



FIRM BASED REGULATION AND DISCIPLINARY RECORDS

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A significant change was made to the profession's disciplinary processes in March 2009 when the SRA's rules, including the Code of Conduct 2007 and the Solicitors Accounts Rules 1998, were amended so that they applied not only to individual solicitors, but also to legal practices as entities and to their employees. Since this was also the date at which non-solicitors could, for the first time, become members or partners of firms through the medium of *'legal disciplinary partnership'* the regime was also extended to cover non-solicitors in these positions.

These changes might not have gripped the imagination of most of the profession at the time but were an important step along the road to the introduction of the much wider involvement of non-solicitors in legal practice through the introduction of *'alternative business structures'* later this year.

The focus of the SRA for disciplinary action is now increasingly the firm as opposed to the individual. Action against named individuals is still intended where dishonesty or serious personal misconduct is alleged. The approach of the Solicitors Disciplinary Tribunal has been to examine the personal culpability of each individual solicitor. The rule is that a partner is not guilty of professional misconduct simply because he is the partner of someone who is guilty of professional misconduct (*Akodu v SRA [2009] EWHC 3588*).

There remains a significant exception to this approach in relation to rule 6 of the Solicitors Accounts Rules 1998 which imposes a strict liability duty on all partners in the firm to ensure compliance throughout the firm.

A question arises as to how this new approach by the SRA will affect the disciplinary records of individual practitioners.

There could be significant consequences for former partners who were not actually involved in a problem elsewhere in their previous firm. Will a note of the sanction imposed on the firm be made on the

disciplinary record of each individual partner of the firm? This has the clear potential for unfairness where there was no personal culpability on the part of that individual. The consequences of this injustice could be further compounded where the indemnity insurer takes the disciplinary records of the new firm into account in assessing whether to offer terms and at what fees.

The contrary argument is that failure to record sanctions against individual partners allows them to move from firm to firm creating regulatory havoc in their wake. Is it right that there should be no record of a partner's involvement in these disciplined firms? In the same way that a company director cannot continue indefinitely acting as a director of failed companies should the SRA be looking at a similar regime?

If there is a system linking firm sanctions with individual records, will the individual partners be those in the firm at the date of the misconduct (akin to a professional negligence claim) or will it be the partners at the date of the sanction? Will the SRA provide employment history details so an employer can verify a prospective employee's CV? Should the record remain indefinitely either for a limited period either for the individual or the firm?

The position will become more complicated as the SRA will not only be regulating individual solicitors but also everyone else who works in the practice. Will a record be kept of the names of all employees in a practice that is disciplined?

These questions may seem at first sight academic but they are vital for the future disciplinary function of the SRA.

To quote a very old Johnny Nash song: *"There are more questions than answers and the more I find out the less I know"*

I fear that we must await yet another consultation paper. ■