

# What's on your worry list?

---

April 2024

---

# Welcome and Introduction

Jenny Screech

# What's on your worry list?

A round-up of regulatory issues and risks for SRA-authorized firms

**Graham Reid, RPC**

24 April 2024

# Content

- Workplace Culture
- SRA investigations
- Litigation funding
- AI risks
- SRA hot topics
- Conclusions

# Workplace Culture

# SRA workplace culture rules

- **CFS 1.1** *You do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.*
- **1.2** *You do not abuse your position by taking unfair advantage of clients or others.*
- **1.5** *You treat colleagues fairly and with respect. You do not bully or harass them or discriminate unfairly against them. If you are a manager you challenge behaviour that does not meet this standard.*
- **CFF 1.6** *You treat those who work for and with you fairly and with respect, and do not bully or harass them or discriminate unfairly against them. You require your employees to meet this standard.”*

# “...the Firm was a challenging place to work”

- *“Creating competition amongst fee earners by the monthly publication of league tables, presumably in the misplaced hope that this would increase performance, struck particular disquiet with the Tribunal”*
- *“It was crass to tell junior solicitors that they had to make up hours by working weekends, long evenings, Bank Holidays...This was a notable example of bad, ineffective, and inappropriate management.”*
- *“The Tribunal concluded that fear of supervisors and management, these ‘aggressive litigators’ as described by the Respondent, was so traumatising that the Respondent was knowingly prepared to break the rules in order to avoid having to confront them face-to-face with the truth regarding her actions”*

# Workplace culture rules: the lexicon

- “Fairly”, “unfairly”, “with respect”
  - Not the same as employment law rights.
  - Viewed by the SRA through the lens of risk to consumers and the public interest
- “Bully”
  - No established legal definition.
  - *“unwanted behaviour that is either offensive, intimidating, malicious or insulting; or an abuse or misuse of power that undermines, humiliates, or causes physical or emotional harm to someone.”* (SRA definition...)
- “Harass”, “discriminate”
  - Meanings as per s.26 and 13, Equality Act 2010



# Workplace culture rules: the lexicon

- “Employee”, “colleague”
  - All key working relationships (because everything here is seen through the lens of risk of adverse impact on other SRA rules...)
  - Includes: co-workers, counsel, experts, contractors, consultants
- “Workplace”
  - *“As the introduction to our Codes of Conduct explains, conduct away from the workplace will only be covered by the Codes where it **touches realistically** upon the practice of the profession, in a way that is demonstrably relevant”*

# Where's the workplace / what's the link to practice?

- Mostly obvious. Less obvious situations to be judged by reference to the concept of *proximity of connection to professional practice* (see also Beckwith v SRA)
- It's a multi-factorial assessment, e.g.
  - On the workplace premises, or arising in a workplace context (eg a firm's Christmas party)
  - Following on from a workplace context (e.g. the after-party)
  - Stemming from a professional origin but not at the workplace (e.g. attendance at an external seminar)
  - Involving a client or professional acquaintance
- Social media usage: see Husain SDT case no. 12463-2023

# SRA attitudes to 'behavioural issues'

- *“We consider that some behaviours demonstrated by individuals - such as those relating to sexual misconduct, discrimination, and non-sexual harassment - are unsuitable for a financial penalty, except in exceptional circumstances.”*
- Typical questions posed during an SRA investigation into behavioural issues:
  - *“Has the Firm ever encountered this kind of behaviour in its staff before? If so, please provide full details.”*
  - *“Please provide a full account of the Firm’s investigation into the Incident.”*
  - *“Please provide all relevant material relating to your firm’s internal investigation into the incident and disciplinary processes concerning Partner X.”*
  - *“Please provide all documents and emails that in any way concern Events One or Two, or Victim XY’s interactions with Partner PQ”*

# SRA Thematic on Workplace Culture

- Our experiences
- Topics raised by the SRA
  - The firm's values and expected behaviours
  - The role by played by leaders
  - How we supported workforce wellbeing and mental health
  - Management of workloads, interaction with reward and recognition
  - How we go about reviewing effectiveness
  - Approach to inappropriate behaviours in the workplace
- Key issues
  - Assurance
  - 'The little black book of misdeeds'

**Under investigation...**

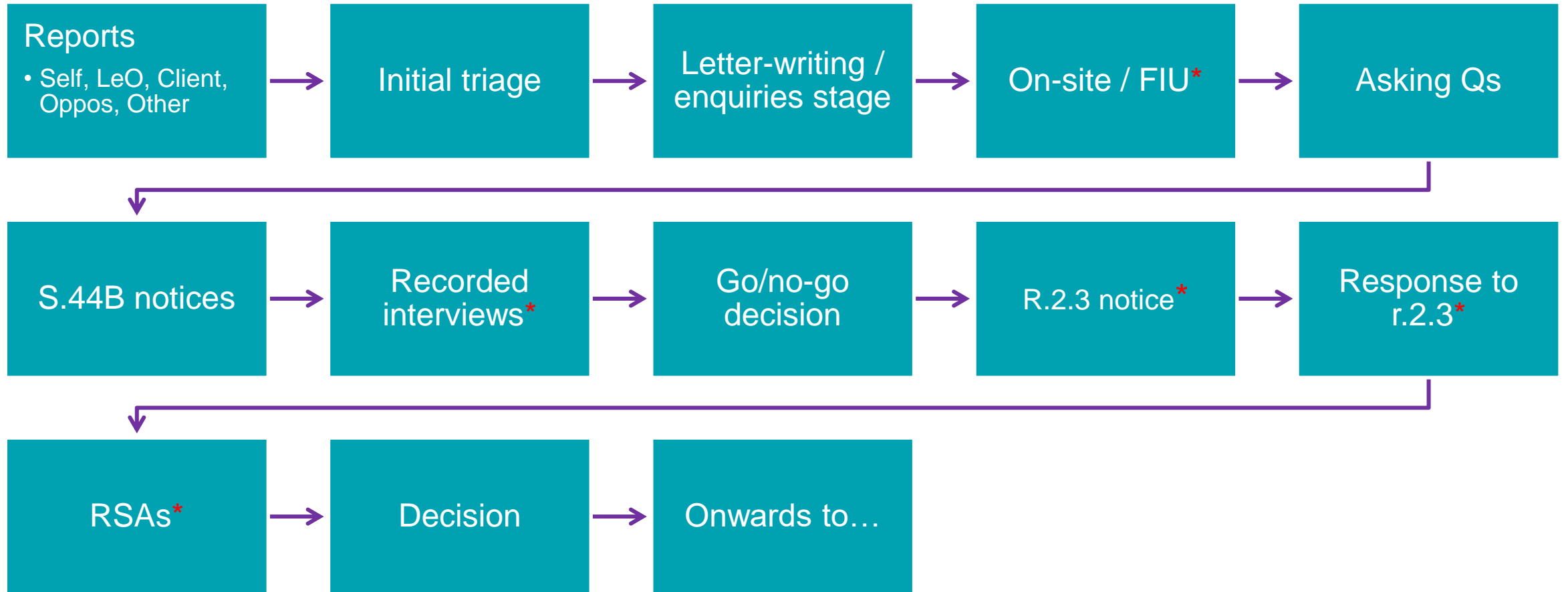
# What are the chances?

- 160,000 solicitors
- 10,000 concerns reported
- 1,740 investigated
- 1530 no findings
- 300 SRA sanctions
- 75 to Solicitors Disciplinary Tribunal

# Resources

- SRA Regulatory and Disciplinary Procedure Rules
- SRA Enforcement Strategy
- “SRA’s approach to financial penalties” (SRA Guidance)
- “Financial penalties” (SRA Statement)

# Pathways for investigations





# Outcomes

- NFA
- Letter of advice
- Letter of warning
- Reprimand
- Financial penalty
  - £25,000 max (normal firms)
  - £Unlimited for ECCTA, £250m licensed bodies, £50m for employees of licensed bodies
- Go to Tribunal
- Other

# Investigation milestones

- Reporting
  - Recording the decision
  - Information gathering
  - LPP acquisition
- Requests for documents
  - Client confidentiality and LPP entitlements
  - s44B and 44BC Solicitors Act 1974
  - Scottish Legal Complaints Commission v Murray [2022] CSIH 46
- R2.3 Notice

# Problem areas

- Evidence-gathering by SRA and impact on later civil proceedings
  - Interviews
  - RSAs; recanting risk
- Reliance on regulatory breaches as sources of civil liability
  - Rules not same as caselaw but...
  - Banking facility breaches used to support accessory liability cases
  - Rules as terms of the solicitor's trust when holding monies (**Giambrone**)
  - Rules going to dishonest assistance case (**Group Seven**)
- Systemic problems and block notifications

# Investigations: cover

- Minimum Terms language:
  - *“The insurance must also indemnify the insured against defence costs in relation to...**any investigation or inquiry (save in respect of any disciplinary proceeding** under the authority of the SRA and/or the Tribunal) during or after the period of insurance **arising from any claim referred to in clause 1.1 or from circumstances** first notified to the insurer during the period of insurance.”*
  - *“defence costs means legal costs and disbursements and investigative and related expenses reasonably and necessarily incurred with the consent of the insurer in...acting for any insured in connection with any investigation, inquiry or disciplinary proceeding (save in respect of any disciplinary proceeding under the authority of the SRA or the Tribunal), and does not include any internal or overhead expenses of the insured firm or the insurer or the **cost of any insured's time**”*

AI

# Law firms using AI: opportunities and risks

- Existing law firm use cases:
  - e-disclosure,
  - document review,
  - document generation – whether pleadings, letters, contracts or reports;
  - marketing; and of course
  - legal research
- Legal angles
  - Risk warnings
  - Barriers in the path of full outsourcing and disclaiming responsibility for the AI (UCTA, £3m limit on capping)
  - Suitability of legal tests: Bolam, unbundled legal services (Minkin); right for the wrong reasons (Adams v Rhymney)

# AI risk warnings

- Victoria University of Manchester v Wilson (1984) 2 Con. L.R. 43
  - *“... For architects to use untried, or relatively untried, materials or techniques cannot in itself be wrong, as otherwise the construction industry can never make any progress. I think, however, that architects who are venturing into the untried or little tried would be wise to warn their clients specifically of what they are doing and to obtain their express approval In the light of that ...”*
- Montgomery v Lanarkshire Health Board [2015] UKSC 11
  - *“The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it”*

# AI: SRA viewpoints

- SRA Technology and legal services (Research paper, November 2018)
  - *“Individual solicitors and firms are responsible for the service they give to people, including whether they use technology to advise clients or use it to work on client matters. They cannot outsource this responsibility to a third party.”*
- SRA report on Unbundled legal services (June 2023)
  - *“To help firms, we are developing guidance on key points to consider when providing unbundled legal services. This will include how to minimise the risk of legal action”*
- SDT decision 12415-2022 - Hon-Ying Amie Tsang
  - SRA prosecuted Hon Ying Tsang for failing to warn her client of the risks of a transaction where that advice had been expressly excluded from the retainer



# AI: Cover under the Minimum Terms?

- Main insuring clause:
  - *“1.1 Subject to the limits in clause 2, the insurance must indemnify each insured against civil liability to the extent that it arises from private legal practice in connection with the insured firm's practice, ...”*
- The phrase “private legal practice” is further defined (at great length), with the opening part as follows:
  - *“...means...the provision of services in private practice as a solicitor or REL in an authorised body including, without limitation”*
  - Does this mean there **must** be a human being in the loop?
- Cyber exclusions
  - Cl.6.12 allows exclusion of certain forms of ‘cyber risk’, but cannot operate to exclude claims for civil liability arising out of private legal practice

# AI: Risk processes

- Internal AI usage policies
  - E.g. don't use ChatGPT, check for 'hallucinations', don't upload client confidential content
  - Policing them / acquiring assurance that the policies are working?
- Implementation risks
- Client demands
  - SLAs prohibiting / requiring AI usage

**Litigation funding**

**The new Costs Wars?**

# PACCAR

- PACCAR Inc & Ors, R (on the application of) v Competition Appeal Tribunal & Ors [2023] UKSC 28 (26 July 2023)
- S.58AA CLSA 1990
  - A DBA is unenforceable unless it satisfies the necessary conditions
  - *“a [DBA] is an agreement between a person providing...claims management services...and the recipient of those services which provides that (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained”*

# PACCAR: Implications

- The vast majority of third party litigation funding agreements are (and have been) invalid and unenforceable
- A wave of negligence claims to arrive?
- Government Bill to fix things, but can it be retrospective?
- Case-law: fixing broken DBAs, LFAs and CFAs
  - Zuberi v Lexlaw Ltd [2021] EWCA Civ 16
  - Therium v Bugsby Property [2023] EWHC 2627
  - Commercial and Interregional Card Claims I Ltd (CICC I) v Mastercard [2024] CAT 3
  - Diag Human SE & Anor v Volterra Fietta [2023] EWCA Civ 1107

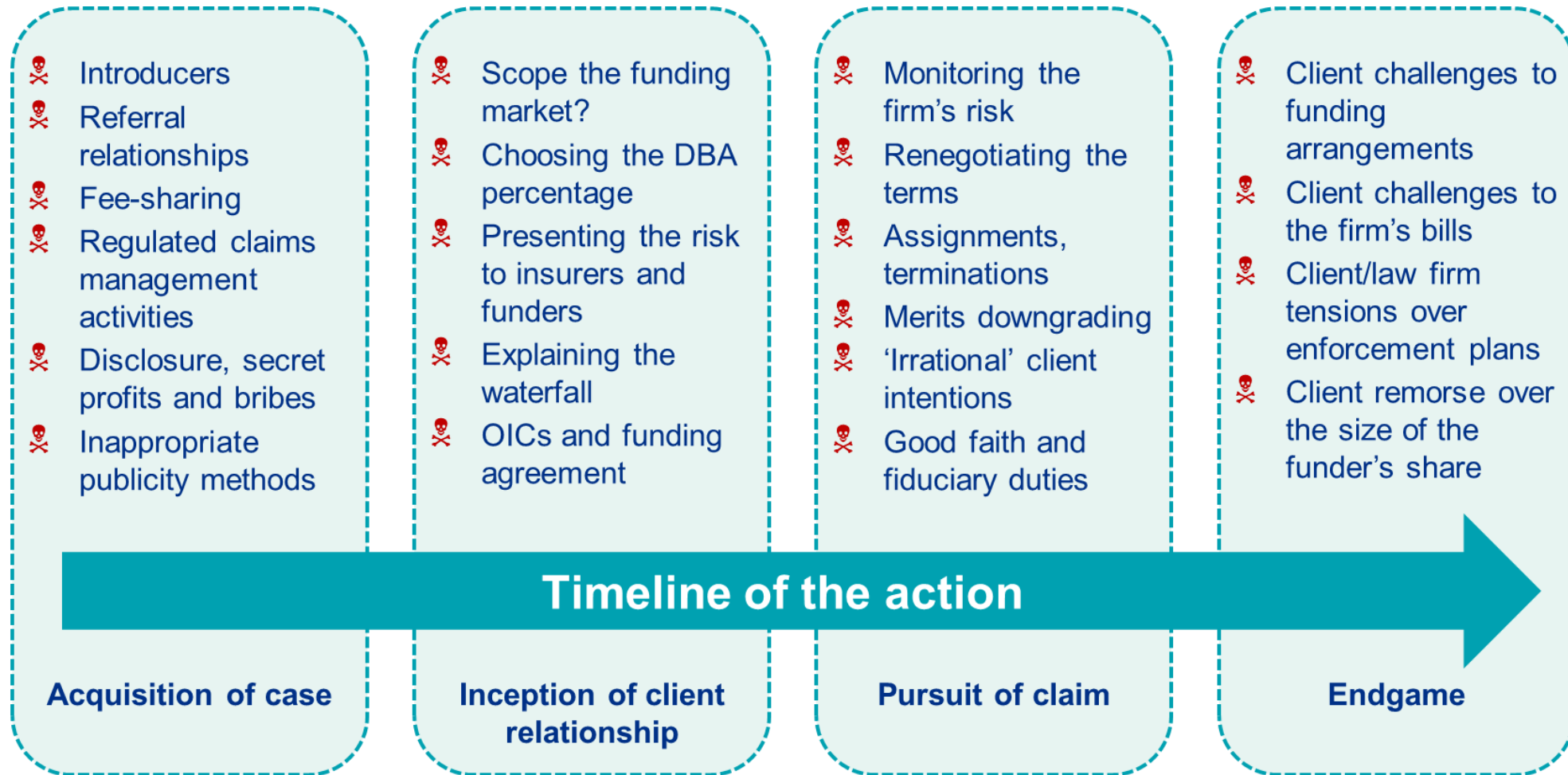
# Funding and fiduciary duties: at the start

- A solicitor does not usually owe fiduciary duties to a client during the negotiation of a retainer
  - ***Belsner v CAM Legal Services Ltd*** [2022] EWCA Civ 1387 (27 October 2022)
  - Worrying reference in **Belsner** to s.176 Legal Services Act 2007 giving “statutory force” to the duty to give clients the best possible information about costs.
  - Duty to give ‘Belsner advice’ at the start of the retainer
- But what about renegotiation mid-retainer?
  - Temporary removal of the fiduciary hat: is it possible? (“*the...concept of reasonable expectation of abnegation of self-interest...*”, **Belsner** at 74)
  - Implied term as to informed consent mid-retainer: see ***Boodia v Slade (t/a Richard Slade and Company)*** [2023] EWHC 2963 (KB) (21 November 2023) (but in relation to the provision of interim statute bills)

# Fixing funding problems: after they arise

- Implication of terms (as between solicitor and client)?
  - See ***Yoo Design Services Ltd v Iliv Realty PTE Ltd*** [2021] EWCA Civ 560 (20 April 2021)
  - How will implication arguments work when a solicitor is also duty-bound to act in the best interests of the client?
- Termination language
  - For a cautionary tale, see ***Butler v Bankside Commercial Ltd*** [2020] EWCA Civ 203 (27 February 2020)
  - What do these words mean: *“We can end this agreement if you reject our opinion about making a settlement with your opponent?”*
- Severance?
  - ***Diag Human SE v Volterra Fietta***

# Mapping the risks





# SRA hot topics

# SRA *current* hot topics

- SLAPPs
- NDAs
  - Don't use clawback clauses
  - Do repeat in the agreement the language of para. 3.11 of the Code (*"You do not attempt to prevent anyone from providing information to the SRA or any other body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest"*)
  - What can you do with the serial litigant / complainer?
- AML, sanctions (Aarrggh...out of scope for this talk!)
- Banking facility rule
  - Still causing problems
  - Over-zealously enforced?

# SRA future hot topics (1)

- Axiom Ince fallout
  - Governance
  - Review of client compensation arrangements
  - LSB report due
- SRA discussion paper “Protecting the public: our consumer protection review” (February 2024)
  - *“... we will also be asking the bigger question of whether the whole model of law firms directly holding client money is the best approach”*
  - *“For instance, although our visit to the firm ultimately identified the suspected fraud, which had not been spotted by other parties, we have increased our checks around bank statements to reduce the risk of such activity not being identified”*

# SRA future hot topics (2)

- Horizon / Post Office
  - A possible new duty of candour?
  - Beefed up requirements to cure misstatements and errors, especially in litigation?
- (Draft) Guidance on
  - “Understanding in-house solicitor's professional obligations as an employer”
  - “Reporting concerns about wrongdoing when working in-house”
  - “Internal investigations”
- Change to the SRA's approach to financial penalties

# Conclusion

# Top tips for risk & compliance people

- Assurance!!!
  - How do you know if all of your policies etc are actually improving things?
  - Capture the good stories as well as the bad
- Can you reproduce the state of your policies etc five years back?
- Strong exception mechanisms for...
  - Litigation funding templates; incepting big DBAs etc
  - Changing funding arrangements mid-retainer
- Get better at putting things right
- Train people in doing the right thing
- Ask ChatGPT for ethical scenarios?

# And if you are going to apologise...

- Mr Williams was asked if he did anything wrong and whether he apologised for anything he had done. Jason Beer KC deconstructs his witness statement for him
  - *“You offer deep regret at harm caused by events, rather than harm being caused to subpostmasters by people or harm being caused to subpostmasters by people in the Post Office, or even harm being caused to them by the Post Office. You offer regret that events caused people harm, don't you, not people caused them harm*
- Williams says:
  - *“I will go so far as to as say, if I have caused somebody harm, I'm deeply sorry.”*

(With thanks to Prof R Moorhead's blog on Post Office / Horizon)

---

Any questions?



---

# Not a Howden client?

[Click here](#) to request a  
quote form and one of our  
team will give you a call.

# HOWDEN

Howden is a trading name of Howden Insurance Brokers Limited, part of Howden Group Holdings. Howden Insurance Brokers Limited is authorised and regulated by the Financial Conduct Authority in respect of general insurance business. Registered in England and Wales under company registration number 725875. Registered Office: One Creechurch Place, London, EC3A 5AF. Calls may be monitored and recorded for quality assurance purposes.