

Guidance

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Decision-making in disciplinary cases

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Status

This guidance explains the procedures we adopt when we make decisions in disciplinary cases.

Who is this guidance for?

- SRA regulated firms, their managers, role holders and employees
- Solicitors, registered European lawyers and registered foreign lawyers
- Members of the public

Purpose of this guidance

This guidance is to help you understand how we make a first-instance decision in a disciplinary case and how we deal with an application for an internal review of that decision.

At the end of an investigation into alleged misconduct, the investigation officer may decide to refer the case for a formal decision on an appropriate sanction. These first-instance decisions will usually be made by an adjudicator or adjudication panel.

We can agree an outcome with the respondent, rather than an outcome being imposed by an adjudicator or adjudication panel. We call this a Regulatory Settlement Agreement – see our guidance on agreeing regulatory and disciplinary outcomes

[<https://www.sra.org.uk/solicitors/guidance/disciplinary-publishing-regulatory-disciplinary-decisions/>]

This guidance also explains when we might decide to hold interviews or hearings as part of our decision making process.

General

Our decisions are made under our legal framework, which includes our Standards and Regulations and various statutes such as the Solicitors Act

1974 and Legal Services Act 2007.

We have rules that govern how we deal with disciplinary cases. The SRA Regulatory and Disciplinary Procedure Rules

[<https://www.sra.org.uk/solicitors/standards-regulations/regulatory-disciplinary-procedure-rules/>] (RDPRs), set out how we investigate and take disciplinary action for breaches of our rules and regulatory requirements. And our Application, Notice, Review and Appeal Rules [<https://www.sra.org.uk/solicitors/standards-regulations/application-notice-review-appeal-rules/>] make provision for internal reviews and external appeals against our disciplinary decisions.

We make decisions in accordance with our decision-making guidance [<https://www.sra.org.uk/solicitors/guidance/make-decisions-criteria-apply/>]. Ensuring that we make fair, consistent, and proportionate decisions is key to our role in protecting the consumers of legal services and supporting the operation of the rule of law. We make our decisions on the balance of probabilities, known as the civil standard of proof.

All our first-instance decisions (FIDs) in disciplinary cases have a right to an internal review, apart from decisions reached by agreement (see below). A review of the FID may be requested by us or by the respondent. No-one else, including a complainant, can request a review. A FID, or review of a FID, may also be appealed. We have set out when a person can apply for an internal review, and any rights of external appeals in annex 1 of the Application, Notice, Review and Appeal Rules

[<https://www.sra.org.uk/solicitors/standards-regulations/application-notice-review-appeal-rules/>].

Most of our disciplinary decisions are published. Our Regulatory and Disciplinary Procedure Rules and our guidance on publishing regulatory and disciplinary decisions [<https://www.sra.org.uk/solicitors/guidance/disciplinary-publishing-regulatory-disciplinary-decisions/>] set out the approach we take when deciding whether to publish decisions.

Who makes our decisions?

Our document Who can make decisions at the Solicitors Regulation Authority sets out the regulatory decisions that are delegated and to whom. Disciplinary decisions are included within this. The staff to whom decisions are delegated are sufficiently trained, experienced and competent to make these decisions.

FIDs and review decisions in disciplinary cases will be made by a single adjudicator or an adjudication panel, apart from decisions reached by agreement (see below). Adjudicators are not involved in the investigation of a case and make objective and impartial decisions based on the evidence disclosed to the respondent, and any representations and evidence that person has provided to us in response.

We employ legally qualified adjudicators who make decisions on their own. Most FIDs in disciplinary cases are made by a single adjudicator. We also have a pool of panel adjudicators consisting of lay and legally qualified individuals from a diverse range of backgrounds. The term 'adjudicators' includes single adjudicators and panel adjudicators.

An adjudication panel provides a forum where different viewpoints and opinions can be discussed amongst experienced professionals. This provides additional assurance and robustness when making and reviewing certain decisions.

FIDs may be made by an adjudication panel in certain circumstances, including if:

- the case is particularly high profile, sensitive or complex
- the respondent is or was an employee of, or consultant or service provider for, us
- lay input is desirable
- the case involves a novel or unusual issue

The SRA or the respondent can request that a FID is determined by an adjudication panel. The request will be submitted by the case officer and considered by the Chief Adjudicator. The Chief Adjudicator or a single adjudicator may also decide to refer a matter to an adjudication panel regardless of whether a request has been made. The decision of whether to refer a case to an adjudication panel is not a decision that is subject to a review.

A financial penalty falling within Band D under our guidance on financial penalties, can only be imposed by an adjudication panel and so where the investigation officer recommends this outcome, the case will be referred to an adjudication panel to make the FID. In other cases, if on considering a case referred to them, a single adjudicator feels a financial penalty in Band D is appropriate, the case will be stood over and referred to an adjudication panel.

How we make our first-instance decisions (FIDs)

Before the matter is referred to an adjudicator for a FID, we will give notice to the respondent. We will:

- set out the allegations and the facts in support
- disclose any evidence or documentation that we consider relevant
- summarise any regulatory or other history which is relevant to the allegation
- where appropriate make a recommendation as to the decision to be made

- where appropriate make a recommendation about the publication of the decision
- where appropriate make a recommendation about the payment of costs

We will invite the person to respond with written representations within a specified period of time, which will usually be 14 days from the date of the notice. We can vary this process, if we think it is in the public interest to do so (See Rule 2.5(c) of the RDPRs). For example, we have provided additional time for the respondent to provide their representations where we felt this was reasonable due to a medical condition, or where the bundle of documents has been particularly large.

Most FIDs are made in private by considering the bundle of documents disclosed to the respondent, together with their representations. The adjudicator may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court [<https://www.sra.org.uk/solicitors/standards-regulations/glossary/#court>] . However, they will only consider the documents presented to them, and that have also been disclosed to the respondent.

The adjudicator will prepare a written decision that will then be sent to the respondent by the allocated case officer. The case officer will explain to the respondent any right to request a review or appeal of the FID.

The operation of the adjudication panel

An adjudication panel will normally comprise a Chair and two other members in which case decisions are made by simple majority. Occasionally panels consist of two members, in which case the Chair has the casting vote. There will always be at least one lay member and one legally qualified member on each panel.

Adjudication panels will usually be supported by a panel adviser whose role is to:

- Ensure the panel have all relevant papers.
- Provide any technical or procedural advice on the application or interpretation of relevant legislation, rules, policy, guidance, or criteria.
- Advise on any relevant case law.
- Oversee the administrative arrangements.
- Help the panel to formulate and record the reasons for its decision.
- Ensure the Chair completes and documents the decision in a timely way.

The panel adviser will not take part in the decision-making process.

Conflicts of interest

If an adjudicator has, or considers that they may have, a conflict of interest in any matter in which they are asked to participate, they should disclose it as soon as reasonably practicable to the Chief Adjudicator. In the case of an adjudication panel member, they may disclose it to the Panel Adviser. The Chief Adjudicator will decide whether there is a conflict of interest and if so, the adjudicator will be required to stand down from considering the matter. If the Chief Adjudicator does not consider there to be a conflict of interest, the reasons for this will be recorded in the decision and the adjudicator will continue to consider the matter.

Case study

A disciplinary case was referred to an adjudicator recommending a disciplinary sanction in relation to a criminal conviction. The adjudicator realised that their friend had been the judge in the criminal case and they disclosed this to the Chief Adjudicator. The Chief Adjudicator decided that there was no conflict of interest or perception of bias because the conviction and sentence were not disputed by the respondent. The issue the adjudicator was asked to consider was whether our regulations had been breached.

Interviews

Most of our decisions are made solely by adjudicators considering documents. However, an adjudicator or adjudication panel may decide to invite the respondent to be interviewed before making a final decision. .

The adjudicator or panel will decide whether an interview with the respondent is necessary and provide reasons for their decision. Interviews are likely to be rare. The purpose of an interview is to clarify evidence or test credibility prior to reaching a decision. For example:

- The respondent may have put forward a significant explanation or mitigation and an interview will help the adjudicator to assess its credibility and the weight to be given to it.
- The adjudicator may want to understand more about the circumstances in which the conduct occurred and the respondent's understanding of those circumstances.
- An interview may be required as a reasonable adjustment to enable the respondent to properly make their representations.

If an interview is required, the adjudicator or panel will prepare a stand over decision explaining the reasons for an interview and identifying the matters that require determination. A "stand over decision" is a decision to defer the final decision until a later date, where an additional step is required in relation to the matter.

Case study

An individual had applied for a role in a law firm. It was alleged that they had failed to fill in the form honestly, failed to disclose a regulatory investigation and stated that they were a solicitor when this was not the case. The matter was referred to adjudication alleging breaches of our requirements to act with honesty and integrity (Principles 4 and 5 of the Code of Conduct for Individuals). The investigation officer recommended that the individual be disqualified from holding compliance officer roles in firms we regulate.

The individual had put forward a significant explanation in their defence of the allegations. Taking into account that their honesty was central to the matter and that there was a risk of disqualification, the adjudicator decided they should hear from the individual to determine their credibility. There was not a need to hear from anyone else, including witnesses to events or experts, and so a hearing was not necessary. The adjudicator therefore decided to interview the individual.

Procedure for interviews

The adjudication support team will contact the respondent (the interviewee) to agree a time and date for the interview. They will be asked whether they require any special arrangements or adjustments to be made. The interview will usually be conducted by video conference.

Although it is not necessary, the interviewee may be accompanied by someone to support them or a representative. The interviewee (not any representative) will be expected to answer the questions put to them. Only the interviewee (and any representative) is present along with the adjudicator or panel. The same adjudicator or panel who decided to interview the person will usually conduct it.

Interviews are inquisitorial in nature. The adjudicator or panel will start by explaining the purpose of the interview and the matters that require determination. They will then ask the interviewee questions to establish any facts and to assess the events surrounding the conduct or behaviour and the reasons for it. The adjudicator or panel may adopt any procedure which is just and fair, they are not bound by the same rules of evidence as the civil or criminal courts.

The adjudicator or panel may provide an opportunity for the interviewee and/or their representative to make opening and/or closing comments. The interview is not an opportunity to provide any new evidence, including witness statements. This type of evidence should be provided to the case officer during the investigation stage of the case.

The duration of the interview will depend on the nature of the case and any reasonable adjustments that are needed. However, interviews should generally last no longer than half a day. The interview may be recorded and a copy of the recording or a transcript of it will be provided to the interviewee on request.

If the interviewee does not attend the interview, without an adequate explanation, the adjudicator or panel may proceed to consider the matter based solely on the documents.

Hearings

All adjudicators can decide if there should be a full hearing - held before an adjudication panel and in which witnesses provide oral evidence and are subject to examination/cross-examination. The respondent or the case officer may also request that we hold a hearing in which case an adjudicator will decide whether a hearing is necessary and provide reasons for their decision.

We anticipate that hearings will be rare. Where we consider that a hearing should be held, we will always make a referral to the SDT if this is possible given their established role as a body which is designed to administer hearings and their considerable experience carrying out this role. However, there are certain circumstances in which it may be necessary for us to hold a hearing in the interests of justice. This is limited to cases where we are not able to refer a case to the Solicitors Disciplinary Tribunal (SDT) because they do not have jurisdiction, for example where the respondent is an Alternative Business Structure, and either:

- there are material disputes of fact which cannot be determined without a hearing in which the parties are cross-examined, or
- there is an exceptional public interest in matters being ventilated in public

This is set out in our rules.

Hearings will usually be conducted during the FID stage of a case. However, it is possible that on review, the adjudicator or adjudication panel decide that a hearing should have been held at the FID stage and therefore direct that a hearing should take place.

A hearing differs from an interview, in that:

- A hearing may only be held before an adjudication panel.
- There will be one or more witnesses giving evidence.
- The respondent may be represented and they or their representative may examine and cross examine witnesses.

- We will be represented and our representative may examine and cross examine witnesses.
- The hearing may be held in public and may be publicised in advance through our website.

If a case is referred to an adjudicator or adjudication panel for a decision on the papers and they consider that a hearing should be conducted, they will prepare a stand over decision explaining why a hearing is required and setting out the procedure for the parties. We have published separate guidance on hearings procedures.

Reviews

Reviews in disciplinary matters can take place following an application by the respondent or they can be initiated by us. This section applies to all these reviews apart from reviews of fixed financial penalties, which are governed by separate rules.

The ground(s) for requesting a review are:

- the decision was materially flawed and/or
- there is new information which would have had a material influence on the decision.

A review is not an opportunity for the same arguments to be presented to a different decision maker in the hope they may take a different view.

If an administrative error in any of our decisions comes to our attention, we will aim to correct this promptly without needing to go through the review procedure.

Adjudicators will not be involved in the consideration and/or determination of any review of an FID they have made. This is set out in our rules.

Material flaw

A decision may be materially flawed where (this is not an exhaustive list):

- The decision maker incorrectly applied the law, our Standards and Regulations or guidance
- Relevant pieces of evidence were not taken into account
- Irrelevant pieces of evidence were taken into account
- The decision is irrational
- There was procedural unfairness

The adjudicator will interfere with a decision under review only if satisfied that the FID was wrong or that the FID was unjust because of a serious procedural or other irregularity in the proceedings. The adjudicator may exercise their discretion not to interfere with a decision even if satisfied that that FID was wrong, if for example, there is no real prospect of a different decision being reached, or other intervening events mean the decision should stand.

The adjudicator should not generally interfere with factual findings in the FID unless they are satisfied that the conclusion reached lay outside the bounds within which reasonable disagreement in evaluating the facts is possible.

New information

This is information that was not made available to the adjudicator at the time they made the FID and which if it was available would have had a material influence on the original decision.

Reviews requested by the respondent

An application for a review by the respondent must be made within 28 days of written notification of the decision, or the reasons for the decision (if provided later). They must explain the grounds of review and the reasons why it is sought. We ask they complete our application form.

An application cannot be made for a review of a decision reached following a review or appeal; or a decision that was made by agreement (in other words, where the relevant person has entered into a regulatory settlement agreement).

We will not provide any extra time for seeking a review unless we are satisfied that there is a good reason why the respondent was unable to bring the application within 28 days. This might include reasons such as (this is not an exhaustive list):

- the individual's health did not allow them to apply for a review
- extenuating personal circumstances meant the relevant person could not make the application
- the individual was unable to access the documentation or decision
- the documentation or the decision was not received
- significant new evidence comes to light that was not available within 28 days

The relevant person is expected to provide evidence in support of any request to apply for a review outside the 28-day period. For example, relevant medical evidence. A decision as to whether to accept a review

outside of the 28-day period, will be made by a nominated decision maker in the operational team responsible for the case.

On receipt of the review application the case officer may prepare a report responding to it. If a report is prepared it will be disclosed to the respondent for comment.

Reviews initiated by us

Unless there are exceptional circumstances, we have up to one year to seek a review of our decision. This one-year period starts when the FID is sent to the respondent.

Once this decision has been made, the case officer will prepare the application and a report for disclosure to the respondent. We will usually give 14 days for the respondent to make written representations in response. The application and report should address the following:

- Our reasons for initiating a review, including why the ground(s) for a review are met
- If new evidence or information has come to light that would materially affect the outcome, what this evidence is
- The outcome we are seeking
- If more than one year has elapsed since the decision was made, the exceptional circumstances that exist for requesting a review

How reviews are conducted

As with FIDs, a review is generally determined on consideration of the written evidence alone, but an adjudicator or adjudication panel may at their sole discretion invite the respondent to be interviewed (see details above for when this may happen and the procedure that will apply).

The adjudicator or panel will receive the original bundle of documents, together with the application for a review and any response (including representations from the respondent).

On review the adjudicator or panel will consider whether the decision was materially

flawed or there is new information which would have had a material influence on the FID.

Possible outcomes of a review

On considering a review, an authorised decision maker may:

- uphold the original decision
- overturn the decision in whole or in part

- make any other decision which could have been made by the original decision maker
- remit the decision for further investigation or consideration

Where the original decision is overturned because it was materially flawed, we may decide to overturn any costs order made by the original decision maker.

Where the original decision is overturned because there is new information that would have had a material influence on the decision, it is unlikely that we will overturn any costs order made by the original decision maker. That is because we do not consider the original decision was wrong or flawed and it was correctly made on the basis of the available evidence/information.

The authorised decision maker will prepare a written decision of the outcome of the review which will be sent to the respondent by the case officer. The case officer will explain to the respondent any right to an external appeal of our decision.

External appeal

Some of the decisions we make can be appealed directly to an external body, such as the High Court or the Solicitors Disciplinary Tribunal. The respondent may appeal our decision externally without going through our internal review process.

The decisions which can be appealed externally are set out in Annex 2 and Annex 3 of the Application, Notice, Review and Appeal Rules. Other decisions we make may be subject to judicial review.