



# *The City of Westminster and Holborn Law Society*

25 ROTHERWICK ROAD LONDON NW11 7DG

Legal Services Board  
Victoria House  
Southampton Row  
London WC1B 4AD

18 February 2010

Dear Sirs

## **SRA (Disciplinary Procedure) Rules**

We understand that the above rules have been submitted to the Legal Services Board ('LSB') for approval. We write as representatives of the solicitors in the City of Westminster and Holborn area to highlight our concern about one particular aspect of the draft rules.

We are aware, from reports in the legal press, that the SRA have put forward the draft rules on the basis that the civil standard of proof (ie the balance of probabilities) should be applied in the exercise of the SRA's disciplinary powers. We are also aware that the draft rules were not approved last year by the Master of the Rolls and the Ministry of Justice because they proposed the civil standard of proof. We are concerned that the LSB should be made aware of the points made by the Master of the Rolls and we suggest that the LSB should ask the SRA for a copy of his letter if they have not already seen it.

## **The Correct Standard**

We have consistently maintained that, in all disciplinary matters, the criminal standard of proof (ie beyond reasonable doubt) should be applied. This view is quite clearly shared by the law lords [see *Re Doherty and Campbell –v- Hamlet* referred to below] and senior members of the judiciary, as well as being endorsed by the Ministry of Justice [see the letters from the Master of the Rolls and the Ministry of Justice]. We are concerned that the SRA is seeking to disregard the views of the profession and senior judges in this matter.

It is well established that the SRA are to use the civil standard in the exercise of their regulatory powers (such as the imposition of conditions on practising certificates) and we accept that this is an appropriate approach in the public interest. In some cases, the SRA need only have a "reasonable" belief that there may have been misconduct to exercise some of its powers and again, the profession accepts that this should be so in order to protect the public. However the draft rules do not concern regulatory powers but rather disciplinary powers. We agree with the Master of the Rolls that the SRA do not appear to have appreciated the important distinction between the two.

The imposition of a fine is, clearly and obviously, a punishment. It has no compensatory effect, nor does it have any continuing benefit in terms of managing risk to clients, the public or the profession. It is intended as a punishment and a deterrent, and will, so we are informed, be attended by all but mandatory publicity on the SRA website, thus ensuring the effective destruction of the fined solicitor's professional reputation. Is it too much to ask then, with so much potentially at stake, that the SRA should be sure that a breach of the rules has been committed?

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## The SRA's Approach

We would note in passing that the SRA have suggested that it is anomalous for the solicitors' profession alone amongst regulated communities to adopt the criminal standard and that the adoption of the criminal standard would result in the SRA having to examine the motives of a solicitor. With the greatest of respect to the SRA, neither of these arguments is persuasive, particularly as it is established law that the criminal standard applies to solicitors disciplinary proceedings.

The SRA is alone amongst regulators in publishing details of the decisions it makes for a default period of three years (with no provisions for updates or removal of the publication). This alone makes the case for a different approach to be applied, leaving aside the existing precedent and the other matters referred to below.

The SRA has extensive powers to intervene in practices, to require the delivery up of files, to require solicitors to be examined. Whilst the SRA's investigation powers are similar to those of, say, the Financial Services Authority, the FSA does not seek to act as investigator, prosecutor, judge and jury. In FSA terms, the SRA's new disciplinary powers are of the type which would be exercised by the Regulatory Decisions Committee which has procedures in place to ensure a fair hearing (and it is a hearing, not a decision based on the papers). It is misleading to compare the standard of proof used by other regulators when they are using different procedures and have alternative safeguards against unfair or arbitrary decisions in place.

Furthermore, the SRA is plainly wrong to suggest that the civil standard of proof requires that the motives of solicitors be examined. The vast majority of the rules have no subjective element; they have been breached or they have not been breached. Intent may go to mitigation but it will rarely, if ever, be determinative of a breach of any given rule.

Finally, on this point, the solicitors' profession is peculiarly given to recording all significant events in writing. The vast majority of cases will turn on the contemporaneous documentary evidence. If the SRA, with all of their powers, cannot locate sufficient evidence to be sure that misconduct has occurred, we would suggest that the evidence does not exist because the misconduct does not exist. It would appear therefore that the SRA seek to reduce its burden as a regulator with no apparent benefit to anyone, but with significant potential detriment to solicitors who stand unfairly accused of misconduct.

We would ask the LSB not to approve draft rules which apply the civil standard for the following reasons:-

### 1. Consistency

The Privy Council and the House of Lords have said in two separate cases<sup>1</sup> that the correct interpretation of the English authorities requires that the criminal standard be applied to disciplinary cases. In the case of *Bryant & Bench –v- SRA*, the Administrative Court held that the Solicitors Disciplinary Tribunal ('SDT') must apply the criminal standard of proof.

Against this background, there is a real risk that decisions made (on paper) by the SRA staff will be inconsistent with decisions made (at a hearing) before the SDT. We need hardly remind the LSB that consistency is one of the Better Regulation objectives.

It is likely that there will be increased appeals from the decisions of the SRA which may be unnecessary if a criminal standard of proof was required. We assume that it was the intention of the legislature that granting the powers under s.44D Solicitors Act 1974 to the SRA would reduce the number of cases coming before the SDT and be a more efficient and proportionate use of resources. By permitting a divergent standard of proof, this intent is less likely to be realised.

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<sup>1</sup> *Campbell v Hamlet* [2005] UKPC and *Re Doherty* [[2008] UKHL 33

There is a risk that the adoption of the civil standard of proof will lead to a perception that the SRA is deliberately making internal decisions because it is aware that its case would fail if sent to the SDT. This would alienate the SRA from the regulated community and lead to a loss of trust and confidence.

## **2. Human Rights**

The LSB will be aware that Article 6 ECHR will apply to the imposition of fines and that the protection of professional reputation is incorporated into Article 8 ECHR by virtue of a recent string of authorities. Solicitors often face difficult issues of professional judgment. In cases of genuine doubt as to whether misconduct has occurred, it would be unfair for the SRA to make an adverse finding (based on its view of the balance of probabilities) in circumstances where it knows (or ought to know) that the SDT (applying the criminal standard of proof) would be likely to overturn that finding. That puts unfair pressure on the solicitor, who would in the circumstances be denied a fair trial within a reasonable time as required by Article 6. It is likewise unfair (and a breach of Human Rights legislation) that the SRA should deny solicitors their right to a professional reputation unless they are sure of their case.

Whilst we accept that a procedure which is non compliant with Article 6 can be remedied if there is an Article 6 compliant appeal process, we feel that it is unfair to erode the rights of solicitors to the extent that they are entitled neither to a hearing - by an independent tribunal or otherwise -, nor to expect that their accusers are sure there has been misconduct. To suggest that incorrect decisions are of no moment because they can be corrected on appeal is, to us, a wholly unacceptable attitude. The regulator has sufficient power and resources to ensure that it has the information to make the right decision. It should be required to ensure that it does so.

The LSB is a public body and is obliged to ensure that the rules it endorses are compliant with the ECHR. We would suggest that requiring the SRA to work to the criminal standard of proof is the very least that should be required in order to achieve this.

## **3. The Future of the Profession**

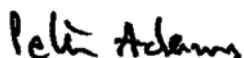
The LSB has recently suggested that it believes that ABS Licensing Authorities should be given the power to impose unlimited fines on ABS. We disagree very strongly with this proposal on the basis that it contravenes all principles of natural justice for the investigator to act as prosecutor, judge and jury. That aside, if, as we suspect, the proposal is an indication that the ultimate goal is for the SRA (and other regulators) to have a general power to impose unlimited fines, our concerns are heightened yet further. It seems the intention is that the solicitors' profession should be left without adequate protection from or recourse against injustice caused by arbitrary decisions of its regulator.

## **Conclusion**

In the circumstances, we ask that the LSB refuse approval of the SRA's draft rules. We submit that it is inappropriate for the LSB to endorse a system which one of the country's most senior judges and the Ministry of Justice refused to approve. We would also submit that the LSB would be failing in its obligations to promote the principles of better regulation, the rule of law and the protection of human rights if it approved the draft rules as drawn.

Please contact us if you require any further information.

Yours faithfully



PETER ADAMS  
**President**