A STANDARD OF PROOF

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Solicitors may soon be fined up to £2000 by the Solicitors Regulation Authority ("SRA") based on the civil standard of proof rather than the criminal standard under rules agreed at a recent SRA Board meeting. The Legal Services Act 2007 gives the SRA powers to impose fines on solicitors without referring matters to the Solicitors Disciplinary Tribunal ("SDT"). The SRA is intending to prove a case during internal investigations on the balance of probabilities rather than beyond reasonable doubt.

There is a divergence of opinion on this topic within the regulatory world. The Law Society and the Solicitors Disciplinary Tribunal ("SDT") insist on the criminal standard of proof whereas the SRA argues that the civil standard is the correct one.

The SRA's proposal was rejected by the Master of the Rolls and the Lord Chancellor when first introduced in June 2009. The Master of the Rolls supported Lord Brown's opinion in Campbell v Hamlet [2005] UKPC 19 that *"...the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession..."*

If introduced, the new system will put an end to the SRA having to refer so many cases to the SDT. Currently the powers of the SRA only extend to issuing reprimands to offending solicitors. Under the new rules, a solicitor will be able to choose to have a less serious conduct matter dealt with directly by the SRA.

The new policy would have its advantages. The proceedings should mean far lower costs consequences for solicitors compared with a case being referred to the SDT. This will hopefully reduce the potentially devastating financial consequences of being called before the SDT.

The Law Society has opposed the new rules. It stated that where the SRA was dealing with allegations of dishonesty or it is likely that a solicitor could be struck off or suspended, that the standard of proof applicable should be the criminal one. Where dishonesty is involved, the SRA has confirmed that it will refer matters to the SDT.

Despite lowering the standard of proof, solicitors will have the right to appeal to the SDT to challenge a decision made by the SRA. The SDT are reluctant to lower the standard of proof for cases heard by them, and will keep the criminal standard of proof.

The higher level of proof required by the SDT could mean that challenged SRA decisions are more likely to be overturned on appeal. Whilst having a decision decided by the SRA may reduce costs, having to make an appeal to the SDT could increase costs to more than they would have been if the SDT dealt with it from the outset.

The profession should also be aware that these internal investigations will be in the hands of "battle hardened" regulatory staff and the SRA's panel of adjudicators rather than the profession's peers that are members of the SDT panel. This may lead to inconsistency in decisions; increased appeal numbers and a less sympathetic approach than the SDT.

Other professional regulatory bodies use the civil standard of proof in their disciplinary proceedings. The medical profession uses the civil standard of proof, as does the Royal College of Veterinary Surgeons. The SRA has argued that the legal profession does not require its own higher standard of proof. All professional regulatory bodies aim to offer protection to the public. Should there be differing standards dependent upon the profession selected?

The SRA has agreed to put the new rules before the Legal Services Board for approval. We can only wait and see which side the LSB opts for – civil or criminal?

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