Solicitors Regulation Authority

Guidance
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How we gather evidence in our regulatory and disciplinary investigations

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Status

This guidance is to help you understand how we gather evidence, the investigatory powers we have to gather evidence and how we can use those powers.

Who is this guidance for?

All SRA-regulated firms and individuals.

Purpose of this guidance

To help you understand how and when we use our investigatory powers to gather evidence.

General

We explain in this guidance how we use our powers to gather the evidence that we need to make decisions.

We need to collect evidence for the many different types of cases we deal with. For example:

- We need to understand the facts of cases so that we can decide if someone has breached our Standards and Regulations.
- We may need to decide whether there is reason to suspect dishonesty or other serious concerns that may lead us to close down a law firm.
- We may think that someone who has worked with a law firm should not work in the law or should only be able to do so if we approve of the arrangements such as how their work will be supervised.

- We may have to prove serious allegations before the independent Solicitors Disciplinary Tribunal (SDT).

This guidance is focussed on the evidence we need to decide whether to take regulatory action following reported concerns about an individual or firm we regulate. The SRA Regulatory and Disciplinary Rules set out how we investigate allegations of breaches of our Standards and Regulations and other legal requirements. When we investigate, we have a number of investigatory powers and these are set out here.

This guidance should be read in the context of our decision making [https://www.sra.org.uk/sra/decision-making/decision-making-sra/] , and other guidance documents, listed at the end. We will update this from time to time.

Powers to investigate

We have strong powers to require regulated individuals and firms to give information to us. We can see information even if it is confidential or subject to a client's legal professional privilege.

In many cases, we will simply ask for information, explaining clearly what we want and why, and we will expect to receive it. People we regulate have a duty to cooperate with us. Someone who does not cooperate with us may be disciplined, and we may even intervene, resulting in a firm being closed down (if we are concerned that it is a risk to clients or others).

The more serious our concerns, the more likely we are to use our powers at an early stage. We may also use them if we think the person we are investigating is not likely to cooperate properly with us.

Our main powers are to require individuals and firms:

- to give us information or documents
- to be interviewed
- to explain their behaviour.

Most individuals and firms work with us to give us information and to explain why they have behaved in a particular way. If they do not, in some cases we can ask the High Court to order them to comply with our requirements. We can also ask the High Court to order other people to provide information or documents to us.

Our powers are set out in legislation and in our Codes of Conduct and it is important to look at the exact wording of them where necessary. The SRA Code of Conduct for Solicitors, RELs and RFLs and the SRA Code of Conduct for Firms provide that those we regulate:

- give full and accurate explanations, information and documentation in response to any requests or requirements
- make sure that relevant information held by them, or by a third party carrying out functions on their behalf which are critical to the delivery of their legal services, is available for inspection by us.

The SRA Code of Conduct for Firms applies to firms, its managers, compliance officers and employees.

Power to require the provision of information

What information is covered?

We have various powers to require individuals and firms to give us information or documents. By "documents" we generally mean papers and electronic documents held in computers that they are holding. Asking a person for 'information' will usually involve the person telling us some facts. For example, asking a firm to give us a list of people who dealt with a client's case. Another would be asking the firm to set out how it calculated the fees it charged. In the rest of this guidance the word 'information' will include both information and documents.

Who do the powers apply to?

This power applies to firms we regulate and to solicitors, registered European lawyers (RELs) and registered foreign lawyers (RFLs) in whatever capacity they are working. The power also applies to people who are not directly regulated by us but are owners or part-owners of law firms.

This continues to apply to individuals even where we have intervened. That is important to avoid people quickly leaving firms to avoid an investigation into concerns we may have about their conduct.

What powers do we have?

Any documents and information held by firms are confidential and are protected by 'legal professional privilege'. We can look at them but, if they are protected by that privilege, we can only use them for our regulatory purposes. If it is necessary to refer to them in a case that is being dealt with in public, part of the hearing can be in private and the clients' identity can be protected by using initials instead of names.

Example 1

A law firm, X & Co LLP, acts for two clients at the same time without either of them knowing. One becomes suspicious that his interests are not being looked after properly. We require the firm to provide us with a list of cases they are dealing with for each client. After considering the list, we are

concerned about several cases. We require the firm to produce their paper and computer files to us, organised chronologically and in sections. They provide the documents. We establish a serious conflict of interest and start enforcement action.

Our specific statutory powers to require information to be given to us for investigations include:

- Section 44B of the Solicitors Act 1974
- Section 93 of the Legal Services Act 2007
- Regulation 66 of the Money Laundering Regulations 2017.

The statutory power under s44B to require information arises if we are satisfied that it is necessary for the purpose of investigating whether:

- there has been professional misconduct by a solicitor
- a solicitor, firm, one of its managers or employees, has not complied with regulatory requirements set out in our rules or in legislation
- there are grounds for us to control how a person who is not a solicitor can work in or with a firm.

It is a criminal offence for anyone who knows, or suspects, an investigation into any of these matters is happening (or likely to happen) to falsify, conceal or destroy a document they know to be or believe to be relevant. It will be a defence if they can show they had no intention of doing so.

If we use our s44B power, to give the person a notice specifying the information required, we:

- may set out when, where and how the information is to be provided
- will set a time limit for the information to be provided
- may require the information to be provided us or someone else (such as someone working with us to investigate a case).

We expect information to be given to us in an organised way, since that saves time and cost. We may make clear in our request for information, how it should be organised. If it is not properly organised, we may treat that as a failure to comply.

We have the power to pay the costs of someone we send a notice to. However we do not usually do so because we try to keep our requests proportionate and part of being regulated is providing information to your regulator. We may consider paying costs in exceptional circumstances. For example, where complying with our requirement will cause significant

financial hardship. We will only pay the expense of providing the information and not consequential costs, such as lost time to earn fees.

Compulsory interviews

Our powers to require interviews include:

- Section 44BA of the Solicitors Act 1974
- Section 93(4) of the Legal Services Act 2007.

The SDT has commented: "As a matter of professional conduct, it is the Tribunal's view, that every solicitor has a duty to give an explanation of actions which in the [SRA's] reasonable opinion give rise to any question related to the proper performance of professional duties." Baxendale-Walker, SDT findings 9124/2004, paragraph 12.9.

We expect people we regulate to talk to us about concerns that we have from time to time. Refusing to talk to us may well be considered a failure to cooperate.

In some circumstances, we can require people to come to an interview. Because those we regulate must cooperate with us, most talk to us without the need for us to use our compulsory power. We expect full and frank answers in interviews, whether or not we have used our power to compel the interview. That power is likely to be used where:

- the person has refused to talk to us
- we are concerned that they have not been cooperating or are likely not to cooperate promptly, clearly or at all.

We will give reasonable notice of the interview, usually not less than seven days, unless we think that the meeting should take place urgently because there is serious risk of:

- immediate harm to the interests of clients or others
- financial default
- frustration or prejudice to our investigation or an investigation by another regulator or law enforcement agency.

The purpose of compulsory interviews is to establish facts and obtain explanations. We will conduct them fairly, usually as follows:

- Before the interview we will explain in general terms what we are investigating and provide key documents to be discussed (unless we think that doing either of these may prejudice investigations).

- The interview will be at any reasonable location, including our premises or at the firm.
- We do not provide questions in advance.
- One of our lawyers may observe the meeting and if necessary, they may set out our position on any properly raised procedural or legal issue.
- The person being interviewed can be accompanied by a representative if they wish, but only the person called to interview can answer questions, unless we agree a different approach.
- We will not allow the representative to be someone also potentially involved in the investigation, such as a partner in the firm.
- A member of our staff will conduct the interview, although we may ask someone acting for us such as a law firm, to do so.
- If we think that the interview is being obstructed by the representative of the person being interviewed, we will warn that we may treat that as failure to cooperate with our investigation.
- If the obstruction continues, we may exclude the representative from the interview or decide that it will be stopped.
- The interview will usually be digitally recorded and a copy of the recording provided to the regulated person within a reasonable time.
- Breaks will be provided, particularly if the meeting lasts a long time.
- Again, we have the power to pay the costs of someone we require to attend for interview, but we do not usually do so. We may consider paying costs in exceptional circumstances such as when coming to the interview will cause significant financial hardship. We will only pay expense of attending and not consequential cost.
- We may decide, or agree with the person to be interviewed, to take a different approach to any of the above if necessary, in the public interest.
- Reasonable adjustments will be made if we are notified in advance of the need to do so. We encourage those we are planning to interview to tell us if they are unwell and of any adjustments they need.

Information or documents from other people

If we need information from someone we do not regulate, we can sometimes ask the High Court to order them to provide it.

The court will make an order only if it is satisfied that it is likely that the information is held by that person, and that there is reasonable cause to believe that it is likely to be of material significance to our investigation.

The cost of this can be kept reasonable by cooperation and we will look favourably on paying the proper and reasonable costs of people who provide information. This could be by agreeing in advance what the court will be asked to consider ordering.

Our powers include:

- Section 44BB of the Solicitors Act 1974
- Article 5 of The Legal Services Act 2007 (Designation as a Licensing Authority) (No. 2) Order 2011
- Regulation 66 of the Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017.

Example 2

We have used our powers to require a solicitor, Mrs A, to provide bank statements because we are investigating whether money has gone missing. She has not provided them. We think that she may not provide them even if we get a court order against her. We contact her bank and explain the situation. We apply to the High Court for an order that the bank give us the statements direct. The bank agrees that the order is sensible in the circumstances and does not object. The court order overrides the bank's duty of confidentiality to Mrs A. We find evidence of theft when we study the bank statements. We intervene to close down the firm and refer Mrs A to the police. She is later sent to prison and struck off.

Example 3

We are investigating a licensed body for failing to have the required level of professional indemnity insurance. The firm has provided evidence to us which we consider does not present a full picture. They tell us they do not have any further documentation and what they have provided demonstrates they had the cover needed. We contact the relevant insurer because we consider they hold information to show the firm did not hold the requisite cover. The insurer confirms they do hold the information. We apply to the High Court for an order.

Explanations and information

It is important that people we investigate are given a chance to explain their behaviour and that they must do so when asked. There are various times during our investigation when a person can provide an explanation about the matter and we will invite them to do so. We often become involved in cases where the person has been challenged by others and has already explained their position. They may also able to provide an explanation for

their behaviour in response to our written correspondence, during discussions with us or if invited to an interview, as above.

If a person does not cooperate with us in providing explanations or information when asked, we may take action against them because that can prevent us from fully understanding the facts in a case accordingly.

If we do not receive an explanation or the information we have requested, we may have to make a decision based on the information we already have.

However, before making a regulatory or disciplinary decision we will give the person notice inviting them to provide written representations on the allegations and supporting facts within a specified period (no less than 14 days from the date of the notice).

There may be certain matters where we do not provide such a notice. For example we may have to act urgently to exercise our powers of intervention to protect clients and others, usually when we suspect dishonesty, or there are other risks such as to clients' money. In such circumstances, we may have to take immediate steps, perhaps with no warning, where there is a high risk of harm or the wrongdoing established, or suspected is very serious. In some cases, the person's opportunity to provide an explanation as to their conduct will be in interview or in response to a letter. There is no legal or procedural requirement for the person to be warned in advance, or to be able to provide a formal explanation.

Further details are given in our guidance on intervening to protect clients [https://www.sra.org.uk/sra/decision-making/guidance/consumer-intervening-protect-clients.page]

In addition, if we are already bringing a case against someone at the SDT, it may save time and cost to include further allegations in that case without providing notice. A case at the SDT provides a full opportunity for the person to explain their behaviour.

Example 4

Mr J is the co-executor of his late father's estate. The other executor is the only solicitor in a law firm A & Co. Mr J tells us that £100,000 seems to have gone missing from his father's estate. We urgently visit A & Co and use our powers to require the solicitor to provide information about the estate and ask him to explain what has happened to the money. His explanation is plausible, but not entirely convincing. We check it with Mr J who shows us documents proving that the solicitor's explanation was misleading. In the meantime, a secretary from A & Co telephones us in confidence to say that the solicitor has been shredding documents ever since Mr J started to get suspicious. We intervene without further notice to the solicitor. He has had an opportunity to explain his behaviour and the

concerns we have about his behaviour are serious. There is also a risk that he has and may again destroy evidence.

Other evidence

We may have to contact witnesses or other people to help us establish the facts of a case. This may include:

- clients of the law firm
- people affected by the law firm's or an individual's behaviour
- the courts
- the police
- other regulators
- people who work, or have worked in the law firm
- instructing an expert witness to advise in complex or unusual cases.

Although our investigations are generally conducted confidentially, it is usually necessary to tell witnesses and other people why they are being asked to help. As well as giving them some information so that they can tell us what they know. If someone has complained or made a report, we consider it important to keep them up to date on our investigation where we can. To protect the public, it may also be important to tell other people about what we are doing. For example, we will generally tell the person's employer about our investigation, unless we consider that it would not be in the public interest to do so. We may also disclose or publish information about an investigation into a particular case (or class of cases) where we consider it is in the public interest to do so.

Example 5

A law firm sent 3,000 letters to people accusing them of illegally downloading copyright material belonging to the firm's clients and demanding compensation. The accusations were exaggerated, threatening and led vulnerable people to pay money that was not owed to the firm. We spoke to some of them, explaining that we were investigating possible misconduct by the law firm and took statements from them. Their evidence was important in explaining to the SDT how people had been intimidated and had paid money because of fear of a large legal bill.

General factors for consideration

As well as the specific matters we consider when using certain powers, there are some general factors we take into account in how we use our investigatory powers. These include:

- Proportionality – Using our resources and powers appropriately to establish the relevant facts in a way that is fair and effective.
- Promptness – using our powers to cut through delay, particularly if the regulated person or firm is being obstructive.
- Transparency – ensuring and demonstrating that we have checked all relevant facts.
- Preserving evidence – we are very likely to use formal powers, or close down the firm, if we think that evidence has been, or might be destroyed.

Related guidance documents

Decision making guidance [https://www.sra.org.uk/sra/decision-making/]

Guidance on intervening to protect clients
[https://www.sra.org.uk/solicitors/guidance/consumer-intervening-protect-clients/]

Further help

If you require further assistance, please contact the Professional Ethics helpline [https://www.sra.org.uk/contactus] .