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Modernisation of Regulatory Decisions – Regulatory Settlement Agreements

1. At its meeting in May 2007, the Board approved in principle the draft policy for the conclusion of investigations by agreement

The policy

2. There is significant support for the use of regulatory settlement agreements. Indeed, there is substantial interest in them, particularly where they can facilitate restitution to clients, and an agreement to that effect was reached in the Gabb & Co miners' compensation case. The firm agreed to repay around £160,000 to clients on the basis that this mitigated the misconduct alleged. Proceedings were therefore not pursued against partners who were not directly involved in miners' work. It was also part of the agreement that the responsible partner would make admissions. He was fined £15,000 and ordered to pay costs estimated at £60,000.

3. The Compliance Committee has settled the policy which is attached (Annex 1) for the Board to consider adopting. The paragraphs which have been altered are: 4 (tidying the drafting); 11 (tidying the drafting); 16 (addition of "or by materially misrepresenting the agreement to any person") and 17 (different introductory words to refer to "examples"). References to RELs, RFLs and recognised bodies have been added to paragraph 5. There was a suggestion to remove the second sentence in paragraph 9, which provides that if an agreement is silent as to whether it is an Issue Agreement or a Settlement Agreement its nature is determinable by the Board. It is recommended that this sentence be retained to avoid the risk of invalidating an agreement which is inadvertently silent.

Delegations

4. It is necessary to delegate the power to authorise settlements. The proposal is that they can be authorised by the Chief Executive, a Director, or adjudicators acting alone and otherwise should be authorised by two people, namely one from each of the following categories: (a) Senior Adviser, Casework Adviser, and Advocate/legal adviser; and (b) Head of unit or Unit Manager. This can be reviewed if it is considered to be too bureaucratic but is probably a sensibly cautious approach at first.

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Cases involving informants

5. The paper to Compliance Committee suggested that the policy be piloted in pure regulatory matters with a view to its use in cases involving informants (formerly complainants) in due course. It has been suggested that this may not be appropriate since it means that cases and individuals would be treated differently depending solely on the route by which the case has been raised with the SRA, even if the merits are identical.

6. Deciding that issue is not strictly necessary to approval of the policy, which covers all investigations, but the Board's view would be welcomed. It was originally suggested that informant cases be brought within the policy later because the proposal was modelled on pure regulatory cases. It may be that issues remain to be worked out in cases involving informants, such as whether, for example, attempts should be made to obtain the acceptance of the informant to an agreed outcome between solicitor and regulator.

7. The answer is likely to be that this should not be a pre-condition but the Office of the Legal Services Ombudsman (OLSO) responded to the consultation by indicating that it did not favour settlements generally. The OLSO's response was:

5 **Do you agree that the Solicitors Regulation Authority should be able to enter into agreements with solicitors to settle regulatory investigations?**

Yes **No ✓**

If not, please explain why

- **SRA should define and propose the type of circumstances that agreements would be suitable for.**
- **Any agreements should be made public. The principle is that regulators should not enter into agreements in order to keep things quiet.**
- **Could be a difficulty in reaching agreement if SRA want to publish. This should not be a reason to not publicise.**
- **Has any testing been undertaken or evidence available on how effective SRA would be at determining cases suitable for settlement?**

8. The answers to these points are:

- Detailed examples and types of circumstances are set out in the draft policy statement;
- The policy statement makes clear that agreements should be public since the Board is strongly in favour of maximum transparency;
- Agreed;
- It is difficult to see how this could be tested in advance. The OLSO will be able to review complaints cases concluded by agreement. When the

Legal Services Board is in place it will be able to oversee practice and process.

9. The Board has probably three options:

   (1) To decide that there is no reason in principle why cases involving informants should be treated differently and therefore that the policy will apply to all SRA cases;

   (2) To decide that there is no reason in principle why cases involving informants should be treated differently but that implementation of the policy in such cases will be considered further in the light of any further views expressed by the OLSO;

   (3) To direct that any issues arising from potential use of the policy in cases involving informants be reviewed and matters for decision be brought back to the Board's next meeting when the Board will decide whether to apply the policy to such cases and consider any particular arrangements.

Recommendation

The Board is invited to:

1. Adopt the attached policy with immediate effect;

2. Delegate the power to authorise agreements to:

   a. The Chief Executive, any Director, and any Adjudicator, acting alone; and

   b. Two persons, one from each of the following categories:

      i. First category - Senior Adviser, Casework Adviser, and Advocate/legal adviser; and
      ii. Second category - Head of Unit and Unit Manager.

3. Decide that, for the avoidance of doubt, the delegation to enter into agreements includes the power to include as part of the agreement any regulatory outcome such as, but not limited to, a finding of misconduct, a sanction, or the imposition of a practising certificate condition.

4. Confirm that agreements may be entered into before or after referral of a solicitor's conduct to the SDT (subject to the SDT's discretion where applicable).

5. Decide that there is no reason in principle why cases involving informants should be treated differently but that implementation of the policy in such cases will be considered further in the light of any further views expressed by

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the OLSO; and that this issue be brought back to the Board for decision as soon as possible.

Annexes

Annex 1 **Draft policy statement on regulatory settlement agreements**

Author **David J Middleton**

Date **August 2007**

This paper is for decision

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Solicitors Regulation Authority Board

Policy statement
Settlement of regulatory and disciplinary cases

Introduction

1. Modernisation of regulatory and disciplinary decisions is needed to:

   - Improve transparency of process and outcome for the public and regulated persons;

   - Enable proportionate outcomes to be reached efficiently, at reasonable cost, and in the interests of the public.

2. This statement establishes the Solicitors Regulation Authority Board's policy regarding agreements that can be reached between solicitors and the Board.

3. The new approach established by this Statement supplements existing processes.

4. Reference to "the Board" in this Statement includes those exercising decision-making powers delegated by the SRA Board.

5. Reference to "solicitor" includes solicitors' practices and all persons who may be affected by the Board's decisions such as Registered European Lawyers, Registered Foreign Lawyers, Recognised Bodies, and unadmitted persons subjected to investigation or application pursuant to section 43 of the Solicitors Act 1974.

6. Reference to "investigation" includes all disciplinary and regulatory investigations and prosecutions.

7. This policy applies to any investigations whenever commenced.

Agreements

8. Agreements may be reached with solicitors in two forms:

   - By settlement of an investigation (a "Settlement Agreement");

   - Upon a particular issue relating to an investigation, such as the appropriate way to compensate victims of wrongdoing, without concluding the investigation (an "Issue Agreement").

9. Agreements reached must expressly state whether they are a Settlement Agreement or an Issue Agreement. If they are silent, their nature is determinable by the Board.

10. Agreements are subject to any reconsideration policy in place from time to time and may also be rescinded by the Board if the solicitor has materially misled the Board or any other person whether intentionally or not.

11. Agreements between the Board and solicitors are not the equivalent of settlement of all or part of a commercial dispute. Agreements are regulatory decisions by the Board, the terms of which are accepted by the solicitor. There is no compulsion on the Board or staff to negotiate or enter into an agreement. The existence of negotiations will not generally be permitted to delay formal processes.

12. The terms of any agreement will:

    - be in writing and be agreed by the Board and the solicitor concerned;
    - state the relevant facts;
    - identify any failings admitted by the solicitor;
    - identify the action the solicitor has taken or has committed to take;
    - identify any sanction imposed by the agreement;
    - be published by the Board unless expressly stated otherwise in the agreement.

13. All discussions with a view to agreement being reached will be conducted “without prejudice” and, subject to order of the SDT or the court, are therefore not admissible in investigations or proceedings upon the same principles that apply to “without prejudice” communications as a matter of law.

14. A relevant factor which may influence the Board in deciding whether to enter into discussions or reach an agreement with a solicitor is whether the solicitor’s integrity is in question and in particular whether compliance with an agreement can be relied upon.

15. The Board considers that solicitors who materially breach a Settlement Agreement or Issue Agreement will be guilty of professional misconduct and potentially in breach of specific rules relevant to the factual circumstances.

16. The Board in its absolute discretion may proceed with the original investigation, or any other investigation, if it considers that a solicitor has materially failed to comply with an agreement or, having entered into an agreement, behaves in a way inconsistent with it (such as by denying

misconduct or other failings admitted in the agreement or by materially misrepresenting the agreement to any person).

17. Example agreements are set out below.

Agreed public statements

18. The Board may agree that a statement be published by the solicitor and the Board. This is likely to be appropriate in the following circumstances:

    - The solicitor acknowledges a failure (which may or may not constitute misconduct);
    - The solicitor states what has been done and what will be done to avoid such a failure in the future;
    - Where publication is part of a Settlement Agreement, publicity for the admitted failure is considered by the Board to be a proportionate outcome in all the circumstances.

19. Examples of circumstances which might be appropriately concluded by a public statement include:

    - A systems failure within a firm, rather than a culpable individual failure, where there is clear evidence that the systems failure has been and will continue to be addressed.
    - A failure of supervision or systems within a firm contributing to misconduct by an individual who is no longer practising or within the firm.

20. Whilst agreed public statements are more likely to be part of a Settlement Agreement, it is possible that they will be Issue Agreements. For example, an agreed statement may state that the firm accepts a failure properly to identify conflicts of interest and that a conflicts checking system has been established to avoid problems arising in future - even though investigation against one or more individuals continues.

Schemes for correction, improvement and restitution

21. It may be in the interests of clients or the public that solicitors establish schemes to correct problems arising from their conduct or to improve their processes. Again, agreement to a scheme may be part of a Settlement Agreement or an Issue Agreement.

22. Examples of schemes of correction or improvement that might mitigate the solicitors' conduct include:

- Where solicitors have made payments from clients' money, such as for amounts not properly due to the solicitors or not properly due to third parties, the solicitors may establish a scheme by which they will:
  - Pro-actively identify and contact all clients (or others) affected;
  - Refund money to them;
  - Report periodically to the Board on the progress of the scheme;
  - Submit to monitoring.

- Where the solicitors have failed to identify conflicts of interest, they may propose a comprehensive conflict identification procedure supported by specialist training for all staff, with verification by the Board.

- Where the solicitors have missed time limits for issuing personal injury claims or registering titles, by which they will:
  - review all files relating to an agreed period;
  - rectify any errors;
  - notify any clients who have suffered or may suffer loss or inconvenience of the circumstances and possible remedies;
  - pay any penalties or refer clients to the solicitors' indemnity insurers;
  - submit to monitoring;
  - establish systems to minimise the risk of recurrence.

23. Agreements that solicitors will implement a scheme of correction, particularly if part of a Settlement Agreement, are likely to require compliance protections including:

- an enforceable professional undertaking from the solicitors that they will comply – although this will normally be implicit in the agreement;

- a residual power for the Board in its absolute discretion to proceed with the original investigation if not satisfied that the scheme of correction has been fully or properly implemented.

Practising controls

24. The Board may be prepared to accept undertakings from solicitors that result in control of their practising arrangements such as that the solicitors will:

- not engage in a particular form of work such as conveyancing, acting for lenders, or litigation;

- close their firm within a set period;

- by a stated date, engage in practising only as employees, perhaps pending the outcome of an investigation;

- correct errors in their accounts and provide independent evidence when the accounts are in compliance;
- seek medical treatment and provide independent evidence of the outcome (such as that the solicitor has overcome an addiction);
- consent to being examined by a medical practitioner and to the provision of medical records for the purpose of a report being provided to the Board as to their fitness to practise whether at all or in controlled circumstances;
- not personally have contact with witnesses in the conduct of criminal or civil litigation.

Removal from the Roll by consent

25. It may be in the interests of the public that the Board consent to an application for removal from the Roll by a solicitor against whom disciplinary proceedings are likely to be taken.

26. The Solicitors (Keeping of the Roll) Regulations 1999 provide in effect that the Board may refuse to remove the name of a solicitor from the Roll who is the subject of an outstanding complaint and that the Board shall not remove a solicitor from the Roll who is the subject of disciplinary proceedings before the Solicitors Disciplinary Tribunal. The Board may be prepared to agree to an application for removal from the Roll where the solicitor signs an agreement attaching a witness statement (an "Admission Statement"):

    - containing a statement of truth;
    - admitting allegations of misconduct;
    - admitting facts relevant to those allegations;
    - acknowledging any previous disciplinary or regulatory findings;
    - acknowledging that serious disciplinary action by the Solicitors Disciplinary Tribunal could be taken in the light of his admissions;
    - requesting removal from the Roll to save costs, distress and further risk to the public;
    - acknowledging that the statement is made voluntarily;
    - acknowledging that the statement and agreement will be published by the Board;
    - undertaking not to seek restoration to the Roll;

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- undertaking not to work for a solicitors' practice without the written permission of the Board;
- making full and frank disclosure to any prospective employer of the agreement with the Board.

[End of policy statement]