

# When the gloves are off...

Solicitors deserve a greater degree of fairness from their disciplinary body, says **Marc Beaumont**

The prospect of a visit to the Solicitors' Disciplinary Tribunal (SDT) fills most solicitors with dread. This may be unavoidable. However, the purpose of the exercise is not to terrorise solicitors, but to investigate their conduct. If that investigation is to take place in a just and even-handed manner, it is essential that due process is observed and implemented. It is also essential that defence advocates should have the courage to ensure that the rules of natural justice are not overridden. Unfortunately, it is far too easy to assert that due process is observed, when in fact this may not be so.

Having defended in a number of recent cases before the SDT, I offer a number of personal reflections about the process.

## Representation

The first major problem in the SDT is the lack of organised defence representation. Many respondent solicitors appear without any representation at all. This is nothing short of scandalous. Such people are often fighting for their professional livelihoods. Unless they are advocates, they will have no direct trial experience. If their firm has suffered intervention, they may have no funds with which to pay for representation.

By contrast, those acting for the Law Society will have higher courts rights of audience and extensive trial experience, as well as intimate experience of the SDT itself. They will have professionals instructing them and limitless funds for use in, for instance, the instruction of expert witnesses in cases which require accounting or financial expertise. The playing field in the SDT is all too often not level.

If the Law Society is able to devote its financial strength to prosecuting its members, then it should also devote sufficient funds to defending them. If it cannot do the latter, it should not be permitted by its members to do the former. It is not the mere servant of government

or the newly created Office for Legal Complaints.

## Professional obligation

It would, in fact, be simple to require all solicitors as a matter of professional obligation to carry indemnity insurance covering them for the defence of disciplinary proceedings, as well as for claims. Such policies are readily available. It cannot be beyond the ability of the Law Society to develop such a policy with the insurance industry for all of its members, particularly if such cover becomes compulsory. At the Bar, my proposals eventually resulted in the Bar Mutual Indemnity Fund offering to all barristers full cover for the defence of complaints.

A second problem is that the pool of defence advocates is narrow. Solicitors who are complained against receive a list of solicitors who are willing to defend before the SDT. Not a single barrister appears on that list. A number of the solicitor advocates on the defence list are also instructed regularly to prosecute solicitors before the SDT.

With the advent of the Bar Public Access scheme, even a solicitor without a current practising certificate may now instruct a barrister directly. Speaking from personal experience, direct barrister instruction works very well in SDT cases, where the solicitor may not have a current practising certificate.

## Indictment issues

Another real problem is that there is no proper indictment in SDT cases. The nearest thing to it is a r 5 statement (formerly a r 4 statement). But the contents of this document are dependent on the personal style, experience and sense of fair play of the prosecuting advocate.

There are three features which are worryingly recurrent: (1) the propensity to allege fraud and dishonesty against solicitors without proper analysis of the

facts or proper supporting evidence capable of satisfying the high (criminal) standard of proof, (2) the overloading of the document and/or (3) lack of specificity.

As to (1), this leads to more—and longer—contested trials, something that is a real concern for those who run the SDT. A finding of dishonesty leads to almost automatic striking off. There are cases in which a solicitor would be prepared to admit guilt and to enter a plea in mitigation, were it not for the fact that an admission of dishonesty is the professional equivalent of signing one's own death warrant.

As to (2) and (3), I was Counsel in a recent case in which the variations and permutations of the charges gave rise to several hundred potential offences. The charges were expressed in a rolled-up, generic fashion. There were several dozen underlying factual transactions all germane to only two charges and predominantly to only one of them. The document cross-referred to a number of other detailed documents, such as the forensic investigation report.

The vice of this approach is that the defence has to sift through every single document in the case. Every document becomes a potential charge sheet. Every issue has to be subjected to analysis, cross-examination and submission. At the end of the process, unless the Defendant is exculpated in relation to every single underlying transaction and in relation to every single formulation of the case against him, he will be found guilty of the generic



charge. In this way, acquittal becomes almost impossible. Inevitably, in 2008, only one solicitor was acquitted of all charges.

### Potential solutions

The solution is to ensure by way of a Practice Direction from the SDT itself, that r 5 statements should contain a statement of the offence and particulars of offence, without generic or rolled up allegations and without rhetoric. Fraud and dishonesty should be sparingly deployed and only in the clearest of cases. It should in fact become professional misconduct for prosecuting advocates to allege fraud or dishonesty without proper foundation. The charges should appear in one document only and without cross-references. The accused solicitor should not have to root about in the papers fully to understand the prosecution case. Charges should relate to one factual transaction only. The Prosecution should

Yet interviews are not preceded by any caution. So it may not be apparent to those who are investigated that what they say may be part of an evidence-gathering exercise as a prelude to regulatory prosecution.

The interviews may occur at very short notice. They are often very well prepared by the interviewer, who will be skilled in interrogation techniques. There will be no verbatim record of the interview. And on a throw-away or equivocal remark, partially recorded, may depend an entire career and livelihood.

The Law Society must develop a Code of Practice for interviews akin to the Codes made under Police and Criminal Evidence Act 1984. The sanction for breach of the Code should be that any admission obtained where the Prosecution cannot prove that the admission is reliable, should be inadmissible. There is a standard letter given to interviewees by the investigating

judgments. If those who volunteer for service on SDT panels find the drafting of judgments to be too burdensome (which doubtless it is), they should not volunteer for the work. An Art 6-complaint "tribunal" does not comprise the clerk.

What about the costs? It is no exaggeration that the costs charged by the Law Society in SDT cases are scandalous. Even in routine trials, the solicitor Advocate's costs may be £ 50,000. In any complex case, the costs may well be into six figures.

The SDT seems reluctant to penalise the Law Society for making and later withdrawing serious allegations. This means that the Law Society can allege dishonesty or fraud against a solicitor in a first r 5 statement, require the solicitor to instruct me to spend 50 hours in conferences preparing a response to the dishonesty allegation and then withdraw the allegation later without any costs sanction whatsoever. The proceedings thereby become an instrument of financial oppression.

## “An admission of dishonesty is the professional equivalent of signing one's own death warrant”

take specimen charges where that is likely to save tribunal time without damaging the Law Society's case. Defence Counsel would far prefer to face 50 charges alleging money-laundering or accounts rules breaches on 50 occasions, than two charges alleging 25 such transactions.

A further problem is that prosecutors may well fail to prepare a case in a way which is conducive to rapid assimilation. It should be proper practice in all trials for the prosecutor to serve a detailed skeleton opening at least three weeks before trial, cross-referenced to a properly indexed and sequentially paginated bundle of documents. And the bundle should not contain duplicated documents. To be served, for example, a week before trial with six lever arch files with no index and no proper sequential pagination and no skeleton argument at all, is the recipe for serious injustice.

### Interviews

Another serious issue is the conduct of interviews. Some cases are proven primarily, or even exclusively, by way of admissions gained in interviews with Law Society investigators who are highly trained officers with expertise in the forensic analysis of solicitors' accounts. In some cases, they will have received information about alleged impropriety and will be looking for evidence to support a rumour of impropriety.

officers, the effect is which is that there is an indication that half of solicitors who co-operate fully with the interviewer are not subject to disciplinary action. This document is a deplorable inducement to speak out in order to assuage fear.

Yet an improperly obtained confession cannot be challenged for its admissibility before the SDT, as the rules of evidence adopted in the tribunal are the civil rules. The weight of an admission can be challenged. However, persuading the tribunal to ignore an admission is almost impossible. The rights of solicitors who make admissions when they may be tired, confused, frightened or influenced by the above inducement letter, are, in truth, fewer than those of suspected criminals.

### Clerk's role

Another problem concerns the role of the tribunal clerk. He or she will retire with the SDT Panel. At the end of the case, the SDT announces its findings, but does not give its full reasons for some time. During that period, it appears that the clerk is involved in the process of drafting the panel's judgment.

This practice is surely irregular. Under Art 6 of the European Convention on Human Rights, an "independent and impartial tribunal established by law" is one which hears the evidence itself, makes decisions itself and writes its own

### Great expectations

In summary, solicitors should expect and call for a greater degree of fairness in the SDT. No solicitor should ever have to go there without representation. All solicitors should become obliged to maintain insurance cover for such proceedings. The defence panel should be opened up to the Bar with transparent criteria for appointment. Evidence should not be extracted in interviews without proper safeguards and full video and tape recording. The Prosecution must serve paginated bundles and cross-referenced written openings. The SDT should be more prepared to refuse to give the Law Society all of its costs. The clerk should not be involved in drafting the judgment.

Solicitors are surely entitled to expect that an organisation enforcing high standards of professionalism and probity should practise what it preaches. Those who assert and sit in judgment upon error or wrongdoing must be beyond criticism themselves. If they are not, the system will not command public confidence or the support of the profession. There are features of Law Society practices and the SDT procedures that are so backward, that they violate the most rudimentary standards of fairness. It is time for these issues to be properly addressed.

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