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The Growth In Regulation of Solicitors
Inadequate Professional Services Complaints
Disciplinary Investigations
Prosecutions In The Solicitors Disciplinary Tribunal

A Pocket Guide

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Introduction

“I am an honest and efficient solicitor, committed to my clients. Why do I need to read anything about inadequate service complaints or disciplinary investigations?”

The short answer is: because

- there is more regulation than there used to be;
- it is steadily increasing in scope;
- it is being amended more often;
- it is being more rigorously enforced;
- its scope and complexity has increased still further as a result of the Legal Services Act 2007 (“LSA 2007”). In particular, since 31st March 2009 the regulations cover not just the partners or the solicitors but all the employees;
- despite the Solicitors Code of Conduct 2007, there is still confusion on some issues as to what is permitted - for example in relation to referral fees, and commission – with a corresponding increase in the possibility that you and the SRA will disagree as to what is and is not a breach;
- all of this means that compliance is now an issue for all solicitors in a way undreamed of a few years ago. In consequence, there is a much increased chance that you will have some interaction with the regulatory authorities during your practising lifetime.

- (i) The existing Inadequate Professional Services regime is to be abolished and replaced, probably in 2010, by a new complaints system, administered by a new Office for Legal Complaints, which will replace the Legal Complaints service. The office of Legal Services Ombudsman will be abolished and replaced by a new OLC ombudsman. The details of the new system are not yet available;
- (ii) in relation to disciplinary proceedings there are two different regimes depending on the date of the conduct in question. The Solicitors’ Practice Rules 1990, together with the common law as to misconduct, apply to conduct prior to 1st July 2007, and the Solicitors’ Code of Conduct 2007 applies to conduct after that date;
- (iii) the disciplinary landscape has been substantially changed by provisions which came into effect on 1st July 2009.

It is respectfully suggested that every solicitor needs to have an outline understanding of the complaints, disciplinary investigation and prosecution systems. To know in advance how the systems work may reduce, at least to an extent, the worry and stress of a complaint or an investigation. Like all systems, they have their own special features. Reading up about them for the first time after trouble has arisen is not ideal. Perhaps even more importantly, there are some aspects of the SRA’s modus operandi in disciplinary investigations – for instance, in relation to interviews – which involve dangers for the unwary. Forewarned is forearmed.

This guide is intended as a summary of the regulatory structure and how it works in practice. A comprehensive treatment of the subject, together with relevant source materials, is included in The Solicitors’ Handbook (current edition 2009, to be updated annually) by Andrew Hopper QC and Gregory Treverton-Jones QC. The most comprehensive authority on all the law relating to solicitors is, of course, Cordery on Solicitors.

The contents are arranged as follows (although it is best, if time permits, to read the whole guide, each part is free-standing):

Part 1: (p5) A brief history of regulation, tracing its accelerating growth since the mid-1980s.

Part 2: (p10) The current Inadequate Professional Services complaints system administered by the LCS;

Part 3: (p16) The major differences between the Solicitors Practice Rules 1990 and the Solicitors Code of Conduct 2007, which came into force on 1st July 2007, in particular the changes to the concept of misconduct and rule-breach.

Part 4: (p20) The powers of the Solicitors Regulation Authority (SRA) and how it exercises them;

Part 5: (p23) The test for dishonesty applied in the Solicitors' Disciplinary Tribunal, as recently clarified by the High Court. Dishonesty is the most serious disciplinary issue a solicitor faces, since if found proved it will almost inevitably result in striking off.

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Part 1: The growth of regulation over the last 25 years

(1) Prior to 1985

Few solicitors have ever taken complaints lightly. However, prior to 1985, a solicitor not engaged in deliberate wrongdoing did not need to expend very much time or energy in relation to disciplinary regulations or complaints by clients:

- The Solicitors Practice Rules were relatively limited in scope. All a practitioner needed to know about conduct, in the form of the rules and the published guidance, was in The Guide to the Professional Conduct of Solicitors, eight editions of which were published between 1960 and 1999. If uncertainty persisted after reading the Guide, the Law Society's ethics helpline at Redditch was available for authoritative answers;
- Rule-breach and misconduct were dealt with by prosecution before the Disciplinary Committee of the Law Society, replaced by the Solicitors Disciplinary Tribunal (SDT) in 1975, which adjudicated on misconduct by applying the common law as to what constitutes "conduct unbecoming a solicitor". Such conduct is defined, essentially, as conduct not acceptable to members of the profession generally;
- Aggrieved clients, if the matter could not be resolved informally, had no way to pursue their complaint other than by the risky and expensive course of bringing an action for professional negligence.

(2) 1985-2006

That situation changed radically from the mid-1980s, mainly as a result of the orthodoxy which has held sway since that time that professionals, including lawyers, should be more

readily answerable to clients complaining of bad service and should not be directly responsible for the regulation of their own disciplinary affairs. Other changes have brought further compliance and regulatory issues in their train.

The main developments between 1985 and the end of 2006 were as follows:

- In 1985 a new complaints procedure was enacted, much more easily invoked than the right to bring a negligence action: a jurisdiction vested in adjudicators to give limited financial compensation to clients with justified complaints of **Inadequate Professional Service (IPS)**.
- In 1990 the Courts and Legal Services Act 1990 re-enacted the IPS regime and also created the office of **Legal Services Ombudsman** to deal with complaints from those dissatisfied by the outcome of IPS investigations;
- In 1990 a new set of practice rules, **Solicitors' Practice Rules 1990** came into force, soon supplemented by a number of new codes: the **Solicitors' Introduction and Referral Code 1990**, the **Employed Solicitors' Code 1990**, the **Solicitors' Separate Business Code 1994**, the **Solicitors' Costs Information and Client Care Code 1999** and the **Solicitors' Publicity Code 2001**;
- The **Solicitors Accounts Rules 1998** restated the accounting rules;
- The Financial Services and Markets Act 2000 regulates financial services. By Part XX, persons regulated by designated professional bodies, including the Law Society/SRA, are exempted from the scope of FSMA 2000. The vast majority of solicitors are not involved in mainstream investment business; they are therefore in a position to take advantage of the exemption. But a condition of such exemption

is compliance with the relevant rules of the Law Society. These are the **Solicitors Financial Services (Scope) Rules 2001**, which specify the regulated activities which solicitors may (the "exempt regulated activities") and may not undertake if they wish to take advantage of the Part XX exemption, and the **Solicitors Financial Services (Conduct of Business) Rules 2001** which regulate the way in which the exempt regulated activities may be carried on.

- The advent of LLPs in 2002 brought regulations giving a discretionary power, now exercised by the SRA, to refuse recognition, or revoke recognition, if satisfied that a member is (or has become – perhaps as a result of disciplinary proceedings) *"not a suitable person to be engaged in the direction or ownership of a recognised body, by reason of that person's character, conduct or associations..."*, or if *"...for any other reason the SRA thinks it proper in the public interest not to recognise the body"*. This raises the possibility that the SRA could refuse to renew, or revoke, an LLP's recognition because a member of the LLP has been found guilty of misconduct (although there is no recorded instance of this happening, and if it did there is an appeal procedure);
- Money laundering safeguards, currently in the **Money Laundering Regulations 2007**, and associated customer due diligence requirements have added a new area of compliance which affects every solicitor;
- Conditional fee agreements, as well as creating a new class of satellite litigation over enforceability, have thrown up conduct issues, especially in relation to commercial intermediaries, panel scheme arrangements, After the Event (ATE) insurance, and commission;
- The controversy over payment of referral fees, which continued after it became permitted by amendments to SPR3 in March 2004, has produced among other

things a nationwide investigation of firms by the SRA covering not only current compliance but also payment of referral fees prior to March 2004;

- There have been a number of highly publicised prosecutions arising from the Miners Compensation Schemes.

(3) 2007 to date

Over this period the pace of change has accelerated:

- In January 2007 the inherent theoretical tension between the Law Society's role as a representative of the profession – the trade union function – and as a disciplinary body - the regulatory function - was resolved by the creation of a new regulatory authority, the **Solicitors Regulation Authority (SRA)** to police the profession. The SRA is formally part of the Law Society but in practice is completely independent. Thus since January 2007 the Law Society has been split into three independent organisations; the Society itself, based in Chancery Lane, which retains the “trade union” functions; the SRA, which is the professional regulator; and the **Legal Complaints Service (LCS)** which deals with IPS complaints;
- On 1st July 2007 after a gestation period of several years the **Solicitors Code of Conduct 2007** (“the 2007 Code”) came into force. The 2007 Code includes within it the provisions (amended in some instances) of the Codes ancillary to the SPR 1990 mentioned above, which are repealed. Obviously, a solicitor's acts must be judged according to the rules in force at the time when they were carried out. For some time to come, therefore, the pre-1st July 2007 regime will be important.
- Under the provisions of the **The Legal Services Act 2007**, most of which is now

in force, the basis of regulation has fundamentally shifted:

- (i) **“Recognised Bodies”** – a compendious concept embracing firms, LLPs and LDPs – introduced by the Administration of Justice Act 1985 - are now regulated by the SRA under the provisions of the **SRA Recognised Bodies Regulations 2009**, which came into force on 31st March 2009;
 - (ii) the requirement on every solicitor to hold a current practising certificate is maintained and is now governed by the **SRA Practising Regulations 2009**, which came into force on 1st July 2009; but in addition, a sole practitioner must obtain authorisation by the SRA to be a **“Recognised Sole Practitioner”** by way of an application under Reg 4, which the SRA can refuse “.....if it is not satisfied that the applicant is suitable to run and manage a business providing regulated legal services or if for any other reason the SRA reasonably considers that it would be against the public interest to grant recognition” .
- On 31st March 2009 the 2007 Code was amended to provide that it applies not only to solicitors, but also to recognised bodies and all employees of recognised bodies or sole practitioners (see Rule 23 of the Code);
 - On the same date the Solicitors Accounts Rules 1998 and the other rules relating to solicitors were amended to the same effect.
 - On 1st July 2009 the historic jurisdiction of the Master of the Rolls over regulation of the profession, indicated by his title and contained in his conduct of admissions and the various rights of appeal to him in respect of applications by solicitors, came to an end. The MR is now, as it were, in “run-off”; he will only determine the small number of cases pending on 1st July. The matters he previously determined will

now be heard by the Administrative Court in the High Court;

(4) **Forthcoming changes to the regulatory structure**

Provisions of the LSA 2007 expected to be implemented in 2010 will further change the regulatory structure. As previously mentioned

- the entire IPS regime, and the Ombudsman as presently constituted, will be abolished and replaced by a comprehensive scheme with its own rules and procedures, and new Ombudsman provisions. This will be administered by a new body, the **Office for Legal Complaints** (OLC) which will replace the Legal Complaints Service.
- a new **Legal Services Board** will be “regulating the regulators” ie the SRA and the OLC.

Part 2: The present Inadequate Professional Services regime

The term “inadequate professional services” is not defined in the relevant statute (now section 37A and Schedule 1A to the Solicitors Act 1974, inserted by the Courts and Legal Services Act 1990; the jurisdiction was originally created by the Administration of Justice Act 1985).

However, IPS awards are made by LCS adjudicators if the adjudicator considers that the professional services provided by a solicitor have, in any respect, not been of the quality which it is reasonable to expect of him as a solicitor.

The course of an IPS investigation is as follows:

1. The complaint

Every firm is obliged to operate a satisfactory complaints handling system (2007 Code rule 2.05). Many IPS matters begin when a client has operated that system but is still aggrieved at the resolution and so contacts the LCS. However, some clients go direct to the LCS.

2. The LCS caseworker

Every complaint is allocated to a caseworker. Caseworkers receive legal training but are not necessarily legally qualified. They tend to see themselves as representing the interests of complainants – who are referred to as “customers” – rather than as objectively adjudicating between complainant and firm.

The caseworker’s aim is to reach a conciliated settlement. If the firm’s complaints procedure has not been used the complainant will be encouraged to use it as a first step. If that fails to resolve the matter, there will be a dialogue between the caseworker and the firm, directed to achieving settlement, in which the caseworker will often lean hard on the firm. The caseworker may ask the firm for further information. Solicitors are obliged by rule 20.05 of the Code to deal with the LCS in an open prompt and co-operative way. There is also a statutory power to compel production of documents and information, enforceable if necessary by intervention.

3. The caseworker’s conclusions and the firm’s response

If the dialogue has not resulted in settlement, the caseworker sets out his or her conclusions and recommendations in a letter to the complainant, copied to the solicitor. Both have 14 days to respond. When a firm considers that there is no just ground for complaint it should respond robustly to the caseworker’s conclusions, setting out its arguments in full even if, as is often the case, they have been set out in correspondence previously.

This is all the more important where the caseworker considers that the facts raise a **conduct issue**; for in that event he is likely to refer that issue to the SRA. This can set off a disciplinary

investigation which is quite separate from the IPS complaint, which may have been conciliated or adjudicated on in the meantime. If there is any chance at all of this happening the firm's arguments must be set out in its response to the caseworkers conclusions letter, otherwise the SRA may not, on referral, be aware of what those arguments are. Going back to the IPS complaint, one would have thought that the next step of argumentation after responses to the conclusions letter – that is, replies by the complainant to the firm's response, and replies by the firm to the complainant's response – would be an established part of the system. They are not. The caseworker's conclusions letter states that there is no guarantee that they will be considered.

4. The adjudication

The adjudicator considers the matter and decides whether or not the complaint of IPS is made out.

This is done on paper. There is a theoretical possibility of an oral hearing, in that it is open to the firm to request one. However, if the adjudicator bona fide considers that the disputed issues can fairly be resolved without an oral hearing (which he invariably does) any attempt to challenge the decision by way of judicial review will fail: see *Regina (Thompson) vs Law Society* [2004] 1 WLR 2522. Hence in practice, there is never an oral hearing.

It was also established in *Thompson* that the IPS regime does not engage Article 6(1) of the European Convention on Human Rights (right to a fair trial) because it does not "determine [the solicitor's] civil rights and obligations". Given the jurisdiction to order the solicitor to repay his fees, this conclusion is somewhat surprising.

If the adjudicator finds the complaint proved, he or she can do all or any of the following:

- (i) disallow some or all of the firm's costs and direct repayment of any costs which the complainant has paid;

- (ii) direct the firm to rectify an error at its expense;
- (iii) direct that the firm take such other action in the interests of the complainant, at its expense, as may be specified;
- (iv) direct payment of compensation of up to £15,000 (increased from £5000 on 1st January 2006);
- (v) direct the firm to pay the LCS costs of investigating the complaint; the current practice is to cap this at £840;

5. Amount of awards.

The most common IPS awards are a reduction or disallowance of costs or an award of compensation; sometimes both. Costs are reduced or disallowed in cases where the inadequate service has meant that what the complainant paid the firm to do has not been done, or not completed. Compensation is awarded in respect of two elements; financial loss, and distress and inconvenience. The financial loss is quantifiable and depends on the facts. Awards for distress and inconvenience depend on which of the LCS's four categories of distress and inconvenience the case falls into:

- modest - 90% of awards in this category are £250 or less
- significant – 80% of awards in this category are between £200 and £500
- serious – 80% of awards in this category are between £500 and £1000
- extremely serious – awards exceed £1000

The average compensation award to date has been £450.

6. Enforcement and appeals

Awards are made against the firm, and bind all partners in the firm (or members of the LLP) at the time of the inadequate service. Thus financial liability for the actions of a “rogue” partner, of which the other partners had no knowledge, has to be met by all the partners. However, IPS awards are an insured risk under PI insurance.

There was an automatic right of appeal by either party to a panel of adjudicators, but this was abolished in May 2005.

In practice, the SDT acts as a de facto court of appeal by reason of the fact that if the firm does not comply with the adjudicator’s direction this is treated as misconduct, and the SRA will make a complaint to the SDT which has the power to order that the IPS direction be treated for enforcement purposes as if it was contained in an order of the High Court. It was established in *R(Thompson) vs Law Society* [2004] 1 WLR 2522 at para 99 that in these circumstances the SDT has jurisdiction to consider the reasonableness of the IPS direction. The SDT can decline to make the enforcement order – in which case the IPS award is a dead letter because it has been expressly found to be unreasonable – but, though there has been no ruling on this, probably cannot increase it.

This de facto appeal route is unsatisfactory since it involves deliberate non-compliance with the adjudicator’s award without any procedural protection in the form of a stay pending appeal. In one recent case (the **Raleys** mineworkers’ compensation case, heard in January 2009) the SRA alleged that non-compliance of this nature was in itself misconduct, although this was dismissed by the Tribunal. Therefore a firm wishing to take this course must explain its position fully and promptly to the SRA, and perhaps pay the disputed sum into a separate bank account so as to demonstrate its bona fides.

7. Judicial Review

An IPS award can also be challenged by way of Judicial Review. This is expensive, and the hurdles to be cleared in order to succeed in a JR application are high. However, the procedure does at least give the solicitor the initiative (instead of having to wait until the SRA or complainant begins enforcement proceedings in the SDT) and may have increased attractions since the decision of the Court of Appeal in *Baxendale-Walker vs Law Society* [2007] EWCA Civ 233, the effect of which is that (i) it is much more difficult than previously for a successful respondent solicitor to recover his costs in the SDT (ii) a successful respondent may even have to pay some or even all of the costs of the SRA (see Part 7).

8. The Legal Services Ombudsman (LSO)

The LSO will entertain a complaint by a former client who is dissatisfied with the outcome of an IPS investigation, but not by a firm which is dissatisfied. The complainant should do this within 3 months of the outcome complained of, though the LSO can extend this. Though the LSO has jurisdiction to consider the merits of the original complaint, this has never been exercised; the LSO confines herself to the manner in which the complaint was investigated. If LSO considers that the complaint to her has no merit she will dismiss it. If she considers, on the other hand, that the original complaint to the LCS was mishandled in some significant fashion, she can recommend either that the LCS compensate the complainant, or that the LCS reconsider the original complaint. The latter may lead to reconsideration by the adjudicator panel, or the investigation having to start again.

Part 3: Disciplinary investigations: the differences between the two conduct regimes

(1) The old regime: conduct prior to 1st July 2007.

As regards any conduct which took place before 1st July 2007 the old regime applies, comprising

- (i) the SPR 1990;
- (ii) the ancillary Codes listed above;
- (iii) the published guidance collected in the 8th Edition of the Guide to the Professional Conduct of Solicitors (1999);
- (iv) the further guidance, still available online, given by the Law Society between publication of the 8th Edition and 1st July 2007, and
- (v) the common law as to misconduct – usually referred to as “conduct unbecoming a solicitor”, covering any conduct worthy of disciplinary sanction but not covered by any specific rule.

Note that:-

- Breach of the rules (including the ancillary codes) is generally less serious than misconduct.
- There is one exception to that: breach of SPR 1, the “basic principles”. Conduct which constitutes a breach of SPR 1 is likely to amount to misconduct;
- Many forms of misconduct do not involve dishonesty, but dishonesty is always misconduct.

What is common-law misconduct? It is easier to recognise than to define. According to

Cordery on Solicitors, misconduct is that which the Solicitors’ Disciplinary Tribunal, representing the views of the profession, and the judges, regard as misconduct. In terms of circularity this is on a par with the famous definition of a Deacon as “a person who performs diaconal functions”.

In *Ridehalgh v Horsefield* [1994] CH 205 the Court of Appeal described professional misconduct as “conduct which would be regarded as improper according to the consensus of professional, including judicial, opinion...whether it violated the letter of a professional code or not”.

This is about the clearest definition yielded by the authorities. The reason why no greater precision is possible is that the definition of misconduct reflects the perceptions and standards of the profession, which change over time, so that a once-and-for-all comprehensive definition is impossible. This flexibility has clearly been a virtue. It will not be available in the new regime.

(2) The new regime under the 2007 Code: conduct post 1st July 2007.

The 2007 Code is intended to create a comprehensive regulatory framework for all aspects of a solicitor’s conduct. The concept of common-law misconduct has no place in this scheme.

Rule 1 sets out 6 “core duties”. Rules 2-25 arise from the core duties and give more detail on the minimum standards required to comply with them. Guidance produced by the SRA is provided after each of the rules. Note that the guidance notes have recently been invested with increased status. Originally it was clearly stated that the guidance was non-mandatory and not part of the code. But the new edition of the Code (from 31st March 2009) adds the following: “*However, solicitors, and others subject to the rules, who do not follow the*

guidelines may be required to demonstrate how they nevertheless complied with the rule". For "may" it is prudent to read "will". So now, if you do not comply with the guidance you are likely to be treated by the SRA as guilty until you prove yourself innocent. It is essential, therefore, to comply with the guidance.

The Solicitors' Handbook 2008 described the Code as "...a blend of the familiar, the slightly different, and the occasionally very different". For a full survey of the code, with explanations, see Chapter 3 of the 2009 Handbook. This guide confines itself to the following noteworthy features:

- (i) Rule 1 – setting out the core duties – is framed without limitation of scope, as opposed to the old SPR 1 which refers to acts "in the course of practising as a solicitor". The guidance at 10 expressly refers to "behaviour within or outside your professional practice". This is to reflect one of the aspects of common-law misconduct, which has always embraced behaviour in a solicitor's personal life¹;
- (ii) Rule 2.06 – treatment of commission received: the rule says that provided certain conditions are met the solicitor can retain it. The guidance at paragraph 57 adds another condition – that it must be applied, effectively, for the pecuniary benefit of the client – which negates the rule. The view of the authors of the Handbook is that the words of the rule must prevail. It is understood that consideration is being given to amending the guidance, but this has not so far been done;
- (iii) Rule 5: the supervision and management responsibilities are framed in a new way. Each firm has to have a person who is "qualified to supervise", and the scope of the

¹ See eg *Re a Solicitor* (8th February 1996: SO/3288/95): leaving the scene of a serious accident on a motorway in which the other car was left upside down on the other carriageway, going across some fields to a pub and consuming four pints, and later some whisky, before being arrested: behaviour described by Judge as "disgraceful"; SDT's penalty of indefinite suspension upheld.

- (iv) supervision and management responsibilities, as listed in rule 5.01 (1) is comprehensive. Rule 6.03: each firm must adopt an "appropriate" equality and diversity policy. There is no model policy. It would clearly be helpful if there was.

The 2007 Code was formulated with the best intentions. In some ways it could be seen as an improvement on the accretion of rules, ancillary codes, guidance in the old Guide and on the Law Society website, and case-law on misconduct which preceded it.

However, there are two major areas of concern.

First, the 2007 Code imposes absolute liability. This is the effect of its wording, and it is believed that that is the view of the SRA. Many of the provisions of the 2007 Code cover matters which were previously governed by the principles of common-law misconduct, which involved consideration of the level of personal fault and the degree of mischief caused as part of the determination whether or not the behaviour concerned was such that no reasonable solicitor would regard it to be acceptable; ie whether or not there had been misconduct. Even the specific provisions of the Solicitors Practice Rules 1990 were not treated as imposing absolute liability (as opposed to the Solicitors Accounts Rules which have always been so treated).

Such considerations no longer apply. The conduct in question is either a breach or not a breach; no specific intent or other mental element will be required (save, of course, in the case of an allegation of dishonesty). Hence the issue for the SRA caseworker, the adjudicator or the SDT will be simply whether or not the conduct is a breach of any of the provisions of the Code.

The danger of this is that solicitors or their employees may find themselves being charged with breaches of the Code in circumstances in which solicitors would not have been

convicted or even charged under the old regime.

Secondly, because it has to cover everything, including ongoing changes in standards and attitudes within the profession, it is inevitable that the Code, and the guidance, will require regular amendment. Indeed, Rule 18 had to be amended one month after the Code came into force and after printed copies had gone on sale to the profession, to record the new obligations imposed by the Home Information Packs legislation.

The SRA does take steps to inform the profession about the 2007 Code; for example the “regulation roadshows” referred to in an article in the Law Gazette on 10th December 2008 by Peter Williamson, the Chairman of the Board of the SRA. The SRA’s Practice Standards Unit visits firms in order to advise and assist them to achieve compliance, and these visits are pastoral, rather than investigative.

It is unrealistic to expect the SRA to bring every amendment to the attention of the profession. Firms will, nonetheless, be expected to be aware of every amendment. It is suggested that the safest way to deal with this is to make sure that someone in the firm has the responsibility of keeping a continuous eye on the SRA website, acquainting him or herself with every amendment posted there and circulating any significant matters.

Part 4: The powers of the SRA and how it exercises them

Obviously there is a need for a strong and effective regulator to preserve what has been described in the Court of Appeal as the profession’s most valuable asset – its reputation for integrity and trustworthiness. It is pretty much unarguable, too, that in order to ensure that the profession retains the trust of the public the regulator has to be completely independent.

But complete independence carries its own dangers. First, the obverse of “strong and

effective” is often experienced by solicitors as “harsh and unrealistic”. While the nature of the process inevitably predisposes a solicitor under investigation to feel that the SRA is being overly zealous, there is plenty of anecdotal evidence that these strictures are sometimes justified.

Secondly, as with any independent organisation, there is a tendency towards “mission creep” – the accretion of greater size, status, and power. And, as with many policing authorities, a culture may arise in which those policed are regarded with scepticism and cynicism.

According to the Chairman of its Board, in the article above referred to, the SRA is dedicated to exercising its powers fairly and proportionately. It is obviously sensible and realistic to make sure that a body exists whose remit includes supervising the SRA to ensure that this objective is realised. There has not previously been such a body. For the future, the Legal Services Act 2007 charges the new Legal Services Board with “regulating the regulators” – ie regulating the SRA and the OLC. The LSB is not yet functioning.

It should always be borne in mind that while it has, and exercises, a pastoral role, the SRA is first and foremost a policing authority. Arguably, it is in the nature of the beast that it will tend to prioritise the pursuit of solicitors who are getting it wrong over the task of helping solicitors to get it right. This certainly seems to be the case in relation to referral fees; much time and effort has been spent by the SRA pursuing solicitors for breaches, some of them very technical, of the post-March 2004 rules and their successors in the Code in relation to referral fees; and yet there has been no compliance pack – which could have been developed at a fraction of the cost – for solicitors to use so as to ensure that they are compliant. See as to this the article by the authors of the Solicitors Handbook in the Law Gazette, 18th November 2008.

You can still “ring Redditch” for guidance on conduct and ethics questions. But beware:

the official position of the SRA is that for the purpose of any investigation or adjudication it is “not bound” by any opinion or advice given by its own staff on the ethics hotline. So the fact that you followed the advice of the SRA itself will not necessarily protect you from disciplinary action. It may even be (though this is not clear) that your phone call itself will precipitate an investigation if it is thought to reveal a “regulatory issue”.

The only statutory provisions “regulating the regulator” are subsections 28(2) and (3) of the LSA 2007:

- “(2) *The approved regulator must, so far as is reasonably practicable, act in a way*
(a) which is compatible with the regulatory objectives, and
(b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.
- (3) *The approved regulator must have regard to*
(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
(b) any other principle appearing to represent the best regulatory practice.”

These are not particularly onerous requirements; and the statute imposes no sanction should the SRA fail to meet them. That is clearly to be left to the LSB. It remains to be seen how the SRA will interpret the statutory obligations, to what extent the LSB’s interpretation will differ from that of the SRA, and what action the LSB will take in that event.

Part 5: The test of dishonesty – applicable to both the old and new regimes

Rule 1.02 of the 2007 Code provides: “*You must act with integrity*”.

Whether under the new regime the SRA charges all acts which it alleges to be dishonest as breaches of Rule 1.02, or continues, as hitherto, to allege dishonesty as an express “add-on” to other charges, dishonesty will continue to be the most important issue in any prosecution in which it is alleged.

After a period of doubt, it has been settled by *Bryant and Bench vs Law Society* [2007] EWHC 3043 (Admin) that in solicitors’s disciplinary proceedings the test to be applied to determine whether a respondent has been dishonest is that set out by the House of Lords in *Twinsectra vs Yardley* [2002] 2 All ER 377:

“ before there can be a finding of dishonesty it must be established that the defendant’s conduct was dishonest by the standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest” (per Lord Hutton in paragraph 27)

There is therefore both an objective and a subjective element.

Note that evidence of good character by testimonials can be relevant to the issue whether or not the respondent has been dishonest, not just to mitigation: *Donkin vs Law Society* [2007] EWHC 414 (Admin).

Since it almost always results in striking off, a finding of dishonesty by the Tribunal is the death-knell of a solicitor’s career. The near-certainty of strike-off has recently been emphasised by the Court of Appeal in *Salsbury vs the Law Society* [2008] All ER (D) 240 (Nov). In that case a solicitor altered the amount of a cheque from a client from £862.50 to £1862.50. It was common ground that he was owed £1000 by the client in addition to the £862.50. The SDT struck him off. The Divisional Court reduced this to suspension for three years, on the basis that he had been entitled to the extra money and that his actions were “at the very bottom of the scale of dishonesty”. The Court of Appeal was having no truck with that. It held that this was a serious

case of dishonesty and the normal consequence must follow. It restored the strike-off.

Part 6: Disciplinary Investigations

These are carried out by the SRA. A set of rules - the **SRA (Disciplinary Procedure) Rules 2009 (“the 2009 Rules”)** was due to come into force on 1st July 2009 but has been delayed until later this year because, it is believed, unanimity has not yet been achieved on the precise drafting. Costs are dealt with by the **SRA (Costs of Investigations) Regulations 2009 (“the 2009 Costs Rules)** which came into force on 31st March 2009.

Essentially, these two sets of rules codify the existing practice of the SRA. There are some changes in terminology. In particular, most people – and this guide – apply the term “disciplinary investigation” to the whole process of interaction with the SRA, usually starting with a forensic investigation. However, “**discipline investigation**” is defined in the 2009 Rules as the process which begins after the Forensic Investigation report is considered by the SRA.

On rare occasions, when there have been multiple complaints, a firm will be investigated by the SRA’s Investigation Casework Team. Whilst serious - they can result in intervention - ICT investigations are not strictly speaking conduct investigations.

(1) Commencement

An investigation can start in one of the following ways:

- (i) a client may complain direct to the SRA;
- (ii) another party (usually an IPS caseworker) may refer a conduct issue to the SRA;

- (iii) a monitoring visit from the Practice Standards Unit of the SRA, which may be the result of the firm’s complaints history, or may be genuinely random, may turn up a conduct issue, which is then referred for investigation;
- (iv) The SRA may launch an investigation of its own volition, in response to intelligence received or some other major regulatory concern.

In the case of a complaint referred from an IPS caseworker or a concern revealed by a monitoring visit, the SRA may not need to undertake a full forensic investigation, because it has enough information already. In that situation the allotted SRA caseworker may go direct to the next stage: writing to the solicitor concerned requesting a formal explanation (see **(4)** below).

In many cases, whatever their provenance, the SRA will launch a **forensic investigation**.

(2) The Forensic Investigation

This is the process whereby the firm is visited by investigators from the SRA who examine minutely its documents and records, and interview solicitors.

Forensic investigations are very thorough. The investigators can stay for several days per visit. There is often more than one visit. The total time taken by the visits may sometimes be measured in weeks. For the solicitor under investigation the process is time-consuming and very stressful.

The investigators will come prepared with information pointing them to specific areas of

concern. They will not share that information or say what the area of concern is (though recent anecdotal evidence suggests that some investigators are now willing to summarise their concerns); but as time goes by it will usually become possible to deduce it.

There is an initial fact-finding exercise (questionnaires are provided in advance) followed by detailed investigation into accounts and client files, and, usually, interviews with the solicitor under investigation. Further requests for information and documents often follow.

When carrying out investigations the SRA has a panoply of powers contained in the new sections 44B, 44BA, and 44BB of the Solicitors Act 1974, inserted by the LSA 2007. In place of the old power to require production of all relevant documents, the SRA is empowered (i) to require the production of information as well as documents, (ii) to require that to be done by the employees of solicitors as well as solicitors, (iii) to require solicitors or their employees to whom notice is given to attend at a specified time and place to provide an explanation of any information or documents produced, and (iv) to apply to the High Court for any such orders against persons other than the solicitors and their employees. Two new criminal offences have been created by section 44BC - of falsifying, concealing or destroying relevant documents when an SRA investigation is in progress or in prospect, and knowingly or recklessly providing false information. Both are punishable by up to two years' imprisonment.

Note the provisions enabling the investigators to require employees as well as solicitors to produce information and documents and to be interviewed. This is a logical corollary of the extension of the 2007 Code to employees on 31st March 2009 (see Part 1 above); but if full use is made of these powers it will constitute a major change to previous practice. In this potentially very sensitive area it is not clear, as yet, how investigators will proceed.

Every solicitor is obliged by rules 20.05 and 20.08 of the Code to deal with the SRA in an open, prompt and co-operative way, and promptly comply with all requirements made by the SRA for production of documents, information, or authorisations to interview clients or staff, or inspect any of the firm's records or other documents in the custody of other institutions, eg banks. Failure to comply is not an option, since that invokes the powers of intervention.

It is important not to get hustled. The investigators are entitled to demand prompt compliance but not instant compliance. You can consider and take advice about requests for information and documents before complying, provided you do so without delay. Investigators should not object to this. Nor should they object, where the situation is complex or serious, if you ask for clarification of their request in writing.

Investigation interviews are a very important part of the investigation process. There may be more than one interview, of more than one solicitor or member of staff. There will always be a **final interview**, at which the investigators ask about the matters which have been revealed by the investigation to be of the most concern.

The answers given in the interviews may, and often do, become the cornerstone of the prosecution case in the SDT. Despite this, there is a notable lack of procedural protection for interviewees:

- (i) the interview is not under caution, and there is no requirement for the investigators to convey to the interviewee in any other way the use which will be made of the interview record and its potentially vital importance;
- (ii) there is no consistent practice as to how interviews are recorded. Sometimes they are digitally recorded; this is the best option. Often the investigators make

- (iii) handwritten notes which may not be very full; there is no provision for the interviewee to read over or sign the notes at the time of the interview or to check their accuracy in any way. Some of the answers given will be paraphrased in the FI report, but the text of the notes is unlikely to be exhibited to the FI report and the interviewee may not see them until months later, and then only if the investigator makes a statement in a contested SDT prosecution;
- (iv) the questions will have been carefully prepared in advance by the investigator. They may be searching and hostile. They may invite the interviewee to make admissions of breach (eg “would you agree that in doing that you preferred your interests to the interests of your client?”). But the interviewee does not know exactly what is under investigation, and may have been required to attend the interviews at short notice;
- (v) detailed questions may be asked about particular case files without an opportunity necessarily being afforded for the interviewee to look at the file before answering;

Thus in relation to what is often a pivotal part of the investigation, there is no protection for the interviewee at all. This is in marked contrast to the requirements of criminal law relating to interviews of suspects under caution, which if not followed render the evidence of the interview inadmissible.

There are no such safeguards in relation to investigation interviews. Nor, as a corollary, is there any mechanism for challenging the admissibility of the interview record. The SDT applies the civil rules of evidence, not the criminal rules. So an equivocal remark made by an exhausted and frightened interviewee which has been recorded in its more incriminating interpretation, will be read by the Tribunal. Evidence from the interviewee at the Tribunal hearing that it has been inaccurately recorded (that is, if the interviewee has a sufficient recollection to be able

make the allegation) will of course be entirely unsupported and may well not be accepted.

(3) The Forensic Investigation report (“the FI Report”) and the decision on disposal

The FI report is produced after the investigation and embodies its results. It is usually a detailed and substantial document with bulky appendices. Though the FI report does not contain specific charges, it sets out any matters of rule-breach and/or misconduct which the inspectors have found. The documents relied on by the investigators in support of their findings are appended.

The SRA then considers the FI report. In about 50% of cases it decides not to take any further action. In those cases the matter ends at this point.

In the remainder of cases, the SDT decides to institute a conduct investigation – in the terminology of the 2009 Rules a “**discipline investigation**”.

(4) The caseworker: request for a formal explanation

Whatever the provenance of the complaint - whether by direct referral from an IPS caseworker, the Practice Standards Unit, or by way of an FI report – if the decision is taken to begin a discipline investigation the matter will be referred to an **SRA caseworker**, who may or may not be legally qualified.

The caseworker then writes an **initial letter** to the individual solicitor concerned (or, if the complaint relates to a number of solicitors, to the senior partner of the firm or the designated members of the LLP, asking that the reply be on behalf of all the individuals concerned) enclosing the FI report, setting out the matters which he has identified as requiring formal explanation, and asking for a written explanation to be provided.

The letter will give information about the Solicitors’ Assistance Scheme. This is an organisation with about 80 members, independent of the Law Society and the SRA, which gives advice and assistance on disciplinary, partnership and employment issues. The initial

² There are indications that the SRA’s support of this organisation is to end, so the reference to the SAS may not be in these letters in the future. 29

interview is free of charge.²

The letter asks for an explanation to be provided within 14 days. You can usually get an extension of this timeframe if you explain to the caseworker why more time is reasonably needed. An adamant refusal to grant more time indicates that the matter is being treated very seriously, and may mean that the caseworker has concluded that the SRA's powers of intervention have arisen (prior to 31st March 2009 caseworkers were required to inform the solicitor of this, but now they are not). In that event you should take legal advice immediately.

(5) Your written explanation

It is essential to take great pains over drafting this. Though there is provision for further responses before the matter is disposed of, as explained below, it is the first written explanation which is the most influential with the caseworker. It is, therefore, the best and probably the only shot you have at convincing the SRA that no further action, or a very low-level regulatory response, is appropriate. Every effort should be made to answer the FI report point for point, exhibiting all relevant documents.

With appropriate diffidence, it is suggested that it may be advisable to seek specialist assistance in drafting the explanation.

(6) The caseworker's reaction to the explanation

The caseworker has the following options, in ascending order of seriousness:

- (i) decide that there are no grounds for any further action. This, of course, is the primary objective of your written explanation;
- (ii) decide that though there have been errors or rule-breaches they are not serious

enough to justify referral to an adjudicator. In this event a "letter of advice" will be sent which identifies the fault but confirms that no action will be taken. The letter will stay on the record of the solicitors concerned;

- (iii) decide that the matter should be referred to adjudication. This is the next step in the process.

(7) Referral to adjudication: the caseworker's report

If the caseworker decides to refer the matter to adjudication he will prepare a caseworker's report. **The caseworker's report** is based on the FI report (if there is one) but is a different document. It exhibits the FI report and the written explanation received in response to it. The text of the report will (a) set out the facts, (b) in a section usually headed "Issues" identify the issues, state the caseworker's reasoning and conclusions as to what rule-breach and/or misconduct has occurred, and make recommendations to the adjudicator. The recommendation may be

- (a) that a particular issue or issues should be resolved in favour of the solicitor and no action taken;
- (b) (in respect of investigations commenced before the 2009 Rules come into force) that there should be a reprimand or severe reprimand;
- (c) (in respect of investigations commenced after the 2009 Rules come into force), that the SRA should exercise the power given to it by sections 44D (2) and (3) of the Solicitors Act 1974 (inserted by the LSA 2007) to give the solicitor a written rebuke and/or direct him to pay a penalty not exceeding £2000. The caseworker's

recommendation that the adjudicator should do this is a “**SRA finding**” as defined by the 2009 Rules rule 1(11) and the caseworker is empowered by rule 7(1) to make it. There is a right to appeal to an adjudicator against the recommendation (rule 9);

- (d) that the matter should be referred to the SDT for prosecution ;
- (f) that intervention should be considered.

The caseworker’s report is sent to the solicitor under investigation, and he is invited to respond in 14 days (again with some leeway in the ordinary case).

Receipt of the caseworker’s report is a dispiriting moment; it means that despite your best efforts at explanation, the process is now proceeding to the next stage. The list of rule breaches and/or misconduct can be and often is different from that which you thought you were being asked to explain. The recommendations are included so as to make clear to you what you face and give you a chance to make a response; but the existence of the recommendations can make it seem as if the adjudicator is being told what to do by the SRA, so that the result of the adjudication is a foregone conclusion.

In addition to the recommendations, the caseworker can also at this point recommend restrictions on your practising certificate. This topic is dealt with next.

(8) Conditions on practising certificate.

The grant, refusal and imposition of conditions on practising certificates are now governed by the **SRA Practising Regulations 2009** which came into force on 1st July 2009. In Reg 3 there is a long list of circumstances in which the SRA has a discretion to refuse renewal or to impose conditions on the certificate. One of these is that “(b) *the SRA has*

requested an explanation from the applicant in respect of a matter relating to the applicant’s conduct and has notified the applicant in writing that it does not regard the applicant’s response, or lack of response, as satisfactory”

In the regime that preceded the Regulations, the caseworker could in his report state that the SRA’s view was that the solicitor had failed to give a sufficient and satisfactory explanation in respect of a conduct matter, and could recommend that the adjudicator make a resolution to that effect pursuant to section 12(1)(e) of the Solicitors Act 1974; this had the effect of enabling the SRA to refuse to renew or impose conditions on the practising certificate at the time of the next renewal application. This was called “vesting a discretion”.

In respect of conditions the system now operates more rapidly. As before, it is the caseworker who decides that the response is not satisfactory and recommends that the adjudicator imposes conditions or refuses to renew. But conditions can be imposed immediately; Reg 6 provides that conditions can be imposed “at any time during the practising year”. Although it is not specified in what circumstances this may be done, it is likely that the circumstances are those listed in Reg 3.1, of which the relevant provision for present purposes is that at (b) quoted above.

Reg 6 specifies the purposes for which conditions are to be imposed. Essentially, they are for the protection of the public rather than the punishment of the solicitor; but the effect of some conditions can be onerous. There is a wide range of conditions, including prohibitions on doing specified types of work, prohibition from handling client money, and prohibition from taking on trainees.

The SRA must give 28 days written notice, with reasons, before imposing a condition (though this can be dispensed with if the SRA is satisfied on reasonable grounds that it is in the public interest to do so).

The solicitor can appeal, within 28 days of notification, the imposition of any condition. The first avenue of appeal is within the SRA, to the adjudicator; the courts encourage solicitors to do this first. Otherwise there is an avenue of appeal to the High Court.

It can happen, therefore (and in the writer's experience regularly happens), that at this stage of the investigation a separate process involving conditions on your practising certificate comes into being, which runs parallel with the main disciplinary process, despite the fact that, if the matter has gone for a contested hearing before the SDT, it has not yet been decided whether or not the alleged rule-breach or misconduct has occurred.

(9) Response to the caseworker's report

If the first explanation has been properly drafted there may be little further that can be said in this response. But it is always advisable to check very carefully the differences in emphasis, and sometimes in content, between the FI report and the caseworker's report. The Issues section of the caseworker's report is the most important to address. Any new allegations should be fully answered, with supporting documentation.

(10) The adjudication

This is the stage at which many disciplinary investigations are resolved. There is a pool of about 20-25 adjudicators. They are appointed and remunerated by the SRA, though they are not SRA employees in the full sense of the word. Their independence from casework management was guaranteed by a Law Society resolution in December 1999.

It is important to be clear as to the limits of this guarantee. What is guaranteed is that the

adjudicator has not been involved with the investigation, not that he is independent of the SRA itself. He cannot be; he is appointed and paid by the SRA and is defined in the 2009 Rules as a person not involved in the investigation or preparation of a case who is authorised by the SRA to take disciplinary decisions.

Some of the adjudicators are solicitors, some are not. The only power generally exercised by a panel of adjudicators (two or three) as opposed to an individual, is to authorise an intervention (though an individual can authorise this in very urgent cases). In practice, therefore, the vast majority of adjudication decisions are taken by a single adjudicator.

The adjudicators handle a large number of cases. In 2008 adjudication panels made nearly 600 decisions, while individual adjudicators made 5,790 casework decisions, of which 1,245 related to conduct matters. There is no database of decisions to which adjudicators can refer; they rely on their individual and collective experience. Theoretically there can be an oral hearing before the adjudicator, but in practice requests for an oral hearing are hardly ever granted.

The disposals open to the adjudicator are as follows, again in ascending order of seriousness:

- (i) decide to take no further action. This may be accompanied by a "finding and warning" that the solicitor has been at fault, which will stay on his record;
- (ii) (in addition to the other options) direct the solicitor to pay the cost of the investigation. This is currently calculated in bands from £300 for less than two hours work to £1350 for 16 hours' work plus £75 for each further hour. The costs regime is governed by the 2009 Costs Rules;

- (iii) (in respect of investigations commenced prior to the 2009 Rules coming into force) impose a reprimand or severe reprimand. This stays on the solicitor's record. It is disclosed to the solicitor's senior partner, if there is one, and may at the SRA's discretion be disclosed to any original complainant. It is disclosed to the Ministry of Justice if the solicitor applies for judicial appointment; it is also taken into account to the extent relevant in any future disciplinary investigation or proceedings.
There is a right of appeal, on paper, to a review panel of adjudicators in respect of a decision to impose a reprimand or severe reprimand.
- (iv) (in respect of investigations commenced after the 2009 Rules come into force) impose a rebuke and/or a penalty of up to £2000, and decide to publish the decision if it is in the public interest to do so. This is defined by the 2009 Rules as a "**disciplinary decision**".
- (v) refer the matter for prosecution in the SDT.
To decide whether or not to refer, the adjudicator applies a two-stage test – the **evidential test** (is it more likely than not that a finding of rule-breach or misconduct will be made by the SDT?) and the **public interest test** (is a prosecution in the public interest, or are the allegations too old, trivial, etc?). If both tests are passed the matter is referred.
- (vi) refer the matter to the police (in addition to eg referral to the SDT)
- (vii) resolve to intervene.

Internal appeals against the adjudicator's decision

There is a right of appeal against the imposition of reprimands and severe reprimands, but not in respect of a decision to refer to the SDT. Under the 2009 Rules there is a right of appeal against a disciplinary decision. The appeal lies to an adjudication panel. It must be made within 14 days, and is dealt with on paper (rule 9).

External appeals against adjudicator's decision

By Section 44E of the Solicitors Act 1974, inserted by the LSA 2007, there will be a right of appeal to the SDT against any disciplinary decision made under the 2009 Rules except a decision to rebuke without publicity. The Tribunal has power on appeal to affirm or revoke the disciplinary decision, or to strike off or suspend. There is a further appeal from the SDT to the High Court.

Theoretically, judicial review is available in respect of decisions of the adjudicator, but it is subject to the difficulty, recently considered in *Jain vs Trent Strategic Health Authority* [2007] EWCA Civ 102, that it is inconsistent with the role of a regulator that it should have a duty of care to those it regulates. In *Jain* the Court of Appeal held, in line with earlier authority, that no such duty existed, but the door has not been shut entirely. The fact that there is no duty of care does not absolve the Law Society (by the adjudicator) from the requirement to act reasonably, but obviously makes it more difficult for a judicial review application to succeed.

Judicial review of a decision to refer to the SDT will only be granted in the very rarest of cases.³ The reasoning is that the solicitor will be able to set out his defence at the substantive SDT hearing and if the defence is made out the case will be dismissed.

³ (R (Aurangzeb) vs Law Society [2003] EWHC 1286(Admin))

(9) The fast-track procedure

It is within the power of the SRA to dispense with the adjudication stage altogether and refer the matter to the SDT of its own motion after the caseworker's report is received, if the SRA is satisfied (a) that there is sufficient evidence to provide a realistic prospect of a conviction; (b) that the consequence of a conviction is likely to be striking-off, suspension, a financial penalty exceeding the maximum the SRA can impose, or any other order the SRA is not empowered to make, and (c) that it is in the public interest to make the reference in this way (this is a synopsis of rule 8 of the 2009 Rules, which codifies existing practice).

This power has been little used to date, and it is to be hoped that its use will be confined to the plainest cases – ie those where it is plain from the caseworker's report that referral to the SDT is absolutely inevitable.

(10) Publicity

No publicity is given to investigations. However, in relation to investigations started on or after 1st January 2008 the SRA has a discretion to publish information as to how the investigation is progressing if it considers that it is in the public interest to do so. It is likely that this will be done in cases which have given rise to public concern.

(11) Regulatory settlements

In cases where the solicitor's integrity is not in issue, and the circumstances are such that his compliance with the agreement can be assured, the SRA may be prepared to resolve a regulatory or disciplinary case by means of an agreed settlement.

The agreement will be in writing and will set out the facts, identify the failings admitted by the solicitor, specify the action the solicitor has taken or agrees to take, identify any sanction imposed, and will be published by the SRA unless it is expressly agreed otherwise.

The SRA is under no obligation to consider or negotiate such an agreement.

Part 7: Prosecution before the Solicitors Disciplinary Tribunal

Overview

If the adjudicator decides to refer the case to the SDT, you will be informed of that decision. There will then be a delay, often of several months, while the SRA instructs the Tribunal Applicant (see below) and the rule 5(2) statement is drafted. The next communication you receive will be an Application, a rule 5(2) statement, notification that a case to be answered has been found, and a letter from the clerk to the Tribunal giving a listing date.

Prosecutions in the SDT are usually of individual solicitors (or, now, employees of solicitors) not of firms or LLPs as a whole. The SDT has had authority over recognised bodies since they were created by the Administration of Justice Act 1985, but to date prosecutions of recognised bodies have been rare. With the new emphasis on "entity based regulation" this may change in the future.

Like all disciplinary tribunals, the SDT is a hybrid; part criminal court and part civil. Proceedings before it are not criminal proceedings, yet they are called prosecutions; the SRA has to prove the allegations to the criminal standard of proof (though it has made clear that it would like to substitute the civil standard, as mentioned below); and the consequences for respondents found guilty can be very grave.

It should be borne in mind that in the vast majority (anecdotally, about 97%) of cases which come before the SDT, the facts and documents collated by the SRA clearly reveal misconduct or rule-breach, and the explanations of the solicitor, in initial responses to the investigation or in a statement for the purposes of the SDT prosecution, do not amount to a defence.

The SRA may be receptive to plea-bargain proposals, whereby the solicitor admits some of the allegations, and the others are dropped; but this can in no case be guaranteed. When it does happen, the live issues are before the tribunal are then (i) whether the plea-bargain is acceptable to it, and (ii) the penalty to be imposed. Short of this, there may be scope for discussions about narrowing the issues.

Genuinely disputed cases are, therefore, a small minority. Perhaps for this reason the **Solicitors (Disciplinary Proceedings) Rules 2007** and their predecessors, the 1994 Rules, do not set out in detail the kind of procedural provisions as to statements of case, interlocutory applications, striking out, disclosure, evidence and so forth which are to be found in the civil courts. However, the tribunal has power to give directions, and will do so in regard to these matters if the nature of the case requires it. In cases which are genuinely disputed, therefore, the Respondent is not in general disadvantaged procedurally.

Even in fully disputed cases, however, the hearing can often differ from a trial in the courts. It often happens that the SRA's only witness is the investigator who compiled the original FI report, who is not called to give evidence since the evidence is all in the report in the form of documents whose veracity is not in dispute and factual averments by the witness – eg as to what was said in interview – which are not challenged; so that the live evidence is limited to the Respondent and any supporting witnesses he wishes to call.

Where the facts are fully disputed and witnesses from both sides give evidence the tribunal

will consider the evidence and give judgment in the normal way.

Are “innocent” partners liable?

The SRA is unlikely to bring proceedings against a solicitor merely because he is in the same firm as an (allegedly) transgressing solicitor. But where the Respondent is a partner in a firm, what is the position of other partners who had no direct involvement in the conduct alleged to constitute a breach of the code?

Before the 2007 Code came into force the situation was clear: whether in relation to misconduct or rule-breach, a partner or solicitor was not guilty merely because he was the partner of someone who was guilty. That was because misconduct, and rule-breach, included a subjective element - the accused person had to act consciously and deliberately; at the least he had to have had an awareness of what was taking place.

Arguably the situation is not so clear under the 2007 Code. While a wholly independent “frolic” in breach of the Code by a single partner is most unlikely to bring about prosecution of the other partners, the abolition of the subjective element in establishing liability raises the possibility, at least in theory, that the ambit of prosecution will embrace more partners than previously

This issue was raised, but not determined, in the pre-2007 code case of *Vaughan and Others* 9536-2006, SDT. In that case, all the partners in the firm were prosecuted even though the personal injury work in respect of which the case was brought was the exclusive province of only one of them. This was contrary to what was understood to be the law, as described above; the SRA may have taken this course because the case concerned the miners' compensations schemes, about which it took a particularly stern view. The “innocent” partners applied to strike out the proceedings against them as an abuse of process; they argued that there was no evidence against them. The SRA opposed the application and even argued that the SDT had

no jurisdiction to strike out. In the event the matter was settled, so no ruling was made.

The Tribunal

Members of the SDT are appointed by the Master of the Rolls. They consist of solicitor members (practising solicitors of not less than 10 years' standing), who up until 2009 were unpaid but are now paid, and lay members, who are paid. A tribunal consists of three members, of which two, including the chairman, must be solicitor members (though since 31st March 2009 this is not mandatory). The President of the Tribunal is elected to the post and must be a solicitor member.

The Tribunal is assisted by a Clerk to the Tribunal whose duties are listed in rule 3. Essentially the clerks are responsible for all administration, sit with the Tribunal in hearings, procure that the evidence is recorded, and write the summaries of allegations, evidence and submission which form the major part of the Tribunal's "detailed findings" ie the reasoned judgment.

Procedure

(1) Start of the prosecution

SDT prosecutions are governed by the **Solicitors (Disciplinary Proceedings) Rules 1994** in relation to proceedings commenced (ie Application dated) before 14th January 2008, and by the **Solicitors (Disciplinary Proceedings) Rules 2007** in relation to proceedings commenced after that date. The differences between the two sets of rules are not of major significance for the purposes of this guide. References are to the 2007 rules. The rules have as appendices 7 forms, 4 brief practice directions and a "Policy/Practice Note" about adjournments.

When the adjudicator or adjudication panel resolves to refer the conduct of a solicitor to the

SDT the case is allocated either to an in-house advocate in the Legal Directorate of the SDT or to a solicitor on the panel of solicitors maintained by the SRA. That person becomes the **Applicant**. You are the **Respondent**.

The SDT has jurisdiction to hear a number of applications, some of which are by solicitors rather than the SRA (eg to restore a solicitor to the roll or terminate an indefinite period of suspension). These are outside the purview of this guide. For present purposes, the relevant application is a **Form 1** application, as prescribed by rule 5(1). This is an application that the Respondent (you) "*be required to answer the allegation contained in the statement which accompanies this Application and that such Order be made as the Tribunal shall think fit*".

Rule 5(2) provides that "*The application shall be supported by a Statement setting out the allegations and the facts and matters supporting the application and each allegation contained in it*".

(2) The Rule 5(2) statement (previously rule 4(2))

This is the fundamental document in the case. Broadly speaking, it has three components:

- (i) It starts with a list of allegations in short form, roughly equivalent to a combination of the "statement of offence" and "particulars of offence" found in a criminal indictment. Note that these allegations may be different again from the allegations listed in the caseworker's report: it has been said by the High Court that there is nothing wrong with this, because the Applicant is a prosecutor and he considers the facts afresh and decides what charges the facts will support, which may well result in a different and longer list from that put forward by the caseworker. The SRA, via the Applicant, tends to lay every charge which it thinks the facts will bear;

- (ii) There is then a narrative starting with basic particulars of the Respondent's date of birth, date of admission, short practising history and current practising position, and then narrating the facts of the case as alleged by the SRA, and the history of the investigation to date, including a summary of any particularly incriminating remarks made in interview. There may be further specific particulars in relation to one or more of the allegations;
- (iii) there are bulky appendices, which include the FI report and its appendices if there is one, and should include the Respondent's written explanations in answer to the FI report and the caseworker's report. It has been known for Applicants to omit the Respondent's explanations; this is improper and was severely criticised in **Bluett, 8221-2000 SDT**

Rule 5(2) statements are neither indictments nor particulars of claim. They are not even a mixture of the two, because they contain most if not all of the evidence the prosecutor relies on. The quality is very variable, and it has to be said that there is not usually the clarity to be found in particulars of claim.

Often it is clear from the statement what is being alleged and what evidence is advanced in support of each allegation; but this is not always the case, and in these instances it is imperative to request clarification. Though the CPR do not apply, in the writer's experience a request in the form of a Part 18 request will be replied to, and the Tribunal will make a direction to that effect if asked to do so.

The rule 5(2) statement is supposed to make it quite clear which if any of the allegations include an allegation of dishonesty. If dishonesty is not alleged in the rule 5(2) statement but is alleged at the hearing, any conviction is liable to be overturned: see eg *Singleton v*

Law Society [2005] EWHC 2915 (Admin).

Note that by rule 7 the Applicant can file a supplementary statement, seemingly at any time, containing additional evidence or additional allegations.

(3) Certification of a case to answer

Rule 6 provides that the Application and rule 5(2) statement shall be considered by a solicitor member of the Tribunal who shall certify whether there is a case to answer. If he or she is in doubt the case is considered by a panel of three members one of whom must be solicitor member and one a lay member. If a case to answer is certified, the application and rule 5(2) statement and exhibits are then served on the Respondent.

It is not known how many cases are stopped because of a finding of no case to answer. It is probably safe to assume that, at least in the case of prosecutions by the SRA, it seldom happens.

(4) Listing and directions

So far as the Respondent is concerned, the prosecution begins when the application and statement are served on him by special delivery mail, together with a copy of the Rules and practice directions, a list of possible advocates, and notice from the clerk of a "**Pre-Listing Day**", usually about two months ahead, at which the clerk to the Tribunal will consider what listing directions to make, together with a questionnaire.

The Pre-Listing Day is not a hearing, and the parties do not normally appear. Its purpose is to give any agreed directions and set a hearing date.

Very shortly after service of the application the Respondent will receive a **notice under**

rule 13(4) from the Applicant requiring him to state which if any of the facts set out in the rule 5(2) statement are disputed. There is no sanction for failure to comply with this notice, other than in costs, which the Respondent will usually pay in any event (see below). A Defence document, which should always be filed in disputed cases, will usually contain the information required by the notice

(5) Interlocutory matters

The Tribunal can regulate its own procedure (rule 21(1)) including dispensing with any provision of the rules if it considers it just to do so (rule 21(2)). In general, the Tribunal will if required give directions which are similar if not identical to those given in the High Court, in relation to service of a Defence, disclosure including specific disclosure, witness statements, skeleton arguments and so forth.

The Tribunal may strike out the proceedings if it considers them to be an abuse of process. Although the SRA argued in **Vaughan** that the Tribunal does not have this jurisdiction, it clearly does, and it was exercised in *Law Society vs Adcock and Mcroft* [2006] EWHC 3212 (Admin).

(6) The Defence

There is no specific provision in the rules requiring the Respondent to serve a defence. However, if there is a substantive defence to any of the allegations it is essential to serve a defence. It can be in the form of (i) a pleading ie setting out the Respondent's averments but not the evidence on which they are based, plus (ii) the Respondent's evidence in the form of witness statements and exhibits, and perhaps character testimonials. This practice is preferable in heavy and complex cases. Alternatively the defence can simply be in the form of a witness statement or statements.

(7) Adjournments

The Tribunal is reluctant to adjourn hearings which have been fixed. It has published a practice note on the subject which Respondents receive with the application and rule 5(2) statement. Applications should be made by letter to the Clerk to the Tribunal more than 21 days before the hearing date, giving full reasons and enclosing, where applicable, documentary evidence in support. Applications will be entertained within 21 days of the hearing but the Respondent will be expected to support such an application with a statement of truth.

In general, the existence of other proceedings, be they civil or criminal, lack of readiness, ill-health (unless supported by cogent medical evidence) and inability to secure representation will not be regarded as providing justification for an adjournment. The Clerk may grant the adjournment in a suitable case, or may refer the request to the Tribunal.

On proof that the Respondent has been served with notice of the hearing the Tribunal may proceed to hear and determine the matter in the Respondent's absence. This happens quite frequently.

(8) The Hearing

The Tribunal generally sits between two and three days a week at Gate House, Farringdon (just by Ludgate Circus). There are three courtrooms, so that long cases can be accommodated in one of them while routine matters proceed in the others. Recently, the volume of hearings has increased dramatically; for the whole of 2009 two of the three courtrooms have been fully occupied with disputed cases.

Rule 12(3) provides that hearings should be held in public. There is provision for them to be held

in private (rules 12(4) and (5)) but this will only be in exceptional circumstances⁴, and will not be ordered simply because of the unwelcome consequences of publicity for the Respondent.

As stated, the Tribunal has power to regulate its own procedure including power to dispense with “any requirements of these Rules in respect of notices, Statements, witnesses, service or time in any case where it appears to the Tribunal to be just to do so”⁵

The Tribunal may act upon evidence given by witness statement, but not if the other party requires the maker of the statement to attend the hearing for cross-examination.⁶

“At the discretion of the Tribunal” the strict rules of evidence shall not apply.⁷

Convictions of a criminal offence, proved by production of a certified copy of the certificate of conviction, are conclusive proof that the person in question was guilty of the offence, and of the facts on which the conviction was based.⁸ Findings of fact by another civil court or tribunal are admissible as prima facie proof of those facts. The Tribunal may depart from such findings⁹ and will do so if presented with substantial material, for example material which was not available at the earlier trial.

Evidence at the hearing is taken on oath. The parties conduct their advocacy seated. No pleas to the allegations are formally taken. The course of the hearing mirrors that in a civil

⁴ In one case, a hearing in private was contemplated where medical and psychiatric evidence showed a serious risk that the Respondent might self-harm to the extent that his life might have been threatened if the hearing had been in public. In the event, for the same reason, the case did not proceed to a final hearing.

⁵ Rule 21(1) and (2)

⁶ Rules 14(1) to (3)

⁷ Rule 13(10)

⁸ Rule 15(2)

⁹ Rules 15(3) and (4)

court, with the Applicant opening the case and (if necessary) calling evidence, with examination in chief, cross-examination and re-examination as normal. The Respondent can make a submission of no case to answer, but it is unusual and seldom succeeds. The Respondent calls his or her evidence. It is not usual for the Applicant to make a closing speech, but in complex cases he may do so. The Respondent makes a closing speech. Though there is no rule to this effect, the practice is that the Applicant does not have a right of reply save in relation to points of law or to correct mistakes.

(9) Standard of proof

It is settled law that allegations in the SDT must be proved to the criminal standard, whether or not dishonesty is involved. This was the ruling of the Privy Council in *Campbell vs Hamlet* [2005] UKPC 19. Nothing daunted, the SRA has made clear that it wishes this to be changed to the civil standard, and Leading Counsel for the SRA made a lengthy submission to this effect in *Beresford and Smith* 9666-2007, SDT. Unsurprisingly in view of the existence of high and recent authority to the contrary the submission did not find favour.

One would have thought that with a 97% conviction rate there is no pressing need to make conviction even easier. However the SRA is persisting in its efforts to substitute the civil standard. It attempted to argue the point before the High Court in the recent case of *Richards* [2009] EWHC 2087 (Admin), in which the Law Society intervened to argue in opposition to the SRA. The Court would not allow the point to be argued because it had no relevance to the result and “*The court is not in the business of conducting academic seminars*” (Sir Anthony May, judgment para 21). However it was clear that had the matter been argued the court would have considered itself bound by *Campbell vs Hamlet* (para 22).

For the present, therefore, the standard of proof remains the criminal standard.

Symbolically this is a very important issue. However, it has to be said that it may not be of central importance in practice. Whereas a jury in a criminal case is clearly directed that it must not convict unless convinced on the evidence beyond reasonable doubt, it is perhaps unlikely that the Tribunal, if convinced that on the balance of probability the allegation was proved, would find it not proved on the basis that it was not proved beyond reasonable doubt.

(10) The Tribunal's findings

The procedure is now enshrined in Rule 16. Though it is empowered to delay the pronouncement of findings and penalty, save in the most complex cases the Tribunal pronounces (often after a brief retirement) immediately after the final submissions. The Tribunal will announce its findings together with brief reasons. The Clerk then informs the Tribunal of any previous disciplinary findings against the Respondent.

The Respondent then makes a **plea in mitigation**, possibly producing any character testimonials if they have not been adduced earlier.

The Tribunal then proceeds to impose the penalty. The order made is signed and served on the Respondent immediately.

After the hearing (anything between 4 and 10 weeks later, as a rule) the Tribunal produces its equivalent to a detailed judgment, referred to in rule 16(5) as "*its detailed written findings which shall include its reasons and conclusions upon the evidence before it*". This is largely drafted by the Clerk¹⁰. It tends to consist of a summary of the opening submissions, the evidence, and the closing submissions, with the findings tacked on the end. It is not of the same calibre as a High Court judgment, but it is possible to deduce the reasoning of the Tribunal, and so it is generally adequate for the purposes of advising on appeal.

(11) Penalties which may be imposed on solicitors

In respect of any allegation found proved, the sentencing powers of the Tribunal in relation to solicitors, save as to reprimands, are set out in section 47 of the Solicitors Act 1974. In ascending order of severity, the Tribunal can:

- (i) (though this is not specifically provided for) give a reprimand;
- (ii) impose a fine. Since 31st March 2009 there has been no upper limit;
- (iii) revoke or suspend – indefinitely or for a specified period - the solicitor's sole solicitor endorsement;
- (iv) disqualify the respondent from undertaking publicly-funded work (though there is no recorded instance of this penalty ever having been imposed);
- (v) Suspend the solicitor from practice either indefinitely or for a specified period;
- (vi) Strike the solicitor off the Roll.

(12) Penalties which may be imposed on managers and employees

As from 31st March 2009 the 2007 Code regulates managers and employees as well as solicitors. In relation to managers and employees the Tribunal may¹¹

¹⁰ a procedure which was challenged unsuccessfully in *Virdi vs Law Society* [2009] EWHC 918 (Admin)

¹¹ See Section 47(E) of Solicitors Act 1974; para 18A (2) of Schedule 2 to AJA 1985

- (i) impose a fine, unlimited in amount;
- (ii) require the SRA to take such steps in relation to the relevant person as the Tribunal may specify; and/or
- (iii) order the SRA to refer the conduct of the relevant person to an appropriate regulator; and/or
- (iv) make an order controlling the employment of the relevant person under section 43 of the Solicitors Act 1974.

(13) Some guidelines on likely penalties

It is a truism that each case turns on its own facts. Certain principles are pretty immutable, however, and these can be briefly listed:

- (i) dishonesty of any kind, whether in relation to client account or other matters, will result in striking off; see the lapidary and oft-repeated passage in Bingham MR's judgment in *Bolton v Law Society* [1994] 1 WLR 512, recently reinforced by *Law Society v Salsbury* [2008] EWCA Civ 1285, referred to in Part 5 above;
- (ii) Breaches of the Solicitors Accounts Rules attract a variety of penalties depending on the facts. Keeping a chaotic system creating risk for clients may well result in striking off. Administrative failings and errors such as failure to submit accountants' reports at the correct time may well attract a fine;
- (iii) Overcharging: almost all bills are reduced on taxation. But if a bill is reduced by more than 50% the costs Judge may well, and in the case of non-contentious

business is required to,¹² report the matter to the SRA, which may bring proceedings based on "culpable overcharging". The penalties vary according to the circumstances but are unlikely to include suspension or striking off. If the overcharging is so gross as to give rise to a finding of "dishonest overcharging" – ie that the Respondent had no honest belief that it was a reasonable charge – that is dishonesty, and will merit striking off;

- (iv) Payment of referral fees. This is a vexed area in that prior to March 2004 it was very difficult for solicitors to deduce from the rules and the Law Society's guidance what was and what was not permitted. In March 2004 payment of referral fees became permitted; but it remains a very controversial topic, in that a very substantial minority within the profession view the March 2004 amendment as a mistake. The SRA has recently been "cracking down" on payment of referral fees, both before and after March 2004. The Tribunal responds to these cases, in general, with fines¹³ or reprimands.

(14) Agreed Settlement

There is one instance of the Tribunal adopting a Carecraft- type procedure; the matter was dealt with on agreed facts and the Tribunal sanctioned an agreed result. It is understood that the SRA is not generally in favour of this type of disposal, however.

(15) Costs

This is a vexed question, and by reason of recent authority has become even more so. Rule 18 gives the Tribunal a full discretion as to costs. The Tribunal can either summarily assess the costs or order detailed assessment by a Costs Judge.

¹² Solicitors (Non-Contentious Business) Remuneration Order 1994 article 5(1)

¹³ eg Mendelson 9212-2005, SDT

An unsuccessful Respondent will have to pay the SRA's costs of the prosecution as well as his own. These will include the costs of any Forensic Investigation, and can be substantial. If the Respondent has been suspended or struck off the Tribunal must before making any order consider his means and ability to pay.¹⁴

What of the successful Respondent? Until recently a solicitor who was successful in defending a prosecution could expect to have his costs (subject to assessment) paid by the SRA. This is no longer the case as a result of *Baxendale-Walker vs Law Society* [2007] EWCA Civ 233 in which the Divisional Court, upheld by the Court of Appeal, held that (i) since the SRA is a statutory regulator, when it addresses the question of whether the evidence justifies an application to the SDT it has a far greater responsibility than would a private party deciding whether to bring civil proceedings; (ii) therefore the normal principle that costs should follow the event does not apply; and (iii) where the SRA has acted reasonably and properly in the public interest, on grounds that appear to be sound, the Tribunal should consider the financial prejudice to the Respondent if an order is not made in his favour and the need to encourage public authorities to make and stand by honest and reasonable decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged. Therefore (iv) the fact the Respondent has been successful is not determinative – even prima facie, as in the CPR; it is merely one element.

This indicates, and has been interpreted by the Tribunal as indicating, that unless the SRA has acted unreasonably in bringing the prosecution the successful Respondent will not get his costs against the SRA. It may be very hard to persuade the Tribunal that the SRA has acted unreasonably.

However, experience suggests that Tribunals now generally take the view that unless the prosecution has been unreasonably brought the Respondent should have to pay some or

all of the SRA's costs even if he is acquitted. Often, the best that can be achieved is a discount in the amount payable in respect of the SRA's costs.

This leads to some impossible situations for Respondents and their advisers. Suppose a Respondent is facing six charges. Four of them are well-founded and the Respondent intends to plead guilty to them. The other two are completely ill-founded. The SRA are not interested in a plea-bargain. It won't make much difference to the penalty whether the Respondent is found guilty of the four charges or all six; but if he has the temerity to contest the unfounded two charges, he will probably have to pay both sides' costs of the contested hearing even if the two charges are dismissed at the end of it. But why should the Respondent face a choice between pleading guilty to something he hasn't done or the certainty of a large costs bill even if he is vindicated?

Whatever the merits of the Court of Appeal's reasoning in *Baxendale-Walker* from other points of view, it is difficult to see how situations such as this are in the interests of justice.

(11) Appeals

Section 49 of the Solicitors Act 1974 provides a right of appeal to the High Court without permission, either against conviction or sentence. The vast majority of appeals are against sentence. The appeal must be lodged within 14 days from the date the detailed findings are lodged with the SRA (they are sent to Respondents as well as the SRA).

The appeal is a review, not a rehearing¹⁵. It is heard by the Administrative Court. There is a further right of appeal to the Court of Appeal, but this has to satisfy the criteria for permission to bring a second appeal contained in CPR rule 52.13, and such appeals are very rare.

¹⁴ Merrick v Law Society [2007] EWHC 2997

¹⁵ CPR rule 52.11 (1)

Stay pending appeal

The Tribunal does not readily grant a stay pending appeal, and an appeal does not operate as a stay. If a stay is to be obtained, a Respondent will probably have to apply to the High Court for it. In case where the detailed reasons from the Tribunal have not become available from the Tribunal before the stay application is heard, the court is presented with a difficult task. The test to be applied was set out by Rose LJ in **Re a Solicitor 16th November 1998**, unreported; t/s CO/4359/98:

“For such a submission to succeed, it would be necessary to establish not only that the applicant’s appeal against striking off would have a reasonable prospect of success, but, further, that this Court would be likely to impose in substitution for the order of the Tribunal a penalty no greater than suspension from practice for some three or four months” [being the period within which the substantive appeal could be expected to be heard].

The approach of the Courts on the hearing of the appeal

Traditionally the High Court was very reluctant to interfere with the findings of the Tribunal. There are dicta from those years to the effect that it would require a very strong case to interfere with sentence, because the Tribunal was best placed to weigh the seriousness of the misconduct. This attitude has softened in the last decade, perhaps by reason of the Human Rights Act 1998, and the High Court is more willing to intervene. The best summary of modern practice is in the Court of Appeal judgment in *Salsbury*:

“The correct analysis is that the Solicitors Disciplinary Tribunal comprises an expert and informed tribunal, which is particularly well placed in any case to assess what measures are required to deal with defaulting solicitors and to protect the public interest. Absent any error of law, the High Court must pay considerable respect to the sentencing decisions of the

tribunal. Nevertheless if the High Court, despite paying such respect, is satisfied that the sentencing decision was clearly inappropriate, then the court will interfere.”

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I am very grateful to Andrew Hopper QC for his valuable comments.

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