Not guilty, but probably dishonest

John Gould puts disciplinary procedures & the standard of proof required by the Solicitors Disciplinary Tribunal under the spotlight

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IN BRIEF

▶ Deciding the standard of proof required in allegations against solicitors means striking a balance between the interests of the individual and public protection.

It takes a long time and a lot of money and effort to become a solicitor, but does that mean that disciplinary sanctions should only be applied as if they were criminal convictions? Can it be right that the public's trust of solicitors should be qualified by the knowledge that some solicitors still in practice have been adjudged as probably dishonest? In this article I look at the question of the standard of proof in the Solicitors Disciplinary Tribunal (SDT) and then, following on from my previous article ('Regulatory matters', *NLJ* 16 March 2018, p10), consider the distorting effect of allegations focused on a binary decision on dishonesty rather than a graduated approach to integrity.

Applying the criminal standard

In its recently published annual report the SDT has announced that it will be bringing forward new rules in 2018 which will deal with the standard of proof required in its proceedings. At present, very unusually, allegations against solicitors have to be proved to the criminal standard, whereas most other professional disciplinary tribunals apply the civil standard, which requires proof on a balance of probabilities. One of the few exceptions, the Bar Standards Board, has already announced that it will be abandoning the criminal standard of proof in 2019. The only other exception, I believe, is the Royal College of Veterinary Surgeons which applies what it describes as the highest civil standard 'so as to be sure' that the charge is proved.

In many cases it is questionable whether the standard of proof makes any difference to the outcome because often the facts to be proved are not in dispute. It is often wrongly assumed that the same standard applies to the assessment of the tribunal as to whether those facts show a breach of the rules of conduct. There is, however, something more fundamental underlying the choice of which standard to apply. That fundamental question is where, in regulation generally, the balance is to be struck between the interests of an individual professional and that of the public in general.

Keeping up appearances

Conventionally the courts tended to consider the standard of proof in professional discipline cases in terms of the characterisation of the defendant which would follow from any finding. If an allegation was of deceit or moral turpitude (*Bhandari v Advocates Committee* [1956] 3 All ER 742) or was tantamount to a criminal offence (*Re a Solicitor* [1993] QB 69) the view was that an allegation should be proved beyond reasonable doubt. In *Aaron v Law Society* [2003] EWHC 2271 the court confirmed the connection between the standard of proof and the risk of suspension or striking-off. A solicitor, it was thought, should not lose his or her reputation and livelihood only on the basis of probabilities.

This approach is hard to reconcile with the fundamental importance of the reputation of solicitors and the need for public trust and confidence recognised by Lord Bingham in *Bolton v Law Society* [1994] 1 WLR 512. A solicitor who has probably been guilty of deceit, moral turpitude, conduct tantamount to a criminal offence or which should result in suspension or striking-off, sounds like just the sort of person from whom the public needs to be protected in order to maintain the necessary trust in solicitors generally.

A striking illustration of this issue arose in *Law Society v Waddingham* [2012] EWHC 1519 in which the judge decided that a solicitor had probably been dishonest but that that finding was insufficient to meet the required standard of proof. It is hard to think of a greater risk to public trust than an approach in which solicitors who have been established as probably dishonest are sprinkled around the solicitor population as a whole. The courts are clearly beginning to recognise that the climate has changed.

In *SRA v SDT* [2016] EWHC 2862 (Admin) Leveson LJ called for a re-evaluation of the approach to the standard of proof in the context of the need for public protection.

Of course, the criminal standard is not only applied to these particularly serious cases; it applies to all cases in the SDT. This brings another trend into play. Over the years the concept of generalised misconduct or conduct unbefitting a solicitor has faded away and now cases are brought exclusively in terms of breaches of conduct rules. This is to move away from the characterisation of the solicitor based on conduct towards the potentially narrower question of whether a rule has been breached. Breaches of rules may involve limited ethical opprobrium particularly where they are brought against entities or other persons with a secondary responsibility. The enforcement of rules is an important part of ensuring compliance with proper standards in the public interest. It is hard to see why the standard of proof should be weighted so as to protect solicitors from their own probable rule breaches even in the absence, for example, of an allegation of lack of integrity.

This brings us back to the distorting effect of allegations of dishonesty in professional disciplinary cases. If a case is brought which attempts to prove something which is tantamount to a criminal offence, a finding may have consequences for the defendant beyond the ability to practise as a solicitor. As a public finding, it may make any opportunity of earning any living very difficult to obtain for many years. The criminal standard may seem natural because what is being alleged effectively goes beyond fitness to be a solicitor and becomes a trial of general character.

The dishonesty roulette

In my last article I described the distinction between honesty and integrity and explained why integrity is the more important concept in assessing professional conduct. Integrity is the higher ethical standard of the profession whereas honesty is the standard of the ordinary person. Dishonesty always involves a lack of integrity but whether or not a professional has or has not behaved dishonestly should not be the central question in disciplinary proceedings.

The question of honesty or dishonesty has tended to become a proxy for another question, namely whether a professional is fit to be a member of his or her profession. A finding of dishonesty almost always results in striking-off on the basis that a dishonest person cannot be a fit person to be trusted to practise. There are in fact two steps within this approach. First that the action found to be dishonest allows the characterisation of the person in question as dishonest, and secondly that that characterisation means that the person is unfit to practise.

In many cases these niceties don't make much difference. If a solicitor steals client money, she is dishonest and easy to characterise as a thief. She obviously lacks the integrity to be fit to practise and will be struck off. I suspect that it is these easy cases that have led to the conceptual blurring to which I am referring.

> *"The use of the criminal standard of proof to mitigate the potential for draconian outcomes does not appear to be the best approach"*

Taking a different example, however, things aren't so clear. A solicitor, John Keats, has the misfortune to act for a Robert Maxwell who is an aggressive bully. Keats is recently qualified and his superiors are themselves granite-faced authoritarians. He is anxious to please and takes on too much work. The pressure mounts and the anti-depressants are not as effective as once they were. Following a number of delays, he has promised to issue proceedings for Maxwell by a certain date, but then his children are sick. Maxwell phones immediately on the passing of the self-imposed deadline to check that the promise has been kept. Keats can't face being shouted at again and says the proceedings have been issued. Shortly after Maxwell demands an email confirming the position and Keats without much thought sends it. A few days later the proceedings are issued but Maxwell demands to see them and spots the date.

Taking an approach based on dishonesty, Keats may well be as doomed as if he had consumed a litre of hemlock. He has been dishonest and has lied to his client. He is quite likely to be struck off with a public finding that he is dishonest. But is the characterisation of Keats as a dishonest person who is unfit to practise appropriate? He has behaved dishonestly on this occasion and that may show a higher risk that he will behave wrongly again in the future. But yet, how many solicitors would be certain that they would never lie to a client whatever the circumstances? The inflexible use of dishonesty as a regulatory concept is more like Russian roulette—if the circumstances amount to a loaded chamber, it is the end. The use of the criminal standard of proof to mitigate the potential for draconian outcomes does not appear to be the best approach.

Integrity required

The consideration of integrity need not be such a binary choice. The degree by which a solicitor falls below the standard of integrity expected of the profession seems obviously relevant. The worse the failing the more likely it is that it shows an unfitness to practise. The surrounding circumstances are relevant to seriousness. Seriousness is relevant, amongst other things, to the question of risk which is, in turn, relevant to fitness.

I wouldn't wish to suggest that fitness to practise is the only relevant issue. Punishment, public confidence and deterrence are also important purposes served by regulatory sanctions.

So what would the relegation of the concept of dishonesty in disciplinary proceedings involve? Allegations could be framed as a failure to meet the standard of integrity required of the profession. It would be unusual to specifically allege dishonesty. The factors indicating seriousness would need to be fully pleaded. It would also be for the prosecution to prove that the conduct showed the defendant to be unfit to practise. Alternatively it would have to be alleged that the seriousness of the misconduct required striking off for reasons of public confidence, punishment or deterrence. Fair and proper pleading is an important safeguard to ensure that a defendant knows well in advance that allegations may be career-ending.

The movement away from dishonesty would make it even more obvious that the standard of proof in the SDT should be changed from the criminal standard to the civil standard. In the absence of a public finding that a person is dishonest, there seems little reason to allow someone who is probably unfit to practise to stay in the profession simply because allegations can't be proved beyond reasonable doubt. The findings would show the facts which supported a decision that the defendant lacked the integrity to be fit to practise or the seriousness which required striking-off or suspension.

Anyway, for the present, a change in the standard of proof would be a step in the right direction. **NLJ**

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