Changes in SRA enforcement: what the increase in fining powers means for solicitors under misconduct investigation

Andrew Katzen assesses the changing attitude and impact of the higher fining powers available to the Solicitors Regulation Authority in regard to misconduct investigations

For solicitors and law firms under Solicitors Regulation Authority (SRA) investigation for misconduct, deciding whether to seek agreement with the regulator used to be a relatively simple question to answer.

Professional disciplinary lawyers were generally able to predict with confidence the SRA's attitude to any enforcement matter; and could follow long-established guidance on the level of financial sanction internally available to it.

The number of SRA investigations was quite low and tended to focus on allegations of dishonesty and/or misuse of client accounts. When financial penalties were proposed by the SRA using their internal powers, they were necessarily small, due to the limits placed upon it.

Much has changed at the SRA in relation to misconduct enforcement over in recent years, however.

Higher fining powers, coupled with a stark change in attitude, have caused the SRA misconduct kaleidoscope to shift. While some pieces are still in flux, it is possible to make out the contours of the new rules of engagement.

Increased SRA fines and the new guidance

In July 2022, the SRA's power to fine solicitors and law firms it has found to have committed misconduct grew from a maximum of £2,000 to £25,000 (for any law firm that is not in alternative business structure, or lawyer working for such).

Prior to this change, any solicitor or firm under SRA investigation may have taken the view that it is better to seek settlement or an agreed outcome with the regulator than bear the financial costs (and run the risk of greater punishment) of allowing a case to be referred to the Solicitors Disciplinary Tribunal (SDT).

Reaching agreement with the SRA enabled the solicitor (or firm) to pay a relatively low fine then move on with their professional lives, so the thinking went. A tribunal referral, on the other hand, may result in extra cost, delay, sanction and reputational damage.

The July 2022 fine increase changed this calculation. Eleven months later, the SRA issued a new set of guidance on how it would use this power. This guidance is far more formulaic and mathematical than has previously been the case and has resulted in the assessment of fines generally that are much higher for certain types of misconduct (and often over £25,000).

It is likely to move further this way if, as is expected, the regulator wins the power to imposed unlimited fines for financial misconduct in the Economic Crime and Corporate Transparency Act.

The impact of the SRA's changed fining regime on drink driving

As a solicitor who defends lawyers and law firms caught up in SRA investigations, I have been struck by two types of misconduct matters which may indicate trends in the regulator's enforcement practices over recent years.

The first relates to drink driving. In January this year, there was a sense of shock in the legal profession when the SRA fined a solicitor £13,836 (plus costs of £1,350) after he was convicted for driving a car while under the influence of alcohol.

This fine was 31 times higher than the financial penalty issued by the criminal court in this case: a fact which led some legal commentators to question its fairness.

This is not an isolated case. Anecdotally, I am aware of a similar matter in which the SRA proposed a fine of nearly £60,000.

In these cases, the individuals concerned pleaded guilty, were fined by the criminal courts and reported themselves to the regulator. But for the SRA, this was insufficient. It has threatened to impose financial penalties which dwarf the criminal court's sanction.

The well-publicised case mentioned above prompted significant commentary in the legal media from solicitors concerned that, in pursuing this approach, the SRA may be adopting an inappropriate approach. Certainly, it is hard to avoid the conclusion that the regulator is acting in a way that is disproportionate to the offence, and contrary to the proper purpose of professional regulation.

The impact of the SRA's changed fining regime on AML

The second recent trend relates to anti-money laundering (AML). Official SRA figures show that, over the eight months from February 2023, the regulator fined law firms a total of £5,250 for breaching its anti-money laundering regulations. However, over the five months from October 2023, the total amount fined was £290,000: a nearly sixty-fold increase.

This huge increase in fines has been accompanied by a noticeably less forgiving attitude at the SRA to AML breaches.

I have been struck at the frequency with which the SRA, having conducted a (sometimes unannounced) AML inspection, has succeeded in finding fault with the way the law firm has either obtained, or kept, the correct documentation.

Effective record keeping is, of course, essential for a well-run law firm and is sometimes a requirement of the Money Laundering Regulations. But rarely in these cases is any actual money laundering detected. The SRA nonetheless proposes huge fines based on the risk of money laundering taking place.

When it comes to quantifying this risk, there is something of the wisdom of hindsight. Regulatory AML compliance is of course a legal obligation. But by applying a 'gold standard' to the appropriate penalty, the regulator does not always consider the everyday challenges small and medium-sized law firms face.

A disparity in the approach between the SRA and SDT?

The recent changes to SRA enforcement have sharpened pre-existing concerns about the potential for difficulties resulting from differences between the SRA's and the SDT's assessment of financial penalties for misconduct.

Broadly stated, the SRA's guidance is to follow the following three step process:

1. Determine a basic penalty taking into account the seriousness of the breach, any aggravating or mitigating factors benchmarked against the firm's turnover or individual's income.

2. Adjust this by taking into account specific mitigating factors relating to conduct after the breach.

3. Remove any financial benefit arising from the misconduct.

The SDT guidance is different. Its process is broadly:

1. Determine a basic penalty taking in to account the seriousness of the breach and the level of fines imposed in analogous cases.

2. Adjust this taking into account the size or standing of the firm or solicitor.

3. Adjust again in regard to the means available, including the total financial detriment suffered, any costs order and any adverse financial impact of the decision itself.

It is noticeable how, in its guidance, the SDT takes explicit account of what we may term 'real world' factors in assessing an appropriate level of sanction.

Drink driving seems to be one area in which this difference is glaringly obvious and could lead to a markedly lower financial penalty at the tribunal.

Time for new rules of SRA engagement?

Solicitors facing the prospect of an SRA misconduct investigation have always weighed the pros and cons of seeking to reach a settled conclusion with the regulator.

For years, the conventional wisdom was to try to avoid the expense, delay and potentially higher sanction of the SDT by reaching an agreement with the SRA.

This is no longer a given. Recent changes at the regulator mean that, for matters such as drink driving and AML breaches, the tribunal may take a less rigid view than the SRA.

These are just two areas in which the defensive strategy to SRA action may be changing. If the SRA succeeds in winning the right to impose unlimited fines in misconduct related to economic crime, there will likely be many more.