



# Understanding the regulatory process

Being able to access decisions by our regulatory bodies and courts is an essential step to understanding their approach and expectations in the new world of outcomes focused regulation, says **Susanna Heley**

Keeping track of changes in regulation can be difficult given the sheer volume of regulators and other interested bodies which solicitors now have to deal with. In addition to the SRA as our frontline regulator, compliance officers should look to lessons which can be learned from decisions of the Legal Ombudsman (LeO), the Solicitors Disciplinary Tribunal and the High Court.

Taking the decisions of such bodies to heart is arguably more important in the world of outcomes focused regulation than it was under the old Code of Conduct. The SRA Handbook is entirely founded on the premise that the ten principles are all pervasive and the most important of these principles is the solicitor's responsibility to act in furtherance of the proper administration of justice. This tends to imply that the discretion afforded to solicitors in the handbook should be exercised taking into account relevant decisions from these – for want of a better term – quasi-regulatory sources.

LeO is getting close to two years old and now has published a fair body of information about its work and the lessons it is learning. LeO, we are told, has been challenged by way of judicial review 19 times – nine times by complainants and ten times by lawyers – a nice even mix. None of those cases has yet come to a final hearing although one was settled. That's quite an impressive outcome considering that LeO has now dealt with more than 8,000 cases. LeO has been involved in other proceedings about how and when it may exercise its powers to require solicitors to comply with its directives and decisions. These make for interesting reading and there are lessons to be learned about the LeO's processes and attitudes.

Decisions of the Solicitors Disciplinary Tribunal are now also being published on

the SDT website. While the functionality of the database is not as helpful as other case law sources, it is an improvement on the way in which such decisions were published under the aegis of the SRA. Again, lessons can be learned from the decisions of the tribunal. Although it is quite rare that the tribunal dismisses cases in their entirety,

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it has done so in numerous instances. In addition, the tribunal has, on occasion, highlighted areas where there is a lack of appropriate guidance for the profession. It may that tribunal's decisions will become yet more important as a source of guidance once it has built a body of decisions in its capacity as an appellate court.

## Consistent appeals

Turning finally to decisions of the High Court, all solicitors' statutory appeals to the High Court are dealt with by the Administrative Court in London. Handily, the Administrative Court also has jurisdiction over judicial review proceedings so most challenges to decisions of the SDT, LeO and the SRA will all be dealt with in the same forum. Traditionally, the Administrative Court is inclined to afford a great deal of respect to the experience and expertise of the SRA and the SDT. There have however been several successful appeals to the court in recent years.

In *Law Society v Waddingham & Ors*, the SRA appealed a decision of the SDT which imposed fines of varying amounts on the partners of a firm due to breaches of the Accounts Rules. The SRA invited the court to overturn the tribunal's decision that there was no dishonesty and to impose a harsher

penalty. The court found that it could not be certain that the relevant partners had been dishonest but that nevertheless, suspensions were more appropriate penalties given the nature of the conduct in question. There are – to my mind – two really interesting aspects to this decision, the first is the detailed approach of the court to the facts in question

and the second is that the solicitors would have been found to have been dishonest if the civil standard of proof had been used.

Avid followers of regulatory news will be aware that there has been an ongoing dispute as to the appropriate standard of proof to be used in disciplinary proceedings. The SRA is, unsurprisingly, in favour of the civil standard and has adopted that for its own internal decisions. The tribunal and the courts still adopt the criminal standard. That particular comment may – in the longer term – be fuel for the debate and may lead to changes which could affect the whole profession.

Such decisions are important because they inform the approach taken to regulation. In a world where all firms are to have their very own officially sanctioned 'sneaks' in the form of COLPs and COFAs with their reporting obligations to the SRA, understanding more about the process of regulation and how it is viewed and implemented is essential.



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