Legal Services Board – Decision Notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

Solicitors Regulation Authority's application for approval of the Solicitors Regulation Authority's SRA (Disciplinary Procedure) Rules [2010]

Introduction

1. The Legal Services Board ("LSB") is required by Part 3 of Schedule 4 of the Legal Services Act 2007 ("the Act") to review and approve or reject alterations to the Regulatory Arrangements of the Approved Regulators. The Law Society is an Approved Regulator and whose regulatory functions are carried out through its regulatory arm, the Solicitors Regulation Authority ("SRA").

2. Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are "...satisfied that..." the approval would fall within one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below[1]). If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria.

3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules about how the application to alter the Regulatory Arrangements must be made including the contents of that application. The rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub paragraph 25 (3) (f) requires that each proposed alteration has been made or is likely to be made in accordance with the procedures which apply in relation to making of the alteration. This includes the LSB's rules.

4. The LSB will approve Regulatory Arrangements in so far that they appear to achieve their intended outcome and satisfy the sub paragraph 25(3) criteria. Most notably there must be no adverse impact on the Regulatory Objectives overall and the alterations and the process by which they have been produced must be consistent with Better Regulation Principles.

[1] The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

5. We received the SRA's application for approval of SRA (Disciplinary Procedure) Rules [2010] (the "proposed rules") on 15 February 2010. This is the Decision Notice in relation to that application. In the following paragraphs we explain the alterations we were requested to consider, the concerns that we raised in relation to the approval criteria and how these have been resolved in discussion with the SRA. The chronology for handling of this application can be found towards the end of this Decision Notice.

Decision

6. The SRA's application is for approval of alterations to the Regulatory Arrangements to introduce the proposed rules. These rules will enable the SRA to exercise its new statutory powers to give written rebukes and/or impose a penalty of up to £2000 where it is satisfied that there has been a breach of regulatory obligations or professional misconduct. These could be ordered together and may be published. The Act provides these new powers which are inserted as sections 44D and 44E of the Solicitors Act 1974 (the "Solicitors Act") and which came into force on 31 March 2009[2]. Until the rules are introduced that will allow the SRA to exercise its new powers the SRA only has powers to reprimand and reprimands are not published except where it has been agreed as part of a regulatory settlement agreement. The SRA must refer any matter to the Solicitors Disciplinary Tribunal (the "SDT") if it is seeking sanctions such as a fine or written rebuke.

7. To utilise its new powers Section 44D(7) of the Solicitors Act requires the SRA to make rules:

   - prescribing the circumstances in which the SRA may decide to issue a written rebuke or order payment of a penalty;
   - about the practice and procedure to be followed in relation to such action;
   - governing the publication of decisions to issue a written rebuke or fine.

8. We are content that there is a statutory obligation on the SRA to introduce the proposed rules and with the SRA's assessment that the proposed rules meet the criteria set out in Section 44D(7) of the Solicitors Act. In line with the statutory aims, the proposed rules aim to provide a swift and effective alternative in circumstances where a formal prosecution to the SDT may not be a proportionate response but where private reprimand may be insufficient.

9. Overall, we are content with the SRA's assessment that the proposed arrangements will facilitate and promote the Regulatory Objectives of the Act and the Better Regulation Principles. We are content that the SRA application is in accordance with our process. The nature and effect of the proposed rules has been set out and the SRA has demonstrated it has undertaken appropriate research, consulted widely and made decisions with due consideration of the evidence collected. We believe that in

[2] Paragraph 14B(7) of Schedule 2 to the Administration of Justice Act 1985 contains the equivalent powers in relation to a recognised body or a manger or employee of a recognised body

consideration of all the evidence the SRA has reached conclusions that are both reasonable and rational.

10. Therefore, we are satisfied that, having considered the application in the context of Schedule 4 sub paragraph 25(3) criteria, we have no grounds for refusing the application made in whole or in part and are therefore granting the application.

11. In addition to approving the application, there are certain areas upon which we wish to comment in this Decision Notice. These are the areas in the application that raised queries in relation to the approval criteria as described in the introduction to this document and therefore further clarification was required. The application sets out that the key area of contention amongst interested parties is the standard of proof that the SRA intends to use in carrying out its new disciplinary powers.

Standard of Proof

12. Rule 7(8) of the proposed rules provides that the SRA apply the civil standard of proof (i.e. the balance of probabilities) in the exercise of its disciplinary powers. When the SRA consulted on the proposed rules in late 2008 several consultees argued that the criminal standard of proof (i.e. beyond reasonable doubt) should be applied to all solicitor disciplinary procedures and that case law requires this. These consultees included the Law Society and the SDT – the statutory appellate body for SRA decisions under the proposed rules. The SDT applies the criminal standard of proof and has stated that case law binds them to do so.

13. An application for approval of the proposed rules was originally made under the approval system that was in operation before the LSB took up its full powers in January 2010. This required concurrence by the Master of the Rolls and the Lord Chancellor. Concurrence was refused by the then Master of the Rolls (and subsequently the Lord Chancellor to reflect refusal by the then Master of the Rolls) on the grounds that the application made for concurrence was not persuasive as to the standard of proof that the SRA should apply. The then Master of the Rolls supported the view put forward by the Law Society and the SDT that case law requires that the criminal standard of proof be provided for solicitor disciplinary proceedings (and certainly for those cases which go in front of the SDT) and that therefore the SRA rules as submitted may not have been compliant with case law.

Policy Position

14. The SRA has reached a clear and rational policy position to apply the civil standard of proof and has provided a range of reasons with relevant explanation and research to support its views.[3] Although it is not our role to revisit the information presented by applicants and make our own assessment of the evidence we do need to be satisfied that the policy position that the SRA has reached is reasonable in light of the evidence that it has provided. The SRA has commissioned research that

[3] For example Annex 2 of the SRA application http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/sra_disciplinary_procedure_application_annex_2.pdf

demonstrates that the civil standard of proof is the prevalent standard applied across other professions, including notably:

- General Medical Council
- General Dental Council
- General Social Care Council
- Nursing and Midwifery Council
- General Teaching Council
- Chartered Institute of Public Finance and Accountancy
- Institute of Legal Executives Professional Standards

15. Evidence suggesting consistency with the changing trends of other regulators provides a reassuring check on the reasonableness and rationality of the policy position that has been reached.

Legal Position

16. The SRA and the LSB has a duty to support the constitutional principle of the rule of law. Therefore we cannot proceed with the approval of any application if on the face of the record the rules are not legal. We were mindful of the arguments put forward by some that case law requires that all lawyer disciplinary proceedings apply the standard of proof of being beyond reasonable doubt. This was particularly so given the opinion expressed by the then Master of the Rolls.

17. However, we have received reassurance from the SRA that it has reached its conclusion with expert independent legal advice and in full consideration of the relevant case law and the opinion of the then Master of the Rolls. The SRA has concluded that the case law requiring the higher standard of proof in SDT prosecutions predates the new powers that Parliament has provided to the SRA and is not binding in relation to the powers that they have now been granted. We have received reassurance from the SRA that the opinion of the then Master of Rolls was based on a different statutory basis and considerations from those that apply now. It is particularly notable that the then Master of the Rolls did not have sight of the Queen's Counsel's advice that the SRA had obtained. Consequently, in the SRA's view the current application is lawful.

18. It is not the role of the LSB to undertake further analysis to try and reach our own legal opinion on applicable case law – as our powers to review are limited to those stated in the Legal Services Act. On this basis we are content that the SRA has properly considered the issues at stake in reaching its conclusion and taken reasonable steps to establish the legality of its rules. Therefore, we do not believe that the lack of consensus over the standard of proof to be applied compels us to refuse the application.

19. However, because of the lack of consensus, the SRA's application suggested that it may be appropriate for the LSB to oversee further discussion between the SRA, the SDT and the Law Society. Therefore, a meeting took place with representatives from

these parties on 31 March 2010, chaired by the LSB[4], to seek to ensure that each party had fully understood each other's opinions in forming their views. The particular concern was that the proposed rules apply the civil standard of proof whilst the SDT as the appellate body apply the higher threshold of being beyond reasonable doubt. Therefore, there would be a different standard of proof on appeal – where there is the power to increase the severity of disciplinary action as well as reach a different verdict on guilt. All parties have agreed that an aligned standard of proof would be preferable so as to avoid operational difficulties. As a possible remedy the SDT and SRA have discussed a third way which would make a distinction between "regulatory breaches" and "professional misconduct/disciplinary offences". This would allow for a different standard of proof for different types of offence. As the SDT believes that the case law explicitly binds them only to matters defined as "professional misconduct" the standard of proof for each type could be aligned accordingly.

20. The discussions were inconclusive and it was apparent that this solution was not achievable. This appeared to be because it failed a simple test in that insufficient clarity has been provided as to where the distinction would be drawn or how the distinction could operate in practice. It appeared that at best it could reiterate the position that some breaches of regulation are more serious than others, but that fact is well captured by the overall regime.

Regulatory Conflict

21. Section 54 (1) of the Act provides that the Regulatory Arrangements of an approved regulator must make such provision as is reasonably practicable to prevent or resolve any external regulatory conflicts. As previously highlighted the SDT has indicated it believes that case law binds it to apply the criminal standard to hearings before it but it has said that it would need to look at the final and approved SRA rules and decide how to react. Our authority is to approve or refuse (in full or in part) the application put before us. The broader question of the standard of proof applied at the SDT does not form part of this application. Therefore, as the approved regulator the SRA has a statutory duty to ensure that any practical implementation issues which may arise should the SDT hear appeals under a different standard of proof are sufficiently resolved. In particular, we would expect that there would not be detriment to the accused for example by being required to incur the cost and delay of progressing an appeal hearing before the SDT if it were apparent in advance that the appeal would be upheld as the case had not originally been made to the higher standard of proof.

22. We anticipate that initially the SRA is likely to deal with such potential conflict on a case by case basis. We understand from the SDT that there are few hearings before it where the standard of proof plays a significant factor. In many disciplinary matters the facts are not contested and are decided on the documents. Therefore, we are

[4] A note of this meeting is available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/note_of_meeting_held_on_wednesday_31_march_2010_final.pdf

content to approve the rules on the basis that the risk of potential conflict causing unfairness for the defendant is small.

23. However, to further mitigate such risks, we expect the SRA to provide sufficient information so that the process that their case will follow and the options open to them is transparent and clear to each defendant. We note from the application that the SRA intends to publish guidance on their procedures "which will provide further details of what normally happens during the disciplinary process in a way that would not be appropriate in the rules". As this guidance falls under the remit of Regulatory Arrangements, we will be required to approve the guidance. We will therefore seek assurance that the material provides such clarity, as well as being consistent with the policy of the approved rules.

24. A case by case approach may not provide a suitable long term solution to potential regulatory conflict. We therefore expect the SRA to review the position, in discussion with the SDT when there have been sufficient cases to generate data to build a picture of the impact in practice. We will ask the SRA and SDT to identify the optimal timing for such a review and ensure that its scope enables both bodies to identify and make any necessary changes to their procedures arising from its lessons.

Monitoring and review

25. The application and supporting information has identified potential benefits created by the proposed rules. The SRA has asserted that it will be able to regulate in a more effective way by taking swift, decisive and proportionate action in cases where a formal prosecution to the SDT may not be a proportionate response but where private reprimand may be insufficient. The SRA has assessed that this will benefit the consumer and improve public confidence and that the proportionate approach should reduce the overall cost of regulation for the profession.

26. However, risks have also been identified and concerns expressed that the proposed rules will not achieve these benefits and may have the opposite effect. For example the rules provide an internal appeal within the SRA for cases where there is also a statutory right of appeal to the SDT and the High Court. Therefore, if the accused were to utilise all the appeal routes at hand, the time taken to resolve a disciplinary matter may be both lengthy and would increase costs for the accused (although it is a reasonable assumption that the costs of the internal appeal would be less than if the accused had to approach either the SDT or Court in the first instance).

27. The possibility has also been identified that if there is a higher standard of proof applied for appeals, there is an incentive for this route to be pursued in cases where it would not be justified to do so (although this may be tempered by the cost and exposure that an appeal may provide and, as stated above, the standard of proof is unlikely to be relevant in many cases).

28. It is not possible to judge definitively at this stage whether the impact of these changes will be positive or negative. However, we are content that the SRA will identify the timescale and methodology to monitor impacts such as cost, the length of

the process, and the number of appeals as they develop their casework monitoring and information technology capability as part of the review mentioned above.

Chronology

- The LSB confirmed receipt of an application from the SRA for approval of the SRA (Disciplinary Procedure) Rules [2010] on Tuesday 16 February 2010.

- The 28 day initial decision period for considering the application originally ended on Monday 15 March, 28 calendar days following confirmation of receipt of the application.

- Following discussions with the SRA, an extension notice was issued by the LSB on Thursday 11 March 2010 extending the initial decision period to Friday 14 May 2010.

- The LSB chaired a roundtable discussion about the standard of proof issue with the SRA, SDT and the Law Society on Wednesday 31 March 2010.

- The LSB Board considered the application on Tuesday 27 April 2010.

- This Decision Notice was issued to the SRA on Monday 10 May 2010 and published on the LSB's website on Tuesday 11 May 2010.

SRA (Disciplinary Procedure) Rules [2010]

Rules dated [the date of the approval of the Legal Services Board]]

commencing [1 March 2010 or the first day of the month following the approval of the Legal Services Board, whichever is the later]

made by the Solicitors Regulation Authority Board, after consultation with the Solicitors Disciplinary Tribunal, under sections 31, 44D, 79 and 80 of the Solicitors Act 1974, and section 9 of and paragraph 14B of Schedule 2 to the Administration of Justice Act 1985, with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007.

Part 1 – General

Rule 1 - Interpretation

In these rules, unless the context otherwise requires:

(1) "adjudicator" means a person not involved in the investigation or preparation of a case who is authorised by the SRA to take disciplinary decisions;

(2) "disciplinary decision" means a decision, following an SRA finding, to exercise one or more of the powers provided by section 44D(2) and (3) of the Solicitors Act 1974 or paragraph 14B(2) and (3) of Schedule 2 to the Administration of Justice Act 1985;

(3) "discipline investigation" means an investigation by the SRA to determine whether a regulated person should be subject to an SRA finding, a disciplinary decision or an application to the Tribunal;

(4) "LLP" means a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000;

(5) "manager" means:

(a) a partner in a partnership;
(b) a member of an LLP; or
(c) a director of a company;

(6) "recognised body" means a partnership, company or LLP recognised by the SRA under section 9 of the Administration of Justice Act 1985;

(7) "registered European Lawyer" means a person registered by the SRA under regulation 17 of the European Communities (Lawyer's Practice) Regulations 2000;

(8) "registered foreign lawyer" means a person registered by the SRA under section 89 of the Courts and Legal Services Act 1990;

(9) "regulated person" means:

(a) a solicitor;
(b) a registered European lawyer;
(c) a registered foreign lawyer;
(d) a recognised body;
(e) a manager of a recognised body; or
(f) an employee of a recognised body, a solicitor or a registered European lawyer;

(10) "SRA" means the Solicitors Regulation Authority, the independent regulatory body of the Law Society of England and Wales;

(11) "SRA finding" is a decision that the SRA is satisfied in accordance with section 44D(1) of the Solicitors Act 1974 or paragraph 14B(1) of Schedule 2 to the Administration of Justice Act 1985 and for the avoidance of doubt does not include:

(a) investigatory decisions such as to require the production of information or documents;
(b) directions as to the provision or obtaining of further information or explanation;
(c) decisions to stay or adjourn;
(d) authorisation of the making of an application to the Tribunal;
(e) authorisation of an intervention pursuant to the Solicitors Act 1974, the Administration of Justice Act 1985 or the Courts and Legal Services Act 1990;
(f) a letter of advice from the SRA to the regulated person.

(12) "the Tribunal" means the Solicitors Disciplinary Tribunal which is an independent statutory tribunal constituted under section 46 of the Solicitors Act 1974;

(13) the singular includes the plural and vice versa.

Rule 2 – Scope

(1) These rules govern the procedure for the SRA to:

(a) exercise its powers pursuant to section 44D of the Solicitors Act 1974 or paragraph 14B of Schedule 2 to the Administration of Justice Act 1985; or
(b) subject to rule 6(9), authorise an application to the Tribunal.

(2) The powers referred to in sub-rule (1)(a) are to do one or a combination of the following:

(a) give a regulated person a written rebuke;
(b) direct a regulated person to pay a penalty not exceeding the maximum permitted by law;
(c) publish details of a written rebuke or a direction to pay a penalty if the SRA considers it to be in the public interest to do so.

(3) These rules shall not prevent, prohibit or restrict the exercise of any other powers or other action by the SRA.

Rule 3 – Disciplinary powers

(1) The circumstances in which the SRA may make a disciplinary decision to give a regulated person a written rebuke or to direct a regulated person to pay a penalty are when the following three conditions are met:

(a) the first condition is that the SRA is satisfied that the act or omission by the regulated person which gives rise to the SRA finding fulfils one or more of the following in that it:

(i) was deliberate or reckless;
(ii) caused or had the potential to cause loss or significant inconvenience to any other person;
(iii) was or was related to a failure or refusal to ascertain, recognise or comply with the regulated person's professional or regulatory obligations such as, but not limited to, compliance with requirements imposed by legislation or rules made pursuant to legislation, the SRA, the Law Society, the Legal Complaints Service, the Tribunal or the court;
(iv) continued for an unreasonable period taking into account its seriousness;
(v) persisted after the regulated person realised or should have realised that it was improper;
(vi) misled or had the potential to mislead clients, the court or other persons, whether or not that was appreciated by the regulated person;
(vii) affected or had the potential to affect a vulnerable person or child;
(viii) affected or had the potential to affect a substantial, high-value or high-profile matter; or
(ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person;

(b) the second condition is that a proportionate outcome in the public interest is one or both of the following:

(i) a written rebuke;
(ii) a direction to pay a penalty not exceeding the maximum permitted by law; and

(c) the third condition is that the act or omission by the regulated person which gives rise to the SRA finding was neither trivial nor justifiably inadvertent.

(2) The SRA may make a disciplinary decision to publish details of a written rebuke or a direction to pay a penalty when it considers it to be in the public interest to do so in accordance with the publication criteria in the appendix to these rules.

(3) Nothing in this rule shall prevent the authorisation of an application to the Tribunal in accordance with rule 8.

Part 2 – Practice and Procedure

Rule 4 – Investigations

(1) The parties to a discipline investigation are the SRA and the regulated person.

(2) The SRA may exercise any investigative or other powers at any time including those arising from:

(a) sections 44B, 44BA, 44BB of the Solicitors Act 1974;
(b) rules made by the Law Society or the SRA for the production of documents, information or explanations.

(3) Subject to sub-rule (4), the SRA may disclose any information or documents (including the outcome) arising from its discipline investigation:

(a) to an informant;
(b) to a regulated person who is under investigation;
(c) to any person in order to facilitate its investigation and in particular to identify and obtain evidence, comments or information;
(d) to other regulators, law enforcement agencies, or other persons in the public interest.

(4) The SRA may restrict disclosure of information to protect another person's right of confidentiality or privilege.

Rule 5 – Seeking explanations

(1) The SRA will give the regulated person the opportunity to provide an explanation of the regulated person's conduct.

(2) When seeking an explanation from the regulated person as referred to in sub-rule (1) above, the SRA will warn the regulated person that:

(a) failure to reply to the SRA may in itself lead to disciplinary action;
(b) the reply and other information may be disclosed to other persons pursuant to rule 4(3); and
(c) the reply may be used by the SRA for regulatory purposes including as evidence in any investigation, decision by the SRA, or proceedings brought by or against the SRA.

(3) The regulated person must provide the explanation referred to in sub-rule (1) or any other information within a time period specified by the SRA, which shall be no less than 14 calendar days from the request for an explanation and where no explanation or information is received within the specified time, the SRA may proceed to decision in the absence of an explanation.

Rule 6 – Report stage

(1) Before making a disciplinary decision, the SRA will prepare a report for disclosure to the regulated person.

(2) Subject to sub-rule (7), the report will summarise the allegations against the regulated person, explain the supporting facts and evidence, and attach documentary evidence that the SRA considers to be relevant.

(3) The report may also include evidence of the regulated person's propensity to particular behaviour and a summary of the regulatory and disciplinary history of the regulated person and of any other person that the SRA considers relevant.

(4) The report will be provided to the regulated person for the regulated person to provide written comments upon it within a time period specified by the SRA, which shall be no less than 14 calendar days from the date on which the report has been sent to the regulated person.

(5) The regulated person will also be invited to make submissions on whether any decision which is made by the SRA, in respect of the matters in the report, should be published. Any such submissions must be made within a time specified by the SRA, which shall be no less than 14 calendar days from the date on which the report has been sent to the regulated person.

(6) The report may be disclosed by the SRA to any other person with a legitimate interest in the matter to enable that person to comment upon it. Any such comments shall be disclosed to the regulated person if they are to be included in the documents referred for adjudication.

(7) The SRA may restrict disclosure of part of the report or all or part of the attached documents in the public interest or in the interests of efficiency and proportionality, such as:

(a) by only providing to the regulated person or any other person documents that are not already in their possession;
(b) by not providing to a person other than the regulated person whose conduct is to be considered the report or documents if they include information that is or might be subject to another person's right of confidentiality or privilege.

(8) The SRA may recommend an outcome or advocate a particular position in the report or otherwise.

(9) The report and comments received shall be referred for consideration within a reasonable time after receipt of any comments or the expiry of any time period specified for the provision of comments.

(10) The SRA is not required to adopt the procedure in rules 5 and 6 in order to make an SRA finding or an application to the Tribunal under rule 8 below.

(11) Where the SRA considers that it is just and in the public interest to do so the SRA may dispense with or vary the procedure and the time limits set out in rules 5 and 6.

(12) Where the SRA dispenses with or varies the procedure or the time limits in accordance with sub-rule (11), the SRA shall, so far as practicable, notify the regulated person that it has done so.

Part 3 – Decisions and Referrals to the Tribunal

Rule 7 – Decisions

(1) An SRA finding may be made by:

(a) agreement between the regulated person and the SRA;
(b) a person duly authorised by the SRA;
(c) a single adjudicator; or
(d) an adjudication panel.

(2) A disciplinary decision may be made by:

(a) agreement between the regulated person and the SRA;
(b) a single adjudicator; or
(c) an adjudication panel.

(3) An SRA finding which does not involve a consequential disciplinary decision may incorporate or be accompanied by:

(a) advice to the regulated person as to the regulated person's regulatory obligations;
(b) a warning to the regulated person as to the regulated person's future conduct.

(4) A disciplinary decision may be made by a single adjudicator but the SRA may refer a matter to an adjudication panel for such a decision.

(5) An adjudication panel shall be properly constituted if at least two members are present.

(6) Where an adjudication panel is comprised of three or more members, a decision may be made by a majority.

(7) The strict rules of evidence shall not apply to decisions of the SRA.

(8) The standard of proof shall be the civil standard.

(9) Decisions will normally be made on consideration of the report described in rule 6 but an adjudicator or adjudication panel may give directions as necessary as to the provision of evidence or representations whether oral or otherwise.

(10) The decision shall be made when it is sent to the regulated person in writing. The decision will be accompanied with information in writing about any right of appeal within the SRA and any external right of appeal.

(11) Where the SRA directs the regulated person to pay a penalty, such penalty shall be paid within a time and in the manner specified by the SRA but shall not become payable until:

(a) the end of the period during which an appeal may be made under rule 9 below, section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985; or
(b) if such an appeal is made, such time as the appeal is determined or withdrawn.

Rule 8 – Referrals to the Tribunal

(1) The SRA may make an application to the Tribunal in respect of a regulated person at any time if the SRA is satisfied that:

(a) there is sufficient evidence to provide a realistic prospect that the application will be upheld by the Tribunal;
(b) the allegation to be made against the regulated person either in itself or in the light of other allegations is sufficiently serious that the Tribunal is likely to order that the regulated person:

(i) be struck off;
(ii) be suspended;
(iii) be subject to an order revoking its recognition;
(iv) pay a penalty exceeding the maximum that can be imposed from time to time by the SRA; or
(v) be subject to any other order that the SRA is not empowered to make; and

(c) it is in the public interest to make the application.

(2) The SRA will apply sub-rule (1) in accordance with a code for referral to the Tribunal as promulgated by the SRA from time to time.

(3) An application in respect of a regulated person to the Tribunal may be authorised by:

(a) agreement between the regulated person and the SRA;
(b) a person duly authorised by the SRA;
(c) a single adjudicator; or
(d) an adjudication panel.

(4) There is no right of appeal against authorisation of an application to the Tribunal.

(5) Subject to any contrary order of the Tribunal, the SRA may exercise any investigative or other powers at any time before a final hearing of an application at the Tribunal, including those arising from:

(a) sections 44B, 44BA, 44BB of the Solicitors Act 1974;
(b) rules made by the Law Society or the SRA for the production of documents, information or explanations.

Part 4 – Appeals and Reconsideration

Rule 9 – Internal appeals

(1) A regulated person may appeal against all or any part of an SRA finding, a disciplinary decision or both.

(2) There is no appeal under this rule against:

(a) any decision other than an SRA finding or a disciplinary decision;
(b) a decision on an appeal; or
(c) an SRA finding or a disciplinary decision which has been made by agreement between the regulated person and the SRA.

(3) An appeal by a regulated person must be made within 14 calendar days of the date of the letter or electronic communication informing the regulated person of the decision or within a longer time period specified by the SRA.

(4) An appeal shall:

(a) be in writing; and
(b) provide reasoned arguments in support.

(5) Appeals will be determined as follows:

(a) where the decision was made by a person duly authorised by the SRA , the appeal will be decided by a single adjudicator;
(b) where the decision was made by a single adjudicator, the appeal will be decided by an adjudication panel;
(c) where the decision was made by an adjudication panel, the appeal will be decided by a differently constituted panel.

(6) Appeals will be limited to a review of the decision which is being appealed, taking into account the reasoned arguments provided by the regulated person. Failure to provide reasoned arguments either at all or in sufficient or clear terms may result in summary dismissal of the appeal.

(7) All powers available to the SRA on adjudication are exercisable on appeal and for the avoidance of doubt this means that an appeal decision may include findings or sanctions more severe than those made or applied in the decision being appealed.

(8) Nothing in these rules shall affect a regulated person's right of appeal to the Tribunal under section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985.

(9) Subject to any rule made by the Tribunal pursuant to section 46(9)(b) of the Solicitors Act 1974, an appeal to the Tribunal by a regulated person must be made within 21 calendar days of the date of the letter or electronic communication informing the regulated person of the decision or, if there has been an internal appeal, within 21 calendar days of the date of the letter or electronic communication informing the regulated person of that decision.

Rule 10 – Reconsideration

(1) The SRA may reconsider or rescind any decision including an SRA finding, a disciplinary decision or authorisation of a referral to the Tribunal with the agreement of the regulated person.

(2) In its absolute discretion the SRA may also reconsider any decision including an SRA finding, a disciplinary decision or authorisation of a referral to the Tribunal when it appears that the person or panel who made the decision:

(a) was not provided with material evidence that was available to the SRA;
(b) was materially misled by the regulated person or any other person;
(c) failed to take proper account of material facts or evidence;
(d) took into account immaterial facts or evidence;
(e) made a material error of law;
(f) made a decision which was otherwise irrational or procedurally unfair;
(g) made a decision which was ultra vires; or
(h) failed to give sufficient reasons.

(3) Reconsideration pursuant to this rule may be directed by a duly authorised person who may also give directions for:

(a) further investigations to be undertaken;
(b) further information or explanation to be obtained from any person;
(c) consideration of whether to authorise an application to the Tribunal;
(d) the reconsideration of the decision to be undertaken by the original decision maker or adjudication panel or by a different decision maker or a differently constituted adjudication panel.

(4) Nothing in these rules requires the SRA to commence or continue with any proceedings or prospective proceedings in the Tribunal or any other court or tribunal. A duly authorised person may rescind a decision to take proceedings in the Tribunal.

Part 5 – Publication and Commencement

Rule 11– Publication of decisions

(1) This rule governs the publication of details of a written rebuke or a direction to pay a penalty.

(2) Subject to sub-rule (4), publication in accordance with this rule:

(a) will include a short statement of the disciplinary decision including brief details of its factual basis and the reasons for the decision;
(b) will identify the regulated person;
(c) will take reasonable steps to avoid the publication of information relating to other identifiable persons;
(d) will provide the practising details of the regulated person at the time of the matters giving rise to the decision and at the time of decision if different;
(e) will be in such form as the SRA may from time to time decide;
(f) may include provision of a copy of the publishable information upon request by any person;
(g) will be made promptly after the decision has been made, provided that the SRA may delay or withhold publication in the public interest.

(3) The SRA may vary or dispense with any of the requirements in sub-rule (2) in the public interest.

(4) The SRA may not publish details of a written rebuke or a direction to pay a penalty:

(a) during the period in which an appeal may be made under rule 9 above, section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985; or
(b) if such an appeal has been made, until such time as it is determined or withdrawn.

(5) For the avoidance of doubt, the SRA may also publish information about other decisions or investigations.

Rule 12 – Commencement

These rules shall come into force on [1 March 2010 or the first day of the month following the approval of the Legal Services Board, whichever is the later] but shall not apply to any matters where the act or omission which gives rise to the SRA finding occurred wholly before these rules came into force.

APPENDIX

Publication Criteria (Rule 3(2))

1. In deciding whether or not to publish a decision to give a regulated person a written rebuke or direct the regulated person to pay a penalty, the SRA will take into account all relevant circumstances including the following factors when relevant.

2. Each case will be decided on its own merits.

3. The following support a decision to publish:

   (a) the circumstances leading to the rebuke or penalty, or the rebuke or penalty itself, are matters of legitimate public concern or interest;

   (b) the importance of transparency in the regulatory and disciplinary process;

   (c) the existence or details of the rebuke or penalty will or might be relevant to a client or prospective client of a regulated person in deciding whether to instruct or continue to instruct the regulated person, or as to the instructions to be given;

   (d) the existence or details of the rebuke or penalty will or might be relevant as to how any other person will deal with a regulated person;

   (e) the seriousness of the finding against the regulated person;

   (f) the rebuke or penalty has been given to a regulated person who has previously been the subject of disciplinary or regulatory decisions whether private or published;

   (g) the rebuke or penalty arises from facts that affected or may affect or have affected a number of clients or other persons;

   (h) the rebuke or penalty arises from facts that relate to the administration of justice.

4. The following support a decision not to publish:

   (a) publication would disclose a person's confidential or legally privileged information;

   (b) publication would disclose a regulated person's confidential medical condition or treatment;

   (c) publication may prejudice legal proceedings or legal, regulatory or disciplinary investigations;

(d) publication would involve a significant risk of breaching a person's rights under Article 8 of the European Convention on Human Rights;

(e) in all the circumstances the impact of publication on the individual or the firm would be disproportionate.

5. In deciding whether to publish, the SRA may also take into account:

(a) the overall disciplinary and regulatory history of another regulated person when relevant;

(b) whether any disciplinary or regulatory action by another body is being or has been taken against the regulated person.

6. The factors set out above are not exhaustive and do not prevent the SRA from taking into account other factors that it considers to be relevant.

7. The SRA will from time to time publish indicative guidance about the application of these criteria.