From compliance to engagement

Francis Dingwall

Compliance is sometimes dismissed as 'an operational issue of the second order'. But it's actually much more than that

Some compliance issues are certainly operational. Take, for example, the rule under the SRA Practice Framework Rules 2011 that a traditional law firm (a recognised body, as opposed to a licensed body or alternative business structure) must not be owned by a limited company, A Ltd, unless A Ltd is wholly owned by a solicitor and is itself authorised as a recognised body.

In recent years, the term 'compliance' has been applied to conduct issues as well as operational ones, as Iain Miller observed in his article 'Legal ethics 2.0' (*Legal Compliance Bulletin* [2016] March, issue 42, p. 11). The term is even applied to criminal law issues in relation to anti-money laundering: it is a serious crime knowingly to become involved in an arrangement that facilitates money laundering, and yet it tends to be treated as a 'compliance' issue.

The very word 'compliance' is an unhappy one, when it is used away from operational issues and applied to professional ones. The definition in the Oxford English Dictionary includes:

'(a) The acting in accordance with, or the yielding to a desire, request, condition, direction, etc.; a consenting to act in conformity with; an acceding to; practical assent.'

There is something passive about the phrase a 'yielding to' – a submission to – rules and regulations imposed from above and from outside. One complies because one is ordered to do so. But beyond that, does compliance actually matter?

There are cases where non-compliance has demonstrably played a part in the collapse of a law firm. The immediate issue is usually financial stability, but that is often a symptom of underlying problems of a different nature. In a number of collapsing firms, there is a culture of non-compliance at the top: senior partners who ignore compliance, but are untouchable because of the fees they generate, their power base or even because of contributions they have made to the firm in the past. For example, in one firm, a file had been opened on the promise of client due diligence (CDD) from a partner which never materialised. The partner in question was the firm's money laundering reporting officer (MLRO) and the transaction was residential conveyancing for a foreign client.

The permafrost below the top

The 'tone at the top' tends to be reflected further down the firm, in what Peter Kurer in his book *Legal and Compliance Risk* (Oxford University Press, 2015) has described as 'the permafrost below the top'. In most firms, below the top, the rules and regulations are implemented through systems and controls. The symptoms of the permafrost are that, although fee earners follow the firm's systems and controls, they are merely going through the motions. This is the so-called 'tick-box' mentality. The box has been ticked, but no thought has been applied and nothing will change.

File audits at firms close to collapse have revealed, by way of example, the following non-compliance, indicative of a penetrating permafrost.

- At the outset the firm had been unable to estimate the likely costs, but promised to tell the client when the work in progress (WIP) reached £750. Instead, it told the client nothing until it submitted a bill when the WIP reached £7,500.
- Each file had a 'client/matter risk assessment form', and fee-earners were required to tick one of three boxes: high risk, medium risk, or low risk. No file was marked 'high risk' or even 'medium risk'. The box marked 'low risk' was ticked in a case where the firm was acting for a client who had sued the last two firms acting for him.
- A general file had been used for a series of separate matters, with no conflict searches.
- A lawyer had been working in Russian and no partners spoke Russian so could not read his files.
- Internal photocopying charges had been claimed as disbursements.
- There had been delays in paying back money to a client; in one instance, the case finished in 2007 and there remained £50,000 in client account seven years later.
- Fee earners had failed to produce files for audit, either because the files could not be found or because the fee earners had ignored the demand for their files.

Those are the symptoms of the permafrost. What are the causes? The tone from the top is crucial: if the MLRO does not do CDD, why should anyone else bother? Beyond that, there are three reasons. First, the passive nature of compliance from outside, imposed from above, arguably removes autonomy. Research by Dr Steven Vaughan (University of Birmingham) into city law firms indicates that junior fee earners do not even look at the SRA Code of Conduct 2011: they look at their firm's office manual instead – the firm's systems and controls. As Dr Vaughan says: 'This may devalue, demote and de-emphasise the individual responsibility that individual lawyers should feel.' A second cause of the permafrost may be that processes are generally regarded as low status by lawyers. Conscious thought has high status and lawyers value striving for mastery – the desire to get better and better at something that matters. And a third cause may be the lack of understanding of the purpose of compliance: it seems to be just pointless box-ticking.

What motivates us?

What does the compliance officer for legal practice (COLP) do if the partners and staff ignore compliance, if they are too busy, or if attendance at in-house seminars is poor? COLPs can use the traditional 'carrot and stick'. There are tools available,

ranging from nudges to the nuclear option of resignation (if the COLP can afford to). It is often said that the only way to get partners to comply is via their wallets. But firms are sometimes reluctant to impose financial penalties on partners if they are earning a lot for the firm. And there is a question mark over whether financial incentives work. Psychologists have done experiments with and without rewards and they indicate, surprisingly, that humans (and other animals) do better when there is no reward. The research done has been summarised in the book *Drive* by Daniel Pink (Riverhead, 2009). Experiments indicate that financial rewards do not change behaviour once you reach a threshold, which is a fairly low threshold. Money is a 'threshold motivator' when it comes to changing behaviour.

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Daniel Pink says that what really motivates people is:

- **Autonomy:** over task (what you do), time (when you do it), technique (how you do it) and team (whom you work with). It is important to be in control, directing your own life. We all want to be a player, not a pawn.
- **Striving for mastery:** the desire to get better and better at something that matters to you. It is important to be doing something because you find it deeply satisfying and personally challenging, achieving mastery as a lawyer (or as a cook, a surgeon, a footballer).
- **Purpose:** '[Business leaders] must find ways to infuse mundane business activities with deeper, soul-stirring ideals, such as honour, truth, love, justice and beauty...' (Pink, quoting Hamel). In theory at least, solicitors who are obliged to uphold the rule of law and the proper administration of justice should not have to search too far for a purpose.

One word that sums up these three motivational concepts would be 'professionalism'.

Injecting autonomy, mastery and purpose: ethics

Are these three elements the answer for solicitors? They may be, if we look back at the causes of the permafrost. The passive nature of compliance removes autonomy. The low status of processes subverts a striving for mastery. And the lack of understanding, the box-ticking mentality that is induced, denies a sense of purpose. How do we inject those three elements into the solicitor's working life? Iain Miller's article 'Legal ethics 2.0' points the way: better results may be achieved by an ethics-based model than by a compliance-based model. Solicitors need to understand the ethical principles they should be following.

Let us look back at the first of the examples given above of a penetrating permafrost. In terms of ethics, it is important at the time of engagement to give a client the best possible information about the likely overall cost of their matter to enable the client to make an informed decision about whether to proceed. It corrects one aspect of the asymmetry of information between solicitor and client: the solicitor, having handled many transactions, is much better placed to assess the likely cost. It is tempting for an unethical solicitor not to disclose the full cost of taking proceedings to a conclusion because it may deter the client from instructing the firm at all. The temptation is to give the client only the cost of issuing a claim form. But once the client has taken that first step of issuing proceedings, he or she is committed. A less unethical solicitor may reason that very few cases (less than 5 per cent) go all the way to trial and it would be misleading to suggest that they did; but the solicitor should give clients the percentage to enable them to assess the risks for themselves. It is also a question of managing the client's expectations. In the example given, where the solicitor failed to tell the client when WIP reached £750, the problem was compounded and when the client was presented with the invoice for £7,500, he understandably refused to pay.

Solicitors would be more likely to respond positively to the ethics of giving good costs information to the client than to the bare outcome 1.13 in chapter 1 of the SRA Code of Conduct 2011. And the rule derives from the ethical imperative.

This is the so-called 'tick-box' mentality

Anthony Townsend, the former chief executive of the Solicitors Regulation Authority (SRA) under whose auspices the language of compliance entered the SRA, was recently asked in his new role (Financial Services Complaints Commissioner) what advice he had for new financial advisers. He answered: 'Think about the underlying purpose of the myriad regulations which you are having to grapple with. Ethical standards are often the best guide to a dilemma.'

If lawyers acquire a thorough understanding of the principles that underlie the rules, they will acquire the three components identified by Daniel Pink. They will attain some autonomy, in that they will not just be following meaningless rules and regulations. It is not suggested that they be given complete autonomy over whether or not to behave ethically at all; it is their motivation that is being addressed. They will be freed to strive for mastery: instead of just following processes, they will be applying conscious thought, getting better and better at something. And they will acquire a sense of purpose, the recognition that they are serving a greater good. This may enable them to make a transition from compliance to engagement.

The COLP is not the in-house violinist

The role of the COLP also changes in an ethics-based model. The compliance officer's role is not just to communicate the rules and regulations to the firm and oversee enforcement – a policeman or even copper's nark. His or her role is to shape ethical behaviour, to influence. The role is one to which lawyers are not well-suited by their legal training. Lawyers deliver advice and walk away; it is up to clients what they do with the advice. The key to shaping behaviour is repetition. The message needs to be communicated not once but a thousand times. It is a soft skill, requiring the expertise of a teacher, rather than of a

lawyer. It is like teaching the violin: the teacher does not just show the pupil the fingerings, how to use the bow, and 'off you go'. The pupil has a lesson every week, practises daily, plays in ensembles, has rehearsals and listens to virtuosos in concert. Even an accomplished performer still has lessons, weekend retreats, practice.

All too often a compliance manual is drafted and presented to the firm. It may be done with a flourish, perhaps with an inaugural seminar, maybe even with sandwiches. And then frequently it goes onto the firm's intranet, never to be mentioned again.

A further danger has been highlighted by Dr Vaughan. There is a risk that, if you have a compliance officer, he or she becomes the repository of knowledge about compliance, the repository of professionalism and the conscience of the firm. This may devalue and depersonalise the sense of responsibility of individual lawyers. Thus, you simply harden the permafrost. The COLP needs to teach the partners and staff how to play the violin. He or she must not become the firm's in-house violinist.

What's in a name?

Finally, let us return to the word 'compliance'. The COLP's job would be made easier if the issues for which he or she is responsible could not be dismissed as 'risk and compliance', with the negative connotation of business prevention (risk) being reinforced by the negative connotation of an operational issue of the second order (compliance). Professionalism lies at the heart of the job and to take its rightful place at the core of the firm the function should bear an appropriate name: 'professional conduct and risk', 'quality and risk', or even 'ethics, risk and compliance'.

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