended beyond what might otherwise be expected under local COI rules.

Key Question 1 therefore attempts to identify key themes, or "norms" in the negotiation of COI, including how the applicable standards are arrived at. Chapter 4 introduced the notion of 'redlines', and so it might be possible to determine where these lie for law firms, for example, whether they reflect adherence to SRA OFR II on COI, or other COI rules, or any other rules. As a sub-question therefore:

a) What factors are key in the private contractual negotiation over COI between parties:

In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

In relation to the SRA's COI rules themselves, as considered in Chapter 3, the current rules are already modelled around a limited definition of COI, largely as a result of their CLLS-drafted ancestry, which has been largely re-adopted on each successive consultation the SRA's wider regulatory approach. They have however been stripped of their original supporting guidance, and this is a trend that continues. Whereas under OFR Mark I the rules on COI were supported by indicative behaviours, OFR Mark II removed even these, and it has not been replaced to any extent with context-specific guidance or case studies. Consequently, there appears to be increasing scope for interpretation by large law firms in light of the sub-contracting of compliance to the regulated community itself.

The lack of guidance is important for example when considering the notion of an irreconcilable COI, a conflict that cannot be waived, or consented to by a client because it

[698] Ibid.

poses an irreconcilable conflict between the duty of loyalty owed to each client.[699] The SRA's rules on COI merely provide exemptions in which it is possible to act. Key Question 1 will also seek to identify what norms have developed to determine what is actually recognised a "irreconcilable" in practice. This sub-question therefore asks respondents under what circumstances they have, or would, decide that they cannot act for a client, and left it open for them to choose how to address the question. This seeks to identify any particular set of determinative factors governing thinking:

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI - Under what circumstances have you, or would you decided that you could not act for a client where there is a COI?

Another interpretive issue exists which appears to present a fundamental challenge to an effective PBR-based regulatory system, and especially in an intra-firm self-regulatory context, given that this requires effective external regulatory safeguards and monitoring, usually in the form of reporting by the regulated community to the regulator as highlighted in Chapter 2. Under OFR Mark II, only the most "serious breaches"[700] now need to be disclosed to the SRA[701], and yet these are also undefined. In fact, Chapter 2 noted how the SRA's 'Reporting Concerns Consultation' recognised that large law firm COLPs were interpreting the reporting obligation narrowly as an obligation to report only where misconduct had been investigated internally and proven to the COLPs satisfaction, whereas the SRA felt that a report should be made anyway so that it could determine this.[702] Nevertheless, following the consultation the SRA altered the standard required for reporting from a "material" to "serious breach",[703] refusing to define "serious", and

[699] Which incidentally, Millett LJ sitting in the Court of Appeal in Mothew v Bristol & West Building Society [1998] EWCA Civ. 533, referred to as an "actual conflict" to emphasise the clash between the duties of loyalty owed to each client.

[700] The SRA Code of Conduct for Firms 2019 Rule 3.10 is mirrored by the Code of Conduct for Solicitors Rule 7.7, although Rule 7.12 considers that an individual's responsibility is fulfilled by informing the COLP, rather than escalating the matter any further.

[701] Reporting Concerns: Our Post-Consultation Position January 2019,

[702] SRA (2018) *Reporting Concerns Consultation* Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-consultation.pdf?version=4a1abf, para 32

[703] SRA Code of Conduct 2019 Rule 6

expecting firms to formulate their own norms.[704] The CLLS initially indicated that an objective approach to the term could be adopted,[705] however, this was not adopted into SRA guidance, and it is unclear what standard large law firms follow in respect of COI. The sub-question posed was therefore:

What is a serious breach re COI - What would you consider to be a "serious breach" in a COI context?

However, more fundamentally, a potentially determinative factor in relation to each decision around COI, relates to whether or not they are even recognised as such in the first place in that the SRA's separate Codes of Conduct for entities and individuals both define a COI as "arising in the same of related matters", [706] and again there is no guidance or definition. Key Question 1 therefore seeks to identify any norms that reflect how large law firms determine the 'prerequisite' degree of relationship between matters in this sub-question:

What are related/unrelated matters - How do you determine the degree of relationship between matters?

On the related topic of the SRA's exemptions to not acting in a COI situation as well, Key Question 1 also attempts to identify whether any norms have arisen around what constitutes an adequate level of disclosure for a client's informed consent in relation to the *"substantially common interest"*[707] and *"competing for the same objective"*[708] exemptions, and what is taken into account by decision-makers in satisfying the safeguard to the operation of both : that it is *"reasonable to act for all clients*[709]*"*?

In relation to the two exemptions: "substantially common interest" and "competing for the same objective":

What constitutes and adequate level of disclosure for informed consent to be provided by the client under each exemption?

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[704] SRA (2019) *Reporting Concerns: Our Post-consultation position* Available at: http://www.sra.org.uk/globalassets/documents/sra/comnsultations/reporting-concerns-post-consultation-position.pdf?version=4a1abb, para 18

[705] Ibid., para 71

[706] SRA Code of Conduct 2019 Rule 6.1

[707] Ibid., Rule 6.2

[708] Ibid., Rule 6.3

[709] Ibid., Rule 6.4

What would satisfy you that it is reasonable to act for all clients?

Key Question 2 In light of devolved regulation to law firms what do systems to manage decision-making look like in respect of COI?

As a result of the literature review in Chapter 4, Key Question 2 considers who is involved in decision-making around COI in large law firms, and whether, given the complexity of COI issues in these firms, decision-making has been taken out of the hands of individual fee-earners, and what the systems developed to "facilitate" decision-making on COI actually look like and do. These systems might potentially be geared-up to operate in a wider, global context than SRA OFR. Nevertheless, under SRA OFR Law firms are expected to operate 'Compliance and Business Systems' pursuant to the SRA Code of Conduct for Firms Rule 2, which is an umbrella provision requiring *"effective governance structure, arrangements, systems and controls in place to ensure: a) you comply with all the SRA as well as other regulation and legislative requirements, which apply to you"*[710]. The firm is therefore responsible for ensuring that *"managers and employees comply with the SRA regulations which apply to them*[711]*"*.

A further consideration emerging from the literature review in Chapter 4 was who is "allowed" to be involved in decision making around COI. It was suggested that OFR's PBR-heritage requires a focus on the design and implementation of self-regulatory mechanisms to achieve socially desirable outcomes[712], which include reflexive internalised structures and procedures within organisations for continual learning and reflection.[713] Hunt expected *"transparent decision-making systems – and such decisions should not be left to the compliance function alone. Senior Management needs to be involved and supportive"*.[714] However, where decision-making around COI has to take into account a more global dimension, then how is this being managed? Furthermore, Chapter 3 identified how earlier empirical research suggested that law firms had historically been very weak at identifying COI that arose 'downstream' i.e., during the course of a transaction, even though an initial conflict check might have been performed. In terms of sub-questions therefore:

[710] SRA Code of Conduct for Firms 2019 Rule 2.1(a)

[711] SRA Code of Conduct for Firms 2019 Rule 2.1(b)

[712] Teubner, G. (1983) *Substantive and Reflexive Elements in Modern Law,* Law & Society Review 17, pp. 254-255

[713] Davis, A.E. (2008) *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, Georgetown Journal of Legal Ethics 21, p.95

[714] Hunt, p.39

Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

What happens as transaction progresses, and how are emerging conflicts managed?

Key Question 3 How are conflicts between the SRA's rules on COI and other local rules reconciled?

Chapter 3 also recognised that OFR needs to be situated within its international client context at the large law firm level. Key Question 3 therefore seeks to identify how the SRA's rules on COI, and local conflicts rules and duties are actually reconciled, including who takes decisions on this, and what the process of reconciling these rules actually looks like. Unfortunately, though, the SRA's approach towards the issue of duo-deontology reveals some significant limitations, and is unhelpfully devoid of supportive guidance. There is also inferential evidence from English case law that US rules might be standing in to fill uncertainty[715], and that it is possible that the SRA's COI regime is not a regime of choice at the international level. There could be industry norms emerging around decision-making towards conflicts between the SRA's rules on COI and other local conflicts rules or duties.

6.3 Summary of the Key Themes Emerging from Thematic Analysis in Appendix C

The next step in this qualitative thematic analysis is to summarise the themes that emerged across the interview data in Appendix C. The framework for this analysis followed the Key Question and sub-question structure, and as closely followed in the interviews.

Key Question 1: How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties?

In what circumstances would you "push-back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

The purpose of this part of the analysis is to consider what is important to law firms in negotiations towards drafting contractual retainer agreements in view of the fact that these could set the ethical standards to follow on a transaction, and that it is unclear what role the SRA's rules for COI play in this, if any. By asking firms to explain where they might

[715] Georgian American Alloys, Inc & Or v White & Case & Anor [2014] EWHC 94 at para 16

"push-back" on client terms governing COI, it might be possible to determine what their 'redline' negotiating positions are, in other words their acceptable standards in particular contexts, and any circumstances that they feel makes them potentially more exposed to client demands. Question 1a) asked respondents what factors are key in the private contractual negotiation over COI between parties?

A thematic analysis of the interview data contained in Appendix B[716] revealed that since the SRA's Independence, Representation and Risk report (2015)[717], a greater range of clients appear to have adopted what were commonly referred to as Outside Counsel Guidelines (OCGs). Several firms considered that the practice of client-drafted retainers had begun as panel agreements in the banking sector, but had very recently begun to cross over into other sectors. Several firms were specific about the areas where this first began to emerge, industries known for being highly competitive, including the high-tech, and Intellectual Property sectors, but also more recently general commercial contracts work (F1 G3). The mechanism of enforcement under an OCG is contractual, with the expectations and duties around COI expressed as service levels appended to the OCG. This provides a mechanism of redress that goes no-where near the SRA or any other legal regulator. Respondents B1 and E3 considered that instead of reporting concerns to a regulator, that they might expect service level credits[718] as financial redress. As noted in Chapter 3, there is generally an absence of English case law dealing with large law firms, and so this might

[716] Appendix C Thematic Analysis of the Interview Data follows the Field Notes in Appendix B

[717] Vaughan, S. and Coe, C. Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms (SRA 2015) pp59-61

[718] For further information on 'service level credits' see for example Latham & Watkins LLP Service Levels Whitepaper (Undated) Available at: https://www.lw.com/presentations/Service-Levels-Whitepaper#:~:text=Service%20credits%20(or%20service%20level,set%20in%20the%20service%20levels [Accessed 18 April 2021] In essence, sophisticated clients outsource services including their legal services provision to external law firms. Service levels and service credits are important tools used in outsourcing contracts (including OCGs) to ensure that the supplier law firm performs services to the required standard. Essentially these tools objectively define how well the supplier law firms needs to perform, and the immediate financial consequences of failure. Service level credits are a mechanism by which amounts are deducted from the amounts to be paid under the OCG to the supplier law firm if its performance fails to meet performance standards set in the service levels. Service levels are contractually binding and focus on important parts of the services, and important to the client's business objectives, and this therefore includes the client's definition of loyalty and/or instances constituting conflicts of interest. Service levels are usually defined by some form of objective and reliable measurement, and in relation to conflicts of interest for example this can include "number of breaches", or parties named in an appended schedule.

perhaps help to explain why. However, it also means that unethical behaviour in relation to COI might be being shielded from the SRA where it is not being reported by either clients or firms.

"what were once just panel agreements have become OCGs – increasingly more complex agreements containing all manner of KPIs and service levels. The appendices usually set out their performance expectations, including the management of COI". E3

The notion of 'KPIs' or Key Performance Indicators and service levels, affords clients an opportunity to reframe obligations owed around COI to suit commercial ends, and the use of OCGs appears to have become so frequent, and grown to such an extent that a number of respondents now actually do recognise COI issues derived from the provisions governing COI under OCGs as "contractual conflicts". As mentioned earlier in this chapter, it is a categorisation not currently recognised in the literature.[719] Several firms defined a contractual conflict along similar lines:

"Potentially these do expand the duty of loyalty – requiring firms not to represent in 3 main areas really: firstly, where other parties in a matter are averse to any affiliate of the client; secondly, any competitors of the client; thirdly, being contractually bound to US rules, such as the ABA's Model Rules, and in particular Rules 1.6 – 1.11" A2

Therefore, at least some OCGs contractually bind law firms to the ABA's model rules in relation to COI. This means that contractual obligations could be enforceable in US Courts against and English law firm purportedly governed by the SRA's rules, and regardless of the fact that no US State Bars, or indeed the ABA itself being licensed by the LSB to regulate legal services in England & Wales Nevertheless, this appears to confirm indications emerging in limited English case law, that the SRA's COI rules are being usurped as the guiding standards for large law firms on transactions in relation to COI. Furthermore, in terms of frequency, one respondent considered that given their scope, they COI of this nature now appeared on a daily basis, far more frequently than 'legal conflicts'.

[719] Although it would have been useful to include a copy of an OCG example in this work, this was refused by all General Counsel because the document is the client's property, covered by the duty of confidentiality, and nor were respondents willing to afford the time to redact a version for my purposes.

"Legal conflicts, well I only deal with a couple each week. Hardly any. But as for contractual conflicts, I see these all day, every day". C2

I found that the attitude of respondents towards OCG's was especially negative among the largest firms, which appeared to link them most strongly to the financial services industry, and blamed them for being an instrument of bad practice being utilised by powerful corporate borrowers of large banks. Furthermore, bemoaning the fact that the SRA appeared to have done little about them, and that it was a practice that ought to be banned.

You might want to take a look at a report produced about 4 or 5 years ago for the SRA considering lawyer independence and autonomy. I can't recall the authors, but it had identified bad practice in the market relating to conflicts. In practice banks make a borrower pay the banks legal costs, as is standard practice, but where they are powerful enough, the borrower can use them as leverage to dictate what law firms the banks can use as well. So, they can insist that law firms use the same ones as the borrowers. However, this also dictates what law firms can ask. This practice still continues, and the SRA has still done nothing about it, although we would not act in this scenario, it is a practice that ought to be banned". A2

This quote describes the triangular relationships considered in Chapter 3. By way of explanation, borrowers usually pay the lending bank's legal costs (so i.e., the bank's costs of engaging the external law firm). Because of this, the borrower will usually insist that the bank uses the same legal advisor that they do, and so in practice this means that the borrower feels able to dictate what questions the legal advisor is able to pose on behalf of the lender. A2 felt that the SRA ought to be taking action to "ban" this sort of practice by powerful borrowers. Nevertheless, these largest firms in the A and B bands were most likely to claim that they had the gravitas to push-back and even reject OCGs entirely, although they also considered that the "push-back" position, i.e., the "redline" that should not be crossed were the standards set by the ABA Model Rules by comparison to any OCG terms. The SRA's rules were not mentioned. Firms in Bands A and B also expressed their view that the least likely firms to be able to push back to client OCGs were those in what they regarded as "the mid-tier" large law firms A1, A2, B1

"if client expects more than this [ABA standards] we remind them of our expertise in a particular area – our long-standing clients already know where the lines have been drawn and for the time being they are holding" B1

The other category of "large firm" that felt more able to push-back and reject OCGs entirely, but for different reasons, were the Big 4 ABS's, included within the scope of this research given their direct competitive threat to large law firms, and broader professional services contexts. Rather than bargaining power and size, these entities explained their decision-making in terms of a greater ethical culture than law firms, and a brand in which trust was seen as extremely important. Significantly, they explained the strictness of internal policies governing COI which were geared up to satisfying wider client due diligence processes which arose, not just because of the terms of their SRA ABS licences, but also their accountancy and audit functions, including the expectations of the ICAEW (The Institute of Chartered Accountants in England & Wales):

"We are unable to accept client terms of engagement as a business. Our engagement letter is drafted very tightly to comply with our internal policies and due diligence on the client. We are far more heavily regulated than law firms, and are subject to several regulatory regimes. This includes the terms of our ABS licences from the SRA, and also the ICAW for example." ABS1

"We don't accept these sorts of t's and c's, we are not afraid to disappoint a client by telling them, I'm sorry but I can't act for you now. This is even saying no to the biggest client…there is a huge cultural difference between the Big 4 as opposed to law firms, it is the audit culture and trust in the brand, which is extremely important". ABS 2

In relation to the suggestion by the Band A and B law firms that it is the "smaller" mid-tier firms who are most likely to struggle to push-back on OCGs, in fact there was some limited evidence that larger firms appeared might be avoiding the issue by obtaining advanced waiver from a client, something permissible under the ABA Model rules, but not possible under the SRA's regime, for which there is no such right A2 C2. Also, the picture regarding smaller large firms (i.e., below band C) indicated that rather than caving in to client demands that they might be able to draw from niche strengths to enhance their bargaining position against a client:

"We have a relationship with one major global bank going back to their foundation, i.e., 150 years, but also because of our niche, world leading expertise and strengths in areas such as aviation and shipping, which can't really be done economically by the really big firms, we do have some leverage with particular financial services clients. We punch well above our weight on panels. This means that we have been able to negotiate some of the more onerous terms down to be more acceptable to our business." F2

Nevertheless, my thematic analysis would suggest that it is firms below Band C that have to more readily concede to clients, and despite going against their own redlines. There are a variety of different reasons for this and several GCs were in fact very candid about the hard economic motivations for this:

"In any negotiation we have to bear in mind our own position as a law firm relative to our competition, the client and any other parties that might be involved. It's a largely commercial decision." C3

"It is really very difficult to push back given that we are reliant on repeat business from the same handful of financial institutions and tech providers. So, your answer is, often we don't, or rather can't". E1

"Each engagement casts a new net over our client list, and in terms of bargaining power, we are not well placed to counteract and say no, because we cannot absorb the loss of opportunity in this market. In fact, the reality is that we never say no. We just have to manage the risk as best as possible". G1

However, it also appeared that these firms could be bound to the contractual provisions of an OCG inadvertently, and potentially as a result of the notion of bounded rationality described in Chapter 4, which can limit a fee-earner's judgement on provisions governing COI. This is because of the limited time afforded by clients to negotiate terms – and then difficulty in revisiting a provision that has essentially been either overlooked or "acquiesced to", rather than "agreed to" B1 C3 D2. In line with the discussion in Chapter 4 around the need for systems & controls to assist decision-making in these circumstances, this was the first indication that decision-making on COI might have been take out of the hands of fee-earners entirely for these reasons:

"I have had a couple of instances recently where client retainers have, effectively been accepted without negotiation because the fee earners that they have been sent to are not

yet familiar or competent with the centralised internal systems that they are supposed to follow. The issue is the tight turnaround time, and I would also say, pressure to win business." D2

"What is particularly problematic is that our ability to push back on these terms through negotiation is often limited by a lack of awareness within the firm around the sensitivities where there is actually no conflict at all. Typically, this occurs with the lesser experienced lawyers, but even so, with the largest US clients it's virtually impossible. I'm fighting a losing battle" C2

Furthermore, even where decision-making appears to have been a conscious process for fee earners, , a determinative factor determining is indeed a form of 'risk appetite'[720], which is an assessment involving how the terms governing COI will be enforced and, the likelihood that those terms will be enforced. Firms in the Band B to F bracket are willing to accept this risk rather than pushing back, or considering asking the client for a conflict waiver:

"we do just have to let some terms that I'm not entirely comfortable with go, because we have to take a pragmatic view, and that is that they are not likely to be enforced in reality. So, for example, we don't actually do work in a particular industry or with any of the affiliates specified in the matter. Obviously, we'd keep this under review though". C3

"The risk appetite is a combination of factors, but includes the benefits in taking a client on versus the harm that they might cause the business. Exclusivity might be afforded to some clients where, for example we can afford to restrict our operations in a particular jurisdiction or field of work. However, we might push back the closer their demands come to the core of our business, and I would say are particular niche strengths in, for example construction matters, and especially where, for example that is going to impact on our 5-year business strategy, e.g., will we be expanding into particular areas in the near future". H1

In terms of where the redlines lay across all firms, there were a broad range of contextual factors, but largely characterizable as 'commercially' rather than 'ethically' driven. These often reflecting the nature of the business, and its future business strategy, but where they

[720] For a consideration of "risk appetite" please refer to Chapter 4 of this thesis. Essentially it is the level of acceptable risk appearing to emerge from a complex set of business-led commercial and social interactions.

approached ethicality, then this was by measurement against the firm's own engagement letter terms on COI A1 F1, or in other instances the ABA's model rules as an easily referenceable benchmark standard A1 B1 C1 C2 E1.

"We push back where for example; they want to restrict us from representing an affiliate of a competitor in another jurisdiction. That's just unreasonable. When they insist on terms like that, we say well, what have we got to lose exactly, what is this client worth to us versus its harmful impact on our future business plans and loss of business" E2

Other negotiating efforts sought to try and find a compromising 'middle ground' with the client, and rather than to seek a waiver, to push back where the scope of the client's demands could cause specific harm to the business. Strategies included scoping the client's OCG down to:

- certain types of affiliates that the firm has no relationship or contact with B2 C1 C2
- a particular industry or field of work B2 H1
- by jurisdiction C2 F1 G3 H1
- duration C1 H1

However, in two instances where there had been recent US/UK global partnership mergers, the GCs saw the UK business still in legacy terms, and informed me that 'the UK side of the business' was being increasingly forced to adopt the ABA Model Rules as the standard for COI in relation to transactions by clients, as they had their hands tied by the more dominant and larger US side of the business which was keen to impose internal US COI policies upon them in order to facilitate cross-referrals. This was posing considerable internal upheaval given the greater prominence of OCGs among US clients. Perhaps most significantly though was an admission by firm C1 that the US side of the business did not regard SRA OFR as credible:

"Getting people to move more in step now with US client demands, and the US side of the business has been a massive cultural upheaval in terms of personnel and systems and controls. This causes all sorts of problems for me when we are dealing with client outside counsel guidelines. I think this is part of US practice culture. It has been quite a learning experience for us, and actually we have had to re-define our expectations considerably. We've had to re-define the lines with some clients, and I have to be honest, some of our

most loyal have been told to go elsewhere, simply because they are subsidiaries now of larger US groups". D2

Both the US firm, and their clients have expectations that in performing work for them, we follow their standards. Clearly, they don't have a very high impression of OFR, and I can understand why they might not get it. However, it means that we are being forced, through contract, to adopt the US rules by clients of the US business, and furthermore, the US side of the business makes it very hard for us to push-back" C1

Only one of my twenty respondents appeared to view OCGs as a largely positive development for law firms, and this appeared to be based upon the non-controversial nature of client-to-client conflicts in their specific field of practice. With respect to defining the standards expected of law firms when dealing with COI, their view was that an OCG could be a very useful document which clearly set out the terms of the client's expectations, and which would therefore help them to manage the client relationship:

"I don't really find them too controversial on the whole, because unlike some industries debt-recovery work is not especially controversial as between client banks. It is an expectation that banks should be able to recover their losses, and it is also an expectation that we will be representing competitors to do the same thing. It is standard solicitor breach of trust, solicitor's negligence, and breach of lending conditions stuff on behalf of the lender … its very much a useful governing document that is at the heart of managing the client relationship in fact". E3

b) Understanding how the SRA's COI rules are interpreted in the large law firm context

The purpose of this question is to determine whether the SRA's rules are being used/followed, and what norms have emerged around operative provisions in the SRA's rules on COI, in the absence of guidance, case studies or indicative behaviours.

What do law firms and lawyers recognise as an irreconcilable COI – Under what circumstances would you decide that you could not act for a client where there is a COI?

Two GCs expressly mentioned an "irreconcilable" clash of adverse duties in terms of 'legal conflicts', by specific reference to English case law e.g., Hilton Barker, or irreconcilability between the duties of confidentiality and disclosure, or because of one party's fraud C1 F1.

Two other GCs recognised the likelihood as arising in a contentious litigation context only, for example where the relationship between parties changed, perhaps breaking-down to the extent that it became hostile and, for example, a matter was referred to arbitration G1.Three other GC's also recognised considerations around whether or not to act for a client in terms of a legal conflict first and foremost, but stated that they had not had to refuse to act for a client on the grounds of a legal conflict recently D2 E1 H1:

"It is rare to find that we cannot act for a client on legal COI grounds to be honest, given the sophistication of our conflicts management system and screening, we are taking full advantage of technology that was not available at the time of Bolkiah in order to enhance ethicality. The world has moved on, and it's about time the law in this area did too" H1

I can't recall us having to refuse a client on the grounds of legal conflict for ages. On the other hand, commercial conflicts are another matter". D2

The majority of GCs though, encompassing the entire spectrum of large law firms in the sample, did not recognise this as an issue of 'irreconcilability' between fiduciary duties (as per the English common law standard), but rather instances in which "the firm" was effectively excluded from acting for a client by contractual or positional conflicts. B1 B2 C2 D2 E1 E2 E3 F2 G2 ABS1:

But obviously this is all subject to positional and contractual conflicts, which are, I would say, the first, and to be honest, most important consideration in every instance. That is when we would probably turn a client away rather than manage the matter through ethical screening" B1

"The starting point here is whether there is a positional conflict, then whether there is a contractual conflict, then whether there is a legal conflict – in that order" B2

"it is not really entirely dependent on legal conflict. We have our hands tied in terms of some of these contractually based conflicts, but also positional concerns". C3

Several GCs also expressed their frustration that the SRA's rules were too vague to be of use in determining instances where they should not act owing to the utter lack of any form of relevant guidance A1 C2, and it also appeared that in order to fill the void, the largest two firms were using ABA Model Rule standards to fill in gaps in OFR interpretations (specifically ABA Model Rule 1.8 when a conflict can't be waived) A1. However, what was

particularly interesting was the use of a "for the avoidance of doubt" strategy, under which the largest firms were able to convince the client to provide an Advance contractual waiver governed by US law to "sweep-up" not just legal conflicts, but also to provide consent for any contractual, positional, and commercial conflicts as well A1

Finally, as an aside, ABS 2 drew an interesting distinction between 'Legal conflicts' and what he referred to as the 'SRA's conflicts rules', to reflect the approach he took to COI, and on a global basis, because of perceived limitations in the SRA's COI rules:

"We take a stricter line than the SRA's conflicts rules … really the starting point for us is legal conflicts … a legal conflict is wider than an SRA conflict, consider an SRA conflict to be a conflict arising under the SRA's provisions on conflicts, which, when you read them are quite bespoke and tailored to suit large law firm practice. On the other hand, a legal conflict reflects the wider duties of loyalty and confidentiality emerging from case law, and the duty of loyalty for example is recognised globally to different standards" ABS 2

What is a Serious Breach re COI - What would you consider to be a "serious breach" in a COI context?

Several GCs considered that this was an area in which the SRA might have a helpline to help clarify the rules, however, at the moment the SRA was of little help to large law firms B1 E3. For one thing, the term "serious breach" does not appear in the SRA's rules on COI themselves, but as part of the reporting requirements that *the COLP* has to follow[721] and it is undefined. A further issue is that, strictly speaking, it was the GC, rather than the COLP who was responsible for COI among my sample of firms, and so the GC would either need to refer back to the COLP, or to the SRA directly in the event of a sufficiently "serious breach" of the SRA's rules on COI. under the intra-firm self-regulatory approach enabled the issue to be, but especially given the lack of SRA guidance. Several norms have emerged, which might be likely to keep breaches out of regulatory view, and which would negate having to address breaches in all but a very narrow range of instances anyway.

Most GCs considered the extent of harm to the client as an important factor C1 C2 D1 D2 E2 G3 ABS1, however, in terms of the origins of that harm, half of respondents considered that the SRA's Enforcement Guidelines meant that it could be interpreted as having a focus

[721] SRA Code of Conduct for Firms 2019, Rule 9 Available at: https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/ [Accessed 4 May 2021]

on serious misconduct C1 F3, or criminal forms of behaviour, and especially in line with the reference to "victim". C1 C2 C3 D1 D2 E2 E3 G1 H1:

"I think that the SRA's enforcement policy provides a flavour of this, and I have been hunting around for a definition. It's one of the instances where you would hope that the Law Society's ethics panel would step into the breach, but frankly, they're just a glorified coffee shop on Chancery Lane, so I think it pretty much has to be a conflict that is impaired in some way by fraud, or some other criminal behaviour. However, we'd also have to look at the harm to the victim. It's definitely a much higher standard than the previous material breaches". D2

However, what was especially interesting was the reluctance to report any issues to the SRA at all:

"Letting the SRA know about anything is risky, because once you let them know, they must reach a decision, and they know less than you do, so you are sort of shooting yourself in the foot". B2

Other respondents stated that they did not think that there was any need to report where OCGs provided private remedy mechanisms for the client in order to service a breach of COI A1 A2 B1. Therefore, allowing the client to choose the remedy negated the need to make a report to the SRA.

"This is something that can be remedied with the client, and without the need to report the matter to the SRA, I mean, what good would that do? In reality, if there were to be any breaches, regardless of whether they might be deemed falling within the non-material, material, or serious categories, or whatever the flavour of the month, most OCGs now contain a resolution procedure anyway, and in the most serious instances, a binding commercial solution is appropriate, often in the form of a reduction in service level credits, leading to a reduction in their next bill". A1

The definition of "seriousness" of breach might also be contained in an OCG, potentially by reference to a contractually agreed scale with a particular client A2 F2

"Serious can be defined in a measured way by the OCG, and I think this is helpful in confronting a lack of clarity in the SRA's rules" A2

However, one of the most profound remarks to be made, and not just in connection with this particular question, was that:

"It's not the rules anymore that govern lawyer behaviour, and this goes more generally, but the client" B1

What are related/unrelated matters - How do you determine what the degree of relationship is between matters?

Whether a matter is "related" for the purposes of the SRA's rules is left undefined and with no contemporary guidance. In terms of the development of norms therefore, most respondents considered that a relationship was defined by subject matter B1 B2 C1 C2 C3 D1 D2 E2 H1 and clients including affiliates B1, C1, C3, D1, E2 H1. However, in terms of determining the extent of the relationship, the Marks & Spencer v Freshfields standard[722] of "some degree of relationship" was perceived as a bit loose, and several firms had adopted the US standards instead of "substantial degree of relationship" given the availability of a greater range of interpretive case authority A1 E1 E3.

"So, although we are afforded a bit of artistic licence here, what we actually do is adopt the ABA standards again, which also happen to be reflected quite widely in OCGs and other state bar rules as well" A1

Ultimately, the determination though appeared to be made by reference to scope and extent of retainers C1 C2 C3 E2 E3 G1 G2 G3 ABS1. Nevertheless, there were some other interesting perspectives that considered that the matter could be determined by a rule of thumb, recognising to what extent things would be done differently if one client was represented as opposed to all A2. One also highlighted the importance in this regard of having a centralised conflict checking to capture arms-length beneficial ownership B1

"Substantially common interest" and "competing for the same objective" - What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

[722] Marks & Spencer v Freshfields [2004] EWCA 741

In terms of approach, a fairly consistent response in line with the SRA rules on COI was to start with a generally-worded communication to the clients first, to determine the client's views, and in particular whether they require further information on the matter, and to suggest that mechanisms were available to protect their confidentiality (including information barriers) A2 B2 G1 H1

However, the role played by OCG's in determining the level or standard of disclosure when advising clients of COI was noted: C1 C3 H1

"I still keep a copy of the old Blue Book[723] *to hand, and the guidance in there around arms-length transactions for example is what I suspect most of us used to follow as a guide to the delicate balancing act to avoid breaching confidentiality. However, increasingly we have to balance disclosure expectations specified between OCGs".* B1

"Neither of these exemptions is relevant under the terms of the framework service agreements that we have in place with clients" E1.

Also, taken into consideration were the impact of global firm policies, and in particular a direction informed by US COI rules of obtaining advance waiver from clients as a mechanism to deal with all forms of COI, including contractual, positional and commercial as well as legal, marking a complete departure from the SRA's two permitted exemptions coupled with "informed consent" standard A1

"As a firm, the global policy on COI adopted in respect of exemption follows the US position… this is to secure advanced client waiver at matter inception. In E&W we could take an extra-territorial approach and this could be done through advanced contractual waiver. In fact, waivers will often specify a range of different types of conflict". A1

However, either way, several GCs had adopted a rule of thumb regardless of jurisdiction, and this followed a fairly similar set of norms to determine whether the client had sufficient information to:

- Be aware of the nature of the COI, and in particular its seriousness B2 D2 H1 F1 G3

[723] A reference to the SRA's Solicitor's Code of Conduct 2007, the last 'prescriptive rules-based' version of the Solicitor's Code of Conduct prior to the introduction of SRA OFR Mark I in October 2011.

- Be aware of the scope D2 H1
- Gauge what the risk is to their business ABS1

What would satisfy you that it is reasonable to act for all clients?

No respondents actually referred to the need to act in the client's best interests, with the exception of several firms in Band A - B who drew from the ABA Model Rules on competent representation, meaning that the firm needed to satisfy itself that it had the necessary skills and expertise to act on the matter, and sufficient flexibility and latitude to accommodate all clients with the necessary protections in place A2 B1 B2.

"When we are comfortable that they understand the scope of the retainer, and the precise nature of the legal services that are being delivered." ABS1

However, others in firms Band C - G C considered that this would be related, not to the SRA's rules directly, but to the firm's own internal policies and procedures on conflicts C1 C2 C3 D2 E1 E2 E3 F1 G1 G2, which might also be US-informed.

One respondent considered that the standard would be where the firm's risk appetite had not been exceeded in relation to the potential harm that the clients might cause the business. H1, and several others as to whether it might be possible to justify to a court or regulator that the firm had made all "reasonable endeavours" to protect confidentiality B2 C1 G1. Another respondent considered that it meant there should not be concerns over the integrity of the client D2

Key Question 2: In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Several of respondents expressed concerns over the commercial sensitivity of this question, and so unfortunately it was not possible to obtain any further documents including copies of the conflicts policies, or any technical specifications. However, all of the sample group now operate a centralised conflicts control centre, and in several instances very recently A1 A2 B1 B2 C1 C2 C3 D1 D2 E1 E2 E3 F1 F2 G1 G3 H1 ABS 2. Furthermore, even in the case of global networks operating under a verein structure, the need to

centralise COI identification and management globally trumped the self-autonomous office structure. A1 E2

"Although the London office is an LLP, and a separate entity from the rest of the firm, this is not the case for conflicts checking, which is overseen by me in New York – this is where we have the database of client interest and beneficial ownership of subsidiaries" B2

A pattern is emerging of a centralisation of the process of conflicts identification, management and tracking. One of the most sophisticated systems that I encountered was at ABS 2

"We have a very sophisticated centralised approval system designed for us by Microsoft. The first check is for any accountancy or audit conflicts, then AML/KYC checks are performed, then any reputational concerns are considered, then at this point we assign the matter a level of risk. At this stage, if it is High Risk, it will be referred to the COLP who will consider whether we proceed with it as a legal matter. If so, then we conduct the legal conflict of interest checked, and then send out our engagement letter, which will be drafted in line with any issues identified during this process. ABS 2

The process for dealing with COI followed the same general pattern across the sample. Firstly, this recognises that instructions can arrive into the business in various places, and not necessarily within the fee-earning department, but for example, accounts and billing. This needs to be captured and sent to central compliance at matter inception, directly. This means that the central conflicts team are involved right from the very outset, and usually before any fee-earners. They will make a determination on any COI within 24 hours. Fee-earners are either not involved, or in some cases, expressly forbidden by firm policy from taking decisions on legal conflicts B1 C1.

"I think this has been one of the greatest cultural changes in legal practice in recent years in our firm, and I think at many partners in London are still getting used to the fact that they have a little less ownership over their clients. Increasingly they belong to the firm". C1

The central conflicts system and team is an independent operation from the fee-earners for reasons of confidentiality, which it was argued actually enhanced ethicality A1 C1 C3 E2 E3. This is re-enforced in policies and training A2

"importantly the conflicts team is totally independent from the fee-earning community. This is absolutely vital for reasons of confidentiality because of course they know everything about everyone" C1

"In future, the risk team will replace the partners and COLP on decision-making around COI specifically because it has become a complex global issue, and the risk team will be independent from fee-earner decision-making so they can give independent, objective advice on transactions" D1

"The SRA can talk as much as it wants about individual and entity regulation, but the reality is that decision-making has had to be relieved from the individual fee-earner with respect to conflicts. Furthermore, to make fee-earners an integral part of the centralised process would pose a considerable risk to confidentiality, and so it has to be an independent process and team of compliance specialists. They are also expert in reviewing client external counsel guidelines". E1

The reasons for centralisation of the process, include the increasing number of client OCGs, no longer just financial services clients A2. This means that systems have to cope with a multitude of conflicts imposed by stricter contractual terms. Also, the increasing complexity of firms themselves:

"Realistically, no human being could possibly know all of this information, and this is the standard now imposed upon the entity by OCGs"

A higher standard is required of entities effectively- one that individuals can't really achieve A2 C2 E1:

"It became absolutely impractical, or rather infeasible, for a fee earner working in our Birmingham based commercial team, to know with any degree of certainty, what one of his colleagues in the Southampton Office (which is part of the legacy business following the merger) had done in the past, or was currently managing, and in particular the subsidiaries and affiliates of that client" E3

"We have been able to catch so many more potential conflicts since this system went live, and its infinitely better than the old system of circulating emails…or even the leather binder" F1

Nevertheless, client relationship partners do usually have a right of appeal to an ethics committee chaired by GC A1 A2 B1 B2 C1 C2 C3 D1 D2 E1 E2 E3 G1, although in several firms, the GC's word is final F1 F2 H1. Nevertheless, while decisions are taken by law firm compliance personnel in the risk team regarding legal conflicts, client relationship partners might still be able to determine commercial conflicts D1 G3. Several GCs were clear that COI was the domain of the GC, not COLP, given their expertise in cross-border matters, and the COLP was very much an English, SRA role.

What happens as a transaction progresses, and how are emerging conflicts managed?

All of the respondents operated systems that were capable of checking for COI across the firm using an integrated, centralised conflicts database, linked in with other systems and controls within the organisation, and drawing from open-source information externally to notify the conflicts team of changes in client and matter status E1. Several of the most advanced systems, operated by the largest firms of all, were able to work across verein structures. A1 A2 B2 ABS1 ABS2.

"The system will draw data related to the client from across the verein to automatically notify the fee-earners of any changes as the matter progresses, for example any changes in ownership or financial health etc. We are looking at this not just from a legal COI perspective, but also a commercial one". ABS1

Some systems are in fact so sophisticated that in relation to client-to-client conflicts that they can detect even an arms-length change in beneficial ownership in a foreign jurisdiction, and positional and commercial conflicts as well A2 E1. This is very useful given the extent of COI clauses in OCG agreements that might contain expansive definitions of client, and in fact one respondent considered that "client" was a concept, rather than an individual:

"One of the biggest risks in this respect is recognising who is the client, because this is now often a concept more than an individual. The main client, and its affiliates, and then to what extent the rest of the world might clash". C2

However, despite levels of sophistication in client-to-client matters, in relation to personal conflicts, there appears to have been little progress since the pre-OFR era case of Koch

Shipping (2002)[724]. As considered in Chapter 3, in Koch which the Court of Appeal was a) willing to accept that the onus was upon individuals to inform the firm about personal conflicts, and b) that it was not reasonable to expect the firm to have any systems or controls in place to detect conflicts of this nature. Despite SRA OFR in the time since, the detection of personal conflicts is still dependent upon individuals being expected to do the right thing and disclose the nature of a personal conflict when they ought to. However, some firms did make an effort to check for personal conflicts, but only at the point of recruitment of new staff, and not beyond this A1 A2 B1 B2 D1 E2 G1

"It's fun and games, so for example, a typical question is "if we were to ask you to represent Barclays would this pose a problem – it's a time consuming and frustrating process involving a lot of lateral thinking". B2

"lateral hires are provided with a list of names in an Excel spreadsheet to check" A2

"work is in a dynamic context; you still need to have conversations with people for them to tell you that something has changed" ABS 2

Key Question 3: How are conflicts between the SRA's rules on COI and other local conflicts rules reconciled?

How are conflicts between the SRA's rules on COI and other local rules reconciled?

Decisions around jurisdiction might start with a discussion that embraces not just regulations on COI, but a range of other dominant issues that will inform the final decision as well.

"Where conflicts are flagged by our central team between different offices globally, then ultimately, they may fall to be resolved by a round table discussion between the firm's ethics committee in NY, where it's not just a matter of clashing legal conflicts, but for example tax regimes. A decision is reached on the best interests of the client, but it is also a commercial decision, the best financial compromise too". B2

[724] Koch Shipping Inc v Richards Butler (A Firm) [2002] EWCA Civ 1280

"In terms of the wider regulatory environment, for example. PI etc, the SRA's regulatory regime is just a very, very small part of the wider jigsaw puzzle really, and in respect of COI, where we have clients able to set the rules, it really is more or less irrelevant from a practical point of view in most instances". C2

From the point of view of COI though, the starting point is to determine the jurisdiction of predominant effect of the transaction, then to undertake a comparison with other rules. A1 A2 B1 B2 C1 C2 C3 D1 D2 E1 E2

"It's really a case of determining the predominant effect of the transaction and also where the lawyers working on the transaction are authorised. It's pretty much a case then of spot the difference, and identify what fits, and what doesn't, and seeking further clarification and consent from the local regulatory authorities, and second opinions from external counsel if we need it, and especially where local regimes impose very onerous conditions around loyalty and confidentiality. The SRA's helpline is utterly hopeless". C1

"I literally start with a copy of both codes or, in some jurisdictions, the relevant laws and try to map the SRA's code onto it. Where there is some particularly unusual provision and the client is not happy with it, we might seek external counsel help" G3

"In time, GCs may develop the experience to be able to navigate around the rules in an international context, rather than the COLP, because it is a case of piecing together an international jigsaw puzzle" D1

However, in addition to the local rules, and potentially the SRA rules, the GC will need to bear in mind any relevant agreed OCGs in decision-making, including where there has been an agreement over the standard of rule to be applied A1 E1

"Clients may agree their own standards on jurisdiction, and choice of law so to speak. It is rarely the SRA's OFR regime that is selected as the "governing law". C2

A number of firms have tried to adopt a benchmark standard in finding a suitable standard to all parties, and above which there is discomfort. This is very often the ABA Model Rules. The SRA's rules are not the regime of choice for A1 A2 B1 B2 C2 D2 E1, who all follow the ABA standard, and one GC considering that the ABA Model Rules offered clearer redlines

than the SRA's rules on COI when determining where standards overlap, or where gaps exist. C3

"the ABA's model rules are the basis for the rules in New York, and most US States, but also some more reasonable sophisticated clients adopt them as the standard for contractual conflicts provisions. We see this with clients who have nothing to do with the US as well. I have a sense in fact that in so far as conflicts are concerned, the ABA's model rules are being increasingly adopted as a sort of international benchmark, and the SRA's OFR regime is not the regime of choice". B2

However, in relation to the English "legal" standard, ABS2 stated that where local standards were higher than the COI rules under OFR, that it would adopt the English legal standards on confidentiality and loyalty, rather than the SRA code on the matter ABS2

As for the interpretive nature of OFR, although this was deemed to be acceptable in some jurisdictions, the weaker definition of COI and confidentiality did not measure up to several civil jurisdictions in Europe for example. These jurisdictions can be very strict on the duties of loyalty and confidentiality in particular, and, respondents informed me that countries such as Sweden, France and Germany impose criminal sanctions on confidentiality A1 A2 B1.

"The SRA's current rules on COI sort of work like a pair of elasticated trousers. They are very accommodating, but on occasions they can fall down. This means that when compared with the prescriptive rules of other jurisdictions such as the US, they more or less wrap around them. However, in other civil jurisdictions, such as continental Europe for example, the duties of loyalty, confidentiality and personal conflicts are all taken very much more seriously, and might even have criminal sanctions attached to them… some foreign lawyers I've dealt with view the notion of devolved regulation as somehow a bit corrupt".

Several respondents informed me that they sometimes needed to seek advice from external counsel over cross-border conflicts B1 C1 D1 G3, and there was a sense that the SRA' Cross Border Practice Rules 2018[725] are quite unhelpful where they simply direct firms

[725] SRA Overseas and Cross Border Practice Rules 2018 Available at: https://www.sra.org.uk/solicitors/standards-regulations/overseas-cross-border-practice-rules/ [Accessed 4 May 2021]

to follow the CCBE Code[726], as this in turn directs that they should follow the local Member State rules, which in several European jurisdictions are often very onerous, especially around confidentiality, and with some even attracting criminal sanctions A2 B1

"The reality is that the member state's own rules are often more onerous than the CCBE code, and so frankly the SRA's [foreign] rules are utterly meaningless in this respect". A2

"What is particularly disappointing is the total lack of any guidance in the SRA's Codes about foreign jurisdiction rules. The SRA just seems so reluctant to actually do anything about this, and I've been pressing them. [REDACTED] and so I know it's probably most likely related to lack of expertise" H1

6.4 Addressing the Key Questions in Support of the Main Aim

Having undertaken a thematic analysis of the data, and identified and summarised the emergence of several key themes against the sub-questions in the previous section, the next step is to try to make sense of these findings in support of the main aim, which is to consider whether SRA OFR is an effective model of regulation for COI in large law firms.

6.4.1 Key Question 1: How Do Large Law Firms Determine what standards to follow in respect of COI?

The data reveals the extent to which American clients, firms and traditions appear to be changing the face of regulation around COI in large UK-based law firms. The tool of choice are "OCGs", which appear to have begun with US financial services clients, and now appears to be common usage in other, competitive industries. My research subjects were still referring to conflicts in normative terms of 'positional', 'commercial' and 'legal', but also "contractual conflicts", which were a product of OCGs. Furthermore, as between the different types of conflicts, GCs regarded contractual conflicts as the most significant concern for them. Importantly, they are not really non-legal or purely commercial in nature, because they contract English lawyers and firms to either the American Bar Association Rules (ABA rules), or the client's. This means that a breach of a contractual COI rule (specifically the ABA Model Rules 1.6 – 1.11) could be actionable by a client as a

[726] Charter of the Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (2013) Available at: https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf [Accessed 4 May 2021]

breach of contract actionable in another jurisdiction dependent upon the choice of law and jurisdiction clause contained within the OCG, rather than as a regulatory matter. It also appeared that some OCGs were particularly sophisticated, and operated as framework agreements, including service levels and key-performance indicators that could entitle the client to specified "contractual" rather than regulatory remedies, but backed by the threat of more serious legal sanction. Penalties included several commercial forms of redress, including the full or partial reimbursement of fees. Given that these mechanisms of financial redress are deemed satisfactory to the client, it opens up the possibility that it is less likely that breaches of COI are being reported to the SRA by either clients or firms.

Unfortunately, I was not able to obtain a copy of an OCG for reasons of confidentiality despite best efforts, however I was provided with a descriptive overview. OCGs typically used US conflict rules, such as those prescribed by the ABA Model Rules (and adopted by most US State Bars) as their basis, with some amendment. These were also perceived as the benchmark negotiating position by law firms, above which COI standards were regarded as strict of onerous. In their strictest incarnations therefore OCGs imposed a very severe duty of loyalty by requiring firms not to represent in 2 main areas:

1) Where other parties in a matter are averse to any affiliate of the clients; and
2) Where other parties in a matter are competitors of the client

"Affiliates" and "competitors can be very broadly defined, and so the potential scope to encroach upon the firm's client lists was quite substantial. Nevertheless, law firms appeared to have clear redlines in pushing-back against onerous OCG provisions. This could be characterised as much a commercially-motivated decision rather than an ethical one. Notably in instances of US/UK mergers, the US businesses appeared to be applying substantial pressure on the UK legacy firms to accept US-client OCGs as a condition of cross-referrals of business, and to treat the ABA Model Rules as a benchmark standard for these purposes. However, with non-mergers, decisions to 'push-back' against onerous OCG provisions were focused around weighing up the client's commercial value, versus the loss of opportunity by not accepting the client or their conditions, and also the commercial harm that acting for them could cause the business. Several firms below the A-B band described how their niche strengths in particular practice areas provided them with some leverage to push-back. Nevertheless, several mid-tier firm GCs admitted to accepting terms that they were not entirely comfortable with, and it also seemed that until the recent

introduction centralised conflict functions, that firms had simply 'inadvertently' acquiesced to onerous COI provisions in OCGs because the decisions had been taken by fee-earners working under the constraints of limited time and information at the outset of transactions. Other GCs though appeared to identify the protection of the firm's core business essential, and that when this was put at risk, by unreasonable client exclusions, then even the smallest large law firms who did not always consider themselves to have sufficient bargaining power, would refuse the engagement, but especially where this also threatened their long-term business strategy H1.

What also struck me, was the tougher stance taken by both Big 4 ABS's which provided a useful comparative perspective. By comparison to the law firms, which in a number of instances felt that they had to give way to client demands, ABSs flatly refused to do business on the basis of OCGs as a matter of policy. The reason for the different stance appears to be the influence that the IAEW's rules, rather than the SRA OFR continued to have, even in the performance of legal services. The IAEW regime appeared to add another level of scrutiny to the delivery of services which meant that a matter could not even commence on the basis of an OCG's given the extent of the due diligence checks involved. Among all my research subjects only one (E3) expressed the view that OCGs were a positive development, given that they more clearly set out a client's expectations, and that this document "was at the heart of managing the client relationship".

The second part of Key Question 1 was based on several of the themes to emerge from Chapter 3, and in particular recent changes to the codes which appear to have removed several safeguards in the operation of the rule against COI and its exemptions. Each sub-question focused on one of the last remining safeguards around the operation of the two COI exemptions in the SRA's Code, and more generally, the detection and monitoring of unethical behaviour. I wanted to understand how they were being interpreted and followed, if at all, and especially given the international practice context, which included UK/US firm mergers within my purposefully sampled subjects. I therefore expected to see a potential US influence in the interpretation of the key elements of the SRAs rule on COI, and as Chapter 3 recognised, elements such as the extent of 'the degree of relationship' between matters was also supported by US authorities.

In relation to how respondents recognised situations in which they could not act for a client because of a COI, the legal duty was recognised and even described in terms of key English common law case authority as an irreconcilable clash between the duty of loyalty

owed to each client, and so to this extent the interpretation around the SRA code was driven by English legal authority. However, respondents in Bands D-H considered that they had not had to deal with an irreconcilable conflict recently. Furthermore, the focus appeared to have shifted away from legal conflicts, and towards situations in which a firm determined that it could not act for a client because of an irreconcilable 'contractual' or 'positional' conflict, which were the first considerations over legal conflicts in deciding whether or not they could act for a client. The SRA's OFR regime does not even regulate these other situations, which are instead governed by contract in the form of an OCG.

Perhaps more fundamental though, was how respondents dealt with the SRA's OFR requirement to report all "serious breaches" of the code. As considered in Chapter 2, reporting breaches by the COLP is key to the SRA's intra-firm system of regulation because it is a crucial point of contact between the regulator and regulated under this PBR-based system of regulation, and this interaction is necessary to enable the SRA to be responsive to regulatory risks under its purportedly risk-based approach. In interpreting "serious breach" in relation to COI issues, the issue would have to be recognised and reported by the GC, possibly through the COLP to the SRA. Most respondents appeared to recognise 'severity' as based upon notions of 'harm' that might potentially be caused to a client, a concept with its roots in tortious duties in both the US and UK. Others did look to the limited guidance that appeared, not in the SRA's Code, but in its enforcement strategy[727] and from this arrived at the conclusion that it could be understood as relating to 'criminal' forms of behaviour, in line with the SRA's reference to 'victims'. Several respondents expressed frustration with the lack of SRA guidance on this topic, but I was surprised by just how candid several respondents were about deliberately not wanting to engage with the SRA, and possibly even keeping bad practice hidden from them: *"Letting the SRA know about anything is risky, because once you let them know, they must reach a decision, and they know less than you do, so you are sort of shooting yourself in the foot"* B2. This was also confirmed by A1 who justified not reporting to the SRA on the basis that most OCGs now contained a "resolution procedure" anyhow, in the form of a reduction in service level credits. It therefore appeared that the SRA's OFR rules on COI were being by-passed by private contractually agreed mechanisms; that reporting to the SRA was not occurring, and that with some respondents equated "serious breach" to a criminal standard, meaning that it was unlikely that breaches of COI could ever fall within this category.

[727] SRA (2019) *Enforcement Strategy* Available at https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/ [Accessed 3 May 2021]

A further fundamental issue in any decision-making process, whether guided by SRA OFR or otherwise, is in recognising a COI in the first place. Under SRA OFR a COI arises where a matter is "related", although no further guidance is provided. By implication however, it would seem that a COI does not arise where a matter is "unrelated". In terms of determining the degree of relationship between matters, where OCGSs were not being followed, several respondents adopted US rules that provided some guidance with a "*substantial* degree of relationship". This was the standard which subject A1 adopted when negotiating the terms of OCGs, as it restricted the range of instances in which a COI would arise. Most respondents though considered that the definition turned on the scope and extent of drafting in OCGs. Decision-making is therefore guided by the scope of any existing OCGS and US rules and guidance to define "related" in the absence of SRA guidance. Furthermore, OGCs might consider the duty of loyalty extended beyond "related matters", to unrelated matters. Essentially the SRA's COI rules appear out of kilter with decision-making in large law firms, as this is not being driven by its CLLS-drafted rules dating back to the early noughties.

A further 'safeguard' in the operation of the exemptions under SRA OFR is the client's informed consent. I originally set out to identify what respondents thought an adequate level of informed consent might be. However, it has become clear that the standard of disclosure required for 'informed consent' to be provided is governed more by the clients themselves, and that a process had developed around this. Respondents who identified a COI (legal, positional or contractual) at the outset or during the course of a transaction, made an approach to the client, describing the COI in general terms in order to determine how the client wanted to proceed. The next steps were then largely determined by the client, including whether or not they were willing to provide a waiver covering legal, positional and contractual forms of COI to enable the firm to continue to act. Notably, the two expressly permitted exemptions under the SRA's COI rules, related to legal conflicts: 'substantially common interest' and 'competing for the same objective' did not appear to guide decision-making at all.

However, in relation to the final "catch-all" safeguard under the SRA's conduct rules, to be satisfied that it is reasonable to act for all clients, this did have an equivalent. Essentially, the ABA Model Rules on "competent representation" were adopted, requiring the firm to consider whether it had the necessary skills and expertise to take on the matter, but in addition to this, a 'risk-appetite test', which considered the risk that a particular client

might pose to the firm, so, in other words this was not a test actually motivated by the *client's* best interests, but the firm's. Furthermore, none of my respondents actually referred to acting in the clients' best interests at all, in this respect it might be argued that by accepting client OCGs. Law firms had given them considerable opportunity to define their own interests and expectations around how these were to be upheld. However, this appeared to be driven less out of a willingness to do this, and rather more begrudging by virtue of their limited bargaining power against powerful sophisticated clients. Either way, the SRA's rules on COI do not govern decision-making by large law firms around legal COI, and nor do they cater for contractual or positional COI either. The safeguards and exemptions set out in the SRA OFR Mark II appeared to play little role decision-making in light of contractually agreed standards.

6.4.2 Key Question 2: In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

Several significant themes emerged through this Key Question which considers a significant shift from decision-making at by individual solicitors, or practice group level, towards global centralised COI centres in recent months. Notably, the Court of Common Pleas, Cuyahoga County Ohio in RevoLaze LLC v Dentons US LLP (2016)[728] sent shock-waves around verein-based networks of firms operating under one brand but different local jurisdictions were not in fact firewalled from each other as regards legal COIs. This had led to the removal of local decision-making around COI, and the creation of centralised global COI centres. However, it also appeared to be a process driven by the emergence of client OCGs, and the shear scope of the 'global duty of loyalty' that was expected under contractual COI rules, and this was coupled with a shift in the notion of "client". In fact, one of the most pertinent comments made by one of my research subjects was the notion of the "client" as a "concept" because of the impact of OCGs. Under this interpretation, the "client" might include *"the main client, and its affiliates, and then to what extent the rest of the world might clash"*. C2. Essentially, the client could be defined contractually by relation. Recognising the client therefore is a case of recognising their outline by the fringes of adversity around them, which can be extensive. Some OCGs seek to exclude law firms from acting for competitors on a global basis, and so the risk is in the client materialising unexpectedly.

[728] RevoLaze LLC v Dentons US LLP et al 1:2016-cv-01080 (Court of Common Pleas, Cuyahoga County Ohio)

The systems and controls that firms use to detect and manage conflicts therefore have to be centralised to be able to identify and manage contractual conflicts, and not merely legal and positional conflicts. According to the interview data several firms had only very recently passed responsibility for their firm's COI compliance from local partnership-level over to central compliance centres. As D1 explained "*In future, the risk team will replace the partners and COLP on decision-making around COI specifically because it has become a complex global issue, and the risk team will be independent from fee-earner decision-making so they can give independent objective advice on transactions"*. The sense provided by some GCs was that the task of being able to detect and track conflicts has now passed beyond what is humanly possible because of the scale of the firm and its clients. These centralised global COI functions also recognised that instructions could arrive into the business in various locations, and not necessarily with a fee-earner, and this included support functions. Central conflicts checking could therefore be involved at the outset automatically, and on an on-going basis. They were also seen as essential in detecting conflicts in US/UK merger scenarios, and better at detecting and managing conflicts downstream because of the ability to input open-source business intelligence into the system across the global network, to detect changed in ownership and financial health in client and even their beneficial ownership.

The downside though of this centralisation of the COI function is that solicitors are no-longer involved in the decision-making process around legal or contractual forms of COI, and this included the equity partnership at all 20 of the large law firms that I visited. In fact, more to the point, they are "banned" through internal policy from being involved. Some client-relationship partners were however permitted to take decisions on commercial conflicts only, however, legal conflicts and contractual conflicts had become the responsibility of centralised COI functions, and often overseen by the GC. In terms of the main aim of this research therefore, to consider whether SRA OFR is an effective model of regulation for COI in large law firms, it is important to understand that SRA OFR has played a negligible, if any, role in influencing this new approach. Nevertheless, on one hand, this new approach has not been might enhance ethical decision-making at the *entity* level by, for example, removing some of the more inconsistent decision-making variables discussed in Chapter 4 including, for example, the impact of hierarchal power-structures between fee-earners, and bounded-rationality, and the varying approaches to protecting client confidentiality between fee-earners. On the other hand though, perhaps one of the great tragedies in this globally centralised, non-solicitor engaged decision-making process, is that

a central tenet underpinning OFR has been undermined, because as considered in Chapter 2, in order for a PBR-based system to be effective, it needs to internalise structures and procedures for continual learning and reflection. However, the opportunity for fee-earner reflection, appears to have become divorced from practice.

6.4.3 Key Question 3: How are conflicts between the SRA's rules on COI and other local rules reconciled?

This question was designed to examine the extent to which conflicts between the SRA's rules on COI, and other local conflicts rules were reconciled in practice, and it has subsequently also highlighted the role played by OCGs, which bind law firms to client jurisdiction and choice of law. This research has highlighted that in all 20 of the firms sampled, the SRA's rules on COI are not the starting point in negotiations over duo-deontology., Instead, the role falls to GCs to determine the issue based upon a range of factors including: the predominant effect of the transaction; where lawyers working on the transaction are licensed to practice; the jurisdiction in which the firm's conflicts policies were drafted; the provisions of any relevant client OCGs; and where the firm's central conflicts team is located. A determinative factor where this is not governed by an OCG is how each set of rules 'measures up' to the ABA Model Rules. These are deemed to satisfy the required standards in many jurisdictions, offering a benchmark standard amenable to all parties, and thereby solving something of a regulatory jigsaw puzzle. This ABA Model Rules take precedence over the SRA's OFR rules on COI.

The perceived advantage of the ABA Model Rules on COI by comparison to SRA OFR is that they offer certainty. They are clearly expressed and prescribed, and this has enabled them to gain recognition among firms and clients as the global benchmark for conflicts regulation In particular, A1, A2 and B2 considered that because of the interpretive nature of OFR, that although the SRA's rules might be suitable in some jurisdictions with weaker definitions of COI and confidentiality, that it was of little assistance elsewhere By contrast, the ABA Model Rules served to provide a clear opening negotiating position with local regulators and other parties, and especially in several European civil jurisdictions where there could be very strict duties on loyalty and confidentiality. The ABA Model Rules therefore serve to benchmark what is "strict" or "soft" when COI rules are reviewed.

The process then is essentially one of mapping the scope of local rules, client-expectations, often against the ABA Model Rule standards, and it is a process that is undertaken by the GC rather than the COLP. The GC often develops a specialism in various local laws and

regimes as a consequence. However, the majority of GCs were also keen to point out that their decision-making was not just informed by rules governing COI, but also a much wider regulatory environment, which also had to take into account the policies and views of their professional indemnity insurers as well. In terms of the main aim of this research therefore, to consider whether SRA OFR is an effective model of regulation for COI in large law firms, it has been usurped by the ABA Model Rules as the benchmark standard where there are any duo-deontological issues to resolve, and this is because it simply does not offer the clarity required to be able to negotiate positions over COI.

6.5 Conclusion

This chapter began by re-iterating the Key Questions and the rationales behind their supporting sub-questions. It then summarised and presented the key themes to emerge from the thematic analysis undertaken in Appendix C against each Key Question; then how these themes helped to address the main aim, which is to consider whether SRA OFR is an effective model of regulation for COI in large law firms. In terms of how this research has developed current knowledge therefore, in addition to the legal, positional and commercial forms of COI recognised in the academic literature, any future research in this area should also recognise the emergence of the 'contractual conflict'. Contract appears to be increasingly governing the decision-making process around COI under terms dictated by powerful and sophisticated clients. Under Outside Counsel Guidelines (OCGs) corporate clients can define who they are as "client" extremely broadly, even down to partial beneficial ownership in affiliates within jurisdictions that do not concern a particular matter. This prompted one respondent to consider whether "client" had now become a "concept" rather than an individual entity. Importantly, under OCGs, clients can also determine the scope and extent of the duty of loyalty owed to them on a global basis, and encompass legal, positional and commercial forms of COI within the scope of obligations. This can extend the duty of loyalty and the potential for COIs well beyond that envisaged by the SRA's OFR regime related to COI with its "same or related matter" benchmark, and focus on legal conflicts only.

The terms of an OCG express the client's entirely bespoke rules on COI, but where they do adopt professional rules on COI, then this is likely to be the ABA Model Rules. Furthermore, in UK/US-merged firms the ABA Model Rules also inform internal firm policy on COI. The SRA's OFR COI rules are not regarded as having sufficient clarity or guidance to be of use at this global level, and especially where a clear benchmark is required to guide parties

through navigating the complex duo deontological issues at this global level. This research also found evidence that not only are the SRA's rules being ignored in favour of clear prescriptive standards such as the ABA Model Rules, but that the SRA's reporting and enforcement regime on COI is also being by-passed as well. COI in these firms is not the responsibility or domain of the English COLP, and several GC respondents were candid about not reporting to the SRA anyway because of its perceived lack of expertise, something highlighted some years ago by the Smedley Review as well. Furthermore, breaches of COI were not only defined under what had been contractually agreed, but also subjected to a contractually agreed private enforcement mechanism under which law firms could be penalised by reference to expected service levels and key performance indicators. This might include reimbursing fees. Other GCs did not equate the sort of breaches that required reporting to the SRA as likely to encompass COI, because they were not criminal per se. This means that breaches of COI are not reaching the SRA, and that a key tenet in its monitoring and risk-based approach to regulation is simply not working.

In response to an emerging OCG-governed landscape, which appeared to have expanded beyond its financial services and banking client origins, law firms have had to adapt to the complexities, coupled with the removal of the protection that verein structures were once thought to afford firms operating within a global network. They have done this by establishing centralised COI centres on a global basis. These form part of the compliance function, but identify, manage and track legal, positional, commercial and contractual COI. They are overseen by the GC, and are expert in reading and assessing the terms of OCGs quickly. The process of review commences on receipt of an approach into any department in a firm, rather than traditional "matter inception" and receipt of an instruction by lawyers. Furthermore, lawyers were prevented from decision-making on COI, with the exception of some equity partners who were allowed to input into commercial conflict matters.

However, it was widely acknowledged that the scope and complexities of COI had now moved beyond what could be identified and managed at an individual, practice group, or even local level. It was argued that this shift enhanced ethicality because it meant that COI teams could be more objective, and not tied-up with inter-firm politics and matters of protecting confidentiality and disclosure as between fee-earners. Nevertheless, this significant infrastructural shift was not driven by the SRA's OFR regime, but rather OCGs and the failure of vereins in respect of COI. In addressing the main aim again, to consider whether SRA OFR is an effective model of regulation for COI in large law firms, the answer

is that it is not effective at all. The final chapter in this thesis therefore concludes by considering what these findings might indicate about the underpinning regulatory theory, the future for regulation of large law firms, the SRA's OFR project, and research that could be carried out subsequently.

Chapter 7 Conclusion

7.1 Is OFR an Effective Model of Regulation for COI in Large Law Firms?

The research has considered whether SRA OFR is an effective model of regulation for COI in large law firms, and the findings are quite stark in this respect: SRA OFR does not appear to be an effective model of regulation because it does not appear to be very relevant, if at all, to large law firms when decision-making over COI. This research highlights several reasons for this, and fundamentally, SRA OFR appears to be out-of-step with recent developments in global legal practice, including the emergence of the 'contractual conflict', and fact that behaviour is dictated to a large degree, not by SRA or its rules - but by clients and their OCGs. Sophisticated powerful clients are the regulators of COI at this global level, on a private contractual basis with law firms, dictating to large law firms the extent of the global duty of loyalty to be owed to them, and bearing no reflection of the SRA's Rules. This Chapter therefore considers the implications for the regulation of large law firms in respect of COI; the need for empirical research, and state-level regulatory intervention at a level above the SRA on COI specifically, and what this might say about the SRA's OFR project more widely.

Client-drafted rules are whatever the client determines, and could contractually bind large law firms to foreign jurisdictional rules, such as the ABA Model Rules, but can also be very broad in scope, capturing 'unrelated' matters which can be geographically global scope, and deep, capturing the beneficially-owned affiliates of competitor organisations. Furthermore, these conflicts should be regarded as contractually-imposed, and not merely 'commercial or positional', because not only do clients define and, often expand, the scope of the fiduciary duty of loyalty beyond that expected by the SRA's Rules (which have their origins in rules crafted by the CLLS in the early noughties for the Law Society), but their terms and conditions are enforced, not by the SRA, or any other regulator, but in the form of services levels measured against Key Performance Indicators on the softer-end of the scale, but leaving the possibility of the most fundamental contractual breaches to be enforceable in a foreign court under the stated governing law.

Contractual conflicts appeared to be at the forefront of my respondent's minds, and the driving-force for decision-making around COI, regardless of SRA OFR. Decision-making by law firms in response to contractual conflicts did not appear to be motivated by ethical concerns per se, but by a conscious consideration of 'risk appetite', the extent to which a law firm's business might be exposed and harmed by a contractual conflict actually occurring, and the risk of this actually arising. Furthermore, the extent to which "the client" appeared to have become a concept, rather than an "individual", but more akin to an artificially constructed cloud; bounded by the extent of the actual or potential 'conflict' as defined by an OCG. This meant that the OCG was always at the centre of decision-making, and that decision-making around COI had gone beyond the scope of individual cognitive, or even practice level competence to identify, track and manage contractual conflicts given their complexity.

Notably, where law firms had originally tried to address this problem on a global scale through verein-structuring, this could no-longer be relied upon, the County-level decision in the Court of Common Pleas, Cuyahoga County Ohio against DLA Piper[729] to instigate global change, and arguably having more direct impact upon the way in which large SRA-regulated law firms manage COI than the LSA 2007 under devolved regulation in the years since SRA OFR was introduced. In this respect, this research managed to capture a significant moment in time for large law firms which had only recently established centralised conflicts centres overseen by General Counsel, and also taken the decision-making for COI out of the hands of fee-earners, including equity partners. Centralised conflicts teams are now involved from the moment that a potential matter is received by a law firm, and wherever that lands within the business. It is a state of affairs that directly contradicts the Hunt Review, because although Hunt envisaged differences in approach to PBR, and that because of this, a regulator should be able to take a relatively relaxed view of a diverse range of compliance methods across the sector, *however,* this was possible *"so long as firms adopt transparent decision-making systems – and such decisions should not be left to the compliance function alone. Senior management needs to be involved and supportive".*[730]

Fundamentally, the SRA regulates all large law firms falling within its regulated community, and as such they are subject to SRA OFR Mark II in respect of COI. In this respect, SRA OFR

[729] RevoLaze LLC v Dentons US LLP et al 1:2016-cv-01080 (Court of Common Pleas, Cuyahoga County Ohio)

[730] Hunt, p.39

should be assessed against what it was originally intended to achieve when it was selected following the Hunt Review as a derivative of PBR. In essence, the literature describes the rationale for principles as, among other things, promoting ethical conduct by individuals, who might otherwise display mindless conformity to the rules at the level of risk analysis and risk management[731], and the flexibility to enable firms and individuals to demonstrate compliance with the stated outcomes in ways that accommodate their particular practice specialism. It was a marked a departure from the prescriptive rules-based one-size fits all system that preceded it, but comes with potential drawbacks unless these are specifically catered for. This includes a potential lack of clarity and certainty by contrast to prescriptively-drafted rules. It is dependent upon the discretion of the regulated community to create their own norms of practice, but subject to oversight by the regulator. In turn, this places the onus on there being an effective system of communication with the regulator to agree standards, and then also report breaches. It is dependent upon a culture of compliance being created in terms, and so in order for a PBR-based system to be effective, it also needs to internalise structures and procedures within organisations for continual learning and reflection.[732]

In this respect, when consulting on its OFR project originally, the SRA recognised the need for senior managers to take greater responsibility for creating the right culture in order for OFR to work effectively,[733] and a critical part of its success would be in reporting what it originally designated as "material breaches" through COLPs.[734] It is evident that this standard has become watered down since 2011, and under OFR Mark II the threshold for reporting was subsequently raised to "serious breaches" only in response to concerns raised by law firms about the burden that the original "material breaches" standard imposed.[735] Nevertheless, despite the fundamental role of this requirement, the SRA has

[731] Nicolson, N and Webb, J. (1999) *Professional Legal Ethics: Critical Interrogations*, Oxford University Press, p.112

[732] Ibid

[733] SRA (2010) *Achieving the Right Outcomes* Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/achieving-right-outcomes-consultation-paper.pdf?version=4a1ae5, para 7.1

[734] SRA (2018) *Reporting Concerns Consultation August 2018* Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-consultation.pdf?version=4a1abf, para 32

[735] SRA (2019) *Reporting Concerns: Our Post-consultation position January 2019* Available at: http://www.sra.org.uk/globalassets/documents/sra/comnsultations/reporting-concerns-post-consultation-position.pdf?version=4a1abb, para 18

refused to define it, simply explaining in its 2019 post-consultation position on its revised enforcement strategy, that it was "*concerned that any attempt to crystallise this in an exhaustive way in a rule will risk proving inflexible and becoming outdated"*.[736]

In the absence of this guidance from the SRA, this research has highlight how large law firms are generally equating *"serious"* with a criminal or serious harm threshold, and so unlikely to be appropriate for COI, even were they following the SRA rules. This is because several respondents admitted that they would not engage with the SRA by reporting a "serious breach", or even discuss whether an issue amounted to one. This attitude among GCs has to be seen in light of the original criticisms of PBR identified by the Turner Review,[737] and fact that OFR was supposed to be fundamentally different from PBR because of its new focus, not just upon having the right systems and controls, but also the right outcomes. As Hector Sants former Chairman of the FSA stated, "*PBR does not work with individuals who have no principles"*,[738] and so here there is a sense of Deja vu, because not only is there no question that a matter is unlikely to be raised with the SRA; but that this lack of communication means that the SRA has absolutely no means by which it can monitor COI and gain the 'intelligence' that it requires to be a responsive regulator, and to focus resources appropriately under its own RBR "better regulation" objectives referred to in Chapter 2 of this thesis. This needs to be recognised as an instance of regulatory failure that undermines the SRAs OFR project.

As for the rationale provided by GCs for not reporting matters to the SRA, the SRA was consistently criticised for lacking the expertise to deal with the complexities of COI at this level, and so reporting a matter to the SRA was perceived as a risk, given that the SRA would have to reach a decision based upon its limited level of expertise. This is a criticism of the SRA that has been recognised before, by 2009's Smedley Review. Nevertheless, the SRA's approach in regulating large law firms under SRA OFR, and with particular regard to COI, owes itself to Lord Hunt's dismissal of the recommendations made by Smedley that

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[736] SRA (2019*) Reporting Concerns: Our Post-Consultation Position January 2019,* para 17, pp. 5 – 6, Available at: https://www.sra.org.uk/globalassets/documents/sra/consultations/reporting-concerns-post-consultation-poistions.pdf?version=4a1abb [Accessed 6 May 2021]

[737] FSA (2009) *The Turner Review: A Regulatory Response to the Global Banking Crisis* Available at: https://webarchive.nationalarchives.gov.uk/20090320232953/http://www.fsa.gov.uk/pubs/other/turner_review.pdf [Accessed 18 April 2021]

[738] Hunt, D (2009) *Review of the Regulation of Legal Services* Available at: http://www.legalregulationreview.com/site.php?s=1 [Accessed 7 September 2020]

the corporate law firm sector ought to have its own system of regulation given its unique complexities and the nature of the clients serviced. Inevitably, in the years since the Hunt and Smedley Reviews, the market has continued to evolve, and it strikes me the SRA has been aware of the existence of OCGs since at least 2015, and that it had even considered that OCGs might pose a threat to lawyer independence[739].

Nevertheless, nearly six years on and the SRA has not sought to act to intervene to protect interests of its large law firm regulated community, something recognised with frustration by firm A1, and echoed by several mid-sized large law firms admitting that they were struggling to push-back on the terms, and just hoping that provisions would not be enforced. In terms of the SRA's response to the issue, aside from publishing threats to "lawyer independence" cause by clients more broadly as a thematic risk in its Risk Outlooks 2016 – 2018, no tangible action appears to have been taken to protect the market against the specific issue of OCGs, and nor did the issue of OCGs specifically feature as part of the SRA's review of OFR Mark I in 2017. This research highlights that the use of OCGs appears to have spread since 2015 to other client sectors outside of financial services, and that they now dominate decision-making around COI by large law firms.

Confidence in the SRA and its regulatory regime has also been shaken because of the SRA's aggressive pruning of the Code of Conduct, a fundamental tool in the operation of OFR. As Chapter 2 considered, this was driven by the SRA's desire to reduce the volume of words that appeared, and included stripping out the last vestiges of guidance in the form of the indicative behaviours, a cornerstone for OFR Mark I. The responses from ABSs and Law Firms to this lack of credibility have been different. I was struck by the fact that both of my Big 4 ABS respondents felt able to flatly refuse to do business on the basis of OCGs as a matter of policy. The explanation for this was that, unlike law firms, they were guided first and foremost by the IAEW's rules, rather than SRA OFR, and that these were perceived as more stringent, prescriptive standard than the latter. The ABSs also claimed that clients appreciated the greater degree of due-diligence as a means to safeguarding their interests, and did not appear to mind the delay that this caused to the commencement of a matter. There is of course a caveat to be attached to this finding in that only two or the four 'Big 4' ABSs agreed to participate in this research, however, it is true that large law firms are not regulated by the IAEW as well as the SRA. Instead, the vacuum created by OFR's apparently

[739] Ibid.

lack of credibility was being, in a sense, conveniently filled by these private contractual regimes which come with the advantage of operating at the global level.

In terms of large law firms, this leaves an unsatisfactory status quo, and one that the SRA should not mistake for being the desired devolved style of intra-firm regulation that it was hoping to see emerge through large law firms subject to SRA OFR. This is another instance of regulatory failure. This is because the SRA appears to have lost both oversight and control of the community taking the decisions on COI. In many cases the SRA does not even have jurisdiction over these individuals and firms. Centralised COI centres are not very often based in England & Wales, or overseen by General Counsel regulated by the SRA. This means that neither the SRA's individual or entity Codes of Conduct capture the decision-making around COI, and yet the decisions relate to transactions which are otherwise being managed by fee-earners qualified and operating in England & Wales, and on matters that touch and concern England & Wales; and that, given their value, might even impact upon the "public", which despite being undefined by the LSA 2007, could be taken to mean the ordinary man or woman in the street. It is the public that also have vested interests in large scale global transactions, without even being aware of its occurrence, and prime examples arise in public companies and capital markets work, undertaken by large law firms.

Surely, there is a limit to how far the LSB should be willing to tolerate an intra-firm, principles-based approach to regulation that would appear to have failed to move with the market; that lacks effective front-line oversight and credibility, and that has become obsolete in respect of both its individual and entity elements. In view of the concerns expressed by respondents within every band of my sample about the severity of client-driven OCGs, the absence of the SRA (and Law Society) as advocates for large law firms (or indeed the public), there appears to be a need for action at a level above the SRA. These entirely private regulatory mechanisms governing COI lack transparency. They are secluded behind the doctrine of privity of contract, and also 'client confidentiality'. This was evident from absolute refusal by GCs to reveal copies of OCGs as part of this research, and so actual and potential issues can be shielded from external scrutiny, because under this private regulatory system, the "harm" that a client might complain of might not even equate to a repudiatory breach of contract giving rise to damages and judicial scrutiny. Instead, 'softer' service level credits are measured against key performance indicators. This creates the possibility that systemic issues within a law firms do not come to light publicly, and might not even be recognised between clients as private regulators either.

By failing to act in 2015 when the SRA first recognised the issue of OCGs, it might also be considered whether the SRA has failed under the terms of its regulatory mandate, in other words to uphold the LSA's regulatory objectives by not protecting and promoting the public interest[740]; encouraging an independent strong, diverse and effective legal profession[741]; and promoting and maintaining adherence to the professional principles[742]. The situation appears to have escalated since 2015, and so the question therefore turns to what to do about it. It could be argued that the SRA's insistence upon continuing to treat large law firms in the same manner as other firms as regards OCGs, is because of the manacles attached to large law firm regulation by Lord Hunt in 2009. This essentially committed the SRA to a PBR-based approach, despite concerns about this form of regulatory model as a "light touch" at the time, and it would seem that the SRA's drive to reduce "word count" might also have had little to do with OFR, but in any event that the removal of too much guidance has undermined OFR Mark II. Despite a consultation, to which it is unclear quite how many of the largest law firms contributed, this was a short-sighted decision. It opened up a regulatory chasm that is being addressed by private regulation that the SRA lacks the jurisdiction, or expertise to have oversight of.

In this respect as well, the SRA appears to have abandoned regulated GCs and firms to navigate and negotiate their way through a global regulatory landscape that is awash with competing and conflicting regulatory regimes, including those private regimes created by powerful and sophisticated clients. It is worth recognising that PBR-based approaches do not actually ban guidance or safe-harbours, but that the SRA has traditionally been extremely reluctant to provide guidance to address key elements such as "serious breaches", and also as demonstrated by its removal of the Indicative Behaviours, once a key element of OFR Mark I. Furthermore, I found no evidence that OFR-driven norms had actually developed around the SRA's rules on COI. The SRA's regime contrasts for example with the ABA and US State Bars, which have a greater tradition in supporting their members with guidance in the form of Ethical Opinions tailored to particular practice contexts.

Several GCs were very candid about the fact that the SRA's OFR rules, and the SRA's Ethics Helpline were of no help at all when confronted with issues caused by duo-deontology in

[740] LSA 2007 s1(a)

[741] Ibid. s1(f)

[742] Ibid. s1(h)

particular practice contexts, and where, in particular the triangular relationships described in Chapter 3 exist.[743] Regardless of whether a regime is PBR-based or not, the right balance needs to be struck in terms of guidance to meet the needs of all members of the regulated community. The SRA has simply failed to offer the bespoke guidance that it promised to large law firms when it removed the indicative behaviours from its Code of Conduct.

My argument therefore is that it is time for the LSB, as oversight regulator for the legal services market in England & Wales, to review the SRAs regulatory mandate in so far as it relates to COI, because OCGs have been becoming an increasingly embedded and widespread feature of large law firm practice at least 2015 when their impact was actually recognised by the SRA[744]. In order to assist this, future research should seek to understand the client perspective, and in particular, why clients in various sectors aside from banking and the financial services have also started to use OCGs more recently. Also, this should assist in the development of transparent rules governing COI at this global level which can provide a more transparent footing for OCGs, and to manage the complex "conceptual" nature of a "client" to regulate the potentially unduly burdensome influence that a powerful client can have over a law firm's existing and future client list.

This requires cross-jurisdictional collaboration and support by firms, clients and oversight regulators, because in order to be effective there also the need to a greater common consensus over what a COI actually is, as highlighted by the gulf between common law notions of a duty of loyalty, contrasted with client notions, and those originally recognised by the SRA. Several GCs identified that the French, German and Swedish rules on COI and confidentiality were among the strictest in the world, directly backed by public law sanctions, and so considerably stricter than the SRA OFR's intra-firm interpretive outcomes, although the rules on COI which were originally drafted by the CLLS in the early noughties to favour City firms, so already restricting the scope of liability for COI in favour of firms and solicitors to merely "same or related matters". The SRA's rules on COI were largely superimposed onto a PBR framework, but date back to an earlier era in which City

[743] Anecdotally, during the course of this research the author asked the SRA's Ethics Helpline to clarify how the SRA's Cross-border practice rules (2018) worked in relation to work being conducted within CCBE as opposed to the rest of the world, a relatively fundamental query. From an initial call with a helpline advisor who referred the query to a supervisor, it took a further 2 weeks for a follow-up response to arrive, well beyond what would be acceptable in a transactional context. Furthermore, it was a response which largely re-iterated the rules as stated, and with no further practical guidance.

[744] Ibid.

law firms held more of an upper hand against their clients. These rules have now been outstripped by powerful clients, supported by often large, global in-house legal teams, and who can insist upon a duty of loyalty which extends to unrelated matters on a global basis.

Finally, it is worth briefly considering whether the findings of this research focused on COI, can be extrapolated to draw inferences about the rest of the SRA's OFR project. This would be difficult for several reasons. This research has focused purely on the largest law firms regulated by the SRA. Smaller law large firms falling outside of The Lawyer Top 50[745] simply do not operate as part of large global networks, or have the same global footprint in terms of advising international clients. For these reasons, this research should not be extrapolated to the rest of the legal services market, or to the rest of the SRA's Standards and Regulations which also refer to various other ethical issues. Instead, further research should focus on the effectiveness of the SRA's OFR regime in relation to each of these areas as well. However, what might be extrapolated is the fact that SRA OFR needs to be perceived as just one small part of a global regulatory puzzle, including a multitude of public and private regulatory regimes, and even the requirements of professional indemnity insurers. The extent to which SRA OFR has actually been the driving impetus for change in decision-making behaviour could be very limited in other areas, if any.

However, it should also be noted that COI is unique at this large law firm level in not falling within the jurisdiction of the COLP to determine. COI are perceived as a global problem within firms, and that the impact of a seminal case such as RevoLaze [746], upon the way in which COI are identified, managed and tracked, has not been quite as keenly felt in other areas of the SRA's Codes of Conduct. This being the case, they might still be overseen at a domestic level by the COLP and governed within the SRA OFR Mark II framework. Nevertheless, what this research highlights is that ultimately, the key factor governing behaviour is the client. As one GC speaking more generally of SRA OFR stated: *"it's not the rules anymore that govern lawyer behaviour …. but the client"*[747] , and when decision-making is seen in this light, it really does not seem to matter whether the SRA has standards in place, outcomes-focused or otherwise.

[745] The Lawyer Magazine (2019) *The Lawyer Top 200 Law Firms* Available at: http://www.thelawyer.com/firms-and-the-bar/uk-200-1-to-50/ [Accessed 20 July 2020]

[746] RevoLaze LLC v Dentons US LLP et al 1:2016-cv-01080 (Court of Common Pleas, Cuyahoga County Ohio)

[747] Respondent B1

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Appendices

Appendix A Correspondence with the SRA dated 16 June 2020 pp. 210 – 212

Appendix B Field Notes pp. 213 – 279

Appendix C Analysis of Themes pp. 278 – 293

Appendix A

Our Ref: IG/TC/289

The Cube
199 Wharfside Street
Birmingham B1 1RN

DX: 720293 BIRMINGHAM 47
www.sra.org.uk

Mr Mike Webster
By email only: [redacted]

16 June 2020

Dear Mr Webster,

Information request – Our Ref: IG/TC/289

Thank you for your email of 18 May 2020.

The Solicitors Regulation Authority (SRA) is not covered by the Freedom of Information Act (the FOIA), as it is not a designated authority, but has adopted its own voluntary Transparency Code that closely reflects the FOIA.

I am handling your request for information under the SRA's Transparency Code.

You requested the following information:

"I'd be very grateful please, if the SRA could clarify for me how, if at all, the SRA's Risk Framework has changed recently (i.e. since its Looking to the Future Phase II reforms) please?

In particular, although the SRA still publishes its thematic Risk Outlook, does it still use (and publish) its Risk Index for the purposes of its risk-based approach to regulation?

Also, does it still ascribe a score to regulated entities (a risk footprint)?"

Our response:

The SRA no longer uses the Risk Framework but still regulates under the principles of good regulation set out in the Legislative and Regulatory Reform Act 2006. That is to be: proportionate, accountable, consistent, transparent and targeted (PACTT). We track and evaluate our performance against these principles.

Our May 2014 policy statement (updated in November 2015) sets out our approach to regulation in order to meet the regulatory objectives and in particular, our public interest purpose:

www.sra.org.uk/sra/policy/regulation-reform/

We ran a Question of Trust Consultation in 2015 asking lawyers and the public for their views on what action we should take when things go wrong and what factors we should be taking into account:

www.sra.org.uk/sra/consultations/consultation-listing/question-trust/

Having taken on board feedback from the consultation, we published the SRA Enforcement Strategy in February 2019. The strategy sets out our approach to enforcement, and the factors we take into account:

www.sra.org.uk/sra/corporate-strategy/sub-strategies/sra-enforcement-strategy/

More detail about how we make decisions about enforcement can be found on our website:

www.sra.org.uk/sra/decision-making/guidance/

We do not apply risk scores to regulated entities and we consider the facts of any matter of misconduct reported to us on its own merits, on an objective analysis of the facts and in accordance with the Enforcement Strategy and supporting guidance.

I hope the information I have been able to provide has been of assistance to you.

More information on how we handle requests, including a link to a copy of our Transparency Code, can be found on our website:

www.sra.org.uk/sra/how-we-work/transparency.page

Please quote the reference number **IG/TC/289** if you decide to contact us further regarding this request.

Yours sincerely,

Charlie Smith
Information Governance Officer
Solicitors Regulation Authority

Appendix B

Field Note

Firm Name/Code: A1
Brief Description: A1 is a multinational law firm, with offices in more than 40 countries across the world. It is operates as a verein structure, and has expanded rapidly in the last 10 years. The controlling influence, in terms of conflicts is the US business, which hosts the central conflicts centre. It is a market leader in the largest complex corporate transactions, and had a global revenue in excess of nearly £2bn
Meeting: MW & GC
Date: 13/01/20
Time: 17:45 – 18:45

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

Pretty much all of our clients now use OCGs, it's a trend that started in financial services and has spread. Clients will argue that it is a means of managing expectations and legal spend from external counsel, but, honestly, its also an excuse to try and control competition as well. I think that there is a belief among smaller firms that these things are more or less non-negotiable, and while that might be true for them given the number of players in the mid-market, there are far fewer truly mega-firms with the expertise and capacity to accommodate the scale and complexity of the largest transactions and for the largest clients. That probably doesn't come as a surprise, however it also affords us greater bargaining power. On these panels of law firms advisors, which can be 60 -100 strong for some banks for example, there are only a handful of firms on there that could be recognised as expert in this types of transaction. This limits the options that a client has available to them. I'd say that the ability of the mid-tier to push back is considerably weaker. I mean, if we were to tell a client where to go in response to a really unreasonably drafted OCG, then it limits there options to 3-5 firms globally, and that is not going to be good value for money.

As a rule of thumb, we will always consider OCGs that are presented to us, and look at their conflict provisions and determine where they do not align with our own expectations, in particular to conflict waiver, acting for affiliates and subsidiaries of competitors, and also disclosure processes. In some cases, we accept them because, we're not unreasonable, and we do feel that these reflect our client's values and views to an extent. Our central conflicts team are quite experienced at being able to review these sizeable documents and turn them around quite quickly as a team, advising on where liabilities fall. Broadly speaking, the standards that are acceptable to us have to comply, as a bare minimum with the ABA model rules globally, and so I feel that we are not being unreasonable, and this is how we approach negotiation.

This reflects, not in every instance, but in most, the ABA model rules, on the whole these rules provide a stricter standard than most on COI, including the SRA's rules in E&W, however, they are regarded as more liberal around exemptions to acting. They recognise

for example the concept of advanced client waiver, which other rules, including the SRA's don't. We feel that if a client provides an advanced wavier when requested by us compliant with the ABA rules, or their own one, that this is a choice of regime which trumps the SRA's rules on informed consent.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Well, regardless of whatever the SRA might have to say on the topic, we would follow ABA rule 1.8 in respect of non-waivable legal client conflicts, and in any event, I don't think that the SRA's latest code is really very helpful or clear on this at all, although I believe that there could, possibly, be some overlap with what might fall within the range of issues that might constitute a "serious breach" under those rules as well. Essentially, what we're talking about here are non-waivable client conflicts, and given their nature, these would have to apply even where waiver might have been provided. I think that the ABA guidance on this is broadly in line with "serious breach" issues, and these appear to be of a misdemeanour nature, so including client inducements going beyond the scope of fees.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

In line with our centralised US approach to govern conflicts, and in view of the shear lack of clarity and definition around this under the SRA rules, this has not been defined by the SRA, although it is a vast improvement upon the original obligation to report all non-material issues, we equate it to the reach of a non-waivable conflict, as recognised by the ABA rule 1.8. However, there is the dimension of harm caused to the client under the SRA's enforcement strategy as well, and in this regard, this is something that can be remedied with the client, and without the need to report the matter to the SRA. I mean, what good would that do? In reality, if there were to be any breaches, regardless of whether they might be deemed falling within the non-material, material, or serious categories, or whatever flavour of the month, most OCGs now contain a resolution procedure anyway, and in the most serious instances, a binding commercial solution is appropriate, often in the form of a reduction in service level credits, leading to a reduction in their next bill.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

Well a) there is no definition on this in the SRA's rules, not surprisingly, and b) unfortunately the English law position is extremely vague on this as well, "some degree of relationship". Well, what does that mean? So, although we are afforded a bit of artistic licence here, what we actually do is adopt the ABA standards again, which also happen to be reflected quite widely in OCGs and other state bar rules as well. The US standard is a "substantial degree of relationship", and so really that does impose a higher standard than many clients would like. Nevertheless, it falls to be assessed on a case-by-case basis and especially where there is multiple representation. This turns on the subject matter really of

each engagement, and the parties involved.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

- What would satisfy you that it is reasonable to act for all clients?

As a firm, the global policy on COI adopted in respect of exemption follows the US position. That means an entirely different approach to the SRA, and which we feel provides more definitive evidence of client intention to permit acting in a real conflict situation, and one that also sweeps up contractual, positional and commercial conflicts as well. This is to secure either advanced client waiver at matter inception, or in the E&W advanced contractual client waiver. We don't follow the SRA's rules in this respect.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

The first thing to appreciate is that decisions are not taken purely on an ethical basis, in fact, in a practice like this, a large part of the final decision is also based on internal global politics as well. As GC its about sailing a particular course as best as possible between competing internal interests as well when we are presented with one of these things, and I would say that the majority of our clients now rely on them, regardless of industry, whereas, lets say 4-5 years ago, it was predominantly the financial services sector. We have to be really careful about what we can promise. We trade on a global brand, even though we operate as separate firms. In light of the Dentons case a couple of years ago, we decided to centralise all of the decision-making in relation to conflicts in one place, ie. NY, unlike other ethical decisions whereas previously this had been inherent in the autonomy of the individual group members. In relation to COI, there was no incentive to give way between offices because each one was its own profit centre, and there was no financial incentive to do so. That changed with Dentons, given the potential for overall damage to the brand. Clients you see, see us as one brand, and so it just doesn't wash if, when it comes to it, you try and rely on the verein structure to avoid them. Its become somewhat artificial since 2015, and anecdotally, I believe that there has been a corresponding drop in the number of law firms subscribing to the model as well.

- What happens as a transaction progresses, and how are emerging conflicts managed?

When a new party becomes involved in a matter, or, for example beneficial ownership of one of the parties changes, this information is fed into the central conflicts system. They receive information from various different sources and transactions internally, and so to preserve confidentiality, this is an independent operation from the fee-earners. The system, which was developed in-house originally, is now fully integrated database, linked

up to various internal systems, so hopefully we can capture any changes.

One of the areas that still remains a real hassle, more so under the US system than E&W is whenever new lawyers are added to a team. We can't expect them to breach former client confidentiality by expecting them to disclose even the most salient details of their past work to us. Depending on the area that they are going into, the process is managed by our appointments committee, and they will provide the candidate with a list of names of key clients, just sufficient as a starting point for any system checks, and they will be asked to tick-off any that might pose a problem without disclosing why. Their name will automatically be flagged against any matters involving particular clients, and that's when we can have a delicate conversation with them along the lines of, would this pose a conflict? Of course, the onus then falls upon them to recognise and tell us where there is an issue.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

- How are conflicts between the SRA's rules on COI and other "local" conflicts, rules or duties reconciled?

We follow the higher standard of the ABA's rules, and also, of course, bear in mind any particular provisions contained with client OCGs. We approach conflicts from the perspective of where the transaction is being performed, our global policy, which follows the ABA's standards, and, provided lawyers in E&W also adopt the ABA's standards, we feel that they are meeting the SRA's standards, which, helpfully for us, are quite wide open to interrelation. What it really boils down to then is determining whether the local rules comply with the ABA's, and any client expectations as well. It is a bit of a balancing act, but you become experienced at this as a GC. Of course, each local regime has its own particular foibles, and where they exceed the ABA standards, then we will consider with the client whether to try and negotiate with local regulators and obtain the necessary waivers, and where this is not possible, and that is the case in Sweden for example (possibly the strictest jurisdiction in the world), then we just have to try and work around that best we can by organising our infrastructure around it best possible.

Field Note

Firm Name/Code: A2
Brief Description: A2 is one of largest law firms in the world measured both by number of lawyers and revenue, and was a member of the so-called UK "Magic Circle" of law firms. In 2019/20 it had a global revenue of just under £2bn., and PEP of £1.69bn according to The Lawyer Magazine. It offers a "full-service" to clients, and is particularly well known for its top-tier expertise in private equity.
Meeting: MW & GC (It should be noted that, by chance, the GC interviewed had been one of the main architects and draftsmen behind the SRA's rules originally as a member of the CLLS lobbying group in 2000/2001. It is possible that he was approaching this from the perspective of defending his work, however, he conceded that since then, for example, all of the accompanying guidance had been removed)

Date: 26/02/20
Time: 14:00-15:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

Well, first of all, in assessing the impact of OFR you have made the worst possible choice by choosing COI. I think that the rules in this area are fairly well settled now.

That might be the case, but the reason I have approached several large law firms is because I want to understand how they are actually being applied in your particular practice context. In particular there has been a lot of talk recently about the impact that clients might be having in decision-making for example – for example, the role of commercial, contractual and positional conflicts

Well commercial conflicts have always been a bit vague for me, but I suppose that we could consider them to mean contractually excluding a law firm from acting, and potentially these do expand the duty of loyalty – requiring firms not to represent in 3 main areas really: firstly where other parties in a matter are adverse to any affiliate of the client; secondly, any competitors of the client; thirdly, being contractually bound to US rules, such as the ABA's Model Rules, and in particular Rules 1.6 – 1.11.

In the US the rules are a bit stricter than the SRA's rules, but more liberal around exemptions, so it is possible for US clients to agree to waive a real conflict, whereas in England & Wales this is still not possible, although informal consent can be provided following some level of disclosure which has to be seen in light of the duty of confidentiality as well. So, the starting point is the extent to which a clients might be willing and the firm able to waive a conflicts, otherwise as you might expect it falls to respective bargaining powers.

This is a really difficult area for many firms, you might want to take a look a report produced about 4 or 5 years ago for the SRA considering lawyer independence and autonomy. I can't recall the authors, but is had identified bad practice in the market relating to conflicts. In practice banks make a borrower pay the banks legal costs, as is standard practice, but where they are powerful enough, the borrower can use them as leverage to dictate what law firms the banks can use as well. So, they can insist that law firms use the same ones as the borrowers. However, this also dictates what law firms can ask. This practice still continues, and the SRA has still done nothing about it, although [A2] would not act in this scenario, it is a practice that ought to be banned.

What I would say on a more general point though, and I was wondering whether your study also considered confidentiality? In terms of confidentiality my concerns have always been with secondees from client organisations, insisting on sending their firm's in-house counsel to law firms. I've always considered this a considerable risk, and feel that some limits or guidance should be set, maybe, for example only permitting foreign secondees.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Well, things have come a long way since the turn of the Millennium in this regard, because until then the Law Society's rules on the matter, as then was, simply did not permit acting in instances of adversity, and this really wasn't appropriate for our type of practice. The Freshfields judgment, although it wasn't all good news for those involved, did in fact clarify that it was possible to act adverse to the client, and then the Law Society's professional rules were relaxed in around 2006 I think. This introduced the 2 exemptions, which are still subject to obtaining informed consent and providing disclosure at some level, and this is where the greatest issues arise, aside from posting issues around how much we actually have to disclose to a client about the nature of the conflict, ultimately if a client is unhappy about a representation, their GC will let us know. However, you also have to consider that we have been delivering US legal advice since the 1990s, which provides a slightly different, more flexible perspective on when we can and can't act. So, under the US rules clients can agree to waive a real conflict whereas in England & Wales this is still not possible, although informed consent can be provided, in the instance of a real conflict it would be insurmountable.

So are you saying that it also depends on the flexibility of jurisdictional rules, and also the client's attitudes?

Yes, its better to be bound by US rules when it comes to exemption and waiver.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

Yes, this has not been defined by the SRA, although it is a vast improvement upon the original obligation to report all non-material issues. I think that the SRA's view on this is to direct us to their enforcement strategy and a range of considerations that would be relevant in whether it would choose to pursue the matter or not. However, as they recognise this also has to be tied to context, and the duties that we are subject to stem from the terms of the engagement. Very often this is defined by the client's own OCG

Meaning?

Outside Counsel Guidelines

So, in other words this provides the standard that we follow. Its there, sometimes in black and white.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

Well, there is no straight-forward answer to this. It depends on a combination of

contextual factors really including the type of representation. In successive representations it might for example hinge on whether the lawyer received any confidential information that could be used in the new representation. But also, where, say two representations had very different subject matter, that might be enough. It would have to be assessed on a case-by-case basis. It becomes particularly more tricky though where there has been multiple representation. Really, it becomes an issue of recognising to what extent things would be done differently if only one client was represented as opposed to all.

Considering interpretation of the exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

Well under the SRA's rules, there is no guidance of course, but it is a delicate balancing act to avoid breaching confidentiality. Any determination involving a current and former has to start with some very general communications with the affected client to begin with, and we might be able to get a sense from that, and their view on us using, for example, information barriers, so this is how we would sell it to them. We see whether they require any further information. However, with other more sophisticated clients, we are bound the OCG might specify the process and expectations, which we will interpret in line with our duty of confidentiality owed to other clients.

- What would satisfy you that it is reasonable to act for all clients?

Under the SRA rules this goes back to whether or not it would constitute a serious breach, but also it is possible to borrow from the ABA rules, that a lawyer needs to believe that they would be able to provide competent representation.

What would that mean in practice?

Well, essentially that we have the skills and expertise to act on the matter, and sufficient flexibility and latitude to accommodate all clients with the necessary protections in place.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Well, for us, so many of our clients now use OCGs, and not just those in the financial services sector that processes have to exist to protect, not just the individual, but also the firm. We are just such a diverse, geographical operation, and OCGs, client terms and requests for proposals can come into the firm in so many different ways, and are not always received by legal personnel either. The last thing we want is for a bod in HR or accounts, to bind the firm, either expressly or, more importantly through acquiescence, to a new client retainer where the terms present a real risk to us. This is a particular risk for us in continuing representations. We have processes in place that are designed to capture any new mandates, regardless of where they fall so that they can be reviewed by designated persons, which will include in the first instance, existing client relationship partners, or if

new, designated points of contact in the practice group. This is a re-enforced in all staff policies and training.

However, another risk, which is far more prevalent in the US, but which could pose issues with some of our existing clients because of the use of OCGs is in the hiring of lateral lawyers and non-lawyer professional staff who might have pre-existing client engagements. We utilise due diligence questionnaires and have discussions with potential hires to compare client lists.

As you can probably tell, the decision-making process on COI should not, as a matter of strict policy, be undertaken by anyone besides designated individuals who are at equity partner level, and the centralised conflicts centre.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Well we were one of the first firms in the City to develop a centralised conflicts management system in-house, and so it has been through several versions. This was long before any specific SRA requirements. Originally, we would run this at several main junctures, this was before on a client approach, before a new file is opened, and when a new party entered a case. The latter was dependent on the relationship partner informing the central conflicts checking team though. They can still do this of course, but it is, hopefully picked up automatically.

Every time a new party becomes involved in a matter as a claimant, defendant, lender, buyer, seller, guarantee or surety etc – essentially, any party connected with a transaction, our sophisticated central conflicts system is automatically triggered. It's fully integrated with all of our various office systems, and the database at its core can detect even arms-length beneficial ownerships. It can even throw up closest spellings results, ie. variations of a theme.

Also, when a new lawyer is added to a team, we would expect that individual to provide an Excel of the names of any related parties on matters they worked on that can be checked across the database. I'll concede that it does still depend to an extent on a degree of trust, but as yet, we have not invented a means to read people's brains.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

To the extent that they pose a conflict with local rules where there the transaction will have the most predominant effect. They are clear for example that in relation to supplying services into CCBE member states, it is the CCBE rules on conflict that are to be followed. Outside of this it really depends on the client's perspective as to how we proceed. Really the scope for issues to arise is where there is a disparity in the standard offered by the SRA's rules and the local rules, and a sophisticated client GC will be aware of this. The higher standard is what we will usually advise where that is feasible. My view is that the ABA's rules are, with the exception of exceptions to acting, stricter and still with regard to imputed conflicts for example.

We can usually obtain some sort of waiver in this respect. However, other local regimes are far too rigid in my view, and it might take some level of negotiation with the local regulator to approve the use of conflicts management systems, possibly in the form of regulatory waivers or comfort letters. Globally, it really does vary. Take Sweden for example, they don't even recognise Information Barriers as being ethical, and I just have not been able to get the Head of the Swedish Bar Association to reason with me. There might be some negotiation required. In a sense it really does not matter what the SRA's rules say, if, ultimately the local rules say no, and there are going to be serious consequences for us, and our clients were we to continue to act.

Field Note

Firm Name/Code: B1
Brief Description: B1 is one of the top 5 largest law firms in the United States, and one of the 10 largest in the world by lawyers and revenue. It operates under a verein structure in the UK, Europe, the US, Canada, Latin America, Asia, Australia and the Middle East. Global revenue exceeds $2bn
Meeting: MW & GC
Date: 11/01/20
Time: 10:00-11:10

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

The starting point has to be the contract itself of course, and typically the most difficult instances arise with our largest most sophisticated clients, and they operate using their own retainer agreements, commonly referred to as Outside Counsel Guidelines (OCGs). They can be quite lengthy documents with a number of appendices, and sometimes quite confusing. The client will claim that they set out the expectations of the relationship, but in my view they often try to go way beyond this with the duty of loyalty for example. The other thing to bear in mind is that where new terms of sought, there is usually a very limited turn-around time, and its harder to negotiate on unreasonable terms where these have been previously agreed to, and have somehow snook in there. Some of these agreements also contain service levels, it means that client is unlikely to complain to a regulator in the event of a COI, but they might expect some sort of credits in return, possibly even financial. We have to take a view on reasonableness, and frankly whether we want to develop a truly collaborative partnership with the client, or continue one. There is a notion that OCGs are non-negotiable, but I think that's a mid-tier firm problem. I think we have the expertise and strength. We did refuse to act for a client recently who tried to impose a non-sue anywhere in the world OCG. Their loss was the expertise that [B1] would have brought to the transaction.

I think that it is the smaller large firms that are under the greatest pressure to act

unethically – the larger ones like us can tell a client to go away because they have the knowledge/expertise.

I think we're in a pretty strong bargaining position in several areas, we adopt a "one-firm" approach to negotiations, and we expect clients to expect one standard, that means that our starting position are the ABA Model rules, these are the benchmark, and although we are a verein structure, COI is still managed centrally nevertheless. Did you see what happened to Dentons a couple of years ago, they were operating under a verein structure, but it did not save them. We have to have a consistent standard across all offices during negotiation. The question is the comparison between the ABA standards, which our own internal policies are in line with, and then what a client expects. If the client expects a higher standard than that, which in my view is the "golden standard", then most of the time we can tell them where to go, and frankly, our long-standing clients already know whether the lines have been drawn.

Where do the SRA's OFR rules feature in this?

They don't. For the purposes of making decisions on COI, and for that matter, any other ethical issues, the ABA Model Rules is the benchmark standard. We don't like the SRA's OFR rules, and nor do our clients. They are just far too vague, and frankly, I think you'll find that clients would view them as offering a lower standard of accountability. In this industry it is all about brand reputation, and in any event I think that our US, and possibly also other clients would probably push back against that standard as they are accustomed to particular expectations, and to suddenly adopt a lower standard could be bad for business.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Are we talking about "legal" conflicts here?

Yes

We'd be guided by ABA rule 1.8 in respect of "legal" client conflicts which sets out examples of non-waivable conflicts could include a representation that would provide a lawyer, and although this can be largely read as drafted with small practices than ours in mind, I think that it serves as useful guidance especially around, for example personal conflicts and client inducements. So, for example, in our instance, it could be that a client might attempt to induce us into accepting their waiver, for us to act on a matter.

A client would send you *their* waiver to you acting?

Yes, that's fairly common practice now, although obviously we check it against the terms of our own.

So is the default expectation then that you will act with client waiver? With legal conflicts, it is pretty easy to act with a wavier and the sort of sophisticated systems that we have in place here, but it is a different matter with positional or commercial conflicts, which are, I would say, the first, and to be honest, most important consideration in every instance. That

is when we would probably turn a client away.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

Oh, yes so another reason to adopt the ABA's more prescriptive-based rules, just generally in fact, is that the SRA in its infinite wisdom has determined not to define this, and how could they, because there is literally no substance to the rules anymore. I'm conscious that they have set out particular features in their enforcement strategy, I do wonder to what extent this is a bit of a cop out actually. It certainly creates a lot of unnecessary confusion and risk. But from a practical perspective, we have to consider this ourselves, and I think that if we were forced to justify ourselves, we have to consider patterns of behaviour and not just one-offs, and record everything we become aware of.

You mean you?

Yes, in relation to COI, the issue is potentially global and so the "UK" COLP really just feeds this information through to me. But you see the key thing you have to know Michael, even though we purport to adopt the ABA's standard on COI, the reality is that even so, its not the rules anymore that govern lawyer behaviour, but the client. On a single matter basis, we'd have to look at the scope of the retainer, whether that's our engagement or the client's OCG, and whether, according to the COI provisions in that document, we have failed to meet expectations…and I use the term expectations rather than duties, because this stuff is often contained in service levels. To be honest, some OCG's are so sophisticated that they specify breaches in terms of severity, and remedial action that the client might require. This being the case, and if it is our bad, then clearly we'd learn the lessons, and the matter really shouldn't need to go to the SRA.

So would you ever seek clarification from the SRA on the definition?

No, for starters their Ethics Helpline is absolutely useless, and staffed by people who know next to nothing about this type of practice, and wouldn't be able to make a credible determination over enforcement anyway – this has always been the case, and they still haven't addressed it. There's also a risk in letting the cat out of the bag utterly needlessly with all the other repercussions that might have for PI and etc….this is anonymous isn't it?

Yes as agreed.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

I've always considered that really a "related matter", which also, unhelpfully remains undefined by the SRA, really boils down to whether there is a risk that the duties conflict. This is where we have to look very closely at the subject matter of a matter itself, whether we can draw a ring around the scope of the engagements, and possibly even looking a client behaviour if it really comes down to it. For example the course of dealings between the parties historically if we know about that. Really importantly though, it is important to have a very clear sense from the outset of a matter as to who the client or clients actually are. In particular where in both, or all, matters we are dealing with affiliates, or verein structures these days. This is where it is vital, as we do, to have really good centralised

conflicts checking, because then it is possible to examine the beneficial, and even arms-length beneficial ownership of all participants, not just clients, but participants to a transaction.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

Oh, this old chestnut. Well, there's not point looking into the SRA's rules for guidance on this point either, although I will concede that, many years ago, just before the crash, they had far better guidance on this, and, I'll be honest with you, I still keep a copy of that version of the Code to hand, and the guidance in their around arms-length transactions for example is what I suspect most of us would follow as it is a delicate balancing act to avoid breaching confidentiality. However, what I would say is that really that is applicable with less sophisticated, sophisticated clients who don't use their own OCGs, or are probably too busy to care. The reality is that the disclosure expectations will be set out in the OCG, although clearly we still need to think about the impact on other clients, and the duty of confidentiality. What we may have is akin to a battle of the terms in this respect. That can be a tricky negotiation to have where you are effectively telling the client that terms that you have agreed to excessive, or that their OCG is just very badly drafted.

So essentially, you are often guided by contract?

Yes, that's precisely it, and of course negotiating skills and bargaining power.

Does this present the risk of a breach of contract in every instance?

There is the risk that a client could regard our engagement by another client as a *fundamental* breach of contract, even where they are long-standing, but from a commercial point of view, they could always find, or be told to find, another firm if they are not happy with the sophistication of the measures that we could put in place.

COI are something that they know are a possibility, even a likelihood in some of the niche markets that we operate in. Furthermore, it is not going to do them any good in future if they treat the matter strategically. [a strategic conflict]. It is to be honest, something that leave particularly sophisticated clients, both with OCGs and with teams of GC's to argue the toss over between themselves on the basis of the nature of the gist of the conflict that we have disclosed.

- What would satisfy you that it is reasonable to act for all clients?

This is the SRA's wording again isn't it, and again, its up to us to determine what it means, and so in this respect, I follow the US position that allows a client to consent to a lawyer acting in a conflict situation, as long as the lawyer believes that they will be able to provide competent representation.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Well engagements come in from a variety of different sources and so we ensure that they make their way to the relevant client relationship partner before any decision is taken, then this is fed to our central conflicts team who identify any potential issues. This is overseen by myself, although decision-making will usually be taken by a conflicts manager in consultation with the relevant relationship partners, and in the meantime, necessary screens will be put in place immediately, and if necessary the matter referred to the ethics committee for approval where there for example partners cannot agree between themselves, or there are any particular issues, for example a very substantial relationship between matters. They make the final determination, and sometimes that can be down to negotiation between the different personalities. Incidentally, you've only got 24 hours to achieve all of this.

Are any fee-earners below relationship partner level involved?

No, they are strictly forbidden! Once upon a time, when law firms were not the global networks that they are now, that might very well have been a matter that a junior associate might have presided over, but not anymore.

- What happens as a transaction progresses, and how are emerging conflicts managed?

We do have some of the most sophisticated conflicts checking software around, but I'm still not 100% sure that we've got this right yet, but then, I'm not sure that the competition have either. I mean how are you going to say on top of them, you only know what you know, even with all the technology in the world. This is recognised in some US States but not all, for example the DC Bar have the concept of a "Thrust Upon Conflict" which is a sort of get out of jail free card subject to conditions in the event that a conflict emerges downstream that was not detectable at the outset. That isn't a feature of the ABA or SRA's regime, although clearly that would be useful from the perspective of managing client expectations.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

- How are conflicts between the SRA's rules on COI and other "local" conflicts, rules or duties reconciled?

Well as you've probably gathered by now, the answer is that, as a matter of policy, the benchmark standard acceptable to myself, the central conflicts team are the ABA rules, even though it is fair to say that they are still written at the client level, nevertheless, they help to inform a view of what is reasonable, and I feel that provided we follow these rules, we'll automatically be compliant with the ethical expectations in most jurisdictions, including, most definitely SRA OFR which can largely be interpreted to mean anything. I say, most jurisdictions, there are one or two, and I point the finger at Sweden in particular, where even the CCBE code only goes so far in terms of interpretation, given that their local

rules do not, for example, even permit ethical screens.

It varies from jurisdiction to jurisdiction. As with Sweden, some local rules are stricter that even the ABA's standards, but that's relatively rare. I don't find the SRA's Code very helpful in this respect, and especially when doing business outside of Europe, the CCBE area. It might require some negotiation with the local regulatory body so that they are happy. However, it really does depend, and sometimes we do have to seek external advice on this from specialist counsel, something that we'd obviously slows the transaction up, but then the client understands that the same issue would arise with a competitor.

Field Note

Firm Name/Code: B2
Brief Description: B2 is one of the largest law firms in the world, structured as a verein, and with the organisation's firms branded under the same name, but remaining as independent businesses. The brand therefore retains over 70 offices worldwide, and has a global revenue of just over £1bn.
Meeting: MW & GC
Date: 08/01/20
Time: 15:00 – 16:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

Yes, so these, are often referred to as OCGs nowadays often contain expanded duties of loyalty, so we'll be asked not to represent any other parties in matters adverse to any affiliate of the client, or their competitors, or any entities whose interests just might not be aligned with the interests of the client. It can be very challenging when they try to bind us not to act against any subsidiaries and affiliates, yet this is very widespread now, and it is quite frustrating, I mean, really its akin to an access to justice issue, except that here the disadvantaged potential clients usually end up being perhaps SMEs. Now the problem with the SRA's regime, or indeed the ABA's is that they do not do anything to stop this sort of behaviour.

The key question for me therefore is how they will be enforced, and the likelihood that terms will be enforced, rather than immediately pushing back. Of course, it depends on just how unreasonable the client is being in the scope, and, I think that we are still large enough to take a few hits and send a potential client down the road if this contractual conflict will have a seriously negative impact on our business.

COI are often scoped by contract by the clients, and breaching the contractual provisions might entitle the client to some sort of reduction in billing or even financial compensation to the client. I know that might sound absolutely crazy, but there has been a significant

shift in the past couple of years in bargaining power to clients, and its not just financial services clients at it anymore, but other industries, especially in the high tech and social media sectors. Regardless of whatever the Competition and Markets Authority think, the market has reached saturation point as far as law firms are concerned, and sometimes as a firm we just have to accept that we have our hands tied. Its not always possible to turn a client away 100% of the time, or to push-back on their demands.

So, in terms of what to negotiate on, in fact some terms might be acceptable for some client relationship, but in other instances we have to tell the client that they are harming our business. So, although we acknowledge their concerns, in fact we might convince them to permit adversity, for example, certain types of affiliates for which the firm has no relationship or contact. We might also scope the matter down to a particular industry perhaps. Also, as this is a negotiation of a contract, rather than under the SRA's rules, and clearly the client is fully involved in the decision-making around setting the scope of duties owed, we might even seek advance waiver from them to handle certain adverse matters, and the client might also appreciate this seeing how it avoids the hassle of responding to wavier requests.

Do you think that this would be binding in an English Court?

Well, contractually agreed advance waivers, the point is that often we're negotiating on the client's US governed OCGs, and so really the SRA's regime is not really the driving force here. To be honest, the client would have to complain to the SRA, and that just does not happen at this level, because clients tend have mechanism of recompense under contract, and frankly I don't think that many GC's have confidence in the SRA's ability to police this sector of the market either. Its only really where former clients have felt particularly aggrieved about representations that matters have gone to Court in the E&W. Imagine it like this, what the largest law firms and clients have developed in recent years is a private regulatory regime operating often to ABA standards as a minimum, but often with expanded duties of loyalty.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

The starting point here is whether there is a positional conflict, then whether there is a commercial conflict, then whether there is a legal conflict – in that order.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

The SRA has been really unhelpful in this respect. It's a real dammed if you do, dammed if you don't sort of situation. On the one hand, I have a sense that some compliance managers might be being deliberately diligent when they go to the COLP with material issues, and I also sense that the COLP feels that he ought to report things, even non-material still, because he doesn't want the SRA to think that otherwise something suspicious is afoot. However, the term "serious breach" is not defined and so it gives rise

to this level of confusion. Letting the SRA know about anything is risky, because once you let them know – they must reach a decision – and they know less then you do, so you are sort of shooting yourself in the foot.

So how do you define serious in a COI context then?

Well, by reference to the SRA's rules it could be anything that isn't minor, so clearly that isn't any good. What we do is look at the nature of any adversity that has arisen, and whether it was something we missed, and this is especially difficult downstream, and the scope of the contractually agreed duties, and also the extent of the information that the client actually provided to us at the outset of the transaction

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

Put simply, we look to the subject matter and the clients involved, and, for example, whether there is an overlap between affiliates, and whether it is subject to any contractually agreed redlines.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

Sufficient that they are aware of the nature of the COI in the first instance. Then, it's a case of whether they are willing to provide advanced waiver at that stage if that's possible, or where we are working to the informed consent standard we have to perform a bit more of a balancing act with the duty of confidentiality. This is where it comes down to personal relationships. The client relationship partner having a discussion with the client, without gauging how far he is going to have to reveal. Fully informed consent is really what the client considers is full, and hopefully they are reasonable, but where their expectation exceeds our own redlines, that's when we have a problem, and especially if we can't reassure them with barriers.

- What would satisfy you that it is reasonable to act for all clients?

Can we provide competent representation? Have we identified all the clients – which will involve a check with each party that we have identified all their relevant affiliates; do we have the expertise to act, which of course we have; have we identified all actual and potential conflicts as far as we can be aware. This means that we can justify the steps taken if necessary to the client, a court, or a regulatory body and say, we made all reasonable endeavours.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Well from a UK perspective the COLP no-longer has a GC's office, so we split that function and it is the GC who is responsible for COI given their international nature – they are not just a UK regulatory matter. The conflicts checking process on any transaction is managed by the client relationship partner, using a centralised database overseen by the NY office. So although the London Office is an LLP, and a separate entity from the rest of the firm, this is not the case for conflicts checking, which is overseen by a person in NY. This is where we have a database of client interests and beneficial ownership of subsidiaries.

I would draw the distinction though between the relative ease with which it is possible to detect same matter client-to-client conflicts, and positional conflicts. These are much harder to detect and especially internationally, we can't really do a conflict check on them as such.

Also personal conflicts, these are also very hard to detect, hampered by confidentiality limitations about what a lawyer can disclose about ex-clients. Its fun and games, so for example a typical question is "If we were to ask you to represent Barclays would this pose a problem" – it's a time consuming and frustrating process involving a lot of lateral thinking.

Is this a process managed by HR?

No, we only trust HR with low level stuff such as staff recruitment and grads. However Associate recruitment is a different matter and is managed by the Associate Appointment Team – comprising lawyers. Because of our US links, and especially in light of the Dentons judgment, we have to think about imputed conflicts, even in the London office. Fortunately the ABA rules have been clarified recently so lawyers can only be caught by clients they've actually worked for – not, more widely, any client that they firm represented.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Well, as is industry standard, the central conflicts team in NY run a check whenever a new party comes onto a transaction, and we're not necessarily just talking about a new client here, as we need to avoid the risk here of any positional conflicts for example, and other clients who might object even though its unrelated. It's a very sophisticated system introduced quite recently, though not because of OFR.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

To be honest, there are two main factors here, although the firm is a verein, there is, nevertheless, a controlling point of influence, which is NY where the conflicts checking is centred, and so you might say that there is a very US outlook in the firms's global policy on COI, and in a sense that's not a bad thing, because the ABA's model rules are the basis for the rules in NY, and most US States, but also some, more reasonable sophisticated clients, i.e. not financial institutions, are adopting these as the standard for contractual conflicts provisions. We see this with clients who have nothing to do with the US as well. I have a sense in fact that in so far as conflicts are concerned, the ABA's model rules have being

increasingly adopted as as sort of international benchmark, and frankly the SRA's OFR regime has been, not exactly counterproductive, but certainly not the regime of choice where rules can be contractually negotiated.

Why do you think this is?

Because they lack legal certainty. Personally, I think that OFR sounded like a interesting concept, but you have to admit that it was not tried and tested beforehand, and now things have got to the stage where, under the latest incarnation, all you have effectively got is a blank sheet of paper. Well, that might provide the flexibility that some firms have been lobbying for years, and perhaps they have now got their way, and perhaps they are now comfortable with that, but that does not necessarily afford the certainty, or the trust and confidence that clients necessarily want, and especially when those clients are GC who have been raised in jurisdictions such as the US.

This is a real headache for us. Where conflicts arise between our different offices globally, then ultimately they will be usually be resolved first by a round table discussion between the firm's ethics committee in NY, where each regulatory regime, and it's not just a matter of clashing conflicts regimes, but e.g. tax regimes have to be considered globally and weighted up. A decision is reached on the basis of the best interests of the client, but it is, I guess also a commercial decision, the best financial compromise too. The Ethics Committee is an international make-up and comprises several equity partners from London, and these local partners are experts in these areas and so we can usually get a good picture. Where we do need to seek external advice, we'll turn to a consultant firm such as [name removed].

Field Note

Firm Name/Code: C1
Brief Description: C1 is an international law firm headquartered in London and represents 39 of 100 companies listed on the LSE and has almost 30 offices worldwide. It has a niche strength in commercial litigation for FTSE 100 companies in High Court and Court of Appeal cases. In 2018/19 it had a global revenue of approximately £1bn and is structured as a limited liability partnership, and recently merged with a large US firm.
Meeting: MW & GC
Date: 05/02/20
Time: 17:45 – 18:45

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

Like many of our immediate competitors, most of whom are now also recent transatlantic mergers we are still learning to adapt to the impact of being a partly US firm, and servicing

clients from the US side of the business. Both the US firm, and their clients have expectations that in performing work for them, we follow their standards. Clearly they don't have a very high impression of OFR, and I can understand why they might not get it. However, it means that we are being forced, through contract, to adopt the US rules by clients of the US business, and furthermore, the US side of the business makes it very hard for us to push-back. Believe me, it would not be a good day for Anglo-US relations were we to lose one of them. We see these "contractual" forms of conflict every day now.

Sometimes the terms are actually pretty reasonable in being in-line with the ABA's model rules, but but there are other clients, US financial services clients, and clients in very competitive industries which are very heavily regulated and have high-levels of R&D, who often seek to impose their own terms through their external counsel guidelines. These aren't really guidelines, but contractually binding in the US, and they can extend the duty of loyalty far beyond what we know in E&W and likely also the US. These agreements can be very specific about who we can and can't work for, but also very broad. One of the first considerations we have in terms of setting out our negotiating positions is almost invariably over the definition of "client". This can include all manner of subsidiaries, but also affiliate businesses, in virtually every corner of the globe, which is bad, because we also have outposts and do business in virtually every corner of the globe as well.

Sometimes we can achieve some common middle ground with the client over, for example, restricting subsidiaries which are almost wholly owned, and as for the competition we might even try to impose time bars on the length of what is essentially a restrictive covenant.

Sometimes a client will provide a contractual waiver to their terms and conditions around this, but otherwise, we sometimes have our hands tied by the US side of the business, so really we accede to client demand on contractual conflicts quite often, and we just have to ensure that we have good centralised conflicts monitoring in place to catch anything.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Where we are dealing with external client guidelines drafted by the client, this might set contractual expectations out, and it is difficult to ignore this. Otherwise, in terms of legal conflicts in E&W, there is case law on this in the Hilton Barker case about irreconcilability between duties. I think that, as in that case where the duties of confidentiality and disclosure were irreconcilable because of one of the party's fraud that something seriously adverse of that nature has to have arisen.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

In the SRA's Codes of conduct (both of them), there is no clarity, and we are directed to the enforcement strategy which sets this out, and, whereas before, we were left pondering what is a "material breach", now we are left pondering what is a "serious

breach". I think on this occasion however, we do have some - very broad sense of what it might be, and I think that the consensus asking around the GC community is that, in light of the focus on criminal forms of behaviour, and more widely the impact in terms of harm on the client, it is conflicts that are impaired by some form of criminality or extremely serious misconduct.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

Regardless of the type of conflict, I would always look to the content of each mandate first, and also, fundamentally, the scope of the retainer which should define the limits and actually define the clients.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

It is a question of the nature and extent of the conflict itself, and how far we need to go in order to make the clients, sufficiently aware of its potential impact going forwards, but also what we propose to do to manage it. Clients understand that conflicts happen all the time, and so those clients who use their own external counsel guidelines for example (and that is increasing), will set their own expectations out around this, and some guidelines even set levels of conflict out.

- What would satisfy you that it is reasonable to act for all clients?

Are we satisfied that we have identified and addressed all elements of the conflict as far as we can to the satisfaction of the client, but also in line with our own policies and procedures on conflicts.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Legal and contractual conflicts are all managed by the central conflicts team from inception. The decision-making has been totally removed from partners. On inception the team will run checks of the central database which will flag any issues under those forms of conflicts, and we they will then notify the relevant partner. He can appeal to me, and in particularly complex issues it could go to the ethics committee, but, that is going to take more than 48 hours.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Our sophisticated central conflict checking system tracks all matters from inception, and it is fed-into by the fee-earners on the transaction in question, but also fee-earners working

for the client all over the firm. It is fully integrated with other office systems, but importantly this central team is totally independent of the fee-earning community. This is absolutely vital for reasons of confidentiality because of course they know everything about everyone. They run the matter inception checks at the outset of each matter, and any new involvements, or changing client circumstances, networks and connections. I will take a view on any issues that come back after they have advised the client relationship partner on any legal and contractual conflicts. I think that this has been one of the greatest cultural changes in legal practice in recent years in our firm, and I think that many partners in E&W are still getting used to the fact that they have a little less ownership over their clients. Increasingly they belong to the firm.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

- How are conflicts between the SRA's rules on COI and other "local" conflicts, rules or duties reconciled?

We have to figure this out for ourselves really because the SRA's ethics helpline is utterly hopeless when it comes to cross-border issues, or, generally advising large law firms anyway. We, or rather, I, am the expert on a range of local rules now having been in this role for 10 years. In fact, a major difference between myself and the COLP is that I have the international expertise. Its really a case of determining the predominant effect of the transaction to use conflict of laws terminology, and also where the lawyers working on the transaction are authorised. Its pretty much a case then of spot the difference, and identify what fits, and what doesn't, and seeking further input/consent from the local regulatory authorities, and second opinions from external counsel if we need it, and especially where local regimes impose very onerous conditions around loyalty and confidentiality.

Field Note

Firm Name/Code: C2
Brief Description: C2 is a global international law firm and one of the 50 largest in the world. It grew very rapidly in the UK through a series of small firm mergers during the 1990s, and through into the 2000s, but was one of the worst affected firms in the aftermath of the financial crisis, and in the period 2019-2016 also closed a number of international offices. More recently it merged with a major US law firm, and now operates as global merger.
Meeting: MW & GC
Date: 22/02/20
Time: 11:00-12:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

Yes, I'm conscious that people often refer to anything that doesn't appear to fall neatly within the SRA's regime as "commercial conflicts" and these are a major concern with big firms with a US dimension, and especially with us given that we are a partly US firm and pick up clients from the US side of the business. What might not be regarded as a regulatory conflict in E&W, might well be in the US and so, in fact, it is extremely hard for us to push-back, because our US clients exert pressure on us, in order to contractually bind us to the US rules before we can act. This is becoming an increasing problem for us.

Which US rules specifically? The US State Bars, or ABA Model rules for example?

Well, it's a mixture, in fact, an increasing number of US clients, and now we're also starting to see clients in other jurisdictions as well, are issuing their own OCG's, and relying on the Denton's case as leverage, even though this was really about own interest conflicts and PI more than anything else. Sometimes the terms they seek to impose are more or less in line with US standards, but in a number of other instances, they effectively seek to extend the duty of loyalty far beyond this to instances where we'd be prohibited from acting even in matters that are adverse to any "affiliates" of the client, however defined, and so we've got to try and reach a consensus on what that means for example

We're finding this to be an increasing problem because we are seeking more clients of the US side of the business approaching us since the merger, and in fact, we really are two separate firms, however, from the client's perspective we are one. We have to hold ourselves our as one firm, yet it has never been a case of being fully close.

What proportion of conflicts are legal, and contractual?

Legal conflicts, well, I only deal with a couple each week. Hardly any. But as for contractual conflicts, I see these all day, every day.

What is particularly problematic is that our ability to push back on these terms though in negotiation is often limited by a lack of awareness within the firm around the sensitivities where there actually is no conflict at all. Typically this occurs with the lesser experienced lawyers, but even so, with the largest US clients its virtually impossible. I'm fighting a losing battle.

There isn't too much debate around where the duty lies, where the ABA rules have been followed for example, about the wording of code, because actually it is quite black and white, quite clear-cut. However, the good news is that in the US it is possible to obtained conflict waivers, which we don't have under the SRA rules. This is where there is some negotiation around wording. It might be possible to waiver in respect of a specific instruction, or to make them as broad as possible. The challenge though is that some clients will often impose their own waivers, and where there needs to be tight turnaround times on transactions, it is very difficult to afford the time to negotiate. Clients will often made us subject to KPIs.

I mean the chances of being able to push back are very slim, we've been restricted from accepting future mandates where, for example, we'd be acting for the European subsidiary of a US competitor of the client, and another issues is that we're starting to see the Canadian subsidiaries of US clients now also using the US conflicts rules in their engagement term, so this precedent appears to be being more widely adopted.

If, if, it is possible to push back, then we have to carefully consider what the impact of the terms would be on the firm's UK and European business, and find some way of restricting it down, finding some middle ground, for example, allowing adversity for certain types of affiliates. However, we have our hands tied by the expectations of our US colleagues, and the need to service their clients. It's our business model that's at fault.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

There is enormous financial pressure on us and it is a case of looking to the scope of the retainer itself, and sometimes where it is an OCG drafted by the client, it might set their expectations out in terms of disclosure and waiver. However, the SRA's rules don't provide this level of detail, and so we do the best we can to draw the line using the contractual scope of duties between two clients. However, we are looking here at contractual conflicts, and so an irreconcilable conflict is a clash between contractual duties of loyalty and confidentiality, which can be far more restrictive on the clients' terms than under the legal standard.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

Well for legal conflicts under the SRA regime the term is very poorly defined. Although there is a list of types of allegation in the SRA's enforcement strategy which reflect, I suppose criminal forms of behaviour, and more widely the impact in terms of harm on the client. In fact, I believe that the SRA's enforcement strategy uses the term "victim". Given that it is now up to us to find meaning behind the term, the reality is that the majority of legal COI do not fall into this sort of category, and especially in respect of contractual conflicts, where there to be any form of breach according to the terms, then there will be a mechanism to sort this out amicably, and by that I mean, not reporting to the regulator. Since the wording was changed from "material" to "serious" this has, in my view, altered the extent of the obligation, and we don't report COIs anymore, and in any event, I don't think that the SRA are really in any position to judge.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

In terms of legal conflicts, it's the subject matter of each representation, and also whether there are any affiliates involved, as there is always the risk that an unrelated matter might "bleed" into another. The scope of the engagement letter could define the limits further. However, with some contractual conflicts, this might be completely artificially defined on the basis of tenuous, broad associations e.g. by same type of work or industry.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

Where there isn't already some form of advance contractual waiver in place, it is difficult to approach first without breach confidentiality. What constitutes an adequate level for informed consent varies dependent on our previous relationship with the client, and even the industry in which they work. They have particular expectations, and in some cases, with very sophisticated clients, it is possible to merely disclose the essence or nature of a client to receive informed consent under the SRA rules. In contractual conflict situations though, the expectations and processes around level of disclosure and how and when we raise it might be set out more clearly, however we would always have to bear our wider duty of confidentiality in mind to our other clients.

- What would satisfy you that it is reasonable to act for all clients?

To put it simply, when we have the necessary protections in place to the satisfaction of the clients

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

In terms of process, it is really a case of we identify a conflict on the system, and then seek a waiver, the client sends its waiver requirement, and we send a receipt to their GC.

- What happens as a transaction progresses, and how are emerging conflicts managed?

One of the biggest risks now is recognising who is the client, because this is now often a concept more than an individual. The main client, and its affiliates, and then to what extent the rest of the world might clash.

This means that we have to have a very sophisticated central conflict checking system, designed to track conflicts, and that is fully integrated with other office systems. We will run checks at the outset of each matter, and whenever a new party enters, and it doesn't matter in what capacity, the issue is "involvement", it identifies how they are connected with the existing parties including beneficial ownership. If there's an issue the conflicts team will discuss with the relevant partner, and myself, and possibly the central ethics committee in NY if it poses a particular risk, or harm to the UK business. Often we'll get overridden, sometimes not.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

In terms of the wider regulatory environment, e.g. PI etc, it is just a very, very small part of the wider jigsaw puzzle really, and even in respect of COI, where we have clients able to set the rules, it really is more or less irrelevant from a practical point of view in most, but

not all instances. However, it is not the dominant governing regime on COI.

This really does depend on the comparison between what the local rules will permit in the jurisdiction of "predominant effect", and those of the jurisdiction in which the lawyers working on the transaction are "predominantly licensed". Often it can be easy to reconcile these without needing any further input/consent from the local regulatory authorities, and certainly never the SRA. Its only where jurisdictions have stricter rules than even the ABA that there are problems. Some jurisdictions, take France for example, have rules on "secrecy" which extent beyond those of confidentiality, so occasionally new have to seek local advice. What we are seeking however, is that clients will impose their own standards on jurisdiction, and choice of law so to speak. Where they are international, it is rarely the SRA's OFR regime that is selected as the "governing law".

Field Note

Firm Name/Code: C3
Brief Description: C3 is a global law firm with a focus on 5 core sectors: insurance, energy, trade & commodities, infrastructure and transport. It has over 50 offices in every global region, including Latin America, Africa, Europe, the US, Canada, the Middle East, Asia, Pacific and UK and a revenue exceeding £600m. It still conducts its business as a limited liability partnership.
Meeting: MW & GC
Date: 22/01/20
Time: 14:00 – 15:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

I must say that initially I was absolutely opposed to the SRA's OFR rules when they first came out because there is something to be said for knowing where you stand, and, that is was the beauty of the old prescriptive rules. I suppose that overall I'd still prefer prescriptive rules as I really don't like the increasing trend towards a lack of guidance, and especially in the latest version that's due to be rolled out. For me, whether its designed to reduce the cost of compliance or not, it makes little difference in practice, because I think that there does need to be a balance struck between commerciality and ethics, but big sophisticated clients have particular expectations, and especially where, like us, they operate globally. They want a certain benchmark standard and I think the view is that this is not offered by OFR. Increasingly they are imposing their own rules and they'll argue that they are trying to standardise expectations. It could be that they hold a whole panel of advisors to the same standard, and so, on a firm-by-firm basis, and where, you know, you are just one of a number of firms in the same tier, offering the same services, at more or less the same level, its very difficult to push back.

The worst clients are financial services clients, but it is a growing trend for clients to

produce their own retainers, and also client consent forms, setting out what they are/are not willing to consent to in terms of client wavier. In any negotiation we have to bear in mind our own position as a law firm relative to our competition, the client and any other parties that might be involved. Its an entirely commercial decision.

Well first we need to consider what terms go beyond the scope of our own engagement letter, that contains our usual redlines, and where its clear we are being asked to exceed them, we will need to negotiate with the client. I will be involved in that process with the client relationship partner. It's a fairly typical negotiation that takes place as on an commercial contract matter, however, the difference here is that it is being compressed into 24 hours. We have to considered carefully what the risks are to the business, and given the speed at which this has to take place, and because the clients are powerful, and we want to keep them happy and develop a collaborative relationship in some instances, we do just have to let some terms that I'd be not entirely comfortable with go, because we have to take a pragmatic view, and that is that they are not likely to be enforced in reality. So, for example, we don't actually do work in a particular industry or with any of the affiliates specified in the matter. Obviously, we'd keep this under review though.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

So here we're talking about instances where the client has not provided advanced waiver and I guess it would not be possible to act with informed consent right? Well that's the legal conflict position, so the SRA's old blue book guidance is still quite useful here in directing us to the fact that the duty of confidentiality and disclosure could conflict, and impliedly where they might be irreconcilable. So that's really something that can be followed and weighed up in each case and on the basis of the subject matter provided. However, under the current the SRA regime as well, I guess we have to also be mindful of whatever constitutes a serious breach, so, again, what on earth that means. Either way COI are not a local issue despite the SRA rules, or even the English law, and it is not really entirely dependent on "legal conflict" nature. We have our hands tied the terms of some of these contractually-based conflicts, but also positional concerns. In some of these cases, we'd refuse to act, but it isn't really because of a clash of ethical duties.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

Well as I mentioned the SRA's rules don't' really define this, although there is a list of types of allegation that it might reflect and these seem to relate more to issues such as bribery, and I'm not so sure that they actually fall within the domain of COI anymore, whereas before we had to report all non-material and material breaches. However, what I would do is to keep an eye out for any particular patterns of behaviour, if anything for the benefit of the firm and in line with our global risk management policies rather than SRA enforcement.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

The short answer to this is, to determine the scope of each particular retainer, successive or simultaneous and determine to what extent there is any overlap into terms of subject matter, or parties.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

This is where a phone call is often required to the clients, and most of them will have processes and procedures for dealing with this sort of thing. It really depends though, some will be quite understanding and might just need to know the nature of it before agreeing to put in place an ethical barrier. The level is determined by the client's expectations as to what they regard as informed consent. We'll supply them with enough to establish the fact of the conflict, and how it might potentially impact them.

- What would satisfy you that it is reasonable to act for all clients?

Put simply, the standard is that we have put in place processes to manage all foreseeable risks arising out of the engagement, and especially where, let's say we might have had to concede on a few terms within their external counsel guidelines.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

These days, and especially in light of the rise in external counsel guidelines, which can be extremely complex documents containing lots of appendices, the process is overseen and managed by compliance personnel, who are identified in the firm's policies and training procedures. Legal and contractual conflicts are the responsibility of the compliance team. We do not permit anyone else n the firm to be involved in the decision-making process other than the relationship partners and the members of this team, which is overseen by the ethics committee. It is also a relatively short hierarchy, meaning that in theory decisions can be taken more quickly, but also, it eliminates the risk of, less experienced lawyers, and non-lawyers agreeing to ridiculous terms. I should also add that this is entrenched now into our risk management culture, and came about on the advice of our PI insurers originally.

- What happens as a transaction progresses, and how are emerging conflicts managed?

We used to have to rely on the partners to notify the conflicts team of any changes in a transaction, and upon our ability to detect potential conflicts at the outset of a transaction. However, in the past couple of months in fact, and with shifting the decision-making around legal and contractual conflicts entirely from the practice group to the

conflicts team, and our investment in upgraded and far more integrated conflicts checking system, these can be tracked far more easily, so each time a new party becomes involved in a matter. Its not 100% fool proof, but there have been significant advances in technology in this area recently and there are several leading products on the market.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

You have to consider them as part of the much-broader framework of considerations, and especially at the outset of a transaction around, for example, AML and know your client checks. So, we bear them in mind, but I have to say that with the significant rise in client external counsel guidelines, where these tend to dictate the standards and the rules to follow, it is rare to find OFR offers much resistance to these higher, more prescriptive and clearer standards.

It boils down to the predominant effect of the transaction as to which local rules will be relevant of course, but also those the jurisdiction in which the lawyers working on the transaction are "predominantly licensed", which can be the SRA's rules. It is relatively easy to reconcile the SRA's rules without needing any further input/consent from the local regulatory authorities where we adopt the higher standard. Where jurisdictions have considerably stricter rules than even the ABA's that's where there are problems. One or two jurisdictions don't like our methods, and especially where that comes to protecting the duty of confidentiality. They seem to be very out of date with global practice by not, for example, permitting information barriers, and of course, in their view OFR hardly offers a higher standard with its devolved compliance and wide interpretative features.

What do international clients think of OFR?

Well, they tend to stick to what they know best. So, for example US clients prefer their home rules, and to be honest, those do offer good clear redlines for the most part, although they are written from an individual perspective. The best external counsel guidelines that I have seen, where clients want to develop a collaborative relationship with us, are a modified version of the ABA's rules, but which take a balanced approach to entity-level regulation as well, which incidentally, is not based on OFR.

Field Note

Firm Name/Code: D1
Brief Description: D1 is an international law firm with 29 offices across Europe, the Middle East, Asia-Pacific and North America with expertise in a range of areas, but recognised for particular expertise in the digital technology sector. It is a limited partnership structure headquartered in London, and had a revenue of over £350m in 2018/19.
Meeting: MW & GC (ex-SRA, and quite defensive – by way of background, he had largely been encouraged to engage in the study by the firm's CEO)
Date: 15/01/20
Time: 11:00 – 12:00

1) How do large law firms determine where their duty lies in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

We have particular specialisms in IP, and we are particularly good at managing legal conflicts given the nature of the work.

Do you ever encounter US rules being imposed by contract?

We don't accept US rules. Typically our US clients are only 0.5% of our revenue. We don't deal with US/UK transactional matters.

What about other clients using outside counsel guidelines?

Yes, we haven't got this problem yet, although I'm fairly sure it will arrive in due course.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Firstly, in relation to legal conflicts, this will be a decision to be taken, not by a fee-earner or partner, but by the risk team.

Are they qualified lawyers?

Not necessarily, some are experience law firm compliance personnel already. However, fee-earners, specifically partners will still take decisions on commercial conflicts.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

Well actually I think that the guidance provided in the SRA's enforcement strategy is pretty useful in this respect.

Although it doesn't provide a definition of "serious"?

No, but it takes into account the sort of circumstances that need to be taken into account, including for example bribery, and the level of harm to the client, so I would say that the interests behind the COI would have to be practically criminal.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

We determine the degree of relationship by reference to the case law "some degree of relationship" from the Marks & Spencer judgment, it's common sense really. I think you have to consider the subject matter and any affiliations between the parties involved.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

- What would satisfy you that it is reasonable to act for all clients?

We're not really bothered by the exemptions as we don't really do Mergers & Acquisitions anymore, which is the competing for the same asset exemption. As for competing for the same objective, and as for substantial common interest this doesn't come up either, as it is related in content. What I would say however, is that the wording is clear enough as far as I am concerned.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

As it happens, we are moving over to a centralised conflicts checking team within the next two weeks. So, whereas up until now decision-making has been at partner level, legal conflicts will now be handled entirely by a separate team. Lawyers below partner level have not been involved in decision-making, as a matter of policy because at this level they knew the sort of complexities that came with experience. Nevertheless, growing complexity within COI in particular meant that it was now necessary to pass the decision-making over to a centralised team. Until now the decision – making hierarchy has moved from practice group partner to the COLP/risk manager, overseen by the GC, and then at the top of the tree the CEO. In future, the risk team will replace the partners role and COLP role on decision-making. This will sit just below the GC, and CEO. Any disputes between the partners will be decided by committee. If we need any external assistance we will seek external counsel as the SRA ethics helpline is especially unhelpful.

If we need to erect an information barrier, it will be a case of do we erect it around the client, or around the matter (softer standard). Until about a year ago we used to have an open-access document management system, what we have in place now is much better at shielding off around clients, or more locally, the matter itself.

Legal conflicts will be dealt with by the risk team, commercial conflicts dealt with by the fee-earners. This re-enforces the difference that the risk team are supposed to be independent from fee-earners, so can provide independent, objective advice on transactions.

Lateral hires are a big area of concern, and it is an area that is very difficult to manage. In the US the rules are different because of imputation, and parties joining are required to disclose, but in practice, only to the risk management team because of confidentiality, but

even in a sense this still breaches confidentiality. The reality is, as Koch Shipping demonstrated, that there's not really much we can do about these forms of own interest conflicts.

- What happens as a transaction progresses, and how are emerging conflicts managed?

With the system that we have had bespoked from an off the shelf product, there will still be a need for layers to feed into the system, because each transaction is dynamic.

So the system is not fully integrated with other systems and controls then? No, not at this stage, although this will evolve over time.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

There is either great synergy, even as between civil and common law systems, or great difference in the local rules. The key issue is whether the duty of loyalty is different in another jurisdiction, it is the GC who develops the experience to be able to navigate around these issues in an international firm, rather than the COLP, because it really is a case of piecing together a jigsaw puzzle. The SRA's OFR rules require us to follow CCBE in Europe, but otherwise it is a case of determining which regime poses the highest standard. If it is the local one, then you have to follow that, because, quite often, it imposes more precise requirements that SRA OFR. In Germany for example, a breach of the duty of confidentiality comes with criminal sanctions attached. I think that in France as well there is a duty of secrecy which goes beyond continentality and also has criminal sanctions attached.

Other considerations, on for example, duty of confidentiality is, where is the confidential information held, and what is going to be the potential liability for the lawyer?

Field Note

Firm Name/Code: D2
Brief Description: D2 was formed as the result of one domestic merger in 2013, and a more significant merger with a US law firm in 2016. Prior to 2016 the firm featured just outside of the Top 50, and was known for expertise in commercial and public procurement fields.
Meeting: MW & GC
Date: 15/02/20
Time: 11:00 – 12:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

I was with the legacy UK firm, which was a Top 100, but, towards the bottom half of the table. As you can imagine we have gone through some cataclysmic cultural changes recently, and getting people to move more in step now with US client demands, and the US side of the business has been a massive cultural upheaval in terms of personnel and systems and controls, and coming not really only a couple of years after the last merger. This causes all sorts of problems for me when we are dealing with client-own outside counsel guidelines. I think this is part of US practice culture. It has been quite a learning experience for us, and actually we have had to re-define our expectations considerably, because our instinct, being if you like small town lawyers at heart, has been to say, no way Jose, this isn't on, especially around COI and their expectations for who we can or can't work for, either now or in future. We've had to re-define the lines with some clients, and yes, I will admit that in order to accept some, we've had to, tell some smaller clients, and I have to be honest, some of our most loyal, to go elsewhere, simply because they are subsidiaries now of larger US groups.

As a fast-growing firm we are probably making far too many concessions, and I would hesitate to say this, but I suspect that there are still parts of the historic business in the UK that continue to hide their misdeeds from me. I have had a couple of instances recently where client retainers have, effectively been accepted without negotiation because of the fee earners that they have been sent to are not yet familiar or competent with the centralised internal systems that we have had to roll out. The issue is the tight turnaround time, and I would also say, pressure to win business. Even so, when it comes to it, we pretty much have our hands bound as we want to develop an international portfolio, and frankly if we didn't we'd be toast.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Is there such a thing anymore? I can't recall us refusing a client on grounds of a legal conflict for ages. On the other hand, commercial conflicts are another matter.

What is a serious breach re COI?:

- What would you consider to be a "serious breach" in a COI context?

I think that the SRA's enforcement policy provides a flavour of this, and I have been hunting around for a definition without much success, and its one of those instances where you would hope that the Law Society's ethics panel would step into the breach, but frankly, they've just became a glorified coffee shop on Chancery Lane, so I think it pretty much has to be a conflict that is impaired in some way by fraud, or some other criminal behaviour. However, we'd also have to look at the impact of harm on the victim. It's definitely a much higher standard than material breaches.

What are Related/unrelated matters:
• How do you determine what the degree of relationship is between matters? There's no fixed and firm rule on this, and the English law position, which I believe was set out in the Freshfields case, is of little help here either, "some degree of relationship", in line with our US colleagues I think that it has to be a substantial one, in other words, assessed on the subject matter, and also I think a ounce of common sense. I think that in future we will be able to put our trust more in central conflicts systems that will contain all of this information for us, so that we know where boundaries exist, or rather, where we can justifiably draw them.
Considering the interpretation of the two exemptions "substantially common interest" and "competing for the same objective":
• What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption? There is no black and white rule on this, aside from not infringing confidentiality. I think that you have to provide just sufficient that they are aware of the general nature and scope of the conflict. • What would satisfy you that it is reasonable to act for all clients? I think you have to take a holistic view on this on the basis of the risks that have been identified in a given matter, and what measures and contingencies you have in place for them. I think that where we'd have very serious concerns over the integrity of the client for example we'd probably have refused to act.
2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
• Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like? • What happens as a transaction progresses, and how are emerging conflicts managed? Well, in light of what I was saying earlier, I think that we still have work to do in this area post-merger, even now. However, in theory, fee earners and staff are supposed to feed this information into the central conflicts team, and so there are particular triggers that we ask them to look out for in training. This includes for example, changes in client ownership, clients, or other parties more widely, including guarantors and sureties. The conflicts team will also be receiving information from other parts of the business to inform the picture as well.
3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

How are conflicts between the SRA's rules on COI and other "local" conflicts, rules or duties So the firm now US and UK qualified lawyers. In relation to acting against current clients, one very notable difference between jurisdictions is whether a lawyer is prohibited from acting against a current client (US) or only where the two instructions are in the same or related matters (SRA). The ABA model rules require that the client consents and the matter is unrelated., and in E&W the restriction only applies to same or related matters. We have to embrace the US standard when working in the US. There are also instances where regimes are more strict, and we have to consider what isn't possible, but might be under the SRAs rules, like for example some jurisdictions do not recognise ethical screens.

Field Note

Firm Name/Code: E1
Brief Description: E1 is an international law firm with approximately 30 international offices. It was formed as the result of a merger in the early 2000's and has a decentralised headquarters, although its compliance function is centralised as regards COI. In 2018/19 its revenue was over £300m.
Meeting: MW & GC
Date: 10/02/20
Time: 17:30 – 18:30

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

Essentially these agreements, and it is a US thing that is spreading, pose a severe threat to our core business and any strategic plans, and yet, we feel obliged to go along with them at times and just hope for the best. We have a strong presence in the mid-tier in IP and also mid-tier M&As and restructurings. There is a strong US influence and client base, and it is a fiercely competitive part of the market, and we do have clients, especially in IT and data management industries who have their own external counsel guidelines, and we also work for borrowers who can dictate who the banks choose as their legal advisors, so we end up acting for lender and borrower, which is a prima facie conflict, but then even with the relevant ethical screens in place, the borrower is still able in reality to censure the advice that we can provide to the lender. I think that to be honest sometimes, and you might not find many GC able to go on record to admit this, that where ethical screening is put in place, it is purely ornamental, neither here nor there, essentially done out of a sense of appearance or tradition. In other instances where there has been complete waiver, usually the less dominant client just falls into line, and you are acting for only one client really. Regardless of any It is really very difficult to "push back" given that we are more or less reliant on the same old appearances. By this I mean repeat business from the same handful of financial institutions and tech providers. So your answer is, often we don't, or rather can't and especially seeing how we are subject to time pressure and client expectations around service delivery, which might/might not already be in place under a wider

framework service agreement. From our point of the extent of duties are dictated by the terms and expectations of the client's framework service agreement under which the determining factors are governed by characteristics of the other party, including their geographical scope of operations, subsidiaries, and affiliates. Its very difficult to keep track of. What law governs these framework service agreements, and in particular any provisions specifically dealing with COI? It can very between particular State Bar rules, the ABA Model rules, or the client's own bastardised version of these. So not OFR SRA then? No - never
b) Understanding how the SRA's COI rules are interpreted in the large law firm context:
What do law firms and lawyers recognise as an irreconcilable COI:
• Under what circumstances have you, or would you decide that you could not act for a client where there is a COI? Well, legal conflicts, and in particular the SRA's regime on COI, which is what you are getting at, are really thrown out of the window when the regime that we, and I have to say, other firms are working to, is contractual. Under these agreements the instances in which we can or can't act either for another client, or on another matter, are set out in the schedules in terms of severity of breach. These bear little relationship to any traditional notions of fiduciary duties, save for the fact that they blow the duty of loyalty up to a completely disproportionate extent.
What is a serious breach re COI:
• What would you consider to be a "serious breach" in a COI context? In light of what I've just mentioned, the client often makes it very clear what their expectations are in contract, and so if you like, it is a matter of contractual definition, for which there could well be repercussions in the form of service level penalties. This can in a few instances, even mean reimbursing them money paid on account, or punitive reductions on billing.
What are Related/unrelated matters:
• How do you determine what the degree of relationship is between matters? Sometimes we have to look at the terms of a particular set of external counsel guidelines to help determine this where that is relevant, but otherwise my rule of thumb is that there needs to be a substantial relationship looking at the subject matter of the engagement and the clients who are party to it.
Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective"

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

Neither of these SRA exemptions are relevant under some of the framework service agreements that we have in place with clients. The standards followed are governed by a mixture of contract, which usually specify the standard in some derivative of, or the ABA Model rules themselves in relation to the provision of client waiver.

- What would satisfy you that it is reasonable to act for all clients?

Well, clearly it is when we are not in breach of contract to one or all of them these days, and that we have identified and addressed all COI, however defined, as far as is reasonable.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

All new mandates have to be vetted through a centralised conflicts clearance team which operates on a global basis. This is relatively new, and is so sophisticated that it can map the extent and implications of any contractually imposed conflict provisions by e.g. competitor subsidiary or affiliation. Because of the scope and complexity now of these client-imposed retainers, we have to be so extremely careful, and its something that has grown beyond the watch of the practice group, and the fee earners. The SRA can talk as much as it wants about individual and entity regulation, but the reality is that decision-making has been relieved from the individual fee-earner with respect to conflicts. Furthermore, to make fee-earners an integral part of the centralised process as well would pose a considerable risk to the duty of confidentiality, and so it has to be an independent process and team of conflicts specialists. They are also responsible for reviewing client external counsel guidelines.

Where a COI are particularly complex or contested, I will take a view and hopefully be able to mediate between the aggrieved partners. If now, these are passed to the conflicts committee chaired by me as GC, and partners from different practice groups. The decision of the committee is final, although this takes a little bit longer.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Our central conflicts system draws data from a wide range of different sources from within the firm and databases outside of it. This includes market intelligence. We can detect changes in beneficial ownership of the parties to a transaction, however, the team also takes information from the fee-earning team and inputs this as well. This way we can detect any conflicts arising during the course of a transaction.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules

reconciled?
When, as we so often are now, working to a client's external counsel guidelines, we have to take an preferences for governing laws and regimes into account in respect to COI, and OFR never features. It is often the ABA's model rule standards that are referred to in any potential conflicts between the conflicts rules. These tend to satisfy local regulators/regimes that everything is above board I the way that will manage the transaction. However, clearly where lawyers themselves might be licensed to practice in E&W, which means that in the background at least OFR still applies. However, provided we are complying with the more precise and specific US standards everyone is usually happy for most of the time.

Field Note

Firm Name/Code: E2 **Brief Description:** E2 is an international practice headquartered in London and with approx. 25 offices worldwide. It has over 850 staff working for it, and in 2018/19 had a revenue of over £250m **Meeting:** MW & GC **Date:** 19/02/20 **Time:** 14:00 – 15:00
1) How do large law firms determine what standards to follow in respect of COI?
a) What factors are key in the private contractual negotiation over COI between parties:
• In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI? Yes, we are seeing these increasingly frequently, in particular areas of practice, most notably in our corporate and M&A work, other areas, for example public procurement have dictated similar conditions for as long as I can remember, agreed as part of tendering processes. The issue with corporate clients though is that unlike a tendering process, you really have very little time to even think about them, and even where their terms are standard have been used before, there's always a chance that something new has snook in there. It is also quite difficult once terms have been agreed, and become the client expectation to push back on them at a later point in time, when, let's say we come to review them slightly more from the point of view of minimising risk to the business. Some clients will obviously try to extend the duty of loyalty for example well beyond what we'd normally agree to in our own engagement letters, and for that matter, also the SRA's rules on the matter. Unless the terms proposed are going to cause unconscionable issues, and really restrict who we can advise then we tend to just swallow our tongues and hope that nothing actually materialises. A situation where we'd probably have to push back is where, for example they want to restrict us from representing an affiliate of a competitor in another

jurisdiction. That's just unreasonable. If they insist on terms like that we'd have to say well, what have we got to lose exactly, what is this client worth to us versus its harmful impact on our future business plans and loss of business.

We might try and establish some sort of middle ground with a particularly valuable client, where for example we can draw the line at a particular field of work, or affiliates of competitors that we don't currently represent. Its about mitigation really. We are becoming more experienced and adept at doing this, and does fall to me, and the relationship partners to spot all of this quite quickly. However, where they are not being reasonable, we would, if we absolutely had to turn them away as a last resort. We do for example have particular niche in IP and Technology which increases our hand in that particular area.

b) Understanding how the SRA;s COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Well, as we've just been discussing that sort of contractual conflict scenario, we'd draw the line where the harm to the business, either now, or in line with business strategy exceeded the value of the client to us, even if they were a major prospective client, if there's one thing that the last few years have taught us it is to retain diversity in your client portfolio.

In other instances, we recognise more commercial conflicts which are when our acting for a client would just annoy another client who is, to put it bluntly, more valuable to us in the longer term, and also positional conflicts. In terms of legal conflicts though, I can't think of an instance recently where we have turned a client away on this ground, and especially because of the infrastructure we can put in place. Even in terms of frequency of occurrence, commercial, contractual and positional conflicts are a daily thing, and the first consideration. If we have one of those, the legal conflict isn't even an issue.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

One that would seriously harm our reputation I think.

What about in conjunction with reporting obligations though?

Oh, well no one seems to have a sense of what the SRA really mean, and, low-and-behold, its got to be a COI underpinned by something pretty serious, so I would equate this to the worst forms of ethical practice, so ie. criminal behaviour, or looking at it from the client's perspective, where our actions have caused them considerable harm for whatever reason.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

In the case of a legal conflict, it's a clear case of identifying who the clients are, and that

can be determined by the scope of the retainers hopefully, and seeing whether there is any overlap, and also looking at the subject matter itself.

Considering interpretation of the two exemptions "substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

You'll probably hear this time and again, this is really difficult to gauge. There is no golden rule or standard. It really depends on the factual circumstances. In a legal conflict situation we'd start a concertation with both clients first, but mindful of our duty of confidentiality to both. They could well be reasonable about it.

- What would satisfy you that it is reasonable to act for all clients?

I think that from the perspective of managing risk it is of course ensuring that we have obtained their written consent to acting, and that the client is happy with the systems that we might have to put in place to represent them all simultaneously.

What would this include? Usually information barriers which can be erected around the client's matters within the firm, or any given particular matter, for which only particular team members will have access.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Given the rise in outside counsel guidelines and rules that are imposed by the client, you'll probably find that the market response has be to impose central firm control around the agreement of terms. This is because it is a risk management issue for the firm, and unless there us a central system for logging the acceptance of terms, they may, of course, be breached unwittingly.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Well, you're assuming that all matters progress. One of the most frustrating elements of panel appointments for example is that clients appoint firms, then impose terms which prevent the firm from acting against it, and then given the firm no work. Its really a method of controlling competition. Otherwise, of course we have a central conflict team who we will notify if anything changes on a matter.

So it is dependent on input from fee-earners?

Yes to a large extent the fee-earners, or rather the partners will be responsible for notifying the team, although the system itself is quite sophisticated and does link into other systems that will flag particular issues, for example billing.

What about personal conflicts?

Yes, we insist that members obtain prior authorisation before accepting any appointments, but otherwise we do have to trust them. For one thing, asking them to disclose a list of clients could present the risk of a breach of confidentiality in of itself. We have to be very careful with the questions that we ask them on appointment.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

Yes, so it is possible to be bound by more than one set of rules, and we do have lawyers who are qualified in more than one jurisdiction and subject to more than one set of professional rules. We do employ one of two US lawyers, and we're a non-US firm, so the US rules may be more restrictive. The easiest thing to do, and something that a firm like ours can do given the smaller number of foreign counsel we employ in the UK is to exclude them from a particular engagement. I really is a case of reviewing what the local rules say, and spotting the gaps. In relation to acting against current clients, one very tricky area of difference between jurisdictions is whether a lawyer is prohibited from acting in any matter against a current client, or only where the two instructions are in the same or related matters. The ABA model rules prevent the lawyer from acting against a current client unless the client consents and the matter is unrelated. In E&W the restriction only applies to same or related matters. We'd have to adopt the higher standard is the reality unless we can get a waiver.

Field Note

Firm Name/Code: E3
Brief Description: E3 is based predominantly in the UK, and it represents an anomaly as a firm appearing in the Top 50 built on an almost exclusively domestic national presence with approximately 15 offices. Over half of the firm's revenue comes from commercial contracts and private client work - predominantly and personal injury and debt recovery. It has grown by twice since 2015, when it merged with another domestic legal services provider. In 2018/19 E3 had a revenue of over £250m.
Meeting: MW & GC
Date: 25/02/20
Time: 17:45 – 18:45

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

This is a very timely question, I suppose that we have started to see an increasing number of our-UK based commercial clients, but especially on the debt recovery side with pretty much all of our UK-based bank and building society clients renewing their relationships with us on the basis of their own retainer agreements. We have had long-standing relationship with all of our providers, in some cases going back 25 years, and what were once panel agreements, have become increasingly more complex agreements containing all manner of KPIs and service levels. The appendices usually set out their performance expectations of use in the general delivery of legal services. However this does also include the management of COI.

In terms of "pushing back", really these things are based broadly in line with expectations under the SRA's Codes of Conduct, which are pretty broad, and in many respects they are very helpful to us in filling in the interpretive dimensions of those rules, which would otherwise probably be a case of trial and error I guess. I don't really find them too controversial on the whole, because unlike some industries debt-recovery work is not especially controversial as between client banks. It is an expectation that banks should be able to recover their losses, and it is also an expectation that we will be representing competitors to do the same thing. Its standard borrower breach of trust and breach of lending conditions stuff.

I haven't really seen anything yet that exceeds the scope of what would be reasonable to us, or what we would have put into an engagement letter. In fact, its probably more detailed. Its very much a governing document that is at the heart of managing the client relationship in fact. Nevertheless, theoretically speaking, if the business was to diversify and we were being asked to enter into agreements that prohibited us from acting from banking and building society clients in this, our core area, I think we'd have to turn that prospective client away for now.

What sort of proportion of work is now governed by client-own terms and conditions?

It is definitely a growing phenomenon, and we have even seen it a few times among some of our larger SMEs. It is, as a rough estimate about 40% of our business given the role that that the banks play in this.

Do you have much work with US clients?

Well, no we're not really a multinational firm, so our exposure to these clients is limited to the instances where perhaps US companies form a controlling beneficial ownership interests in a client group of companies for example. Even so, we've still not seen the imposition of US terms and conditions on us through contract, although I am conscious that this is a huge dilemma now for other large law firms.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Ok, so there are a range of different forms of COI that will influence this decision. The strongest is the commercial conflict, so for example in our high-tech work in particular where there is a considerable need for secrecy around product development, and so

representing a competitor in for example a patent application is not going to go down very well with a competitor. We have to take a view, is accepting an engagement from a prospective competitor going to seriously annoy an existing client, and are we going to be landed with all sorts of generic breach of confidentiality allegations that will lead to the termination of the retainer. From a legal perspective, and I suppose this arises more on the contentious side, it would be difficult to represent clients who were on opposing sides of a patent dispute. However, positionally as well, we'd have to consider the impact that this had on our reputation in deciding whether or not to act.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

This used to be the duty to report all non-material breaches, then that got downgraded to all material breaches, and so this is the latest standard that the SRA has come up with… although, as is typical with this form of regulation, there is very little to go on in terms of clarification, and if you try using the ethics helpline you just get nowhere. There aren't any indicative behaviours in the code anymore, and the only thing approaching guidance appears in their enforcement strategy of all places, and this is really looking at the harm caused, so ie. after the event, but also in terms of severity, the language used including "victim" for example, and behaviour including inducements, would indicate that the nature of the behaviour has to be more or less criminal I think before it gets reported.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

The M&S v Freshfields case, the legal position left this quite open, its some degree of relationship, which can mean anything really. However, this is a topic that has come up at various events, and I think that the consensus is to regard this as meaning something substantially related, so there has to be some substantial link between the two. The starting point has to be the scope of each retainer which will hopefully identify where matters start and end.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective"

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

As a general rule of thumb it is sufficient to allow both clients to understand the nature of the conflict, and how it might impact upon them. It really does depend on context. Some conflicts will actually be quite routine, low-level and in fact frequent, and don't cause the clients any trouble, so we don't really need to disclose anything specific. Others can be identified at the outset as potential conflicts and we might approach this by talking in general terms and also putting barriers in place, however some could be more serious and we have to treat all clients equally, even terms of the level of what we disclose initially, and at the same time. We wait to see what comes back from each client before determining next steps, but we really do try to treat them equally. Of course, where there is a client contract in place, the process afforded to one client is set out rather more clearly in terms

of disclosure expectations and severity of breach. If so, we'll try to mirror this for the other client.

- What would satisfy you that it is reasonable to act for all clients?

Whether, we can say with a fairly high degree of certainty that we have managed to identify and put in place adequate measures that the client is happy with, and that have passed our centralised conflicts checks.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

Ah right, well glad you've asked. So what we did, about a year ago now, was to invest in a vastly upgraded centralised conflicts management system following the merger with the other UK side of the business. It sort of became a problem of knowing what the left hand was doing with the right. It became absolutely impractical, or rather infeasible, for a fee earner working in our [REDACTED] based commercial team, to know which any degree of certainty, what one of his colleagues in the [REDACTED] office (which is part of the legacy business) had done in the past, or was currently managing, and in particular the subsidiaries and affiliates of that client. Firm mergers present huge problems for mergers, and unlike the US we have to rely more on technology as we don't recognise advance waivers as a thing in English law. The conflicts team, which is staffed by experienced compliance personnel with particular niche expertise in COI and a range of other regulatory matters will make a determination and advise the relevant fee earners on how to proceed, which might well include putting in place ethical screening where possible. Fee earners are not involved in this decision-making process. If the relationship partners object, and that happens, it falls to me as GC to make a determination. There is then an appeal process to the ethics committee by email, and, for expediency, that decision just needs to be made by a committee that is quorate, and electronically.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Well the system is learning, as are the staff still, but the amount of data being inputted onto the system is providing an increasingly more informed picture of all of the firm's clients and matters. Historical information from the legacy systems has been uploaded, and we aim to make the system far more integrated with other systems. We are still a firm of two halves, but gradually coming together though software. On the basis of what we have, and what fee earners supply during transactions, the centralised team will advise should anything crop up during the course of a transaction.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

This isn't really a great problem for us given the domestic nature of the business, and fact that we are not actively seeking to expand our horizons into foreign jurisdictions. Also, I

think that we need to let the last merger settle down as we need, for example our central conflict clearance system to achieve a particular level of reliability and credibility first of all.

Field Note

Firm Name/Code: F1
Brief Description: F1 was regarded as one of the silver circle firms, and in 2018/19 the firm achieved a revenue of over £200m, and PEP of nearly £2m. It advises a range of national and multinational companies, and high net-worth individuals internationally from 2 offices. It has never merged and trades as a Limited Liability Partnership.
Meeting: MW & GC
Date: 08/02/20
Time: 12:00 – 13:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

We don't really engage in advising the large banks, and we probably maintain one of the most diverse client bases in the City. We were aware of, and had been expecting these forms of client-driven terms of engagement to finally make their way over to corporate and M&A a couple of years ago, and even more recently they have been surfacing among some of our commercial, IP clients. Its not something that all of our clients are doing yet, and bearing in mind we still have a wealthy private client function. However, my view is that our terms of engagement were always very reasonable and afforded a higher standard of care than the SRA's rules, because with many of our clients, we want to develop long-term relationships, and that depends on trust and confidence. When the SRA introduced OFR several years ago, and moved away from prescriptive based rules my own view was that this was a dumbing down, and I have to say that the existing code – even to an outsider, and by that, I mean a foreign GC, looks like a complete Horlicks.

It comes as little surprise to me that clients dealing with law firms in the UK would want to ensure that their interests are protected properly. So that's one thing, in their minds offering certainty and a decent level of protection, which I don't think that they get from the rules as written. However, it is quite another thing to extend the duty of loyalty to the N'th degree. We try to be fair and reasonable with clients who have started to do this, and depending on their influence in the market, we have been pushing back on particularly, and unnecessarily onerous terms, especially where the client cannot possibly be doing business in some parts of the world. I think its become something of a bandwagon now among certain industries such as commercial, brands and IP, and frankly some client GC need to recognise that while we recognise that some terms might possibly help to promote better and engagement and collaboration between us, they are wasting everyone's time by trying to negotiate anything stronger.

Our position is set out in our standard engagement letters which have been developed at

the practice group level on the basis of industry norms and expectations of service over many years, so these are already higher than the standards contained in the SRA's 2007 Code, and, most certainly what then followed on from that. For the most part where clients have sought to introduce their own t's and c's around engagement, it is broadly in line with this therefore, but differs perhaps by spelling out the mechanisms to be used where for example a COI arises, and, in fact, that can be a helpful thing for us to take into account in managing the relationship effectively.
b) Understanding how the SRA's COI rules are interpreted in the large law firm context:
What do law firms and lawyers recognise as an irreconcilable COI:
• Under what circumstances have you, or would you decide that you could not act for a client where there is a COI? Well there are instances where it would be inadvisable to because they could have some reputational implications even where it might be possible to manage it. This could be because of the status of a particular individual, or the dodgy political links that they might maintain. I guess you could call that a positional conflict. However, in terms of legal conflicts this is where our duties to two or more clients are drawn into sharp relief with each other, in other words they are so adverse that we cannot continue to act for both in the same or a different matter, and, realistically, because of the confidentiality issue, we'd have to stop acting for both.
What is a serious breach re COI:
• What would you consider to be a "serious breach" in a COI context? I think that, let's say informed consent has been obtained through something like a serious inducement, or the fact that we might have put the client's confidential information at risk by not putting in place appropriate measures, and they have suffered significant harm as a result. Its really difficult to know, except that the SRA expects the conduct to be "serious", which I suppose is slightly more than it used to be "material".
What are Related/unrelated matters:
• How do you determine what the degree of relationship is between matters? There has to be some degree of relationship, and by this we need to define it by the scope of the retainers. We're not just looking at them both though and saying, oh, you both work in the pharmaceutical industry for example, there needs to be something more substantial. I think that this is the US standard, some "substantial" relationship. I think its got to be the same asset, or objective, even though clients can given informed consent to exempt for this.
Considering interpretation of the two exemptions "substantially common interest" and "competing for the same objective":
• What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

This relates to the what the conflict is, how serious is it. This will determine how much we need to disclose to the clients within reason, and of course in the hope that they will provide informed consent.

- What would satisfy you that it is reasonable to act for all clients?

When we have completed our due diligence on the matter, and that has come back with no serious issues.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

I've been with the firm since the late 1970s believe it or not. Back then, when I was an articled clerk a client had to apply to be a client of the firm. We'd ask around and do our due diligence on them, which could take up to a couple of weeks even. As for conflict checks, we'd keep a list of clients in a bound leather binder under lock and key in a filing cabinet at the end of the hall. The notion that clients can now dictate their terms of engagement to us, and that we should have centralised conflicts checking teams, operating from sophisticated IT systems is something that I struggle to get my head around even though I've been a major part of its development. As is now common practice among our competitors, we have been moving decision-making away from partners on legal conflicts, and especially in light of rise of contractual conflicts which have to be very much more closely monitored on an ongoing basis. The conflicts team take the issue on at matter inception, and make a determination. This might not be what the relevant relationship partner wants to hear, and, until recently, they used to have a lot more control over decision-making. If they object I have the final say. It helps having been here so long, as, some of these partners I remember as trainees, and, frankly regard me "as" the firm.

- What happens as a transaction progresses, and how are emerging conflicts managed?

The conflicts system keeps a tab of all open matters, and it is part of the wider systems that keep tab of WIP for example (and we are getting better at calling that in), and it will notify the team should anything change on a transaction. It draws information from across the firm to determine this, so it is not entirely reliant no the particular fee-earning team to know what is going on over in our office in [x] with a particular client for example. We have been able to catch so many more potential conflicts since this system went live, and its infinitely better than the old system of emails…or even the leather binder!

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

I could write a book on this given my expertise now on the rules and regs across the globe. The SRA's current rules on COI sort of work like a pair of elasticated trousers. They are very accommodating, but occasionally they can fall down. This means that when

compared with the prescriptive rules of other jurisdictions such as the US, they more or less wrap around them. However, in some other civil jurisdictions, such as continental Europe for example, and regardless of the CCBE code, the duties of loyalty, confidentiality and personal conflicts are taken very much more seriously, and might even have criminal sanctions attached to them. Furthermore, some Bar associations just don't rate OFR, and view the notion of devolved regulation as somehow a bit corrupt, and so we have to be really careful to provide reassurance around what measures we are putting in place to manage COI.

Field Note

Firm Name/Code: F2
Brief Description: F2 is an international law firm headquartered in London and with nearly 10 offices worldwide. It operates as a limited liability partnership and has one of the oldest and most established presences in the East Asian market. In 2018/19 total revenue was over £200m.
Meeting: MW & GC
Date: 19/02/20
Time: 11:00 – 12:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

We have a very strong shipping and aviation finance, along with corporate and M&A work, but also a very strong banking litigation team as well. You can see the scope for conflict here. All of our banking clients have tried to impose their own terms on us in the recent past, and I think that we've probably come off better than some other firms. In our case we have, relationships with major global banks that go back to their foundation, i.e. 150 years, but also because of our niche, world leading expertise and strengths in areas such as aviation and shipping, which can't really be done economically by the really big firms, we do have some leverage with particular financial services clients. We punch well above our weight on panels, and we have extremely long-term collaborative relationships not only institutionally, but with particular GCs. This means that we have been able to negotiate some of the more onerous terms down to be more acceptable to our business. Its been a case of finding common ground over which part of a competitor's business we can act for, and in what jurisdiction.

We're trying to reign in what are expanded duties of loyalty and confidentiality. Our negotiating position as it were, and you'll hear lawyers talking in terms of redlines quite a lot these days, is what our own terms and conditions would normally require with clients in those areas, and in terms of identifying the client, for example that's key to knowing who is owed these duties. We do try to establish this with the client for certainty. Sometimes they'll even provide a list which we can use to feed into our conflicts database.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Legal conflicts, which is what you are getting at, are not the starting point or the determinative factor in the client relationship at all really. They are important, but really we don't have too much trouble with these, we just tend to have an ethics committee meeting and short it out between us if there is an issue. Far more important are The impact of commercial and positional conflicts, which when you think about it are just an extension of the fiduciary duty. Within the first of those I'd say that the client often makes it very clear what their expectations are in contract, and so if you like, we have to work around all of these.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

In light of what I've just mentioned, and regardless of any thing the SRA "doesn't say" on the matter, I would regard this as a fundamental breach of the terms of a client waiver.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

By subject matter and client, which in the latter can be ambiguous, and so we try, where we can to obtain certainty.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective"

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

We have to look at several features including the sophistication of the clients, any past dealings with them, expectations set out by retainer, to determine what is an acceptable level without infringing confidentiality to other clients involved. It also depends on the nature of the conflict and the extent of its relatedness. If it is on the fringes of what has been agreed in a client retainer for example, we really have to take a view on reasonableness.

- What would satisfy you that it is reasonable to act for all clients?

Are we satisfied and is the client happy that we have protected their confidentiality as far as possible.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

We vet all new firms mandates through a centralised clearance team, and where COI are particularly complex or contested, these are passed to a committee chaired by me as GC. The committee includes a handful of partners from different practice groups, and has the power to give the green light or block instructions. So, essentially over the last 4 years in particular we have really made efforts to centralise client instructions. We now have a team of conflict specialists who also do other compliance matters as well, but who will do the conflict clearing and tracking, and I will always make the final call where there is any uncertainty or complexity. This takes the heat out of any situations where partners might be annoyed about not being able to do the work of course.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Our conflicts system depends on information being inputted into it from a variety of different sources, including but not exclusively the transaction team itself. This way we can determine where conflicts have, or will arise. Its not just about new parties entering a transaction, it might also be something changing in their ownership structure for example, someone acquiring a substantial proportion of their parent company's stock.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

Well there is a complete lack of harmonization at this level, and so really it is like trying to feel your way around really, and identifying where the redlines are. We are concerned primarily with the predominant effect of the transaction as to which local rules will be relevant, against the SRA's rules. Where jurisdictions adopt stricter standards then in so far as conflicts are concerned we have to follow those usually, and a sophisticated client will understand this. There are a number of civil jurisdictions where the rules are considerably more strict, especially around confidentiality, but then also a fair amount of synergy as well given the ancestry of the underpinning duties.

File Note

Firm Name/Code: G1
Brief Description: G1 is a limited liability partnership headquartered in London, with approximately 15 offices worldwide, and niche strengths in energy & infrastructure projects, and maritime work. In 2018/19 its revenue was over £170m, and it is currently expanding into the Far East.
Meeting: MW & GC
Date: 18/02/20
Time: 18:00 – 19:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

To give you a flavour, we see this as an increasing problem across all our areas of work, and in particular of course, in large energy and infrastructure projects are essentially financing transactions that usually involve multiple lenders under a main facility agreement, and then revolving credit facilities for the smaller stuff, but essentially the lead lenders/arrangers of the transactions are the larger banks have considerable say in who to appoint in terms of professional advisors, and the facility . The borrowers are very often sovereign states. It is, as you can imagine quite a niche market, and so unreasonable terms laid down by these financial institutions could have the potential to close off considerable parts of the market to us where terms seek to restrain us from acting for, the few range of competitors that exist in the market. It is a serious threat to the business.

Also, given the scale of the projects, and frankly, the importance of this work to our business, and fact that we are, more of a niche player, means that it really is important to push back on the scale of indemnification clauses, which often appear to me to be punitive. We are always having to push back on these OCGs because a new one is issued for each engagement to reflect the particular circumstances and risks as far as the lender is concerned. Each engagement casts a new net over our client list, and in terms of bargaining power, we are not well placed to counteract and say no, because we cannot absorb the loss of opportunity in this market. In fact, the reality is that we never say no. We just have to manage the risk as best as possible.

Where we have successfully negotiated some of the more onerous terms down, it is because we have been able to have a reasonable conversation with the client, and explain the harm it could cause the business and advice that we might be able to provide in future and get rid of some of the, more obviously unconscionable terms, which might not be valid in either the US or E&W for legal certainty.

We are probably one of the more traditional firms in London, and I guess that we would still regard ourselves as a "City firm", and as the majority of our lawyers are E&W qualified, we tend to follow the SRA's rules on COI. However, what we find is that clients, and especially US lenders/arrangers expect either the ABA's rules on COI to be followed, or their own expanded versions of these, and to be honest, these are somewhat stricter in terms of the duty of loyalty and confidentiality, so we are making a concession in these respects by agreeing to these, arguably stricter and more prescriptive standards. I think that, even if the SRA's rules had more flesh on them, that might still be the case, but as they are so loose, and because there is still no consensus around some of their terms, we really can't use them as a negotiating base.

b) Understanding how the SRAs COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act

for a client where there is a COI?

So, the industry recognises several different forms of conflict, and the one taught in law schools is what we'd regard as the 'legal conflict'. In a situation where we have not been forced to adopt a different, "stricter" standard, then really there is rarely an issue if you can carefully manage the competing interests. The last occasion where we had to stop acting for a client for a legal conflict was in a same matter, when the relationship broke down to the extent that both sides became extremely hostile towards each other, and it became a contentious matter that ended up going to shipping arbitration.

Alongside these, and far more importantly are what we call commercial conflicts, and this is an area where we rely on the experience and knowledge of the fee-earners within the practice groups to tell us, at matter inception, where they think one of their other clients might have an issue. Within the scope of these, OCGs the client will specify what their expectations are, and what they would regard as irreconcilable, and ultimately when they would expect us to notify them and even cease acting.

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

I think that there is fairly open-house on the SRA's definition, in that it directs us to their enforcement policy and the sort of circumstances outlined their, and its use of the term "victim", I would have to consider this to be along the lines of some sort of criminal behaviour, which obviously we would not engage in.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

The English law on this derives from the M&S and Freshfields case, but that its quite academic, because all it really says is "some degree of relationship". I'm conscious that in other jurisdictions though, case law is more specific and in the US for example, they have to be substantially related, but on a day-to-day basis, we have to look for some sort of bright lines, and so really we have to look at the scope and extent of the retainer.

Considering interpretation of the two exemptions "substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

This really depends on the nature of the conflict. Some are quite low level, and provided adequate measures are in place, such as info barriers, they are not going to trouble the client too much, and in fact the client would expect some degree. However, where it is more significant, potential litigation for example, then the client relationship partner would need to have a very general chat with both clients, if, we have not ruled it out as a commercial conflict first. Also, we can't just ignore the client's OCG because they will find out. That might well set out the procedure expected, and on this basis, we might already have to think, at the point of matter inception, whether it is worth taking the other client on, because of the level of disclosure that would be required to constitute informed

consent in the client's view.

- What would satisfy you that it is reasonable to act for all clients?

Have we made all reasonable endeavours to identify all the potential risks to the business and the client our of this representation

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

We have had a centralised conflicts clearance team which work within compliance, and also monitor a raft of other regulatory requirements for us, including AML for example. They have a much better overview than the fee-earners about what is going on within the entire business. Matter inception is managed by this centralised team. They essentially manage all legal and contractual conflicts, and they will advise the teams on whether or not they can proceed. Where there is push-back, and often there can be given the billing pressures, or complexity the issue will be passed to me as GC, and if there is still not decision, then it goes to the ethics committee presided over by the CEO, which has the power to give the green light or block instructions. We are also as careful as we can be over lateral hires, it is still not a perfect process, but as part of associate recruitment we do ask successful candidates to indicate from a list of clients most often dealt with within their practice group where there might be an issue. Once inside, we just have to trust that they notify us of anything else.

- What happens as a transaction progresses, and how are emerging conflicts managed?

Our central conflicts system is designed to track conflicts, and it was developed from one of the leading products on the market at the time, and still is. It was a considerable investment. A check is run at the outset of a matter along with all the standard inception checks, and then it is triggered where there are any changes to involvement on the matter, for example by new parties, or individuals including firm lawyers, because obviously, they might well have had previously dealings with competitors. What we are really worried about is the extent of some of the contractual conflict terms which can extend to subsidiaries, and even "affiliates" of competitors. However, we also depend on fee-earners to update information as well on the transaction. This ought to be done as part of weekly reviews.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

- How are conflicts between the SRA's rules on COI and other "local" conflicts, rules or duties reconciled?

Field Note

Firm Name/Code: G2 **Brief Description:** G2 is a corporate law firm headquartered in London. The firm has grown entirely organically, not adopting the recent strategy of mergers adopted by competitors. It trades as a Limited Liability Partnership, and originally formed part of the "Silver Circle". However with a revenue in 2018/19 of just over £150m is now occupies a place towards the bottom of the Top 50. **Meeting:** MW & GC (This was the shortest interview conducted owing to time constraints, as a result a further interview was conducted from within the same band of firms) **Date**: 10/02/20 **Time:** 12:00 – 12:20
1) How do large law firms determine what standards to follow in respect of COI?
a) What factors are key in the private contractual negotiation over COI between parties:
• In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI? It is quite simple really, the value of the client to our business versus the harm.
b) Understanding how the SRA's COI rules are interpreted in the large law firm context:
What do law firms and lawyers recognise as an irreconcilable COI:
• Under what circumstances have you, or would you decide that you could not act for a client where there is a COI? Well, firstly in the event of a positional conflict, then, most often, a commercial one, then, rarely, if ever a legal conflict.
What is a serious breach re COI:
• What would you consider to be a "serious breach" in a COI context? It is a matter of contractual definition or, where the level of adversity is so great that it has caused harm to the client – an instance in which we should never have acted. An example might be where we have failed to disclose something extremely material to a client and they have suffered harm as a result.
What are Related/unrelated matters:
• How do you determine what the degree of relationship is between matters? A substantial relationship looking at the subject matter of the engagement and the clients. In order to do this, I'd need to see the retainer agreement.

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective"
• What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption? The client needs to be able to gain a sufficient sense of what the conflict is about and how it might impact on them, without disclosing too much. • What would satisfy you that it is reasonable to act for all clients? Once we have undertaken our due diligence into the client, and our central conflicts team have identified any potential conflicts, and we have taken steps to manage them.
2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
• Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like? Matters are received by the firm and go to our central conflicts checking centre. They will determine whether or not the firm can act. Where it is complex, I will take a view and hopefully be able to mediate between the aggrieved parties. Fee-earners no-longer take decisions on this. • What happens as a transaction progresses, and how are emerging conflicts managed? The central system can detect potential conflicts, but it is only as good as the information uploaded.
3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?
It is a case of marrying up the codes and seeing where the synergies exist between them to begin with, and then the gaps. The SRA's rules do not provide any guidance. Local rules can very enormously, and it is hard to reconcile, for example the SRA's rules on confidentiality, with the extent of the duty of loyalty in many, if not most civil law jurisdictions, some of which enshrine the duty in law to a very much higher standard.

Field Note

Firm Name/Code: G3 **Brief Description:** G3 was formed following a merger between two lower mid-tier City firms in 2014. The firm now comprises 10 offices in Europe and the Middle East, and offers a very diverse range of services, including banking & finance, corporate, commercial, and

unusually for the Top 50 law firms, private client and work for the charities and not for profit sector. In 2018/19 its revenue was over £150m. It trades as a Limited Liability Partnership.
Meeting: MW & GC
Date: 13/01/20
Time: 10:00 – 11:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

We are a member of most of the legal advisory panels for the largest UK banks, however we also maintain an extremely diverse client base for a firm in the Top 50 in particular. We are specialists in lending to the SME market, and so we get a lot of work in this way. We think that our business model enables us to be less reliant on the major banks, and also firms of a relatively similar size. We also have clients outside of the financial services sector though who have started to use their own terms of engagement for legal services, and this has nothing to do with panels, but for example, smaller listed companies listed on the mid-tier AIM market for example, and medium sized companies requiring advice on joint-ventures and a range of commercial contracts issues, on an on-going basis. These are the clients who perhaps have one in-house counsel, rather than a big team, and so it is a very recent trend. PLC must have put up a precedent online in the not too distant past because I've been detecting more or less the same t's & c's surfacing among them, albeit with particular industry twists.

On the whole these terms have not very controversial for us. For one thing, they are governed by English law, and in so far as they have provisions that relate to COI and confidentiality, the legal standards are followed, rather than the SRA's Code, and we can't really push back on that. The also require us to have effective business compliance systems in place to detect and manage COI, which we do. What they do well is set out the client's own expectations of the relationship. This means that it is less open to interpretation by the client and, you know, we know precisely how much time we have to respond to requests. What they don't do so well though, and where I will push back is where they provide some sort of really vague generic definition of client and competitor. We don't want to be caught out by some arms-length arrangement that a client might just happen to be running in Turkmenistan or the Amazon Rainforest and that has nothing whatsoever to do with us or this jurisdiction even.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

Aside from shagging a client's wife, this has got to be a pretty serious clash of interests between both, or all, clients, one where it we would be preferring one of them

considerably above the other.
What is a serious breach re COI:
• What would you consider to be a "serious breach" in a COI context? Where the client has actually suffered significant harm as a result.
What are Related/unrelated matters:
• How do you determine what the degree of relationship is between matters? There has to be some degree of relationship, and eg so the same asset, or objective, but also perhaps some degree of relationship between the clients as well. The scope of the retainer would be determinative though.
Considering interpretation of the two exemptions "substantially common interest" and "competing for the same objective":
• What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption? A sense of what the conflict is, how serious is it. • What would satisfy you that it is reasonable to act for all clients? There are no serious issues.
2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
• Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like? Decision-making has been moved away from partners to our London-based conflicts team. They hive off the decision making over COI on the matter inception. Until recently, they used to have a lot more control over decision-making. Partners do still make the determinations over commercial conflicts, but legal ones, and "contract" ones, are for the team. • What happens as a transaction progresses, and how are emerging conflicts managed? Well, we are still in the process of moving over to a centralised conflicts clearance system that can keep tabs on this for us, but we also hope that fee earners will continue to update us. Its an area where we still need to do a lot of work.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?
I literally start with a copy of both codes or, in some jurisdictions, the relevant laws and try to map the SRA's code onto it. Where the is some particularly unusual provision and the client is not happy with it, we might seek external counsel help.

Field Note

Firm Name/Code: H1 **Brief Description:** H1 is an international law firm with offices in the UK, Middle East and Far East, but undertakes work around the world. It has approximately 10 offices, and in 2018/19 a revenue of over £100m **Meeting:** MW & GC (ex SRA) **Date: 19**/01/20 **Time:** 16:00 – 17:00
1) How do large law firms determine what standards to follow in respect of COI?
a) What factors are key in the private contractual negotiation over COI between parties:
• In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI? The whole exercise is largely determined by our risk appetite, or rather that of the conflicts team. It does not involve partners or fee earners anymore. The members of the conflicts team are experts now in these forms of client-terms, and know what the main liabilities and risks are. They are a centre of expertise on the matter, but importantly they have the experience to review these, often lengthy documents quickly, and so saving fee-earners the time. The risk appetite is a combination of factors, but includes the benefits in taking a client on versus the harm that they might cause the business. Exclusivity might be afforded to some clients where, for example, we can afford to restrict our operations in particular jurisdictions or fields of work. However we might push back the closer their demands come to the core of our business, and I would say are particular niche strengths in, for example construction matters, and especially where, for example that is going to impact on or threaten to undermine our 5 year business strategy. So much hinges on our risk appetite, which is a range of business considerations, but also what we can stomach on paper, so where, for example OCGs seek to extend these duties beyond what we would normally think ideal, we'll take a realistic look at whether, in reality, these sorts of conflicts are going to arise on the basis of whether we do, or will, be expanding into particular areas in the near future. We'll also look at what the scope and duration of these OCGs are. So essentially, we will avoid trying to make concessions where it causes the least harm, or does not really matter.
b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:
• Under what circumstances have you, or would you decide that you could not act for a client where there is a COI? So this goes back to the earlier point about risk appetite and that taking into account a combination of factors, but including the benefits in taking a client on versus the harm that they might cause the business. It is rare to find that we cannot act for a client on legal COI grounds to be honest given the sophistication of our conflicts management systems and screening, we are taking full advantage of technology that was not available at the time of Bolkiah in order to enhance ethicality. The world has moved on – this is not by any means to say that we can forget our fiduciary duties, rather more that we have to seek to re-define them, whether there is in line with our clients contractual expectations, or by reference to the duty of loyalty in other jurisdictions. Exclusivity might be afforded to some clients where, for example, we can afford to restrict our operations in particular jurisdictions or fields of work. However we might push back the closer their demands come to the core of our business, and I would say are particular niche strengths in, for example construction matters, and especially where, for example that is going to impact on or threaten to undermine our 5 year business strategy.
What is a serious breach re COI:
• What would you consider to be a "serious breach" in a COI context? In an nutshell, a COI underpinned by a criminal act, or either way one that causes an unconscionable amount of harm to the client. Fortunately, the SRA has been sensible in dropping its reporting requirements in relation to material breaches, because frankly, the question for the COLP was always how much should I be sending the SRA, rather than anything to do with the nature of the breaches. This makes far more sense, and is far more reasonable.
What are Related/unrelated matters:
• How do you determine what the degree of relationship is between matters? Yes, again, we don't have any rules or guidance to follow in this respect either, so essentially we perform a search of the central conflicts database, which will provide us with a good idea, not just of the identifies of the clients, but also any potentially related parties. We can therefore determine any overlap in terms of involvement, and then also whether we can draw any distinction between the industries involved, matter, and nature of advice being delivered. Usually the degree of relationship arises from a same matter conflict. There aren't many related matter, and frankly, the only instance in which the duty of loyalty arises in an unrelated matter, is where the conflict is a client contractually determined one.
Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective"
• What constitutes an adequate level of disclosure for informed consent to be

provided by the client under each exemption?

The range of issues that can fall under both are very wide, and the SRA's previous rules, containing the indicative behaviours were better for giving clarity on this point, as were the rules before that. I also think that the exemptions are applied by many of our competitors beyond the scope of what they were originally intended for. Firms are in conflict all of the time, and sophisticated clients know this. We will of course respect the extent of OCGS, and the best OCGs might append a conflicts resolution mechanism, but what you find is that aside from this some legal conflicts are quite vanilla, and really don't pose much of an issue with clients, and so all you really need to do is disclose the gist of the issue, and so that takes care of confidentiality. In other instances though legal conflicts might be more problematic and adverse, and with these we need to think very strategically about how we disclose to clients. Sometimes it starts with a general conversation first of all, usually setting out the least that we are willing to disclose by email, and how we'd propose to manage the issue, and that way no-one gets caught out in a phone call. We will work on the basis of the response from the client to determine how much they expect us to disclose, and we might then try and meet them half way, and of course if it is a real issue for them, then at that stage we would take a view on continuing to act. Of course this applies to conflicts that we can identify at matter inception and on an on-going basis, and across the spectrum of different types of conflict.

- What would satisfy you that it is reasonable to act for all clients?

As a rule of thumb, once we are confident that our risk appetite has not been exceeded in relation to the potential harm that clients might cause the business. So, in other words, have been effectively isolated any risks off and can we effectively manage and police the scope of any duties whether contractually agreed or otherwise.

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

The conflicts process is centralised, and there is a front-loading of information into the system really from the point of matter inception onwards. This does not just identify potential "legal" conflicts, but also where, for example where OCG's require exclusivity, we have to tip-toe around the, well it's a sort of sphere of influence really. Also, commercial conflicts, so where we know that a client will object to us acting for another, we have to take a view on this, it boils down to what our risk appetite is to act. We might take a view on what how the client is likely to respond, and what the risk is of them dropping us as a legal advisor. Its therefore really important to know your client, and more importantly to define what they are. Its not so much a specific individual anymore, but really a cluster-fuck of affiliates and subsidiaries, and if we're not careful, we could find ourselves being contractually barred from representing all the clients within a particular industry globally. One of the first things we do, and we are becoming more experienced at reviewing these agreements quickly, is to determine the extent of the client.

So, really this is all happening within the conflicts team, and the partners on really get involved where we need to seek advice on the commercial conflicts dimensions because obviously they know the client. They are still quite proprietary about their clients, despite

legal conflicts decision-making having been wrestled off them. We'll take their initial view on commercial conflicts, but ultimately any disagreements, regardless of form of conflict, and including legal ones go to the conflicts committee, which is overseen by me as GC and my word is final. This is, in a sense a spin-off from the ethics committee. It operates quickly and effectively, and also ensures confidentiality internally from other fee-earners. It is an independent body formed of compliance professionals with particular expertise in conflicts, and other regulatory matters.

- What happens as a transaction progresses, and how are emerging conflicts managed?

There is ongoing monitoring of COI, integrated alongside other processes, including AML. Checks used to be performed at matter inception only, but now, and especially in light of the terms imposed by many of our foreign clients, we have to keep alert to any issues that might arise later in the day.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

What is particularly disappointing is the total lack of any guidance in the SRA's Codes about foreign jurisdiction rules. The SRA just seems so reluctant to actually do anything about this, and I've been pressing them. Before I came here, I was with the SRA and so I know something about the internal dynamics there.

Why do you think this might be?

Well, if you create a guidance, or best practice, I suppose you've got to police or monitor it, and let's be honest about this, despite all the criticism in recent years about their lack of expertise, this still hasn't really been addressed.

Just, going off piste here slightly, but do you think devolved regulation is an excuse for a lack of regulatory expertise?

I think that there will always be some level of disparity between the regulator and regulated community, [REDACTED]. I do sense that they are still out of their depth, and that large law firms, and in particular where their regulatory regime meets international rules are where they are particularly ineffective in providing support and guidance.

What about the Law Society? Are they any more help?

The who?

Field Note

Firm Name/Code: ABS 1
Brief Description: ABS 1 grew out of the in-house legal department of one of the Big 4 accountancy providers. In 2014 the business was granted an ABS licence by the SRA to

offer legal services direct to the public. Since then it has grown four-fold from its London office, largely though lateral hiring from the mid-tier law firms. It serves international clients offering a range of corporate legal services and is now comparable in size and revenue to a mid-tier law firm.
Meeting: MW & GC
Date: 11/01/20
Time: 14:00 – 15:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

We are unable to accept client terms of engagement as a business. Our engagement letter is drafted very tightly to comply with our internal policies and due diligence on the client. We are far more heavily regulated than law firms, and are subject to several regulatory regimes. This includes the terms of our ABS licence from the SRA, and also the ICAW.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

We do consider commercial conflicts first, then whether any legal conflict exists. The sort of conflict that could not be resolved by informed consent, or the imposition of a Chinese Wall is usually where the clients are involved in a contentious dispute, and the level of adversity is such that we cannot continue to act as a matter of perception as well as any reality.

What is a serious breach re COI?:

- What would you consider to be a "serious breach" in a COI context?

Where significant risk of harm, or actual harm has been caused to the client arising out of a COI.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

By looking at the scope of each retainer, and which parties are involved, and in which industry. However, unlike a law firm, we also have to consider whether a relationship is emerging through our legal business, or through one of our other business services, so in other words whether the services being delivered are completely unrelated or not.

Considering the interpretation of the two exemptions "substantially common interest" and

"competing for the same objective":
• What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption? Just sufficient for a client to be able to gauge what the risk is to their business. This will depend on the facts. • What would satisfy you that it is reasonable to act for all clients? When we are comfortable that they understand the scope of the retainer, and the precise nature of the legal services that are being delivered.
2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?
• Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like? We have a very sophisticated centralised approval system designed for us by Microsoft, which considers both the matter and client. The first check is for any accountancy or audit conflicts, then AML/KYC checks are performed, then any reputational concerns are considered, then at this point we assign the matter a level of risk. At this stage, if it is "High Risk", it will be referred to the GC, who will consider whether we proceed with it as a legal matter. If so, then we conduct the legal conflict of interest checks, and then send out our engagement letter, which will be drafted in line with any issues identified during this process. • What happens as a transaction progresses, and how are emerging conflicts managed? The system will draw data related to the client from across the business to automatically notify the fee-earners of any changes as the matter progresses, for example any changes in ownership or financial health etc. We are looking at this not just from a legal COI perspective, but also a commercial one.
3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?
The business does follow the SRAs rules on COI, and so it is a case of seeing how far these match, although this does form part of a wider puzzle in terms of integrating a raft of other audit and accountancy rules as well, and so the flexibility, or rather, the "vagueness" afforded by OFR is helpful.

Field Note

Firm Name/Code: ABS 2 **Brief Description:** ABS 2 is the London-based legal firm within one of the worlds Big 4

accountancy practices, established in 2014 under an SRA licence it has grown exponentially in terms of staff and revenue numbers
Meeting: MW & GC/COLP and MP for the legal part of the business. Prior to joining ABS 2 in 2014 he had been a partner in a Band E law firm
Date: 26/02/20
Time: 11.00 – 12:00

1) How do large law firms determine what standards to follow in respect of COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

We don't accept these sort of t's and c's, we are not afraid to disappoint a client by telling them, I'm sorry but I can't act for your now. This is even saying no to the biggest client. This is unique to being an accountancy firm?

Why?

There is a huge cultural difference with the Big 4 as opposed to law firms, is the audit culture and trust in the brand, which is extremely important. For an accountancy firm it is really important to consider conflicts, in the context of the law on confidentiality, as well as commercial considerations and anything else. Tor the Big 4 this is absolutely central to the services delivered.

There is therefore the need for what we call quality and effective risk management measures which are based on metrics, and a raft of other things as well.

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

As I was mentioning, we take a stricter line that the SRA's conflicts rules on this, and really the stating point for us is legal conflicts

Could you explain how you distinguish between the two?

A legal conflict is wider than an SRA conflict, consider an SRA conflict to be a conflict arising under the SRA's provisions on conflicts, which, when you read them are quite bespoke and tailored to suit large law firm practice. On the other hand, a legal conflict reflects the wider duties of loyalty and confidentiality emerging from case law, and the duty of loyalty for example is recognised globally to different standards

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

Well, this is the SRA standard under the SRA conflict rules, but if you are considering legal conflicts instead, as I have defined them, then this would for example be acting where, for example the duties of confidentiality and disclosure are irreconcilable, and in this we'd follow the Hilton Barker Eastwood standard, ie. the legal standard. In that case for example, a solicitor did not disclose the borrower's fraud to the seller, arguing confidentiality.

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?

There is a gulf between how law firms disclose information towards conflicts, and accountancy firms. As an industry we are far more geared up towards compliance, so if there was a legal conflict of course we wouldn't act. This is far stricter than law firms, and I know because before I came here I was a partner at [X] for over 20 years. As I mentioned we're not afraid to disappoint even the biggest client.

- What would satisfy you that it is reasonable to act for all clients?

2) In light of devolved regulation to law firms, what do systems to manage decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

We have a client acceptance procedure, and the whole business uses a global one ['X'], so that information goes onto this, and is then visible by others. It is incumbent on a partner to approve this, and to go through [X] in respect of a range of inception matters, including conflicts before there is sign-off to start. However, even aside from the SRA's regime in my role as GC and COLP I will take an independent look at a matter and consider 4 things:
Firstly, is this a legal conflict or an SRA conflict?

Next, is there any commercial reason why we can't do it? Clients in certain situations don't like it if we act for another competitor, e.g supermarkets. If we act for Sainsburys, Tescos don't like it

After the commercial conflict consideration, the next question is: is there a commercial reason why I, personally, shouldn't do it, does it feel like the right thin to do from a reputational perspective.

So these 3 questions are considered against the facts and the law, and in an intuitive sense, you have to set back, and often there is nothing in any of the rules and regulations in terms of guidance,

Then, the final question, which is especially important in an accountancy firm context – does it look right? This is because, as I have discovered, accountancy firms are far more geared up to the process of auditing, and regardless of the adequacy of any of the rules, you are independent.

How did you develop that last criteria?

I was with [x] previously, and as a junior lawyer I was supervised by a partner in the litigation team who was just really wise. He was looking at things through a particular lens – that of being stood up to cross-examination. This does not mean that you need to be ultra-cautious, and its not just about the conclusion, but also about *appearing* to be inappropriate.

- What happens as a transaction progresses, and how are emerging conflicts managed?

This is really important, you can identify a conflict a the outset, but work is a dynamic context, and you need to be alert to this – you need to have conversations with period for them to tell you that something has changed. So engagement with a range of people with particular roles is very important to spotting change, and what has happened, It is very difficult if you do not work with senior people, and this is regardless of the software, which of course, notifies us if any new parties join a transaction.

3) How are conflicts between the SRA's rules on COI and "local" conflicts rules reconciled?

At a team level, I lead the team to create a culture, and I am judged on whether or not I meet compliance expectations, it is an effective part of the appraisal process, so even if I bring in x amount of business, if I'm below expectations on compliance, the most I can hope for is to meet expectations overall, and conflicts are a very key point in this, and I would thin front of mind for accountancy firms as well.

Do this have anything to do with the existence of OFR?

Not inherently, no. The problem with OFR is that it seems to be framed as expecting a right or wrong answer, as if its black and white. In fact there can be 100% right or wrong, but also something in between.

How do you determine what to do when something falls in between?

This is where the role of culture is important, and here I feel for the smaller practice a lot, because at least as a practitioner in a lager firm there are a lot of people you can consult and take an opinion from.

- How are conflicts between the SRA's rules on COI and other "local" conflicts, rules or duties reconciled?

There is a really complex process where, for example SRA COI rules sit alongside AML at matter inception for example, but also alongside the relevant regulatory requirements for accountants as well of course.

Well it's a case of comparison and seeing where there is any mismatch, and then, as a matter of best practice, adopting the higher standard. However, the issue with OFR in so far as it relates to COI, is that it is very open to interpretation anyway. We often adopt the English law standards where we need guidance. The SRA's own guidance is quite lacking.

Appendix C

Analysis of Themes

"I've been with the firm since the late 1970s believe it or not. Back then, when I was an Articled Clerk, a client had to apply to be a client of the firm. We'd ask around and do our due diligence on them, which could take up to a couple of weeks even. As for conflict checks, we'd keep a list of clients in a bound leather binder under lock and key in a filing cabinet at the end of the hall. The notion that clients can now dictate their terms of engagement to us, and that we should have a centralised team of people, non-lawyers, using a global computer database to track conflicts blows my mind, even though I've been a major part of its development". F1

1) How do large law firms determine what standards to follow in respect of actual or potential COI?

a) What factors are key in the private contractual negotiation over COI between parties:

- In what circumstances would you "push back" on sophisticated client external counsel guidelines, or client-drafted retainer agreements in relation to COI?

- What started as panel agreements in the banking sector appear more recently to have crossed over to other clients, in for example commercial contracts and IP F1 G3

- The bigger the law firm, the more bargaining power and ability to push back? A1, A2

- Audit culture in Big 4 means not afraid to tell client not able to act for you

  "We don't accept these sort of t's and c's, we are not afraid to disappoint a client by telling them, I'm sorry but I can't act for you now. This is even saying no to the biggest client…there is a huge cultural difference between the Big 4 as opposed to law firms, it is the audit culture and trust in the brand, which is extremely important". ABS 2

  "We are unable to accept client terms of engagement as a business. Our engagement letter is drafted very tightly to comply with our internal policies and due diligence on the client. We are far more heavily regulated than law firms, and are subject to several regulatory regimes. This includes the terms of our ABS licences from the SRA, and also the ICAW for example." ABS1

- Not being able to push-back is a mid-tier/smaller firm problem B1

- *"In any negotiation we have to bear in mind our own position as a law firm relative to our competition, the client and any other parties that might be involved. It's a largely commercial decision." C3*

  "It is really very difficult to push back given that we are reliant on repeat business

from the same handful of financial institutions and tech providers. So your answer is, often we don't, or rather can't". E1

"Each engagement casts a new net over our client list, and in terms of bargaining power, we are not well placed to counteract and say no, because we cannot absorb the loss of opportunity in this market. In fact, the reality is that we never say no. We just have to mange the risk as best as possible". G1

- Reasonableness assessed against firm's own engagement letter terms A1 F1

- ABA Model rules as benchmark/standard A1 B1 C1 C2 E1

- ABA Model rules as stricter standard but more liberal re exemptions than SRA Code so able to waive more A2 C2

- "One firm one standard" – linked to brand A1 B2

- Defining a contractual conflict under OCG: A2 C1

  "Potentially these do expand the duty of loyalty – requiring firms not to represent in 3 main areas really: firstly, where other parties in a matter are adverse to any affiliate of the client; secondly, any competitors of the client; thirdly, being contractually bound to US rules, such as the ABA's model rules, and in particular Rules 1.6 – 1.11" A2

- To what extend are clients willing to "waive a conflict under the US standard A2

- Bad practice by banks A2, [and fact that SRA has done nothing about it (despite report] A2 it is a practice that ought to be banned A2

  "You might want to take a look at a report produced about 4 or 5 years ago for the SRA considering lawyer independence and autonomy. I can't recall the authors, but it had identified bad practice in the market relating to conflicts. In practice banks make a borrower pay the banks legal costs, as is standard practice, but where they are powerful enough, the borrower can use them as leverage to dictate what law firms the banks can use as well. So, they can insist that law firms use the same ones as the borrowers. However, this also dictates what law firms can ask. This practice still continues, and the SRA has still done nothing about it, although [A2] would not act in this scenario, it is a practice that ought to be banned". A2

- Afforded limited turnaround time by to negotiate terms – making it difficult to go back on something that has been "acquiesced to" rather than "agreed to" under these conditions B1 C3 D2

  "I have had a couple of instances recently where client retainers have, effectively been accepted without negotiation because the fee earners that they have been sent to are not yet familiar or competent with the centralised internal systems that they are supposed to follow. The issue is the tight turnaround time, and I would also say, pressure to win business." D2

- Service levels (Expectations) – client unlikely to complain to a regulator but might

expect service level credits in return B1 E3

"what were once just panel agreements have become OCGs – increasingly more complex agreements containing all manner of KPIs and service levels. The appendices usually set out their performance expectations, including the management of COI". E3

- "Reasonableness" *"we have to take a view on reasonableness….we did refuse to act for a client recently who tried to impose a non-sue anywhere in the world clause"* B1

- Negotiating position (NB not discussed by A-band firms) – comparison undertaken between client's expectations, ABA standards and our own internal policies –*"if client expects more than this we remind them of our expertise in a particular area – our long-standing clients already know where the lines have been drawn and for the time being they are holding"* B1

- Key question is how the terms will be enforced and the likelihood that the terms will be enforced rather than immediately pushing back, i.e. possibility that client might be amenable to providing waiver anyway B2 C2

  "we do just have to let some terms that I'm not entirely comfortable with go, because we have to take a pragmatic view, and that is that they are not likely to be enforced in reality. So, for example, we don't actually do work in a particular industry or with any of the affiliates specified in the matter. Obviously, we'd keep this under review though". C3

- Push back where there is likely to be a seriously negative impact on the business B2

  "We push back where for example, they want to restrict us from representing an affiliate of a competitor in another jurisdiction. That's just unreasonable. When the insist on terms like that we say well, what have we got to lose exactly, what is this client worth to use versus its harmful impact on our future business plans and loss of business" E2

- Try to scope the matter down to certain types of affiliates that the firm has not relationship or contact with B2 C1 C2

- Scope it down to a particular industry or field of work B2 H1

- Scope it down by jurisdiction C2 F1 G3 H1

- Impose time limits on the length of what is essentially a restrictive covenant C1 H1

- The impact of the US side of the business

  "Getting people to move more in step now with US client demands, and the US side of the business has been a massive cultural upheaval in terms of personnel and systems and controls. This causes all sorts of problems for me when we are dealing with client outside counsel guidelines. I think this is part of US practice culture. It has been quite a learning experience for us, and actually we have had

to re-define our expectations considerably. We've had to re-define the lines with some clients, and I have to be honest, some of our most loyal have been told to go elsewhere, simply because they are subsidiaries now of larger US groups". D2

- *"Both the US firm, and their clients have expectations that in performing work for them, we follow their standards. Clearly they don't have a very high impression of OFR, and I can understand why they might not get it. However, it means that we are being forced, through contract, to adopt the US rules by clients of the US business, and furthermore, the US side of the business makes it very hard for us to push-back" C1*

- Sometimes terms can be reasonable in being in line with the ABA's model rules

- An increasing problem C2

  "Legal conflicts, well I only deal with a couple each week. Hardly any. But as for contractual conflicts, I see these all day, every day". C2

  "What is particularly problematic is that our ability to push back on these terms through negotiation is often limited by a lack of awareness within the firm around the sensitivities where there is actually no conflict at all. Typically this occurs with the lesser experienced lawyers, but even so, with the largest US clients its virtually impossible. I'm fighting a losing battle" C2

- The exercise is determined by risk appetite H1

  "The risk appetite is a combination of factors, but includes the benefits in taking a client on versus the harm that they might cause the business. Exclusivity might be afforded to some clients where, for example we can afford to restrict our operations in a particular jurisdiction or field of work. However, we might push back the closer their demands come to the core of our business, and I would say are particular niche strengths in, for example construction matters, and especially where, for example that is going to impact on our 5 year business strategy, e.g. will we be expanding into particular areas in the near future". H1

- Anomaly – Don't deal with US/UK transactional matters D1

  We don't accept US rules typically our US clients are only 0.5% of our revenue. We don't deal with US/UK transactional matters. We have not got a huge problem with client-drafted rules, although I am fairly sure it will arrive in due course. [NB D1 was extremely reluctant to participate, until encouraged by the firm's CEO and this data should be treated with caution]

- Anomaly – Using niche strength as a bargaining chip F2

  "We have a relationship with one major global bank going back to their foundation, i.e. 150 years, but also because of our niche, world leading expertise and strengths in areas such as aviation and shipping, which can't really be done economically by the really big firms, we do have some leverage with particular financial services clients. We punch well above our weight on panels. This means that we have been able to negotiate some of the more onerous terms down to be

more acceptable to our business."

- Anomaly - Viewing OCGs as a positive thing. E3

  "I don't really find them too controversial on the whole, because unlike some industries debt-recovery work is not especially controversial as between client banks. It is an expectation that banks should be able to recover their losses, and it is also an expectation that we will be representing competitors to do the same thing. It is standard solicitor breach of trust, solicitor's negligence, and breach of lending conditions stuff on behalf of the lender … its very much a useful governing document that is at the heart of managing the client relationship in fact". E3

b) Understanding how the SRA's COI rules are interpreted in the large law firm context:

What do law firms and lawyers recognise as an irreconcilable COI:

- Under what circumstances have you, or would you decide that you could not act for a client where there is a COI?

- Advance wavier under US as sweeping-up not just legal conflicts, but also sweeps up contractual, positional, and commercial conflicts as well A1

- SRA rules too vague to be of use A1 C2

- Using ABA standards to fill in gaps in OFR interpretations (ABA rule 1.8 when conflict can't be waived) A1

- If we were following the SRA rules, it is a situation in which the client won't permit either exemption A2

  "So, 'if' we were following the SRA's rules, and that very often won't suit our client, it is a situation in which the client won't permit either exemption

  Is that how you'd define an irreconcilable conflict?

  Yes, I think that actually that's what it would boil down to". A2

- Legal conflicts rank behind contractual conflicts so these are what drive decision-making more B1 B2 C2 D2 E1 E2 E3 F2 G2 ABS1

- *"But obviously this is all subject to positional and contractual conflicts, which are, I would say, the first, and to be honest, most important consideration in every instance. That is when we would probably turn a client away rather than manage the matter through ethical screening" B1*

- *"The starting point here is whether there is a positional conflict, then whether there is a contractual conflict, then whether there is a legal conflict – in that order" B2*

- *"COI are not a local issue dispute the SRA rules, or even the English law, and it is not really entirely dependent on legal conflict. We have our hands tied in terms of some of these contractually based conflicts, but also positional concerns". C3*

- In terms of legal conflicts in E&W something of a seriously adverse nature reference to Hilton Barker and irreconcilability between the duties of confidentiality and disclosure, because of one party's fraud C1 F1

- Where the relationship between parties changes, breaking down to the extent that it becomes hostile and goes to arbitration G1

- Not had to do this recently D2 E1 H1

  "It is rare to find that we cannot act for a client on legal COI grounds to be honest, given the sophistication of our conflicts management system and screening, we are taking full advantage of technology that was not available at the time of Bolkiah in order to enhance ethicality. The world has moved on, and its about time the law in this area did too" H1

- Linked to positional conflict – one that might harm the firm's reputation F1

  "I can't recall us having to refuse a client on the grounds of legal conflict for ages. On the other hand, commercial conflicts are another matter". D2

- Legal conflicts v SRA Conflicts ABS 2

  "We take a stricter line than the SRA's conflicts rules … really the starting point for us is legal conflicts … a legal conflict is wider than an SRA conflict, consider an SRA conflict to be a conflict arising under the SRA's provisions on conflicts, which, when you read them are quite bespoke and tailored to suit large law firm practice. On the other hand, a legal confit reflects the wider duties of loyalty and confidentiality emerging from case law, and the duty of loyalty for example is recognised globally to different standards" ABS 2

What is a serious breach re COI:

- What would you consider to be a "serious breach" in a COI context?

- SRA's rules too vague A1 D2

- Private remedy mechanisms of client under contract for servicing a breach of COI A1 A2 B1
  "This is something that can be remedied with the client, and without the need to report the matter to the SRA, I mean, what good would that do? In reality, if there were to be any breaches, regardless of whether they might be deemed falling within the non-material, material, or serious categories, or whatever the flavour of the month, most OCGs now contain a resolution procedure anyway, and in the most serious instances, a binding commercial solution is appropriate, often in the form of a reduction in service level credits, leading to a reduction in their next bill". A1

- Interpreting the SRA's enforcement guidelines to mean a focus on criminal forms of behaviour, and reference to "victim" C1 C2 C3 D1 D2 E2 E3 G1 H1

  "I think that the SRA's enforcement policy provides a flavour of this, and I have

been hunting around for a definition. It's one of the instances where you would have that the Law Society's ethics panel would step into the breach, but frankly, they're just a glorified coffee shop on Chancery Lane, so I think it pretty much has to be a conflict that is impaired in some way by fraud, or some other criminal behaviour. However, we'd also have to look at the harm to the victim. Its definitely a much higher standard than the previous material breaches". D2

- Considering the extent of harm to the client C1 C2 D1 D2 E2 G3 ABS1
- Serious misconduct C1 F3
- It is how the client's OCG defines it, usually in a measured way A2 F2

"Serious can be defined in a measured way by the OCG, and I think this is helpful in confronting a lack of clarity in the SRA's rules" A2

- *Its not the rules anymore that govern lawyer behaviour, and this goes more generally, but the client" B1*
- *"I have a sense that some compliance managers might be deliberately diligent when they go to the COLP with material issues, and I also sense that the COLP feels that he ought to report things, even non material still, because he doesn't want the SRA to think that otherwise something suspicious is afoot. I think it was originally deep-rooted in the level of reporting originally envisaged so that OFR could actually work, and then, over time the regulator has, sort-of, caved in".*
- Where it would cause one client to be preferred considerably above the other

"Aside from shagging a client's wife, this has got to be a pretty serious clash of interests between both, or all, clients, one where we would be preferring one of them considerably above the other" G3

- The SRA's helpline not being at all useful B1 E3
- *"Letting the SRA know about anything is risky, because once you let them know, they must reach a decision, and they know less than you do, so you are sort of shooting yourself in the foot". B2*
- Where it would harm our reputation E3
- *Where the duties of confidentiality and loyalty for example are irreconcilable, so, for example because the client's fraud, if known by the other party would cause it to withdraw from the transaction.* ABS 2

What are Related/unrelated matters:

- How do you determine what the degree of relationship is between matters?

- *"So, although we are afforded a bit of artistic licence here, what we actually do is adopt the ABA standards again, which also happen to be reflected quite widely in OCGs and other state bar rules as well" A1*

- Freshfields case "some degree of relationship" US standard of "substantial degree of relationship adopted over E&W A1 E1 E3

- Highly contextual A2

- It is an issue of recognising to what extent things would be done differently if one

client was represented as opposed to all A2

- Subject matter of the matter itself B1 B2 C1 C2 C3 D1 D2 E2 H1
- Client or clients including affiliates B1, C1, C3, D1, E2 H1
- Industry H1
- Verein structures? B1
- Reference to scope and extent of retainers C1 C2 C3 E2 E3 G1 G2 G3 ABS1
- Importance of centralised conflicts checking to capture arms-length beneficial ownership B1
- For example the same asset or objective G3

Considering interpretation of the two exemptions substantially common interest" and "competing for the same objective":

- What constitutes an adequate level of disclosure for informed consent to be provided by the client under each exemption?
- "Neither of these exemptions is relevant under the terms of the framework service agreements that we have in place with clients" E1.
- Adv waiver under US as a better measure to deal with all forms of COI, including contractual, positional and commercial as well as legal, better than the SRA's "informed consent" standard A1
- *"As a firm, the global policy on COI adopted in respect of exemption follows the US position… this is secure advanced client waiver at matter inception. In E&W we could take an extra-territorial approach and this could be done through advanced contractual waiver. In fact waivers will often specify a range of different types of conflict". A1*
- E&W advanced contractual wavier is what client often "consents too" A1
- Approach – start with general communication first, determine client views, see whether there require further info, but also sell info barriers to them A2 B2 G1 H1
- *"I still keep a copy of the old Blue Book to hand, and the guidance in there around arms-length transactions for example is what I suspect most of us used to follow as a guide to the delicate balancing act to avoid breaching confidentiality. However, increasingly we have to balance disclosure expectations specified between OCGs".* B1
- Sufficient that they are aware of the nature B2 D2 H1
- Sufficient that they are aware of the scope D2 H1
- Sufficient for a client to be able to gauge what the risk is to their business ABS1
- Must be related to the seriousness of the conflict itself F1 G3
- As defined by the OCG/s C1 C3 H1
- *"We're not really bothered by the exemptions as we don't really do mergers & acquisitions anymore, which is the competing for the same asset exemption. As for the substantially common interest exemption, this doesn't come up either, as it is related in content"* D1 [treat with caution]

- What would satisfy you that it is reasonable to act for all clients?

- Borrow from ABA rules – competent representation? Mean that we have to have the skills and expertise to act on the matter, and sufficient flexibility and latitude to accommodate all clients with the necessary protections in place A2 B1 B2

- Can we justify to a court or the regulator that we made all "reasonable endeavours" to protect confidentiality? B2 C1 G1

- Satisfied our own internal policies and procedures on conflicts C1 C2 C3 D2 E1 E2 E3 F1 G1 G2

- Where there are concerns over the integrity of the client D2

- Where our risk appetite has not been exceeded in relation to the potential harm that the clients might cause the business. H1

- *"When we are comfortable that they understand the scope of the retainer, and the precise nature of the legal services that are being delivered." ABS1*

2) In light of devolved regulation to law firms, what do systems to manage individual decision-making look like in respect of COI?

- Could you outline who takes the decision on COI within the firm from matter inception, and what the decision-making process looks like?

- Centralised conflicts control A1 A2 B1 B2 C1 C2 C3 D1 D2 E1 E2 E3 F1 F2 G1 G3 H1 ABS 2

- Centralised because of increasing client OCGs – no longer just financial services clients A2

- This is despite local office autonomy otherwise (vereins) A1 E2

- Regardless of source of entry of engagement, policies must go to central compliance A2

  "Realistically, no human being could possibly know all of this information, and this is the standard now imposed upon the entity by OCGs" [a widening gulf between individual v entity regulation]

- Re-enforced in policies and training A2

- Independent operation from fee-earners A1 C1 C3 E2 E3

  "importantly the conflicts team is totally independent from the fee-earning community. This is absolutely vital for reasons of confidentiality because of course they know everything about everyone" C1

- Fee-earners expressly forbidden from taking decisions on legal conflicts B1 C1

"In future, the risk team will replace the partners and COLP on decision-making around COI specifically because it has become a complex global issue, and the risk team will be independent from fee-earner decision-making so they can give independent, objective advice on transactions" D1

"I think this has been one of the greatest cultural changes in legal practice in recent years in our firm, and I think at many partners in London are still getting used to the fact that they have a little less ownership over their clients. Increasingly they belong to the firm". C1

- *"this is entrenched now into our risk management culture, and came about on the advice of our PI insurers originally" C3*

- Relationship partners right of appeal to an ethics committee chaired by GC A1 A2 B1 B2 C1 C2 C3 D1 D2 E1 E2 E3 G1

- GC has final word in appeal F1 F2 H1

  "It helps having been here so long, as, some of the partners I remember as trainees, and, frankly regard me "as" the firm".

- Decisions are taken by law firm compliance personnel in the risk team regarding legal conflicts, although relationship partners can still determine commercial conflicts D1 G3

- Need for brand management reputational concerns A1

- Dentons case – vereins not a firewall anymore A1 also no prior incentive for partners to give way A1

  "Although the London office is an LLP, and a separate entity from the rest of the firm, this is not the case for conflicts checking, which is overseen by me in New York – this is where we have the database of client interest and beneficial ownership of subsidiaries" B2

- A higher standard is required of entities effectively- one that individuals can't really achieve A2 C2 E1

  "The SRA can talk as much as it wants about individual and entity regulation, but the reality is that decision-making has had to be relieved from the individual fee-earner with respect to conflicts. Furthermore, to make fee-earners an integral part of the centralised process would pose a considerable risk to confidentiality, and so it has to be an independent process and team of compliance specialists. They are also expert in reviewing client external counsel guidelines". E1

  "It became absolutely impractical, or rather infeasible, for a fee earner working in our [X] based commercial team, to know with any degree of certainty, what one of his colleagues in the [X] Office (which is part of the legacy business following the merger) had done in the past, or was currently managing, and in particular the subsidiaries and affiliates of that client" E3

  "We have been able to catch so many more potential conflicts since this system

went live, and its infinitely better than the old system of circulating emails…or even the leather binder" F1

- *"We have a very sophisticated centralised approval system designed for us by Microsoft. The first check is for any accountancy or audit conflicts, then AML/KYC checks are performed, then any reputational concerns are considered, then at this point we assign the matter a level of risk. At this stage, if it is High Risk, it will be referred to the COLP who will consider whether we proceed with it as a legal matter. If so, then we conduct the legal conflict of interest checked, and then send out our engagement letter, which will be drafted in line with any issues identified during this process.*

- What happens as a transaction progresses, and how are emerging conflicts managed?

- Integrated database with other systems and controls able to check beyond fee-earning team – therefore far more coverage/comprehensive A1 A2 B2 C1 C3 E1 E3 F2 ABS1

  "The system will draw data related to the client from across the verein to automatically notify the fee-earners of any changes as the matter progresses, for example any changes in ownership or financial health etc. We are looking at this not just from a legal COI perspective, but also a commercial one". ABS1

- Can detect even changes in arms-length beneficial ownership A2 E1

  "One of the biggest risks in this respect is recognising who is the client, because this is now often a concept more than an individual. The main client, and its affiliates, and then to what extent the rest of the world might clash". C2

- Drawing from wider market intelligence as well as from different sources within the firm E1

- Personal conflicts still weak onus still on individuals to inform us A1 A2 B1 B2 D1 E2 G1

  "Its fun and games, so for example, a typical question is "if we were to ask you to represent Barclays would this pose a problem – it's a time consuming and frustrating process involving a lot of lateral thinking". B2

- Issue is duty of confidentiality lateral hires have to disclose excel names to database A2

- *"work is in a dynamic context, you still need to have conversations with people for them to tell you that something has changed" ABS 2*

3) Is OFR an appropriate model of regulation for COI in large law firms?

[Q3 will also be informed by the data provided by Q1 and Q2]

- How are conflicts between the SRA's rules on COI and other "local" conflicts, rules

or duties reconciled?

- Considering the jurisdiction of the predominant effect of the transaction is starting point, then undertaking a comparison with other rules (whatever those are). A1 A2 B1 B2 C1 C2 C3 D1 D2 E1 E2

  "Its really a case of determining the predominant effect of the transaction and also where the lawyers working on the transaction are authorised. Its pretty much a case then of spot the difference, and identify what fits, and what doesn't, and seeking further clarification and consent from the local regulatory authorities, and second opinions from external counsel if we need it, and especially where local regimes impose very onerous conditions around loyalty and confidentiality. The SRA's helpline is utterly hopeless". C1

  "I literally start with a copy of both codes or, in some jurisdictions, the relevant laws and try to map the SRA's code onto it. Where there is some particularly unusual provision and the client is not happy with it, we might seek external counsel help" G3

  "In terms of the wider regulatory environment, e.g. PI etc, the SRA's regulatory regime is just a very, very small part of the wider jigsaw puzzle really, and in respect of COI, where we have clients able to set the rules, it really is more or less irrelevant from a practical point of view in most instances". C2

- Follow ABA's rules not SRA's A1 A2 B1 B2 C2 D2 E1
- Need to bear in mind OCGs in decision-making A1 E1
- Where local standards exceed ABA standard – need to negotiate / obtain waivers from local regulators A1

  "The ABA's model rules are the basis for the rules in New York, and most US States, but also some more reasonable sophisticated clients adopt them as the standard for contractual conflicts provisions. We see this with clients who have nothing to do with the US as well. I have a sense in fact that in so far as conflicts are concerned, the ABA's model rules are being increasingly adopted as a sort of international benchmark, and the SRA's OFR regime is not the regime of choice". B2

- Sweden – one of harshest regimes in world? A1 A2 B1
- The SRA's code [foreign] is pretty meaningless where it refers to following the CCBE rules, as we have to follow local MS rules anyway, which in several European jurisdictions are often very onerous, especially around confidentiality, and some come with criminal sanctions A2 B1

  "The reality is that the member state's own rules are often more onerous than the CCBE code, and so frankly the SRA's [foreign] rules are utterly meaningless in this respect". A2

  "The SRA's current rules on COI sort of work like a pair of elasticated trousers. They are very accommodating, but occasions they can fall down. This means that when compared with the prescriptive rules of other jurisdictions such as the US, they more or less wrap around them. However, in other civil jurisdictions, such as

continental Europe for example, the duties of loyalty, confidentiality and personal conflicts are all taken very much more seriously, and might even have criminal sanctions attached to them… some foreign lawyers I've dealt with view the notion of devolved regulation as somehow a bit corrupt".

"What is particularly disappointing is the total lack of any guidance in the SRA's Codes about foreign jurisdiction rules. The SRA just seems so reluctant to actually do anything about this, and I've been pressing them. [REDACTED] and so I know its probably most likely related to lack of expertise" H1

- Sometimes need to seek advice from external counsel B1 C1 D1 G3
- *"Where conflicts are flagged by our central team between different offices globally, then ultimately, they may fall to be resolved by a round table discussion between the firm's ethics committee in NY, where its not just a matter of clashing legal conflicts, but e.g. tax regimes. A decision is reached on the best interests of the client, but it is also a commercial decision, the best financial compromise too". B2*
- *"Clients may agree their own standards on jurisdiction, and choice of law so to speak. It is rarely the SRA's OFR regime that is selected as the "governing law". C2*
- The ABA rules offer clearer "redlines than the SRA's rules on COI when determining where standards overlap, or where gaps exist. C3
- Some synergy between the SRA's rules on OFR and rules in other jurisdictions D1 F2

  "In relation to the SRA's rules on COI, there is either great synergy, even as between civil and common law systems, or great difference in the local rules, The key issue is whether they duty of loyalty is different in any jurisdiction". D1

- *It is the GC who develops the experience to be able to navigate around these issues in an international firm, rather than the COLP, because it really is a case of piecing together a jigsaw puzzle"* D1
- Adopt the English law standards on confidentiality and loyalty where guidance needed ABS 2

- Anomaly "*This isn't really a great problem for us given the domestic nature or the business, although we do of course receive foreign clients, and fact that we are not actively-seeking to locate our horizons into foreign jurisdictions right now. Also, I think that we need to let the last merger settle down, as we need, for example our central conflicts system to achieve a particular level of reliability and credibility first of all" E3*