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Margaret Hope  
Solicitors Regulation Authority  
DX 19114 Redditch

19 February, 2009

Dear Margaret

## **Consultation Paper 14: New disciplinary powers for the SRA – public rebukes and fines**

The City of London Law Society (“CLLS”) represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the SRA’s consultation regarding New disciplinary powers for the SRA – public rebukes and fines (Consultation Paper 14) has been prepared by the CLLS’s Professional Rules and Regulation Committee.

The Committee’s response to the specific questions regarding the draft SRA (Disciplinary Procedure) Rules [2009] (the “draft Rules”), as set out on page 11 of the Consultation Paper, is as follows

*Question 1: Are the rules clear and transparent?*

Yes.

*Question 2: Do you agree with the approach to the prescribing of circumstances in which the SRA may make a disciplinary decision? (rule 3)*

The Committee agrees that it is sensible to ascribe circumstances. However, it seems that the powers might be more aligned if the first condition is satisfied where the SRA is satisfied that the act or omission by the regulated person is not trivial nor justifiably inadvertent and breaches one of the Solicitors Code of Conduct Rules 1.01 to 1.06 or falls within the proposed categories (i), (v) or (ix), i.e. the act or omission:

- (i) was deliberate or reckless;
- ...(v) persisted after the regulated person realised or should have realised that it was improper;
- ...(ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person.

*Question 3. Do you agree that disciplinary decisions should be made only by adjudicators? (rule 7)*

Yes.

*Question 4. Do you agree that it is helpful to provide for referral to the SDT in the rules even though that is not required by section 44D of the Solicitors Act 1974? (rule 8)*

Yes.

*Question 5. Do you think that there should be an internal appeal process for cases where there is a statutory right of appeal to the SDT and the High Court? (rule 9)*

Yes.

*Question 6. Do you believe that the draft rules will have a disproportionate impact on any group or category of persons?*

No.

*Question 7. Do you have any other comments on the draft rules?*

The Committee has several concerns.

On page 3 of the consultation paper it is stated that the SRA “intend[s] to publish guidance on [its] 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.” (See also pages 4, 8.) The Committee feels that it would have been useful to be able to view and comment on this guidance during the current consultation.

Furthermore, the Committee had concerns about the wording of draft Rule 3(1)(a)(viii) regarding disciplinary powers. The draft Rule states:

- (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 two 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 was not trivial nor justifiably inadvertent and fulfils one or more of the following in that it:

...(viii) **affected or had the potential to affect a substantial, high-value or high-profile matter;**

- (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.

(Emphasis added)

It is not clear to the Committee why a breach in relation to “a substantial [or] high-value... matter” needs to be singled out as the basis for issuing a rebuke or penalty. Indeed, the text of the provision seems inconsistent with the other factors set out in draft Rule 3(1)(a), which all focus on what the act or omission is and how it is committed (rather than the type of work that the act or omission relates to).

In addition, Rule 4 (“Investigations”) states:

- (3) Subject to subrule (4), the SRA may disclose any information or documents arising from its discipline investigation to **any person** when it considers it is in the public interest to do so or in order to facilitate its investigation and in particular to identify and obtain evidence, comments or information. (emphasis added)

The Committee believes that the definition of “any person” in this draft Rule needs to be made clearer. It is assumed that “any person” does not include the press. The same point arises in the context of Rule 5 (“Seeking explanations”), which states:

- (2) When seeking an explanation from the regulated person as referred to in subrule (1) above, the SRA will warn the regulated person that
- ...(b) the reply and other information may be disclosed **to other persons** pursuant to rule 4(3);

(emphasis added)

Furthermore, Rule 6 (“Report stage”) states that:

- (2) Subject to subrule (6), 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.
- ...(6) 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) **when the report or documents include information that is or might be subject to another person’s right of confidentiality or privilege.**(emphasis added)

These draft subrules seem to suggest that a report which goes to the regulated person may omit certain information, such as when disclosure would infringe another person’s right of confidentiality or privilege. Yet surely a regulated person should be entitled to see all the information which could form part of the case against him.

In addition, as Rule 10 (“Reconsideration”) states:

- ..(2) In its absolute discretion the SRA may also reconsider any decision including a 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.

(emphasis added)

It is unclear from the above draft subrules whether the SRA has the right to "reconsider" a decision with a view to imposing a harsher penalty. The rule should either explicitly exclude that possibility, or make it clear that it is included. If it is to be included, the subrule should make it clear that such reconsideration must be initiated within a specified time frame and can only be directed by an adjudicator or an adjudication panel (rather than any "duly authorised person").

The Committee is also concerned about the extent of the discretion that the draft Rules propose to grant to the SRA with regards to the publication of details of a written rebuke or a direction to pay a penalty, and the lack of guidance in the draft Rules as to how that discretion would be exercised. As draft Rule 3 (Disciplinary powers) (2) states:

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 a publication policy promulgated from time to time.

Furthermore, draft Rule 11 (Publication of decisions) states:

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

- (2) **The SRA may publish information about other decisions or investigations in accordance with a publication policy promulgated from time to time or when it is in the public interest to do so.**
- (3) Publication in accordance with this rule:
- (a) will normally be on the SRA website;
  - (b) will be in such form as the SRA may from time to time decide;
  - (c) may include provision of a copy of the publishable information upon request by any person;
  - (d) will comprise a short statement of the disciplinary decision including brief details of its factual basis and the reasons for the decision;
  - (e) will identify the regulated person;
  - (f) 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.
- (4) **The SRA may decide when and how to publish or otherwise disclose all or part of the details of a written rebuke or a direction to pay a penalty. ...**

(Emphasis added.)

**Enclosed** for your consideration is a completed "About You" form. As this response is being submitted on behalf of the CLLS, not all of the parts of this form could be completed (as some questions are directed at individuals rather than organisations).

Yours sincerely

David McIntosh

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