

Pearn Kandola Disproportionality Audit

Recommendation 10: Cases not upheld by the SRA

September 2011

Contents

Introduction.....	3
Audit scope.....	3
Population and sample size.....	3
Key Headlines.....	4
Criteria.....	4
Results.....	5
Data recording.....	5
Compliance with decision making process.....	6
Closure letter content.....	7
Level of decision maker.....	8
Training.....	8
Delay.....	8
Conclusions and recommendations.....	9
Conclusions.....	9
Recommendations.....	9
Annex 1.....	10
Cases where it was not clear whether the process had been followed.....	10

Introduction

1. The Solicitors Regulation Authority (SRA) commissioned Pearn Kandola, a group of business psychologists specialising in the area of diversity, to research the disproportionality of regulatory actions taken against black and minority ethnicity (BME) solicitors, as reported by Lord Ouseley in 2008.
2. In July 2010, Pearn Kandola's findings were published and a number of recommendations made. The SRA's Risk-Audit team was commissioned to carry out a detailed review of recommendation 10, which states:
"A review is required of the decision-making processes used when responding to conduct cases as fewer BME solicitors have their case note upheld and more are referred to the Solicitors Disciplinary Tribunal (SDT). Again if the processes are correct, then how closely these processes are followed in practice should also be reviewed."
3. This report focuses on conduct cases that were investigated and then closed with a process outcome of "not upheld", and how closely the process for reaching this outcome had been followed in practice. A separate report titled „Recommendation 10: Referrals to SDT“ can be found [here](#).
4. The full Pearn Kandola report, including recommendations, can be found [here](#).

Audit scope

5. The scope of the audit was to focus on conduct cases that were closed with a "not upheld" outcome. It was decided that a review would be conducted of cases closed in 2009 and 2010 as this allowed for a review of the data considered by Pearn Kandola (cases closed in 2007-2009) and also a sample that was representative of a more recent position (2010). It was requested that a comparative audit be made of White and BME solicitors, so representative samples of files were reviewed in respect of these groups.
6. Pearn Kandola's findings of disproportionality were based on statistics relating to the subject individuals investigated by the SRA; *"fewer BME solicitors have their case "Not Upheld" and more are referred to the SDT."* Consequently, case files used for this audit were selected by subject individual identification as opposed to SRA file references.
7. The audit focused not only on compliance with the relevant process but also investigated other factors that may have influenced the outcome of SRA proceedings, including the size of the firm and its geographical location.

Population and sample size

8. The population size for the audit was calculated by selecting the conduct cases closed with a "not upheld" outcome in 2009 and 2010. Recognised audit sampling guidelines were used to calculate a sample of 120 cases. This

sampling method provides a confidence level of 95 per cent with an expected error rate of not over three per cent.

9. This was divided into four groups of 30 representing white and BME cases closed in 2009 and 2010 (i.e. 30 BME cases closed in 2009, 30 BME cases closed in 2010 etc). Case files were then chosen by filtering the above groups on the datasets provided and randomly selecting 30 files from each group.

Key Headlines

- § Processes were followed in 96% of cases
- § In the four cases where the process was not followed, the issue was failure to request further evidence. As the result of these cases was “no finding” this did not adversely affect the subject individual and no evidence of bias was found.
- § Where the process was not followed, it is probable that the right outcome was reached, on the basis of the circumstances of the complaint.
- § When **risk-based regulation** is introduced, issues raised will not be investigated following existing processes . A far greater emphasis will be placed on individual judgment, with decisions tailored accordingly. Consideration should therefore be given as to how consistency of approach can be achieved and demonstrated.

Criteria

10. The Conduct Investigations Unit (CIU) was asked to provide all documented processes, guidance and training materials relating to the process for reaching a “Not Upheld” outcome. Training documents on the subject of analysis and closure letters were provided, along with a verbal explanation of how the process works.
11. Due to the nature of the outcome (allegations not upheld) it may not be appropriate to have a documented procedure that can be followed stringently in respect of any case. For example, whether a finding of misconduct is made involves consideration of the requirements of that conduct issue and the facts of that particular case. However, CIU did provide an explanation of the procedure for investigating allegations which may ultimately lead to the caseworker deciding that the allegation is “not upheld”. All case files identified for audit were reviewed to see whether this investigation procedure had been adhered to as follows:
12. On receipt of a new case file, assess the information on the file and consider:
 - § Is there an allegation that the SRA would investigate
 - § Is there evidence to support the allegation, or if not, is there likely to be evidence we can request to support the allegation, and is it proportionate to request it.

13. If the allegation raised is not one that the SRA would investigate, for example it is a legal issue and not an allegation of misconduct, the caseworker would close the case file. If the allegation is something that the SRA may investigate but there is a lack of evidence to support the allegation, and it is determined no evidence can be obtained in support of the allegation, the caseworker will close the case file as “allegation not upheld”.
14. If the allegation is supported by evidence, or it is determined evidence may be obtainable, the caseworker will raise the allegation with the subject individual and request details from the informant where necessary. On receipt of this, the caseworker will again assess whether there is a conduct issue and evidence to support it and, if not, will close the case file as “allegation not upheld”. If there is evidence of misconduct, the caseworker will then recommend the appropriate outcome, which may involve referral to an adjudicator for a formal decision.
15. The closure letter training document provides guidance on how such correspondence should be structured when no finding of misconduct is made. and The document reads:

In separate paragraphs it can be useful to deal with each issue as follows:

- § Set out the issue – a subheading for each issue may lend structure to your letter and ensure that all the allegations are addressed.
- § Paraphrase the relevant rules – explain what the relevant conduct requirement is.
- § Deal with the solicitor’s response where you have one.
- § Explain clearly why the response is acceptable, i.e. how it addresses the allegation to demonstrate there is no misconduct.
- § Set out your assessment of any information or documentation provided by the informant, and identify the evidence which demonstrates why there is no misconduct.

The audit considered whether closure letters on files were set out to explain their findings in accordance with this guidance.

Results

Data recording

16. We found a number of data entry errors where the subject individual recorded against the case was not the subject of the investigation. This was found in four of 120 instances (3.3%). However, due to the relatively small number, it is unlikely that such anomalies will have significantly affected the overall conclusions drawn from the data used.
17. The identity of the subject individual or individuals is currently entered onto SRA records by an administrator when the case file is created. Procedures are in place for checking that the correct information has been entered and updated should the position change. The inaccuracies identified are few in

number, however it would be prudent to provide a reminder to relevant staff in order to ensure records are accurately maintained.

18. The process outcome "Complaint not upheld" is defined in a CIU document entitled "Final Outcomes Codes" as:
*"The case has progressed to a formal decision process and there is no decision that results in a finding, action or sanction against the solicitor/firm.
Or The complaint has been adequately investigated; it does not demonstrate poor service or breach of the rules and has therefore not progressed to a formal decision."*
19. In 17 of 120 records (14.2%) it was considered the criteria for closing a case with the process outcome of "Complaint not upheld" had not been met. In these instances, alternative process outcomes appeared more appropriate, such as "Complaint outside jurisdiction", "Resolved without intervention", "Within jurisdiction but investigation declined", "Customer has not responded", "Ongoing other action", and "Complaint withdrawn".
20. The Final Outcome Codes document contains definitions and comments in relation to each 'final outcome code' to assist staff in selecting the appropriate outcome code for the case. The document is dated 28 April 2004 and appears to reflect a number of Legal Complaints Service (LCS) practices. It is therefore recommended that this document be reviewed and updated to reflect current SRA practices and safeguards put in place to ensure staff refer to the document when selecting the appropriate outcome code.

Compliance with decision making process

21. In 96% of cases it was found that the process for determining a case as suitable to be closed as "Not upheld" had been followed. In each instance it was apparent that the caseworker had:
 - § Assessed the initial information received and decided whether there was an issue to investigate;
 - § Where necessary, requested appropriate further evidence, and
 - § Correctly concluded that the allegation should be "Not upheld".

The cases considered exclude the four cases where the subject individual was not investigated and two cases which were closed for referral to another unit.
22. On four of the remaining 114 cases (3.5%) the process was not followed. In these cases it was considered that further evidence could have been taken into account but was not. Explanation was sought from the CIU Technical Team and their comments can be found at [annex 1](#).
23. The view of the Technical Team did not change the findings of the audit in that, technically, evidence could have been requested in accordance with the standard procedure. However, in the cases identified, the facts suggest that the right outcome was reached.
24. In one case the caseworker did not request advice from the Ethics Guidance Team which would have supported the solicitor's defence. The Technical Team explained that it is a general rule that ethics advice does not

prevent the SRA from making a finding and would therefore not affect the outcome. However, the caseworker put the defence to the adjudicator, who found in the solicitor's favour. The adjudication process provides an additional safeguard to ensure that the right decisions are reached and that a failure to obtain supporting evidence (as in this example) does not jeopardise the solicitor's case.

25. In some cases the nature of the allegation might suggest that the outcome is likely to be "allegation not upheld" even if further evidence is requested. In one case the informant made allegations about several solicitors from different firms in relation to a family law issue. Whilst the caseworker could have requested evidence to support the allegation before closing the file, on this particular case it is assumed the caseworker determined that evidence could not have been provided had it been requested.
26. In another case, the informant, a former employee at a solicitor's practice, raised an initial allegation of conflict of interest and months later when advised that the situation did not constitute a conflict, raised an allegation of overcharging. The Technical Team commented that the circumstances suggested that the informant may have been an aggrieved employee and that if they had evidence to substantiate the allegations, they would have provided this.
27. We are moving away from a reactive approach to regulation in which every allegation is investigated, to a risk-based, outcomes-focused approach where the caseworker or equivalent will assess the value of information and whether it merits further investigation. In view of this, the four cases identified appear to pose a low risk in terms of reaching the right outcome.

Closure letter content

28. The training document on closure letters provided by CIU includes recommendations on the content of a closure letter and is outlined in the [criteria](#) section of this report. Although each case has been reviewed against this criteria, it should be noted that this is guidance only and does not form part of the procedure that must be followed when reaching an outcome of "not upheld".
29. Reference was made to the issues raised in 94% of cases, reference to the relevant conduct rules in 51% of cases and the outcome explained in 93% of cases.
30. Although the recommended layout for closure letters constitutes guidance only, these letters provide a written record of how the decision not to pursue a complaint of misconduct was reached.
31. The process for dealing with informants changed in 2011, and as a result SRA only communicate with informants, in addition to an initial acknowledgement, in exceptional circumstances. Also, the way in which the SRA engages with the subject of an investigation also changed. Where an event triggers engagement, the supervisor dealing with that firm will liaise in the first instance with the nominated SRA contact, and from 31 October 2012, the Compliance Officer for Legal Practice (COLP). Where an event does not trigger engagement, there is no „closure letter“ process.
32. Although the „closure letter“ process is no longer applicable to the way SRA operates now, it is still important to demonstrate that allegations have been

properly investigated and relevant evidence considered. It is therefore imperative that processes are in place to provide such assurance.

Level of decision maker

33. The decision to close a case with the outcome "Not upheld" ,was made by Caseworkers in 73.3% of all cases, heads of business unit in 17.5% and Adjudicator or Adjudication Panel in 5%. Four of the remaining cases were not applicable (3.3%) as the subject solicitor had not been investigated i.e. records were incorrect, and in the last case (0.8%) the decision was made by a Casework Adviser.
34. Where the decision was made by the head of unit, this was as a result of the matter having been outsourced to Agent solicitors but still requiring the ultimate decision to be made by SRA. In each instance the Agent made recommendations which were followed by the head of business unit.
35. Decisions by Adjudication were made on cases where the caseworker had recommended a finding of misconduct but the Adjudicator or Panel disagreed.
36. In 22 cases it was found that the decision maker details differed from the electronic record. In all instances, the decision maker had been recorded as 'Caseworker', when in fact it was the Head of Business Unit in 21 cases and Technical Adviser in the other. Where the decision was made by the Head of Business Unit, every case had been outsourced.
37. In order to establish whether there were any patterns of disproportionality attributable to individual decision makers, their details were recorded as part of the audit. In each of the four cases where the process had not been followed, the decision was made by a different individual. There was no evidence of bias or discrimination by any individual members of staff.

Training

38. Other than core training on Equality and Diversity (E & D) (with reference to Rule 6 of the Solicitors' Code of Conduct 2007), the Conduct Investigation Unit (CIU) confirmed that no additional specific E & D training had been provided to casework staff prior to, or during the period from January 2009 to December 2010.
39. The need for such training was addressed in April 2011 when all staff completed a compulsory E & D e-learning course in which they were required to undertake and pass an online examination.
40. Whilst there was no training specifically for reaching a "not upheld" outcome, training was provided in relation to analysis and drafting closure letters which covered the circumstances in which a file would be closed on this basis. CIU advised that training on this has been provided to staff for at least ten years, although this was not documented in the unit prior to 2006.

Delay

41. The length of investigations is an issue that has been raised previously on behalf of BME solicitors, particularly as those subject to an ongoing SRA

investigation, as this may have an impact on obtaining indemnity insurance or the cost of it.

42. Allocation delay was evident on 59% of cases. The majority of which (51%) was less than six weeks and 34% between one and three weeks. There were seven instances of delay between seven and ten weeks and two over ten weeks which are more concerning. These statistics considered periods of delay in excess of the target 6-8 week allocation from the date of case creation.

Conclusions and recommendations

Conclusions

43. Principle 1 of the SRA 11 principles of regulatory decision making states:
Decisions should be based on the application of guidelines or criteria, which should be (a) fair to all individuals and groups regardless of any of the protected characteristics covered by the Equality Act 2010, (b) published and transparent, and (c) applied consistently .
44. It was found that decisions to make no finding of misconduct were consistent, in that they followed a process and were based on published criteria. The challenge will be to maintain this consistency of approach when the transition is made to risk-based, outcomes-focused regulation.

Recommendations

45. No significant failings were found in the process for determining that an allegation should not be upheld and as such, no recommendations have been made regarding existing procedures, particularly as they are currently subject to review.
46. Current processes are expected to change with the introduction of **risk-based regulation**, where it is anticipated that not every allegation raised to the SRA will be investigated. To ensure consistency of approach and fair and transparent decision making, appropriate processes and procedures must be implemented to prevent the potential for unfair bias or discrimination.
47. Consideration should be given to the future audit requirements of the SRA key regulatory decision making processes to ensure that the arrangements in place demonstrate a robust but flexible risk based approach to providing internal and external assurance.

Annex 1

Cases where it was not clear whether the process had been followed

Case ref: CDT/61754-2009	Conduct issue: Falsely inflating legal aid costs.	Ethnicity: BME
<p>Reason why reviewer considered that the process had not been followed:</p> <p>Allegation received from a former employee of the firm that the subject solicitor was acting for her daughter on a legal aid case. Wrote in August 2009 expressing concern about whether the subject solicitor was allowed to give advice to close family members under the scheme. Wrote again in December 2009 expressing concern about overcharging.</p> <p>SRA wrote to the informant in January 2010 stating that there was no breach of conduct rules in relation to the subject individual acting for her daughter and that there was insufficient evidence in respect of the second allegation. However the caseworker had not contacted the informant prior to this letter and had not asked for any evidence.</p> <p>Comments from Technical Advisor in CIU:</p> <p>Borderline. Informant's original concern did not mention inflating bills, only a possible conflict. Inflating bills was raised only after Ethics had mentioned it. Caseworkers presumably thought that this may have been an aggrieved former employee. The fact that he did not contact the office with any evidence after this letter goes some way to supporting the decision to close the file.</p> <p>Conclusion drawn by audit:</p> <p>Process not followed.</p> <p>Whilst the circumstances are indicative that the informant may be an aggrieved former employee the caseworker should have allowed him the opportunity to provide evidence before making a judgment.</p>		

Case ref: CDT/61776-2009	Conduct issue: Breach of undertaking.	Ethnicity: BME
<p>Reason why reviewer considered that the process had not been followed:</p> <p>Subject solicitor mentioned a couple of times that they had relied on advice given by the Ethics team. The caseworker did not ask for this information or request the file note from Ethics.</p> <p>In failing to obtain this information the caseworker's recommendation to make a finding of misconduct was flawed. The adjudicator addressed this however by concluding that there was no misconduct as the information was relied on in good faith.</p> <p>Comments from Technical Adviser in CIU:</p> <p>Ethics Guidance is not in any way binding on a conduct investigations and therefore in these circumstances even if the note/confirmation was requested it would not have changed the recommendation.</p> <p>Conclusion drawn by Audit:</p> <p>Process not followed.</p> <p>The Adjudicator reached a finding of "allegation not upheld" on the basis that the solicitor relied on the advice received from Ethics Guidance in good faith and therefore the advice did have some relevance to the finding. Whilst the advice given may not be binding it is clearly still relevant.</p>		
Case ref: RDC/1873-2009	Conduct issue: Publicly funded client received a bill from solicitor.	Ethnicity: BME
<p>Reason why reviewer considered that the process had not been followed:</p> <p>Allegation raised that the informant was publicly funded yet received a bill for costs from her client. The caseworker put the allegations to the subject solicitor who responded in an email stating that the firm did not take on publically funded clients before the informant became a client, nor was the client publicly funded. Caseworker accepted this and closed the file. The caseworker should have asked for more information from both parties and not just have accepted the subject solicitor's response.</p> <p>Comments from Technical Adviser in CIU:</p> <p>Evidence should have been sought from the informant and the solicitor</p> <p>Conclusion drawn by audit:</p> <p>Process not followed.</p>		

Case ref: CDT/57725-2009	Conduct issue: Allegation that solicitor was attempting to remove children from informant's care.	Ethnicity: White
<p>Reason why reviewer considered that the process had not been followed:</p> <p>The caseworker did not request evidence as would be done in most cases. Due to nature of the allegation it is doubtful this could have been obtained but perhaps should have requested in the first instance.</p> <p>Comments from Technical Adviser in CIU:</p> <p>The letter of 24 April 2009 is unfortunately worded as the repeated references to "considering no evidence" are not appropriate. It was however not appropriate to ask for evidence of the allegations as the informant was essentially concerned about the courts, throughout which she has been represented by a solicitor in whom she has confidence. The letter of 4 February 2010 was albeit brief a better explanation of our position.</p> <p>Conclusion drawn by audit:</p> <p>The Technical Adviser seems to be suggesting that the issue raised was about a decision made by the court and therefore not an issue that we would investigate. This being the case, it would be appropriate to close the investigation in accordance with the usual procedure.</p>		