

Regulation

Cracking the code

Alan Kershaw outlines the approach ILEX Professional Standards is taking to the fitness to practise rules and to redrafting the ILEX Code of Conduct

STANDARDS IN EVIDENCE? Not that subject again! Why does he keep on about what happens when things go wrong? Well, the last thing I want to do is harp on month after month about a topic which – chances are – will affect only a tiny minority of you, even in a whole career.

So this is my final word on the fitness to practise (OK, disciplinary) procedures which we have been working hard to modernise in recent months. The board of ILEX Professional Standards has now signed off the changes, after consultation with the ILEX Council and others, and the revised Investigation, Disciplinary and Appeals Rules will come into effect at the turn of the year.

From that point, only cases which are already on their way to a disciplinary or appeals tribunal will continue under the old rules, though the panels hearing them will be constituted in the new way (two lay, one professional, no members of ILEX Council). All other cases will start at the new professional conduct panel (two lay, one professional, no members of ILEX Council) and will be handled under the new procedures.

The lay members of our panels still have some time to run on their appointments but we are staggering these so that we do not lose all of their extensive experience at once. Recruitment of new professional panellists is under way. Baljeet Basra set the scene in last month's Journal and the immediate response was very encouraging. We expect to confirm appointments by mid-December, after which all panellists will receive training in the new procedures and we should have all the new structures up and running without any hiatus.

The key changes at a glance

- Cases will be considered by smaller panels (two lay, one professional, no members of ILEX Council).
- The new first level committee, the professional conduct panel, will

meet less frequently than the present investigating committee.

- Complaints lacking substance may be dismissed without reference to the panel, provided two panel members agree.
- New 'determinations by consent' will allow complaints to be settled without a hearing where the member accepts the need to improve their practice.
- There will be a power to suspend a member on an interim basis, pending a formal hearing, in serious cases where they represent a significant threat to the public.
- The standard of proof will in future be the civil standard, now generally recognised as the proper test in professional regulatory proceedings (for a clear, succinct and very witty explanation of what this means, and why no ILEX member need fear the change, see Baroness Hale in *Re B (children)* [2008] UKHL 35; [2008] 2 FCR 339).
- When excluding a practitioner from membership, a disciplinary tribunal will be able to suspend them with immediate effect, during the period allowed for appeal, if they judge the public to be at risk.
- Overall tightening of timescales for submitting documents and hearing cases.
- Panels will be guided by new 'indicative sanctions guidance', helping them to make reasoned and consistent decisions, supported by precedent.

Positive messages

Standing on the shoulders of the existing, well-regarded procedures, the new arrangements are designed to be:

- More streamlined and less costly;
- Human rights compliant but not laborious; and
- Common sense and thoroughly modern.

They are also designed to head off both the obsessional complainant and the obstructive respondent, to the

With rights come responsibilities: the new code of conduct will contain headline principles



benefit of the legal executive profession and the public. And our firm aim is that every case in which a complaint is made against an ILEX member should carry some positive messages:

- To the complainant, that the matter has been properly investigated and explained and, where possible, put right.
- To the public at large, about the standards they have a right to expect of ILEX members.
- To the practitioner involved, reinforcing and encouraging good practice while punishing and discouraging what is unacceptable.
- To the profession as a whole, about the standards ILEX expects of them.

I believe that fitness to practise action without any educational outcome is, in essence, a regulatory failure.

Which brings me to our current work on the ILEX Code of Conduct. It is central to any good regulator's work to have in place a plain-speaking, unambiguous statement of what constitutes good conduct,

ethics and practice in the profession it regulates.

If you doubt this, look at the state of regulation across the financial industry: with volumes of boxes to tick, returns to submit, technical provisions to fulfil, compliance officers to feed, no one could say they are under-regulated. But where is the requirement on individuals to act



ethically? In the whole sorry tale of the past two years, who in finance has ever been struck off for unethical conduct, with little or no prospect of working in their profession again? Just the words You must be honest and truthful would have been a start.

Sharper image

As it happens, the existing ILEX code is pretty good. It is one of the reasons why our regulatory performance has got a good press up to now, including complimentary remarks by the Legal Services Ombudsman. It avoids the encyclopaedic excesses of some rule books in other parts of the legal world. It is succinct, ethics-based, direct and largely free of the kind of jargon and terms of art with which lawyers and other professionals typically bond and defend their closed groups. And its substance is already close to what we want to see.

Our work, then, has been focused on sharpening up the text, modernising its expression and bringing out a few things a bit more explicitly than they are at present. We are about to put this out to consultation, so keep an eye on the

ILEX website and by all means have your say.

We expect to publish the revised code early in the New Year. Obviously what it finally contains will depend on the consultation, but it will certainly put up front a series of headline principles which overarch everything we say – the pegs, if you like, on which the more detailed guidance hangs.

These short statements will be the ones to read, mark, learn and inwardly digest – write them on your hand, set them as a rap, take them as your graduation oath, make them part of your professional life, but don't forget them.

If I were you, I'd be surprised if the code did not turn out to include key ideas like this:

- Membership of ILEX carries both privileges and responsibilities.
- Complying with an agreed and published Code of Conduct is one of the key ways in which professionals reassure the public about their standards.
- Honesty, integrity, fairness, respect, independence, judgement, confidentiality, trust and upholding the rule of law are really rather important.
- So is complying with your professional body and obeying its rules.
- And knowing the limits of your professional competence and staying within them.
- You are an ILEX member at all times: behaviour outside work can result in disciplinary action if it undermines the confidence placed in you and your profession by clients, other members of the legal profession and the public.

Actually, all professional codes boil down to just five letters: T R U S T. All guidance on professional conduct and ethics can be traced back to that word. Once it is lost, it is virtually impossible to recover.

Broad principles

Why are we basing this on broad principle rather than detailed instructions? There are a number of reasons. First, we could never hope to identify every situation that might arise in the lives of professionals. Second, whatever we set down, there will always be new situations arising which we have not provided for. Third, the more words you write, the better the chances of an unscrupulous practitioner finding a way to get off on

a technicality. Fourth, having lots of words has been no guarantee of good performance by some other regulators.

But there's a much better reason than that. For a professional, judgement is of the essence. Every day, I should think, you as professionals apply legal and other principles to specific situations. In some careers there is simply a list of tasks you are expected to do and a set of instructions to follow – and it does not matter terribly if you do not understand why you are doing something, provided you follow the instructions.

What marks out a profession is the understanding not just of what to do but why you are doing it; the ability to communicate that understanding to others; the capacity to choose not just between black and white but between shades of grey; a willingness to look up from the desk and think more broadly than the immediate task in hand. These are hallmarks of professionalism – and they demand a grasp of broad, established principle and the ability to apply it to specific situations, some of which may never have arisen before.

So our revised code will be grounded in the principles – the values – that should underpin everything you do as an ILEX member. All members will, of course, have to comply with it, and their professional and personal conduct will be judged against it. Breaches of the code may lead to action under the fitness to practise procedures and it is important to remember that the code itself is not exhaustive: those judging complaints are not limited solely to the matters it covers.

All our work in this area – the revised Code of Conduct, the procedure rules for handling complaints, the composition of panels, the indicative guidance for imposing sanctions where misconduct is proved – is of a piece. Taken together, they should underpin a modern system in which you can have confidence and which reaffirms to the public the importance ILEX and its members attach to being well regulated.

If, when you see the draft code, you have suggestions for improvement, then we will be happy to hear from you, either direct to the ILEX office or through your local member of the ILEX Council.

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