



Standard of proof applied by the SDT

The Law Society's discussion paper
October 2017

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BIRMINGHAM LAW SOCIETY
RESPONSE TO LAW SOCIETY DISCUSSION PAPER ON
STANDARD OF PROOF TO BE APPLIED BY THE SDT
OCTOBER 2017

Question 1

What standard of proof do you think should be applied by the Tribunal? Why do you think that?

We consider that the standard of proof to be applied in the Tribunal should remain as the criminal standard.

An appearance before the SDT has a devastating effect upon a professional's reputation and his finances (even if the allegations are found not proved). A respondent has to meet his own defence costs and the SRA's costs if the allegations are proved. Even if the allegations are not proved, the Tribunal rarely orders the SRA to meet any of the respondent's costs.

There is generally an inequality of arms between the SRA and the respondents that appear before the Tribunal. The SRA has almost unlimited resources to use in investigating and prosecuting cases (for example Leigh Day) whereas a respondent does not.

It is important therefore that only cases which have the strongest and most cogent evidence should be brought before the Tribunal by the SRA. The higher standard of proof discourages the SRA from bringing cases that might or might not succeed.

Another factor is that the prosecutions now brought before the Tribunal by the SRA emanate from two sources. The first source is the in-house Legal Department at the SRA which is assisted on occasion by Counsel. The second source is a single law firm (Capsticks) which has a three year contract with the SRA. There is no longer a panel of independent law firms from which advice can be obtained. There is a perception that the in-house employed advisers and the sole retained law firm might not be as robust in advising the SRA on cases which should not be brought before the Tribunal.

The retention of the criminal standard of proof acts as a check and balance upon the SRA both in the public interest and in the interests of the profession.

Question 2

Are you able to provide evidence on how effectively the criminal standard of proof currently operates in the Tribunal? Are you aware of any occasion where this has inadequately protected clients?

The Birmingham Law Society is not in a position to provide evidence on the effectiveness of the criminal standard of proof as currently operated in the Tribunal. The Society suggests that the SRA and/or the SDT would be better placed to provide facts and figures so as to enable an evidence based approach to be taken.

Our general impression is that the SRA's rate of success in the SDT is very high and that, as a result, the interests of clients are adequately protected. If we are correct, then any suggestion that the criminal standard of proof does not provide sufficient protection would appear to be apocryphal rather than based on hard data.

Question 3

Are you aware of any other issues with the Solicitors Disciplinary Proceedings Rules 2007 that should be raised with the Tribunal as part of its review?

We are not aware of any issues with the Rules themselves. However, on a more general basis, we are aware that the Tribunal is intent upon making the proceedings more and more like commercial litigation proceedings with a considerable focus on case management hearings and directions. This approach increases costs for the respondents many of whom are without the financial resources to meet defence costs and SRA costs orders.

Virtually any order of the SDT at an interlocutory stage imposing an obligation on a respondent operates as a fine, particularly if represented, because he/she will never be expected to recover the costs of complying (e.g. are skeleton arguments which essentially repeat the pleaded case really necessary?).

Whilst it is accepted that the Tribunal needs to have some control over the proceedings, these are not commercial litigation proceedings. They are disciplinary proceedings and need to be kept as simple and as low cost as possible. The proceedings are a hybrid between criminal proceedings and civil proceedings so need to be tailored accordingly.

27 October 2017



Andrew Beedham
President