Bossing the rules: Your obligations to report concerns

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Our lawyers' liability and regulatory team continue their series demystifying the SRA's new Standards and Regulations in this article looking at solicitors' revised reporting obligations under #StaRs Rules 7.7 and 7.8.

The recent introduction of the SRA's new Standards and Regulations on 25 November 2019 has resulted in updated reporting obligations, intended to bring clarity and consistency to decision-making, but which place stringent requirements on solicitors to report potential beaches of the Code in a wider range of circumstances and at an earlier stage than they might previously have done.

What is the new rule?

The new reporting obligations are set out at paragraph 7.7 and 7.8 of the new Code of Conduct:

7.7 You report promptly to the SRA or another approved regulator, as appropriate, any facts or matters that you reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them (including you).

7.8 Notwithstanding paragraph 7.7, you inform the SRA promptly of any facts or matters that you reasonably believe should be brought to its attention in order that it may investigate whether a serious breach of its regulatory arrangements has occurred or otherwise exercise its regulatory powers.

Following concerns raised in the consultation, the SRA has also introduced a provision to protect whistleblowers, requiring that no one should be subjected to detrimental treatment based on their making a report, or providing information based on a reasonably held belief (Code of Conduct, paragraph 7.9).

What has changed and why?

The previous obligation, set out in the 2011 SRA Code of Conduct, required solicitors to report to the SRA promptly "serious misconduct by any person or firm authorised by the SRA, or any employee, manager or owner of any such firm (taking into account, where necessary, your duty of confidentiality to your client" (mandatory Outcome 10.4).

So what was wrong with the obligations as drafted in 2011? First, "serious misconduct" was undefined, and inconsistent with terminology used elsewhere in the SRA's standards and regulations. Further, there was no guidance on the state of mind needed to trigger a report, and the SRA expressed concerns that understanding of when the duty is triggered could differ. In particular, the stage at which concerns were reported varied significantly, with some solicitors reporting issues at an early stage of their internal investigation process, while others considered that the reporting obligation was triggered only when it had been conclusively determined that serious misconduct had occurred.

The SRA was clear in its response to the August 2018 consultation that its job is to investigate concerns that are capable, if proved, of amounting to a serious breach of its requirements, rather than abdicate responsibility for the investigation and decision on this matter to the potential reporting solicitor.

What potential issues arise from the rule changes?

Interpretation of "serious breach" and "reasonableness"

The SRA has expressly stated that it did not consider it "desirable" to define the term "serious breach" in the Code of Conduct, and likewise it considered that it would not be appropriate to define "reasonableness". However, it has

stated that the use of the word "serious" necessarily has the impact that not every breach is reportable, and has referred to its Enforcement Strategy for further clarification on this point.

The Enforcement Strategy (February 2019, updated November 2019) states that the SRA will take action in respect of breaches of the Code of Conduct which are serious either in isolation or because they demonstrate a persistent failure to comply or a concerning pattern of behaviour. Hence an assessment of seriousness will involve looking back at past conduct and behaviour, as well as looking forward to assess future risk of a repeated breach.

The Enforcement Strategy lists several mitigating factors which might be indicative of a reduced or low future risk, including: expressions of apology, regret, remorse, and no evidence of repetition or a pattern of misconduct.

The SRA explicitly states that it recognises the "stressful circumstances" in which many solicitors and firms are working, and that the health of the individual at the time of the events in question might have a significant bearing on the nature and seriousness of the alleged breach. However, some types of allegations should always be taken seriously, for example:

- Abuse of trust
- Taking unfair advantage
- Misuse of client monies
- Sexual or violent misconduct
- Dishonesty
- Criminal behaviour

The Enforcement Strategy also lists other common factors affecting the SRA's view of how serious an allegation is, including:

- the intent or motivation of the solicitor involved (with dishonesty or lack of integrity being at the "higher end of the spectrum");
- the harm and impact on the victim(s) (including harm that could reasonably have been anticipated to flow from the conduct in question, as well as actual harm);
- the vulnerability of the victim(s);
- the role, experience and seniority of the solicitor involved;
- regulatory history and patterns of behaviour; and
- any remediation that has taken place.

Rule 7.8: a wider obligation?

The new second paragraph of the reporting obligation, imposing an obligation to report where the SRA would want to investigate "notwithstanding" that no such obligation arises under 7.7, clearly sets a lower threshold and appears to subsume the first obligation. However, in reality, the second paragraph is aimed at preventing a different evil, targeting circumstances where there might be no grounds for reasonable belief (for example, because of a lack of evidence or inability to access evidence) but where there might be real concerns about conduct such that the SRA would be likely to feel that an investigation was merited.

Is the reporting obligation overridden by confidentiality, privilege, or non-disclosure agreements?

Most commentators have already spotted that there is no longer a specific requirement to take into account client confidentiality when deciding whether to report, a potentially worrying conundrum particularly to those who act for solicitor clients. However the SRA's recent Guidance on Reporting and Notification Obligations recognises that there are competing interests (including where information is confidential or covered by legal professional privilege) that will need to be taken into account. The Guidance suggests that requirements of confidentiality alone should not deter solicitors from making a report since – whilst a balancing exercise is required - there is a "clear public interest" in reporting misconduct which is likely to justify disclosure where this is provided to enable the SRA to discharge its regulatory function.

Such an approach tacitly involves an assumption on the part of the SRA that a duty to report is capable of overriding a legal obligation to keep something confidential. It is a questionable assumption as there is no apparent caselaw to support the theory that the conduct duty to report overrides an inconsistent legal duty (and the House of Lords decision in Hilton v Barker Booth demonstrates that there can be no contractual implication to that effect).

The SRA does, however, acknowledge that the reporting of information subject to legal professional privilege will require careful consideration, although in some circumstances it will be entitled to see such information and may request that solicitors obtain client consent in order to disclose. In certain circumstances (eg where client consent cannot be obtained to disclose privileged information), the SRA will consider issuing a statutory production ("section 44B") notice requiring disclosure to enable information to be provided without risk to the reporting solicitor.

In its Guidance, the SRA suggests that solicitors speak to its Professional Ethics Helpline or seek independent advice, and consider speaking to the SRA to notify of a situation where information cannot be provided as yet (and why) and the steps being taken to meet reporting obligations.

The Guidance also confirms that non-disclosure agreements should not be relied upon in order to prevent a person reporting to the SRA or other authorities.

General concerns

The change in emphasis to reporting at an earlier stage necessarily brings with it a risk of over-reporting, and consequent concerns about COLPs and the SRA being overrun with minor early reports as individuals and firms seek to stay within the Code for fear of "getting it wrong". This carries with it an inevitable increased level of stress for the subject of the report, who might find themselves summarily subject to an SRA investigation which subsequently proves to be unnecessary.

Practical Tips

- Ensure that you document anything involving personal judgment, eg a decision as to whether or when to report, or a decision involving competing considerations such as confidentiality, so the decision can be justified to the SRA if necessary.
- If you are an individual solicitor, your obligation to report will be satisfied if you provide the information to the appropriate compliance officer of your firm on the understanding that they will do so, i.e. where you believe that the internal report will result in notification to the SRA.
- Reports to the SRA should be made at an early stage, alongside (rather than after) your own investigations.
- Where issues of client confidentiality or privilege arise, you should consider whether you need to seek client consent to disclosure to the SRA. Solicitors should also be aware that privilege can be overridden by service by the SRA of a section 44B Notice.
- You should also consider data protection issues, specifically your obligations under the General Data Protection Regulation, when reporting. Disclosure to the SRA for the purposes of regulation may be permitted, but specialist advice on this should be sought if applicable.
- Solicitors are advised not to enter into non-disclosure agreements that would prevent the reporting of relevant information to the SRA or other authorities and the SRA is clear that such agreements should not be relied upon in those circumstances.
- Look out for the SRA's compilation of case studies (www.sra.org.uk/solicitors/guidance/case-studies/reporting-notification-guidance/); these will hopefully assist (as they build up) in showing how the rules would be applied in a range of circumstances.

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