BIRMINGHAM LAW SOCIETY

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Response to SRA Consultation on Publication of Regulatory Decisions

July 2022

Response of the Consultation Committee of the Birmingham Law Society to the SRA Consultation on publication of regulatory decisions

This response has been prepared by the Consultation Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Consultation Committee whose members are specialist lawyers practising in all aspects of professional regulation and discipline.

Q1: Do you agree that publication of regulatory decisions helps to raise awareness in the profession of appropriate conduct and the consequences for failure to comply?

We agree that publication of some regulatory decisions can help to raise awareness within the profession of what constitutes appropriate conduct and of the consequences of non-compliance. However:

- The desirability of raising awareness, though important, must be balanced against the significant harms that may result to both individuals and firms from the SRA's publication of regulatory decisions. The adverse impact of publication on a respondent's reputation can have significant knock-on effects on that respondent's livelihood and (in the case of individuals) mental health. A respondent's qualified right to privacy and absolute right to a fair trial should thus be fully respected, in accordance with the common law.

- There are, in any case, less damaging and intrusive ways in which awareness of appropriate conduct may be raised within the profession – for example, through the publication by the SRA of supplementary guidance and suitably anonymised case studies, through training and education, as well as through other forms of direct and indirect engagement between the SRA and firms. Some of these alternative approaches may be more effective than the publication of regulatory decisions in raising awareness.

Q2: Do you agree that the publication of regulatory decisions is important to help raise awareness among consumers of what they should be entitled to expect?

We agree that the publication of some regulatory decisions is, in principle, capable of raising awareness among consumers of the standards that they should be entitled to expect. We consider, however, that this needs to be viewed with a measure of caution. In particular:

- It is unclear how important publication is in practice as a means of raising awareness among the public. We are aware of no published statistics on this issue, but we do question how often consumers will take the time to engage with those decisions that:
    - are complex and technical in nature; and
    - may not arise from especially interesting or engaging facts.
- There exist other means of raising awareness of acceptable professional conduct, among consumers as much as among the wider profession (see under Q1 above). These may (a) be more effective than the publication of regulatory decisions and/or (b) minimise the potential harms and reputational damage which publication causes to members of the profession.

We suggest that the SRA undertake, and in due course publish, its own quantitative research into the importance of publication as a means of raising consumers' awareness of professional standards.

Q3: Do you think that principles outlined provide a good framework for our approach to publication of regulatory decisions?
Q4: Are there any other principles and considerations on publication of our regulatory decisions that we should consider?

We respond to Q3 and Q4 together.

The principles outlined at paragraph 15 of the Consultation are clearly important. By themselves, however, they do not provide a comprehensive framework to govern the publication of regulatory decisions. In particular, the proposed framework does not require the SRA, in making a decision to publish under rule 9.1 of the Regulatory and Disciplinary Rules, to take into consideration the serious harm that publication invariably causes to the reputation of both (a) respondent individuals and firms and (b) third parties with whom a respondent may be professionally associated (see further under Q14 below). This is a significant factor in any case and, above all, in any matter in which the SRA may be considering publication during an ongoing investigation: see further below.

Q5: What types of regulatory information do you currently access and for what purpose?

We are submitting this response on behalf of Birmingham Law Society not an individual respondent so this answer is based upon enquiries with members of the BLS Consultation Committee. Our enquiries reveal that law firms will access the SRA website for the purposes of employee screening but otherwise not as a matter of course. Solicitors involved in professional regulation work tend to access the SRA website more frequently for obvious reasons.

The SRA should note that current interest in the decisions published on the SRA website is generated by the legal media. Legal Futures and the Gazette (and some others) scan the SRA decisions on a daily basis and report even the most uninteresting and run of the mill cases. The decisions are easy pickings when legal news is scarce. It could be said that this constant reporting raises awareness within the profession without the need for any further action by the SRA.

Q6: Do you think we should publish more or less detail on the regulatory decisions we make?

We consider the existing level of detail to be appropriate provided it is consistently applied. A brief review of the SRA website shows an inconsistency in the amount of

detail provided for different decisions. For example, a considerable amount of detail is provided for Regulatory Settlement Agreements where the respondent has engaged with the SRA and reached an agreement to resolve matters. On the other hand, where a respondent is fined by SRA there is a minimum amount of detail. To demonstrate the point, attached to this response is a decision when Co-operative Legal Services was fined £143.000 by the SRA as an alternative business structure with three short paragraphs and a Regulatory Settlement Agreement for Ms Campbell for issues in relation to a litigation case with much more detail. Consideration needs to be given to consistency.

Overall, from the public viewpoint, a brief description is all that is needed. Anything further would not be required as the extra detail would not necessarily be appreciated or understood. For the profession it can be argued that more detail is required in order that there is no misunderstanding as to the actual misconduct found or admitted and the mitigation applicable to the allegations.

Q7: How else could we better improve the regulatory information we publish to support the profession?

See above under Q6.

Q8: How else could we better improve the regulatory information we publish to support the public?

We do not consider that any change is necessary. It is unlikely that members of the public would be aware of the SRA Check a Solicitors' record section of the SRA website and even more unlikely that they would access it before selecting and instructing a solicitor. Knowledge of solicitors' professional standards is frequently gleaned from headline stories in the mainstream media of occasional notorious cases whereas the public's experience of the high standards of their own solicitor is usually in direct contrast to the media coverage.

Q9: Is our current approach to balancing the public interest and principles of open justice with protecting the respondent's well-being, fair and proportionate?

We broadly agree with the SRA's current approach, in which, save in exceptional circumstances, publication does not take place until after the imposition of a sanction or after referral to the SDT. Our view, however, is that the SRA should go further by giving even explicit recognition (in any relevant written framework or guidance) to the serious and irreversible damage which publication may do to a respondent firm's or individual's reputation. This is an essential element of fairness and proportionality.

Q10: Are there any circumstances where you think the principles of open justice outweigh the rights of the respondent?

Yes, but only to the extent that is already well established in the common law. Open justice is a fundamental constitutional principle, and transparency is an explicit statutory principle to which the SRA must have regard in discharging its regulatory functions (section 28(3)(a) Legal Services Act 2007). Both principles, however, must always be carefully balanced against the rights of a defendant or respondent – notably those under Articles 6 (right to a fair trial) and 8 (right to privacy). As above, the SRA should always approach any balancing exercise with a profound respect for the serious and often irreparable damage which publication will almost inevitably do to a respondent's reputation and livelihood.

Q11: Are there any circumstances where you think the right of the respondent outweighs the principles of open justice?

There are well-established situations in which the rights of a respondent will take precedence. Three are particularly notable:

1. During any SRA investigation that has not yet resulted in either the imposition of a sanction by the SRA or the issue of proceedings before the SDT, a respondent's Article 8 right to privacy will almost always outweigh the interests

of open justice and the desirability of publication. This is consistent not only with the approach of most other professional regulators but also with the common law: see, notably, *Bloomberg LP v. ZXC* [2022] UKSC 5, in which the Supreme Court agreed that a person subject to a criminal investigation has a reasonable expectation of privacy up to the point when he or she is formally charged. As the SRA's existing approach reflects, that expectation of privacy should be overridden only exceptionally, where there is an immediate risk to the public that cannot be mitigated other than by publication of an ongoing investigation. That approach is, in our view, the correct one for the SRA to take.

2. If publication will prejudice a respondent's Article 6 right to a fair trial, or if it will infringe a respondent's rights to confidentiality, legal privilege or as a data subject, the respondent's rights should almost always take precedence over the interests of open justice to the extent necessary to ensure that those rights are protected. We cannot conceive of any circumstances in which it would be justified infringing on a respondent's right to a fair trial but we recognise that this is a limited right and that there might be very extreme and/or exceptional circumstances which justified such an infringement.

3. Similarly, where it can be shown that publication is likely to result in serious physical or mental harm to a respondent, the interests of the respondent will, again, outweigh those of open justice, and publication will almost always be inappropriate.

More generally, the SRA needs to be cautious when vulnerable clients or witnesses are involved. Sexual misconduct cases are a good example as "jigsaw" identification is always a risk.

Q12: Do you have any other views on this topic that you would like to share?

None, save as set out above.

Q13: Do you think that our current approach to timing of publication of our decisions requires change?

No – we consider that the current approach adequately balances the importance of furthering open justice against respondents' reasonable expectation of privacy, as we have explained above.

Q14: In what circumstances do you think details of regulatory action and/or decisions should be published earlier?

We do not consider that details of regulatory action should be published any earlier than is the current policy. For the SRA to move to earlier publication would represent a retrograde step that would (a) be extremely damaging to respondent individuals and firms, (b) be open to challenge under judicial review and human rights legislation and (c) put the SRA well out of step with most other traditional professions (including, notably, the equivalent policy of the Bar Standards Board) and the criminal law.

Currently, where there is an immediate and clearly identified risk to the public which justifies the SRA's intervention in a practice – details of the intervention are published. We agree that this is the correct approach and should continue in the interests of the clients and the wider public interest.

Otherwise, however, details of a regulatory investigation should never be published before either (a) the SRA has concluded its investigation and imposed a sanction within its own powers or (b) the SRA has issued proceedings in the SDT that have been formally certified as disclosing a case to answer.

Publication of regulatory action and/or decisions will, almost invariably, be damaging to a respondent's professional reputation and, by extension, livelihood. Where that respondent has already been sanctioned by the SRA, or where the SDT has independently certified that the respondent has a case to answer, we accept that the respondent's right to privacy may be overridden by the interests of open justice. For as long as the SRA is still investigating a matter, however, it is plain that no

conclusions can yet be drawn as to a respondent's culpability; indeed, it remains uncertain whether any breach of the rules has even occurred. The respondent's privacy must, in those circumstances, be assured in order to avoid unfair, unjustified, and potentially unnecessary reputational and/or other damage.

Two further observations add significantly to the force of this point:

1. The damage caused by publication may well extend beyond the respondent. Third parties, including the firm of which an individual forms part and/or other organisations with which a respondent is connected, will also suffer reputational and commercial damage as a result of publication. For the risk of such wide-ranging damage to be justifiable must require a compelling reason. That reason can be present at the investigation stage only in the most exceptional of cases, i.e., those where there is an immediate risk to the public.

2. Moreover, reputational damage of any sort will be wholly unnecessary in any event if, as frequently occurs, an investigation by the SRA is concluded without sanction or onward referral. The SRA's own published statistics put this into sharp focus. According to the latest statistics of which we are aware (for the year 2019/20, as published in the SRA's report on "Upholding Professional Standards, 2019/20"), the SRA referred a total of 2,279 matters for investigation.[1] Of those, 274 (12%) resulted in an SRA sanction and 112 (4.9%) were heard by the SDT. A very significant proportion, however – 1,720 (or 75.4% of the total) – resulted in neither sanction nor SDT hearing and were closed on the basis of a finding that the firm had not breached, or seriously breached, the rules. We need hardly add that, if any of those 1,720 matters had been published during the ongoing investigation, the damage caused to the reputations of the firms and individuals under investigation would have been wholly unjustifiable.

[1] https://www.sra.org.uk/globalassets/documents/annual-reports/upholding-professional-standards.pdf?version=4a1bff

The SRA should, accordingly, make no change to its current policy insofar as the timing of publication is concerned. Earlier publication of regulatory decisions cannot possibly be justified.

Q15: What are your views about at what point we should publish referrals to the SDT?

In our view, referrals to the SDT should not be published before the SDT has certified that proceedings issued by the SRA disclose a case for the respondent to answer. We would urge the SRA not to change its approach in this regard. We suggest that an especially useful comparison may be drawn with the equivalent publication policies applicable to barristers: please see below under Q16.

Even after the SRA has made a decision in principle to refer a matter to the SDT, our experience shows that further (external) legal advice which the SRA may then take and/or additional engagement with the respondent or its representatives can yet result in the referral being rescinded and even in no further action against the respondent. It is not until the file is reviewed for the purposes of issuing proceedings in the SDT that detailed consideration is given to the evidence and to the proper allegations that should be laid before the Tribunal. It is not unusual for an allegation of dishonesty and/or lack of integrity to be made by the SRA in-house personnel for the purposes of the decision to refer to the Tribunal and for this then to be abandoned when the evidence is put under the microscope. It is relatively easy for the SRA to make weak allegations for the purposes of a referral to the Tribunal which then never see the light of day when SDT proceedings are issued. Publication on this basis would be a seriously retrograde step and one in our view which would be susceptible to a successful judicial review challenge.

A brief scan of the SRA prosecution decisions reveals that there is invariably a lengthy time lapse between the decision to refer and the publication of the decision. This corroborates our view that publication of the decision to refer before the SRA has reviewed the case in detail is unfair and prejudicial to respondents. Delaying publication until the SDT itself has certified that there is a case to answer thus

provides both the respondent and the SRA with an essential safety net and minimises the risk of unnecessary reputational damage that would otherwise result from material being placed in the public domain prematurely.

Q16: Do you have any further views on the timing of publication of our regulatory decisions?

We suggest that an instructive comparison may be drawn with the equivalent policies governing the publication of regulatory decisions affecting barristers. According to the Bar Standards Board's policy,[2] the BSB does not publish details of the outcome of either a hearing before the Disciplinary Tribunal or a decision made by the BSB under the Determination by Consent procedure if the charge is found not proved. Similarly, where a matter proceeds to a hearing before the Disciplinary Tribunal, no information will be placed in the public domain at any point prior to the listing of a hearing, at which point basic information concerning that hearing – including the identity of the barrister and outline details of the charge against him or her – will appear on the website of The Bar Tribunals & Adjudication Service (at https://www.tbtas.org.uk/hearings/forthcoming-hearings-calendar/).

We suggest in the strongest terms that there is no justifiable reason why the SRA should adopt a publication policy materially less respectful of the rights of individuals and firms than that applicable to barristers – the regulation of whom is similar in multiple other respects.

Q17: Do you think there are benefits to extending or shortening the length of publication of regulatory decisions?

Yes: in our view, linking the length of publication to the level of sanction imposed should be considered. See below our response to Q18:

[2] https://www.barstandardsboard.org.uk/uploads/assets/60273512-50ab-48c0-93538428bfbb6386/210416-LED24-Policy-on-Publication-of-Disciplinary-Findings-PDF-v12.pdf - see especially para. 10.

Q18: Do you think it might be beneficial to link the length of publication to the level of severity of the regulatory decision?

Yes. We consider that a policy linking length of publication to severity could well be beneficial and is worth exploring further. At present, many decisions, ranging from a comparatively minor rebuke to more serious outcomes, are published for a fixed period, frequently three years in length. Not only is this potentially unfair to firms and individuals, but it also gives little indication to consumers as to the relative seriousness of different regulatory outcomes.

By contrast, a tiered system that links length of publication to the severity of a matter would be beneficial to both the profession and consumers and would also be consistent with the statutory provisions of the Rehabilitation of Offenders Act 1974 (as amended).. It would further the SRA's objective of raising awareness among both consumers and the wider profession by giving a clearer indication at face value of a regulatory decision's seriousness. Thus, for example, if a decision remains on an individual's or firm's record several years after its imposition, its seriousness will, justifiably, be underlined in the eyes of the consumer or peer. Conversely, the less serious nature of a comparatively minor sanction of recent date will also be made more apparent.

A tiered system is, moreover, likely to be fairer to both firms and individuals by reducing the risk that a published decision will continue to taint their reputation for a disproportionate period after that decision has ceased to be of any relevance. This consideration is especially important in the present "digitally-focused and data-driven world", as the SRA describes it at para. 4 of the Consultation, in which extensive (and potentially damaging) information can be accessed at the touch of a button.

More generally, the SRA should note that once a decision has been published on the SRA website the name of the firm or solicitor involved remains on the internet for many years and will be number one on a Google search. So, the adverse effect of publication on reputation can be long term.

Q19: Do you have any further views which we should take into account in relation to the length of publication for our decisions?

None, save as set out under Q17 and Q18 above.

Birmingham Law Society Consultation Committee

1 July 2022

Attached:

1. SRA decision – Co-operative Legal Services
2. SRA decision – RSA - Campbell

Co-Operative Legal Services Limited
650 Aztec West Almondsbury Bristol , BS32 4SD
Licenced body
567391

Fined *Date: 9 October 2020*

Decision - Fined

Outcome: Fine

Outcome date: 9 October 2020

Published date: 22 October 2020

Firm details

Firm or organisation at date of publication and at time of matters giving rise to outcome

Name: Co-Operative Legal Services Limited

Address(es): 650 Aztec West Almondsbury Bristol BS32 4SD

Firm ID: 567391

Outcome details

This outcome was reached by SRA decision.

Decision details

Co-Operative Legal Services Limited is a licensed body whose head office is at 650 Aztec West, Almondsbury, Bristol, BS32 4SD.

Co-Operative Legal Services Limited breached Principle 6 of the SRA Principle 2011 and Rule 1.2 (e) of the SRA Accounts Rules 2011 by wrongly recovering the sum of £28,777.12 in relation to medical disbursements from third party insurers. This was a breach of the indemnity principle of costs law.

Co-Operative Legal Services Limited acted recklessly in not considering the impact of its agreement with a medical disbursement supplier regarding the recovering of its fees upon its processes and procedures used by its staff.

Co-Operative Legal Services Limited was ordered to pay a financial penalty of £143,557.56 and the SRA's costs of £1,350 in investigating this matter.

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Angela Campbell
Solicitor
158948

Agreement *Date: 24 January 2022*

Decision - Agreement

Outcome: Regulatory settlement agreement

Outcome date: 24 January 2022

Published date: 2 February 2022

Firm details

No detail provided:

Outcome details

This outcome was reached by agreement.

Decision details

1. Agreed outcome

1.1 Miss Angela Campbell ("Miss Campbell"), a solicitor and sole practitioner of Campbell Chambers Solicitors ("the Firm"), agrees to the following outcome to the investigation of her conduct by the Solicitors Regulation Authority (SRA):

a. she is rebuked
b. to the publication of this agreement
c. she will pay the costs of the investigation of £300.

Reasons/basis

2. Summary of Facts

2.1 Miss Campbell acted for Mrs S in care proceedings in the Wrexham County Court from 6 November 2017 ("the proceedings"). Mrs S had previously instructed another firm of solicitors ("the previous solicitors") and her legal aid certificate was transferred to the Firm on 6 November 2017. The proceedings were concluded on 11 July 2018 by way of a final hearing.

2.2 On 14 August 2018, Mrs S requested from the court and Miss Campbell copies of sealed orders that had been issued in the proceedings.

2.3 On 31 August 2018, the court replied to Mrs S and confirmed that no notice of acting had been filed by Miss Campbell, but a review of the court file was to be undertaken.

2.4 On 11 September 2018, the court wrote to Mrs S to confirm the outcome of its review. The court confirmed that no notice of acting had been filed by Miss Campbell. So far as the court was concerned, Mrs S continued to be represented by her previous solicitors until 7 August 2018 when it received confirmation from the previous solicitors that they stopped acting for her in October 2017. As such, all correspondence including orders predating 7 August 2018 were sent to the previous solicitors.

2.5 On dates 4 and 5 September 2018, Mrs S wrote to Miss Campbell to request a copy of

the notice of acting that had been filed with the court in November 2017.

2.6 On 6 September 2018, 'Support' at the Firm sent an email to Mrs S stating, "Please find attached Notice of Acting". This was dated 6 November 2017; however, the covering email did not explain that it had not been filed with the court in November 2017.

2.7 On 12 September 2018, Mrs S contacted Miss Campbell and asked why the notice of acting had not been sent to the court or other parties in the proceedings. Miss Campbell explained that all parties were made aware that the firm were acting at court in November 2017.

2.8 In correspondence with the SRA, Miss Campbell confirmed that the notice of acting dated 6 November 2017 was created on 12 September 2018 the same day that it was sent to Mrs S. It was not filed at court and was not served on any of the other parties to the proceedings.

3. Admissions

3.1 Miss Campbell admits, and the SRA accepts that:

a. the manner in which the notice of acting was sent to Mrs S may have given the impression that it was filed at court and served upon the other parties to the proceedings on 6 November 2017, which was not the case. Therefore, Miss Campbell failed adequately or at all to respond to requests by Mrs S for information on whether a notice of acting had been filed at court and served upon the other parties in proceedings in breach of O(1.11) of the SRA Code of Conduct 2011 and Principle 6 of the SRA Principles 2011, and

b. by failing to file the notice of acting with the court, confidential information relating to Mrs S was sent to her previous solicitor in error, in breach of O(4.1) of the SRA Code of Conduct 2011.

4. Why a written rebuke is an appropriate outcome

4.1 The SRA's Enforcement Strategy sets out its approach to the use of its enforcement powers where there has been a failure to meet its standards or requirements.

4.2 When considering the appropriate sanctions and controls in this matter, the SRA has taken into account the admissions made by Miss Campbell and the following mitigation which she has put forward.

a. Miss Campbell has apologised for any confusion caused by her and the Firm's responses sent to Mrs S in relation to the notice of acting.

4.3 The SRA considers that a written rebuke is the appropriate outcome because of the following matters.

a. The conduct was reckless. Miss Campbell failed to deal with Mrs S's correspondence fairly and/or openly in that the manner in which she sent the notice of acting would have led a reasonable person to believe that it was filed with the court, when in fact it had not. Such conduct damages the reputation of the solicitors' profession.

b. There has been no lasting harm to Mrs S, notwithstanding the fact that information confidential to her was sent by the court to the previous solicitors.

c. There is no evidence to show that Miss Campbell intended to mislead Mrs S.

d. This was an isolated incident, and the likelihood of it being repeated is low.

e. Miss Campbell has apologised for her actions.

f. The parties consider that in light of the admissions set out above and taking due account of the mitigation put forward by Miss Campbell, the proposed outcome represents a proportionate resolution of the matter which is in the public interest.

5. Publication

5.1 The SRA considers it appropriate that this agreement is published in the interests of transparency in the regulatory and disciplinary process. Miss Campbell agrees to the publication of this agreement.

6. Acting in a way which is inconsistent with this agreement

6.1 Miss Campbell agrees that she will not deny the admissions made in this agreement or act in any way which is inconsistent with it.

6.2 If Miss Campbell denies the admissions or acts in a way which is inconsistent with this agreement, the conduct which is subject to this agreement may be considered further by the SRA. That may result in a disciplinary outcome or a referral to the Solicitors Disciplinary Tribunal on the original facts and allegations.

6.3 Denying the admissions made or acting in a way which is inconsistent with this agreement may also constitute a separate breach of principles 2 and 5 of the Principles and paragraph 7.3 of the Code of Conduct for Solicitors, RELs and RFLs.

7. Costs

7.1 Miss Campbell agrees to pay the costs of the SRA's investigation in the sum of £300. Such costs are due within 28 days of a statement of costs due being issued by the SRA.

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