ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – SPRING 2020

CONTENTS

Chairman's Introduction

Welcome to the Spring edition of the ARDL bulletin which again includes expert insights on regulatory and disciplinary law.

We are currently living in uncertain times and ARDL like all other organisations has had to review its activities. We have suspended all seminars in the light of the Government guidance on Covid-19 and we have also taken the decision to postpone the ARDL dinner which had been booked for 19th June at the Guildhall. This will now take place early in 2021. We are also going to have to make arrangements to enable the ARDL AGM to take place by either video or telephone on 27th April. As matters presently stand we are continuing with preparations for the first ARDL Conference which is due to take place on 2nd October at the Museum of London. We have already lined up an exciting list of speakers and there will be more news in the coming weeks. We also hope to be able to have a full seminar program in the Autumn.

Can I also remind those of you that have not yet renewed your subscription to do so. ARDL seminars and the annual conference are only open to members who are able also to share in the other networking and educational activities of ARDL. We hope shortly to launch the new ARDL website which will include a members' area for booking events and sharing knowledge.

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The SRA Standards and Regulations: An Introduction and some Reflections[1]

Introduction

In November 2019 the SRA's new Standards and Regulations came into force. In many respects the substance of what is expected of the profession remains much the same, but the new regime sees major changes to the regulations and rules through which those expectations are expressed and will be enforced. Both practising solicitors and those involved in advising them on their regulatory obligations must familiarise themselves with what has changed. The aim of this article is to highlight the major changes and give some thoughts on what their implications may be.

According to SRA publications, the new regulatory model aims to have shorter and more targeted rules that focus on protecting the public and their money while reducing the burden on solicitors and law firms and allowing them more freedom to use their professional judgement in considering how to meet the standards required of them. The SRA has also made clear that the changes are intended to reflect changes to the legal services market and the way clients access services by removing restrictions on how solicitors can work.

The key changes being introduced include:

- A new set of SRA Principles;
- New and separate codes of conduct for individual solicitors and firms;
- Shorter Accounts Rules;
- Freeing up solicitors to carry out 'non-reserved' legal work from within a business not regulated by a legal services regulator;
- Allowing solicitors to provide reserved legal services on a freelance basis; and
- Changes to the disciplinary rules.

In this article, we briefly summarise these key changes and examine both the evolving disciplinary landscape and the new Accounts Rules in little detail.

The Key Changes

<u>New SRA Principles</u>

There are now only 7 Principles comprising the fundamental tenets of ethical behaviour that the SRA expects all those it regulates to uphold, both individuals and firms. This is a reduction from 10.

Four of the previous Principles have been removed: 5 (providing a proper standard of service), 7 (complying with legal and regulatory obligations), 8 (running businesses in accordance with proper governance etc) and 10 (protection of client money). It may be said that none of these ever needed to be elevated to the status of principles. Further, in the case of Principle 8, the creation of two codes (see below) makes its removal logical. Moreover, the fact that several old principles are no longer there does not mean they have disappeared entirely: they can still be found in the main body of the two separate Codes of Conduct now applying to individuals and solicitors' practices.

Further, the removal of 4 Principles is counterbalanced by the addition of a new Principle requiring solicitors and firms to act honestly. This is in addition to the existing and retained obligation to act with integrity. This change reflects the trouble that both the SDT and the courts have had in identifying and applying the difference between the two concepts, apparent prior to the Court of Appeal's judgment in *Wingate v SRA* [2018] EWCA Civ 366; [2018] 1 WLR 3969 (CA) but still in evidence in the recent case of *SRA v Siaw* [2019] EWHC 2737 (Admin) (where, very unusually, the Divisional Court ended up substituting findings of dishonesty for the SDT's finding of lack of integrity). The difficulty of differentiating dishonesty and lack of integrity are likely to be compounded by the fact that charges now only need to be proved to the civil rather than criminal standard of proof (see further below).

<u>Two New Codes of Conduct</u>

While the new set of Principles will be common to individuals and firms, there are now two Codes of Conduct:

- The SRA Code of Conduct for Solicitors, RELs[2] and RFLs[3] describes the standards of professionalism required of individuals authorised to provide legal services; and

[1] This article is based on a podcast first made available on 5 November 2019.

[2] Registered European Lawyers

[3] Registered Foreign Lawyers

- The SRA Code of Conduct for Firms describes the standards and business controls the SRA expects of firms authorised to provide legal services.

The SRA have said that these new Codes are intended to create and maintain the "right culture and environment for the delivery of competent and ethical legal services to clients" and also to allow solicitors to exercise their own judgement about applying the standards to the situation they are in and deciding on a course of action.

The Code of Conduct for Firms differs from the Code of Conduct for Solicitors, RELS and RFLs, reflecting the different role firms are expected to play in upholding the SRA's Principles. However, the combined substance of the obligations imposed by the two codes has not changed radically. Further, both Codes are much shorter and simpler than the previous Code of Conduct. The approach of having lengthy lists of Outcomes accompanied by even more lengthy lists of Indicative Behaviours has been abandoned. Instead, there are much shorter lists of what solicitors or firms can or cannot do, without any gloss. The SRA has sought to accentuate the positives by the trust this approach places in professional judgement. However, this less prescriptive approach will inevitably create room for uncertainty and argument.

New and Shorter Account Rules

The extensive and prescriptive rules are to be replaced by a new and dramatically shorter set of Accounts Rules. The existing 52 Rules (many of which have numerous sub-rules) are to be reduced to just 13. We discuss these further below.

Freedom for solicitors to carry out Non-Reserved Activities

An individual solicitor providing non-reserved legal services are no longer obliged to have his/her practice authorised by the SRA (see reg. 10.2(a) of the new Authorisation of Individuals Regulations). They can still seek authorisation if they wish, perhaps to reassure clients that their practice has the protections that arise from being authorised, such as the requirement to have professional indemnity insurance. However, they are now free to provide non-reserved legal services on a freelance basis. Furthermore, significantly, solicitors are also now able to provide non-reserved legal services to the public through an unauthorised entity, the restriction limiting solicitors to providing such legal services to their employer has been abolished.

Freelance Solicitors providing Reserved Legal Services

Although in general individual solicitors are still only be able to provide reserved legal services through authorised practice, under Regulation 10.2(b) of the new Authorisation of Individuals Regulations, individual solicitors are now also able to provide reserved legal services on a freelance basis so long as they satisfy various requirements. Among other things, the solicitors need: to have practised for 3 years or more since admission, to practise in their own name, to employ no one else in connection with the services they provide, to maintain professional indemnity insurance, and to hold no client money unless it is on account of costs and disbursements. This new freedom is aimed at allowing solicitors to be more flexible and so more competitive, without reducing client protection.

Disciplinary rules

The amendments to the SRA Regulatory and Disciplinary Procedure Rules go hand in hand with the revised Enforcement Strategy (published in February 2019).

Some Reflections

The New Codes of Conduct

As mentioned above, there are now two Codes of Conduct, one for individuals and one for firms. They are briefer and have been shorn of their pages of indicative behaviours.

However, brevity does not necessarily carry with it less regulation. Firms are subject to two layers of regulation, with the SRA making clear that it could take action not just against managers and compliance officers but also against employees for breaches of the SRA Code of Conduct for Firms. This (combined with rule 1.2 of the new disciplinary rules, to which we return below) expressly sets out the significant increase of the SRA's regulatory reach against employees in particular. Under the old regime, the SRA was in practice usually reliant on s. 43 of the Solicitors Act 1974, which only applied in circumstances where an employee had been convicted of a criminal offence or had occasioned or been a party to an act or default in relation to a legal practice of such a nature that it was undesirable for him to be involved in legal practice. In recent years, the SRA had started to rely on the broadening of its regulatory reach against

employees brought in by the Legal Services Act 2007, although this was not previously clearly referred to in its disciplinary rules. In a market where work is often carried out by non-lawyers, the increased emphasis on the ability of the SRA to pursue non-lawyers in the new Code of Conduct for Firms suggests this will be a key area to watch.

The new regulation of firms also stretches beyond the conduct of their legal work and extends to their business models. The Code of Conduct for Firms requires practices to monitor their financial stability and viability, exposing those involved in running firms to disciplinary action for lacking business acumen.

By contrast to the double layer of regulation for firms, the new reforms open up the legal market to freelancers. Further, such freelancers are free from the regulation applying to firms, and are also not required to take out professional indemnity insurance at all (if performing non-reserved activities) or insurance that meets the Minimum Terms and Conditions applicable to firms (if performing reserved activities, where their insurance merely has to be "adequate and appropriate"). These moves were contentious and were strongly opposed by the Law Society on consumer protection grounds. We are doubtful that the public will understand, or appreciate the significance of, the different regulatory burdens on firms and freelancers.

The new disciplinary rules

The new SRA Regulatory and Disciplinary Rules ("the disciplinary rules") govern how the SRA will investigate and take disciplinary and regulatory action. These new rules are supported by the SRA enforcement strategy which was introduced in February 2019 with the intention of providing "greater clarity on [the SRA's] approach to cases of potential misconduct" ("the Enforcement Strategy"). Such clarity will be all the more important now that the codes of conduct for solicitors and firms are less detailed and prescriptive.

The SRA will continue to determine whether an allegation is proved on the civil standard of proof – i.e. on the balance of probabilities rather than beyond reasonable doubt. However, the SDT has changed its rules (with effect from 25 November 2019) so that it too will decide cases on the civil standard. This change brings the SDT into line with other legal services regulators including the Bar Standards Board. Rightly or wrongly, concern has been raised as to whether a lowering of the burden is likely to result in more disciplinary actions against solicitors being pursued by the SRA (or more charges of dishonesty being made out). This remains to be seen. However, if it is does, it may lead to commercial pressure being put on professional indemnity insurers to include cover for defence costs in respect of SRA disciplinary action even though such cover is not required by the minimum terms.

As referred to above, rule 1.2 expressly provides for non-solicitors to be caught by the SRA's disciplinary rules where an allegation is made which "raises a question that the person" meets one of the following descriptions:

- Rule 1.2(c), "is a manager or employee of an authorised body and is responsible for a serious breach by the body of any regulatory obligation placed on it by the SRA's regulatory arrangements". An authorised body is either a body or a sole practitioner which has been authorised to practice by the SRA. Managers or employees of authorised bodies however do not themselves need to be solicitors and often will not be. However, they can by subject to disciplinary action where they are responsible for a serious breach by that authorised body.

- Rule 1.2(d), "is not a solicitor and has been convicted of a criminal offence, or been involved in conduct related to the provision of legal services, of a nature that indicates it would be undesirable for them to be involved in legal practice". This largely replicates s. 43 of then Solicitors Act 1974 (which we described as a blunt implement above).

- Rule 1.2(f) "has otherwise engaged in conduct that indicates they should be made subject to a decision under rule 3.1". This rule applies to any "person" whether they are a solicitor or not. Rule 3.1 sets out the powers of the SRA where an allegation has been found to be proved and grants the SRA a range of disciplinary options (from a reprimand to a referral to the SDT). This is a widely drawn catch-all bringing in anyone who is thought to be in breach of the Standards and Regulations but who does not fall into one of the pre-determined categories, and renders the purpose of those categories somewhat questionable. It is also the first time that the disciplinary rules have clearly codified the significant

extension of reach of the SRA against non-solicitor employees of law firms[4].

The Enforcement Strategy

It is beyond the remit of this article to go through the Enforcement Strategy in detail. Interestingly however it returns to the issue of the reporting obligations of solicitors and firms which follows on from the SRA's February 2019 consultation on "Reporting Concerns". The Enforcement Strategy emphasises that where a "serious breach is indicated" firms should engage with the SRA at an early stage even if they are planning to carry out their own internal investigation and states that whilst deciding whether to report is a matter of judgment, if there is uncertainty "you should err on the side of caution and make a report". The Enforcement Strategy also deals with the position of individuals and states that it is sufficient for an individual to report to a firm's compliance officer "on the understanding that they will do so". However, where an individual is not satisfied that the compliance officer will take the same view (and so make the report to the SRA) then the individual should report themselves. Therefore, reporting internally is not sufficient to constitute compliance with the duty to report unless it is coupled with a belief that the internal report will result in the SRA being notified.

The emphasis on the need to report to the SRA demonstrates that while the new regulatory approach permits solicitors some more freedom to decide how to comply with their professional obligations, that freedom has its limits. Indeed, the SRA's disciplinary rules has in fact clarified its extended disciplinary reach[5] by clearly codifying its wider scope for disciplining those involved in law firms.

The new Account Rules?

The SRA Accounts Rules 2019 reduce the number of rules demanding compliance from solicitors and authorised bodies from the 52 rules in the 2011 version to a mere thirteen. Will this vastly increased brevity give the greater flexibility and foster a wider sense of accountability within the profession, as the SRA would intend, or do the rules introduce grey areas which will take time to be worked out? There are three areas of the new rules which catch the eye.

Firstly, under the 2011 rules, Rule 6.1 imposed a strict liability on all principals in a firm to "ensure compliance" with the rules by everyone in the firm. The new Rule 1.2 appears more generous. It does provide for joint and several responsibility upon the partners etc. for compliance with the rules but the language is not so obviously the language of strict liability. So, while the authorised body itself might have an obligation for strict compliance with the rules, it could be argued that the individual partners themselves fall foul of the rules only to the extent that they have acted unreasonably, or negligently. Such a conclusion would be consistent with the general tenor of section 2 of the Code of Conduct for Firms, which is concerned with the firm's "effective governance structures, arrangements, systems and controls" for compliance with all its regulatory requirements. It seems counter-intuitive with the one hand to grant flexibility and with the other to impose a strict no-fault liability for non-compliance.

Secondly, client money under the existing 2011 Accounts Rules had a long and tortuous definition set out in Rule 12. That provision, which contained traps for the unwary and have been the source of much argument, have been vastly simplified under Rule 2 of the new rules. First, there is no definition of office money at all. It must follow that anything which is not client money is office money, now called "non-client money". Second, the current understanding as to what constitutes client money has been tweaked: money for all unpaid disbursements is now client money, and the treatment of interest depends on the solicitor and client coming to a "fair arrangement". But, as ever, separating client money from non-client money will provide the same headaches as have always arisen in the case, for instance, of lump sum mixed payments, most notably settlement sums expressed to be inclusive of interest and costs.

Finally, the 2011 Rule 14.5 has been a persistent thorn in the profession's side, essentially providing that a solicitor is not permitted to pay out client monies to the client's order for purposes unconnected with the underlying transaction. Under the new rules this prohibition appears to have been relaxed slightly. The new Rule 5.1(a) permits withdrawal from a client account "(a) for the purpose for which it is being held; [or] (b) following receipt of instructions from the client…" Who decides the purpose for which the money is held? In a conveyancing transaction or business deal where the solicitor acts on a sale, is the purpose for which the money is held to be spent on a new home, or investment, or to pay off business debts, or to defray

[4] Under the Legal Services Act 2007
[5] Derived from the Legal Services Act 2007

care expenses for an elderly parent? Subject always to the overarching point that a solicitor must not use a client account to provide mere banking facilities to clients or third parties, it may nevertheless be possible by careful drafting of the initial client care letter to identify the purpose(s) to which the proceeds of the transaction might be put. And it may be possible to devise creative arrangements enabling clients to give instructions as to the treatment and destination(s) of their money which stretch, but not beyond breaking-point, the connection to the solicitor's original legal work.

Concluding thoughts

On any view, the new Standards and Regulations give much food for thought and scope for speculation. All practitioners this field will be looking on with interest to see how reality compares to both the stated intention of the changes and prognostications of observers. In time we will see whether the new Codes of Conduct will lead to a greater volume of regulatory action against employees, whether freelancers and solicitors working for unauthorised entities will become part of main stream legal market providing competition that is of real benefit to clients, and whether the new Accounts Rules will improve the husbandry of clients' monies or just provoke greater regulatory action.

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Professional Standards Authority v HCPC and Wood [2019] EWHC 2819 (Admin) – Charging motivation and lies in investigation

The High Court has again highlighted the issue of undercharging.

Mr Wood was a paramedic called to attend Patient A, a highly vulnerable patient who suffered from a split personality disorder. Within 10-15 minutes of leaving the patient, Mr Wood began to text her. Over the course of the following month he continued to contact her. Some of those messages were sexually explicit and others attempted to arrange a meeting with the patient for sex. He also asked her to keep the messages a secret.

After another paramedic call out his misconduct was uncovered. During his disciplinary interview he mischaracterised his texts as supportive, driven by politeness and an intention of dodge the patient's advances.

Before the HCPC Mr Wood admitted that he had acted in a sexually motivated away by:

- Obtaining Person A's telephone number,
- Sending her sexual text messages,
- Attempting to arrange and engage in sexual activity with Patient A.

The panel imposed a six month suspension period, and subsequently on review he was found not impaired.

On appeal, the PSA alleged a number of failings in the way the case was presented. In particular, the panel did not consider fully Mr Wood's motivation and his knowledge of patient's vulnerability. Patient A remembered she had given Mr Wood a document summarising this history when he first attended. Mr Wood denied this. The PSA argued the HCPC should have alleged he acted as he did because Patient A was vulnerable. Saini J agreed. As he noted, whether he knew of her vulnerability during and after this consultation when he engaged in this conduct was key.

In addition, the HCPC should also have pleaded that Mr Wood had lied in interview. Saini J noted:

"In my judgment, the way in which a healthcare professional reacts to the discovery of their misconduct is an important part of an assessment of their attitude, their insight into the wrongdoing and effects on a victim, and the sanction necessary in the public interest. A person who gives a false or misleading account of actions and events when first confronted with allegations of wrongdoing is highly likely to be a person who does not understand the importance of his professional responsibilities. It is more than a matter of honesty and integrity. A lack of candour might, depending on the circumstances, call into the question the fitness of the individual to hold a position of trust and responsibility."

In his view, Mr Wood provided a misleading account which essentially sought to blame the patient. That should form a separate allegation. The case was remitted back to a fresh panel to reconsider.

Commentary

Both these issues of motivation and candour continue to recur in the case law.

Charging motivation or knowledge is more nuanced than simply alleging dishonesty or sexual motivation in certain cases. This decision echoes the judgment in *PSA v NMC and Macleod* [2014] EWHC 4354 (Admin) where the motivation behind a nurse failing to report abuse by a colleague should have been pleaded. An intentional failure to act, in order to protect a colleague, is clearly more serious than a negligent omission. Similarly, pursuing a sexual relationship because the patient is vulnerable and less likely to resist is more serious than flirting with a patient in ignorance of the extent of her vulnerability.

The duty of candour has perhaps shone a spotlight on practitioner's comments during disciplinary hearings. Lying about sexually exploiting a patient is inevitably serious. Perhaps of more significance, a clinical mistake may be relatively minor in itself but the response to those mistakes may be substantially more serious if the practitioner had minimised or misrepresented his conduct. This was the position in *PSA v NMC and Dalton* [2016] EWHC 1983 (Admin). Rather than simply looking on this lack of candour in an assessment of the practitioner's insight, the court increasingly expects this matter to form a separate allegation.

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Student fitness to practice committees. Overall composition versus individual characteristics of Committee Members

Introduction

It is salutary to compare the relative simplicity of the Medical Practitioner Tribunal Service (MPTS) fitness to practise (FTP) hearings (all, with rare exceptions, held in Manchester, with a single set of rules) with medical school FTP committee meetings held locally at 41 UK medical schools/universities (each with its own FTP and other university-specific regulations and committee composition).

It is also interesting to compare the risk of career loss for doctors and students caught up in FTP proceedings. Of 288,521 General Medical Council (GMC) registered doctors in the UK in 2017, 200 were referred to an MPTS tribunal, and 62 were erased (1 in 4654 doctors)[6]. In contrast, of 40,997 UK medical students in 2017, 125 were seen by an FTP committee and 17 were expelled (1 in 2411 students, almost double the risk of a career-ending outcome)[7]. Similar data for other health and social care professionals and their respective students are not easily available.

MPTS FTP committees have only three members, including at least one registered doctor and at least one lay member. This short article is prompted by the endless debate at conferences and on the internet about the appropriate membership of health or social care student FTP committees, the size and composition of which varies greatly between universities.

Rules, regulations and guidance

All university FTP committees have their own rules, regulations and procedures, and in greater or lesser detail these set out their requirements for committee composition, including size and membership. It is a fundamental requirement that there is adherence to these requirements. Common to most regulations is the requirement for there to be a member of the relevant profession on the committee. Various professional and regulatory bodies publish their own guidance[8],[9],[10], but universities are not compelled to adhere to such guidance. Unlike university regulations, such guidance tends to be couched in advisory terms. For example the GMC guidance states that a medical student FTP committee **must** include a registered medical practitioner with a licence to practise, and medical schools **should consider** including someone from outside the medical school, someone with legal knowledge, a student representative, and, where concerns are related to health, a relevant health specialist such as a psychiatrist or occupational health physician.

[6] General Medical Council. Fitness to practise statistics 2017.
[7] General Medical Council. Student professionalism and Fitness to Practise. Data from the Medical Schools Annual Return 2016/17, Annual Report, November 2017
[8] General Medical Council. Professional behaviour and fitness to practise: guidance for medical schools and their students. London, GMC, May 2016.
[9] General Pharmaceutical Council. Guidance on student fitness to practise procedures in schools of pharmacy. London, General Pharmaceutical Council, November 2017.
[10] General Dental Council. Student Professionalism and fitness to practise. Standards for the dental team. Guidance for students. London, General Dental Council, October 2016.

Specific categories of a fitness to practise committee member

Set out below are a few observations, based on experience attending student FTP committees.

Psychiatrist: a few universities have a psychiatrist on every FTP committee. Psychiatrists are likely to be particularly skilled at questioning students, and able to explain mental health and psychological aspects to other committee members, often useful given that at least a third of student FTP cases involve mental health issues (including drugs and alcohol).

University staff member from another health profession: this may help to ensure independence from the staff involved with the student, and to provide the perspective of another profession. They are likely to understand the university context but are at a distance from the programme.

External member: can help to ensure independence (and the perception of independence) of the committee from professional relationships, cultures and courtesies, but may be unfamiliar with the relevant university processes and professional requirements.

Health or social care professional from a placement provider: it is helpful to involve placement providers because of their crucial involvement in the provision of training, because of their need to have confidence in the education provider's management of exceptionally difficult students, and to provide advice in cases where one or more placement providers have refused or might refuse to accept a student because of their adverse behaviour. It is desirable to avoid using placement staff who are likely to have future contact with the student.

Professional involved in supervising and supporting newly qualified trainees: particularly useful when considering the extent to which a newly qualified student will cope with clinical practice as an independent practitioner.

Lawyer or legal adviser: can be helpful in maintaining procedural fairness and clarifying legal aspects and implications of a student's criminal behaviour. Also counts as a lay member.

Student: highly controversial. In favour: a student might take some comfort from seeing input from a peer. Against: a student with mental health concerns may be anxious if highly sensitive and confidential information is discussed in the presence of another student. If a student is to be used this should preferably be from the same programme but someone not known to the FTP student, which can be difficult to organise. An alternative might be a student from another clinical programme. Such a person would be unfamiliar with the course but should be familiar with the need to comply with FTP requirements. A common solution is to use a member of staff of the Student's Union, but such a person is likely to be a graduate rather than a student and is most unlikely to be familiar with the health and social care professions and their training. If it is thought helpful by either party to have the input and perspective of another student, it is open for either party to call one or more students as witnesses.

Lay person: not mentioned by some regulators but used to be a requirement from the Nursing and Midwifery Council for nursing and midwifery student nurse cases. Even with special training, a lay person is unlikely to be familiar with general requirements for students. However lay people have been seen as key to moving on from "self-regulation" of the professions and are usually required to be members of an FTP committee for registrants.

Number of committee members: other than a minimum number (usually three) this is rarely specified. Local data from feedback from FTP students in Manchester suggests that in terms of any adverse effect on the student, the size of the committee is not a factor, and of far greater importance is the behaviour of the chair and committee members. Student feedback indicates that despite reassurance, students usually arrive at an FTP committee meeting convinced that everything is stacked against them, but they take comfort upon seeing close scrutiny being given to the person presenting the case against the student, helping to indicate the independence of the committee members.

Diversity: the composition of a committee should consider gender and other potential protected characteristics.

Chair: the chair has a crucial role in ensuring procedural fairness and maintaining control of everyone present, including lawyers representing students. The use of multiple chairs (one medical school had 7) makes it harder to maintain a consistent approach, and, given the rarity of cases divides the work to such an extent that no individual is likely to build up much experience or expertise. However, a single chair may face a

substantial amount of work and a weight of responsibility for the success of the process. If the number of cases is so large (e.g. 50 cases per year) that numerous chairs are required, this should cause one to question whether there are excessive numbers of referrals, suggesting the need for better methods to deal with lower level concerns.

Debate about committee membership is a diversion from far more important issues

In our view, the required qualities of individual committee members are a more important issue than the differing committee memberships. Committee members must exercise their responsibilities in judging cases as individuals, not as representatives of other organisations. Committee members must be able to make thoughtful and unbiased decisions in the context of the overarching objective of protecting, promoting and maintaining the health, safety and wellbeing of the public, promoting and maintaining public confidence in the profession, and promoting and maintaining proper professional standards and conduct for members of the profession3. This requires the following essential characteristics of all student FTP committee members:

- independence. FTP committee members must be completely independent and have had no previous significant involvement with the student or their case. Giving a lecture to a large group of students would not be a problem, but having had any personal contact whether teaching, supervising or supporting, is likely to be preclude committee membership. If there is any doubt (for example a committee member who it was found had interviewed the student when they applied for a place), the correct approach is for the committee secretary, when writing to supply information about the FTP committee membership, to inform the student of a possible contact and ask if the student has any reasons to object to that person serving on the committee;

- the time and willingness to devote to this complex task. A key feature of student FTP hearings is that the full papers, namely the case against the student and the response of the student, accompanied by the supporting evidence, is precirculated sufficiently in advance to ensure there is sufficient time to read and digest the details of the case before what is likely to be just a one day hearing (leaving no additional reading time). Committee members must have the time available for careful study the precirculated case papers. A committee member who is in the habit of turning up with their pack of papers unopened (as has occurred) is unsuitable to participate in this type of work. There must also be an ability to attend the committee meeting in its entirety, and contribute to the construction of the written determination which is likely to be circulated for comment following the meeting; unlike hearings for registrants, time is not usually available to construct and finalise the written determination during the meeting itself;

- FTP committee members must have attended training for this specialist role, a recommendation of the regulators such as the GMC and the Office for the Independent Adjudicator (OIA)[11];

- intellectual and analytical ability, and the ability to understand and assimilate possibly complex facts and arguments, and to recall such evidence accurately, aided by the making of appropriate contemporaneous notes;

- the ability and willingness to adhere to the university FTP procedure and regulations and follow professional guidance, and to apply these to the case at hand;

- the ability to use information in a fair, accurate and balanced way to arrive at well judged, reasoned decisions supported by evidence;

- the ability to make important and difficult decisions, whilst ensuring judgement is not swayed by personal bias or interests;

- the ability to demonstrate a genuine interest in the work of FTP committees, with a desire to make a real contribution to the education of future health and social care professionals;

- the ability to work as part of a team, respecting the opinions of others and facilitating discussion, whilst also being able to articulate a position which may differ from other members of the committee, with the aim (if possible) of arriving at shared and balanced judgements on contentious topics;

[11] Office of the Independent Adjudicator. The Good Practice Framework: Fitness to Practise. Reading, Office of the Independent Adjudicator, October 2019.

- unlike FTP committees for registrants, which are generally held in public, all matters relating to students remain private and are not disclosed to the public, so committee members must understand the need for confidentiality in relation to all aspects of the case including the evidence, the committee's discussions, and the outcome;

- the need for excellent communication skills, both oral and written, and the ability to be able to express oneself clearly and succinctly;

- a good understanding of diversity, and an ability to approach disabled students in a manner that is supportive and sympathetic, with an understanding of the Equality Act and how this applies to students. All committee members should have received equality and diversity training, to ensure they understand the legislative framework;

- a good understanding and appreciation of cultural issues faced by students from ethnic minorities or from overseas;

- an ability to deal impartially with all matters raised during a hearing.

The above characteristics are also important requirements for those who serve on FTP appeal committees.

Conclusions

The precise composition of a student FTP committee is less important than ensuring that committee members possess several essential characteristics. FTP committee members must be completely independent and not have had personal involvement with the student. They also need to be individuals who possess the intelligence, integrity and independence of mind to properly focus upon the relevant evidence and arrive at a determination which is fair and just. Finally, they must be willing to make available the necessary time to read the papers in preparation for the meeting, attend the entire meeting without interruption, and be available after the meeting to contribute to the written determination.

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Marion Simmons QC Essay Prize

The annual Marion Simmons QC prize continues to be open – the deadline for entries is **5pm on 24 April 2020**.

Entrants are invited to submit an essay or article on a regulatory law or disciplinary law topic of their choice.

The first prize is £2,000, the second £1,000, and the third £500.

The competition was set up in memory of the late Marion Simmons QC, who sadly died on May 2, 2008, aged 59. Marion was a barrister, recorder, arbitrator and, latterly, chairman of the Competition Appeal Tribunal. Her areas of practice covered a wide range of financial and commercial law, including competition and regulation. Marion served on ARDL's Committee for two years and was committed in her support of young lawyers.

Competition Terms and Conditions:

To be eligible, an entrant must fall into at least one of the following categories (subject to the discretion of the competition organisers to extend eligibility on a case by case basis as they see fit):

- undergraduates or postgraduates in study at a recognised educational establishment in the United Kingdom;
- trainee solicitors in the UK;
- pupil barristers in the UK;
- those training in the UK as part of a Chartered Institute of Legal Executives' approved training programme;
- solicitors who qualified in the UK and who have been so qualified for fewer than three years;

- barristers called in the UK fewer than three years ago;
- those who qualified with Cilex in the UK and who have been so qualified for fewer than three years;
- those who are taking a period of up to sixteen months as a sabbatical or "gap year" within their undergraduate or postgraduate study or after such study and before starting a confirmed place as a pupil barrister in the UK, trainee solicitor in the UK or Cilex training in the UK.

Entries must be no longer than **1,500 words** (word count includes footnotes but excludes bibliography) and should be type-written in the English language. The judges' decision will be final. Entries must be submitted so as to be received by **5pm on Friday 24 April 2020** by post or email to:

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Legal Update

***R (Officer W80) v. Director General of the Independent Office for Police Conduct* [2019] EWHC 2215 (Admin)**

Police officer firing fatal shot during police intervention – officer believing his life in danger – police misconduct proceedings – officer acting in self-defence – whether civil test or criminal test of self-defence applicable

The claimant, a specialist firearms officer in the Metropolitan Police, challenged the decision of the Independent Office for Police Conduct (IOPC) directing the Metropolitan Police Service to bring misconduct proceedings against him alleging a breach of the Standards of Professional Behaviour amounting to gross misconduct. On 11 December 2015 the claimant fired a fatal shot at X during a police intervention in Wood Green, North London. It was accepted by the IOPC that the claimant honestly believed that his life was in danger. However, the IOPC sought to apply the civil law test applicable to the torts of assault or battery, that the officer's belief must not only be honest but also objectively reasonable for self-defence to be available for the claimant to have a defence to the charge of misconduct. The claimant contended that this was the wrong test and that the correct test for self-defence in police misconduct proceedings is the test applicable under the criminal law, so that the claimant had no case to answer in circumstances where he had an honest, albeit mistaken belief that his life was in danger. Agreeing with the claimant, the Divisional Court (Flaux LJ and Sir Kenneth Parker) held that in applying the objective civil law test in determining that there was a case to answer, the IOPC applied the wrong test. It should have applied the criminal law test. While seeking to categorise misconduct proceedings as either criminal or civil in nature is not a profitable exercise and misconduct proceedings are essentially *sui generis,* untrammelled by any authority the court might well be persuaded that, in police misconduct proceedings, the question of whether the use of force was justified should be judged by the civil law objective test that the belief of the officer as to the threat faced must not only be an honest one, but also objectively reasonable. However, the Home Office Guidance on Police Officer Misconduct issued under section 87 of the Police Act 1996 stipulates that the Code of Ethics issued by the College of Policing is the framework that underpins the standards of professional behaviour as set out in the Police Conduct Regulations. Under paragraph 1.4 of the Home Office Guidance, a determination whether proceedings for misconduct should be pursued against an officer is to be made by reference to the Code of Ethics. Paragraph 4.4 of the Code of Ethics (which had been laid before Parliament in accordance with section 39A(5) of the Police Act 1996) provides that what is required to justify the use of force is an honestly held belief at the time. That was a clear reference to the criminal law test. In addition, it was clear from the Strasbourg jurisprudence culminating in *Da Silva v. United Kingdom* (2016) 63 EHHR 12 that, for the purposes of Article 2 of ECHR, the use of force by a state actor will be justified where it is based on an honest, albeit mistaken belief.

***Kern v. General Osteopathic Council* [2019] EWHC 1111 (Admin)**

Inappropriate sexual relationship with patient – sexual relationship undermines fundamental trust between healthcare professional and patient – need to uphold reputation of profession - sanction - removal

K, an osteopath, admitted a sexual relationship with Patient A between August 2006 and September 2007.

The committee found that K had engaged in sexual activity with Patient A repeatedly in the context of professional consultations, and after each session of treatment. Dismissing K' appeal against the committee's decision to strike him off the register for unacceptable professional conduct, Martin Spencer J said:

56. …… As stated in *Bolton v. Law Society,* where a case involves dishonesty by a solicitor, which strikes at the heart of the trust put into the solicitor's profession by the public, the protection of the reputation of the profession means that less regard will be had to personal mitigation. It seems to me what is true of dishonesty in relation to solicitors is equally true of sexual relationships in relation to health care professionals.

57. Members of the public reveal to health care professionals their most intimate details and secrets in the belief that the professional will remain just that, professional and objective. The crossing of the boundary into a sexual relationship with the patient, and that is a sexual relationship of any kind, whether or not it includes penetrative sex, undermines the fundamental trust which patients put in their therapists and thus strikes at the heart of the relationship between doctor or any other health care professional, including osteopaths, and patient.

58. …… Once we are into the realm of an inappropriate sexual relationship between an osteopath and his patient, the sanction of removal from the register must be within the reasonable band of sanctions available to the panel and this is archetypically the kind of case where the court should and does defer to the expertise, knowledge and experience of the panel.

59. ….. Undoubtedly, the erasure of this appellant's name from the Register of Osteopaths is a loss to the profession and I refer, again, to the testimonials which with one voice refer to the great work which the appellant has done in this profession and in relation to many patients, but that is the price which this profession is prepared to pay to uphold its reputation generally and instil confidence in the public in the high standards which this profession rightly sets itself. The panel determined that this strong message needed to be sent out to the public and I am not prepared to say it was wrong in so doing.

***Professional Standards Authority v. (1) General Medical Council and (2) Hilton* [2019] EWHC 1638 (Admin)**

Orthopaedic surgeon – misplaced screw following spinal fusion procedure – lie told to patient by surgeon about screw – dishonesty - misconduct found but no current impairment – appropriate and necessary to issue warning to maintain public confidence

H, an orthopaedic surgeon, performed a lumbar spinal fusion procedure on Patient A. H did not recognise either intra-operatively or post-operatively that the right L2 pedicle screw was out of place and, as a consequence, made no mention of this to Patient A. After Patient A had been discharged, he experienced further back problems. Revision surgery was subsequently carried out by another surgeon. Following a complaint by Patient A, a meeting took place at the hospital in which H said he had known about the misplaced screw post-operatively, that he did not want to worry Patient A and that he had adopted a watch and wait approach. It was not in fact the case that H had known about the misplaced screw post-operatively. A medical practitioners tribunal panel found that H was guilty of misconduct by reason of dishonestly informing him that he had known from his post-operative assessment that a screw used in the surgery was misplaced. However, the tribunal found that H's fitness to practise was not impaired, and that it was not necessary or proportionate to issue a warning in his case. On appeal by the PSA, Freedman J dismissed the first ground of appeal namely, impairment, but allowed the second ground of appeal and directed that the tribunal should have issued H with a warning. The learned judge, at [117], said that the tribunal still found misconduct in the nature of dishonesty, and recognised that it would have to be an exceptional case where there was dishonesty without impairment. [See *General Medical Council v. Nwachuku* [2017] EWHC 2085 (Admin) at paras 47 and 48.] This was an exceptional case on the facts. It was an isolated lapse in an otherwise unblemished career. The risk of repetition was extremely low. The testimonials of colleagues and patients all told a story . The tribunal had well in mind that the central issue and the crux of the matter was the upholding of professional standards. The matters of impression which it reached about the lies were not such as to undermine the very basis of the decision. Further, the decision reached on impairment was not one which no reasonable tribunal could reach. However, the decision on warning was not justified; [126] – [138]. The tribunal recognised that the starting point was that there should be a warning because there had been something falling just below impairment and there had been a clear departure from *Good Medical*

Practice. In *PSA v GMC and Uppal* [2015] EWHC 1304, a case involving dishonesty but without impairment, Lang J, at para 41, said that the failure of the tribunal to impose a warning was capable of undermining public confidence in the profession. In this case, a warning was appropriate and necessary. H lied to a patient about the steps that he took in considering his case and about his determination of how to treat the patient. This was in circumstances where the nature of his treatment both in the context of an intended negligence claim and an intended complaint to the regulator. Public confidence in the profession would be undermined that there should be no sanction for the dishonesty, neither impairment nor a warning. It may be that there are certain extreme circumstances where there could be a good reason not to tell the truth or serious extenuating circumstances for not telling the truth, but there were no reasons or extenuating circumstances in this case.

***Jones v. (1) Professional Conduct Committee of the Teaching Regulation Authority and (2) Secretary of State for Education* [2019] EWHC 3151 (Admin)**

Teacher – disciplinary proceedings – appellant wishing to adduce last-minute evidence by Skype and adduce further witness statements – late application after close of prosecution case – application refused

The appellant teacher, Dr J, did not appear, and was not represented, at the hearing before the conduct committee in March 2019. By that time, he had moved to live in Canada. On day 5 of the hearing, by which time the Teaching Regulation Authority had closed its case and the panel had heard from 11 witnesses, the appellant applied to give evidence by Skype and to provide three witness statements, one from him, and one each from two former members of the college staff. The panel declined to admit this additional evidence. In its reasons the panel said that it had taken the necessary steps to ascertain Dr J's lines of defence on the basis of the documents he had previously submitted; and that the panel had ensured that it put questions to those witnesses which Dr J, had he chosen to engage with the proceedings, may have put to them. In dismissing Dr J's appeal, Cavanagh J, at [124], said that the purpose of the Skype application was not so that he could attend and take part in the proceedings, and that the panel was right to treat it as an application to give last-minute evidence. At [130] the learned judge said that the panel was plainly entitled to decide to refuse to hear evidence from the appellant by Skype in circumstances in which (a) the hearing was almost over when the application was made; (b) the appellant, who previously was legally represented, had not made any such application in advance of the hearing; (c) the appellant had been notified via the presenting officer during the hearing that if he had more evidence to put forward he should do so before the TRA closed its case; and (d) most importantly of all, the other eleven witnesses in the case had given their evidence and departed, so there could be no opportunity to put fresh points to them. Having read the witness statements that the appellant submitted late, the court said it was very doubtful whether it raised any new matters or would have made any difference to the outcome of the hearing.

Kenneth Hamer
Henderson Chambers

Request for Comments and Contributions

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact either of the joint editors with your suggestions. The joint editors are:

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