SRA powers and client legal professional privilege: Part I

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Legal professional privilege gets a pretty good billing in the case-law. It has been described as the "condition on which the administration of justice as a whole rests"[1]; as a "fundamental human right"[2]; it even outlasts death and dissolution[3]. In other words, it's seen as rather important to the process of obtaining legal advice.

Of course, it's not the only important thing when taking legal advice. The quality of legal advice is up there; so is the proper regulation of lawyers. Perhaps it's not quite the same as a fundamental human right, but if there is going to be access to justice then clearly the lawyers ought to be held to proper standards.

This article looks at how one particular legal services regulator – the Solicitors Regulation Authority (SRA) – achieves a balance between the competing interests of protecting clients' legal professional privilege entitlements and its obligations to regulate solicitors effectively.

This is the first of two articles. This one looks at the impact of client privilege on making reports to the SRA. Part II looks at the SRA's statutory production notice powers, including under ss.44B-44BC, Solicitors Act 1974

Fundamental inconsistency

Before addressing this issue any further, it is important to acknowledge the fundamental inconsistency between the policy objectives here. Regulation of lawyers is important. It is difficult to achieve if the regulator can only look inside a matter file provided the client consents. On the other hand, legal professional privilege rests on the foundation that "…[a] client must be sure that what he tells his lawyer in confidence will never be revealed without his consent"[4]. These objectives are difficult to reconcile but that does not mean they can be ignored.

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1 *R v Derby Magistrates Court, Ex p B* [1996] AC 487.
2 *Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd, v R* [2002] UKHL 21.
3 See *Addlesee & Ors v Dentons Europe LLP* [2019] EWCA Civ 1600.
4 *R v Derby Magistrates*, op. cit.

Client confidences revealed?

A good place to start is the end-point: the risk of revelation of client confidences. That means the Solicitors Disciplinary Tribunal (SDT), where the most serious allegations of solicitor misconduct are heard. Any complaint about a solicitor's professional conduct could in theory end up in the SDT. It is therefore relevant to consider what protections are available for client privilege in the SDT.

The answer is 'very few'. SDT hearings are heard in public, unless an affected person can show exceptional hardship or prejudice[5]. That means evidence about privileged advice can be heard by anyone sitting in the tribunal room. The SDT's rules do not mention the risk of disclosure of client privilege as an example of exceptional hardship or prejudice. Of course, SDT decisions are routinely anonymised as regards references to the persons involved, but that doesn't necessarily apply to live evidence at hearings[6]. Unfortunately, in many instances it is a relatively easy matter to work out the identity of the persons involved despite anonymisation, especially for those who have some knowledge of the underlying participants.

If, therefore, an SDT case directly concerns information that is subject to the client's legal professional privilege, it is all but inevitable that the substance of that privilege will be revealed to a significant extent during the final hearing

Nor is it an answer to point to the SDT's discretion to hold hearings in private, anonymise identities in its written reasons, and so on. The point is that these are all **discretions**, whereas the foundation of legal professional privilege rests on a client's **certainty** that – at the moment of advice-giving – his or her confidences will not be revealed in the future without that client's consent. It's no comfort for the client to be told that some future tribunal may have a discretion whether or not to reveal the lawyer's advice to the outside world.

Of course, client confidences may also be revealed prior to reaching the SDT. The SRA has a power to disclose or publish **any** information arising from or relating to an investigation – see r.9.1 of the SRA Regulatory and Disciplinary Procedure Rules[7]. It follows that information imparted in confidence to the SRA during the course of an investigation may still be disclosed by it to third parties. Again, it's no comfort to the client wishing to protect its privilege entitlements that this will only be done where it is in the public interest to do so, as the client would (with justification) argue that the public interest in allowing clients to obtain privilege protection outweighs all other considerations. Perhaps the SRA could be persuaded to agree not to exercise its powers under r.9.1, eg as a way of supporting 'safe' disclosure to the SRA on a limited purpose waiver basis, but it is unclear if the SRA would be willing to entertain such an approach (and past experience suggests probably not…).

In summary, the processes of SRA investigation and SDT hearings are, bluntly, as leaky as sieves when it comes to the certainty of protection of client privilege.

Privilege, reports and SRA investigations

Now let's go back to the beginning of things – the commencement of an SRA investigation. Most investigations are triggered by complaints, and complaints (for these purposes) come in two flavours: client-instigated, and 'hostile' complaints.

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5 Solicitors (Disciplinary Proceedings) Rules 2019.

6 Questioning a witness about multiple persons identified only as 'A', 'B', 'C' etc is difficult and risks confusion and incorrect evidence.

7 Rule 9.1, "The SRA may disclose or publish any information arising from or relating to an investigation, either in an individual case or a class of case, where it considers it to be in the public interest to do so.".

Where a client makes a complaint, it is relatively easy to infer that the client impliedly consents to the SRA viewing his or her matter file when investigating that complaint[8]. After all, the client in such a situation will usually be inviting the regulator to look inside that file. This suggests client privilege concerns will rarely arise if the client makes the complaint. Furthermore, the SRA could always adopt a belt and braces approach and seek express client consent – it ought to be forthcoming for obvious reasons.

However, complaints are not always made by clients. A particularly difficult scenario arises where the complaint is made by someone on the 'other side' ie a person who is actively hostile to the solicitor's client's interests. This kind of complaint might be motivated by a genuinely held perception that the solicitor has committed professional misconduct. Sometimes, however, there is a suspicion that the opponent is making a tactical complaint to the SRA, perhaps with a view to obtaining litigation advantage or documents, especially privileged ones. In these situations, the client whose solicitor is the object of complaint may have strong reasons to prevent his or her privileged information going anywhere near the regulator, let alone the other side. If the SRA were to ask for consent, this kind of client is likely to say 'No!'.

'Things to think about when your solicitor is being investigated by us'

Given the obviousness of the points made immediately above, one might have expected the SRA to have addressed this topic in its publications or codes – eg something like, 'Things to think about when your solicitor is being investigated by us'.

Unfortunately, nothing of this kind exists at the time of writing. The SRA Principles and the Codes for Firms and for Solicitors make no reference to client privilege entitlements[9]. Neither do the SRA Application, Notice, Review and Appeal Rules, the SRA Regulatory and Disciplinary Procedure Rules or the Solicitors Act 1974. They are all silent on this fundamental human right and its interaction with SRA investigation processes.

SRA Guidance on reporting

There is some SRA Guidance however, entitled "Reporting and notification obligations"[10]. This says client privilege is a "relevant consideration" when a solicitor considers making a report to the SRA pursuant to paragraphs 7.7 and 7.8 of the Code for Solicitors[11]. It suggests that the obligation to report may require a solicitor to exercise his or her judgment relating to "competing considerations", including legal professional privilege[12]. There is also a section in the Guidance headed "Legal professional privilege". It emphasises that "particularly careful consideration" may be needed where the reporting concerns legal professional privilege.

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8 If such consent is not readily implied, the SRA could of course always ask for it at the start.

9 Para. 6.4 of the Codes does not count for current purposes.

10 See https://www.sra.org.uk/solicitors/guidance/ethics-guidance/reporting-notification-obligations/ , last accessed 29 April 2020.

11 Rule 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)." And rule 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." Similar provisions are in the SRA Code for Firms.

12 "Your obligation to report matters to us may require you to make judgments relating to competing considerations. By way of example, information may be sensitive, personal, confidential or covered by legal professional privilege."

It's good to know that the SRA thinks that client privilege is a relevant consideration and requires particular care when considering making a report. However, there is a concern that these parts of the Guidance are unhelpful, arguably wrong.

The problem lies in the impression created by this part of the Guidance, to the effect that privilege is a "competing" consideration, one to be weighed in the balance. The case-law does not support such a view. The protection afforded to client legal professional privilege is much more of an absolute quantity. To extend the weighing metaphor to breaking point, if privilege had weight then it would be infinite. It always outcompetes other policy considerations, especially where the balancing exercise is to be undertaken by a lawyer[13].

There then follows this paragraph in the Guidance, worth citing in full:

> "In certain circumstances we are entitled to see information that would otherwise be covered by LPP. To allow this, we may request that you obtain specific client consent in order to disclose information to us, or you may judge it necessary to seek consent of your own accord so that you can bring a relevant matter to our attention. Without client consent, we may seek a statutory production notice for disclosure of the information. This allows us to access information and documents held by regulated firms and individuals, even where such material attracts LPP. If a statutory production notice is served on you requiring the disclosure of material, then you must produce this to us."

This is rather muddled.

It starts by referring to an **entitlement** to seek privileged information but then immediately addresses the situation where a solicitor is obliged to obtain client consent to disclosure of privileged materials to the SRA. If there is an entitlement, client consent would not be needed. This is a confusing message. Of course, the very fact that it mentions seeking client consent implies that the SRA thinks the duty to report does not override the duty to protect client privilege. If so, that should be spelled out.

The above extract also does not address the tricky question whether or not the solicitor is able, or indeed obliged, to advise a client whilst at the same time seeking "specific client consent". It seems rather challenging for a solicitor to be duty-bound to seek client consent to disclosure of privileged materials and for that same solicitor to be advising the client whether such consent should be given. 'Own interest conflict' anyone?

This part of the guidance also does not address fully the situations where the SRA "may seek a statutory production notice…" What are the legal pre-conditions for the SRA's ability to use such a power? Where is the policy for its use? (These may well be written down somewhere, but they are not identified in this Guidance…)

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[13] See Derby Magistrates, op cit, "81. In the absence of principled answers to these and similar questions, and I can see none, there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the wisp. That in itself is a sufficient reason for not departing from the established law. Any development in the law needs a sounder base than this. This is of particular importance with legal professional privilege. Confidence in nondisclosure is essential if the privilege is to achieve its raison d'etre. If the boundary of the new incursion into the hitherto privileged area is not principled and clear, that confidence cannot exist."

There is also a boot-strapping problem here. It's all very well for the SRA to say that their statutory production notice powers can override privilege, but how will they know whether or not to exercise those powers if the report cannot be made to the SRA in the first place without obtaining client consent (eg because the report requires reference to privileged material)?

And what about the situation where a solicitor can make a report to the SRA without needing client consent to disclose privileged information, eg the report is based on public domain materials or materials that have lost any quality of confidentiality, but in circumstances where it is obvious to the solicitor that if such a report is made then the SRA will demand sight of the entire matter file, containing privileged information? In other words, the act of making a report can be done without client consent but its commission is likely to expose the client to harm.

Then there are the implications of client consent to disclose privileged materials. If such consent were given, could it amount to a waiver of privilege, meaning that third parties could then demand production of that same (formerly) privileged advice? The case-law concerning privilege is littered with examples of litigants taking precisely this kind of argument, sometimes to the appellate level (and winning…). The Guidance does not address this topic at all.

Finally, and perhaps more importantly, this Guidance does not say if the client can object to the solicitor's disclosure of client-privileged information. Remember: this is a fundamental human right **belonging to the client**, but the SRA does not say anything here about the weight to be given to protection of that right; it's all about what the solicitor must do.

Of course, someone may respond that this is supposed to be Guidance for solicitors, not clients. Nonetheless, one might have expected the SRA to explain somewhere how its powers to compel solicitors to disclose and report information interact with this precious right, the entitlement of a client to assert privilege over the advice its solicitors provides.

Conclusions on client privilege and reporting

The SRA's reporting obligations are silent about the interaction between client privilege entitlements and the solicitor's duty to report. This is a missed opportunity. The rules should have said something about it.

The SRA's Guidance concerning the reporting obligations appears to be based on the assumption that the reporting obligations do NOT override client privilege. This is not expressly stated but it is implicit in the remark in the Guidance about seeking client consent when making a report utilising client-privileged information. Furthermore, if the SRA were to argue that its rules override client privilege, then it would need to get within the well-established legal principles governing statutory override, and there is no attempt to argue that point in the Guidance.

The SRA's Guidance is not up to the task of providing assistance to solicitors when navigating the complex issues that can arise when solicitors may be obliged to make reports that concern client-privileged information.

It is a matter of concern that the SRA does not explain openly and fully to clients the circumstances when its powers may be capable of overriding their privilege entitlements.