

## **Guidance**

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#### **Making decisions to investigate concerns**

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Updated 30 December 2021 (Date first published: 8 August 2016)

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### **Who is this guidance for?**

All those we regulate.

### **Purpose and status of this guidance**

The guidance aims to make sure those we regulate understand how we assess reports and complaints made about those we regulate.

This guidance should be read in the context of decision making at the SRA and other guidance documents listed at the end of this document. It is a living document and we will update it from time to time.

### **Why we investigate**

Those we authorise to provide legal services must be competent in what they do, and act in their clients' best interests. But, while essential, these attributes are not enough. In particular, solicitors have a respected position in society. Their work allows them privileged access to confidential information and puts them in a relationship of trust with clients, some of whom may be very vulnerable.

The public is entitled to expect those we regulate to comply with our Standards and Regulations. Our regulatory powers allow us to take action when they fail to do so. These powers range from engagement with those we regulate, to ensure issues are resolved at a local level, to striking solicitors off the roll or revoking a firm's authorisation to practise.

### **Reports and complaints of misconduct**

We receive complaints from members of the public or clients of those we regulate as well as reports of misconduct from the courts, other regulators as well as from the profession itself.

We do not act on all complaints and reports. Our role is to regulate in the public interest, to protect consumers, and uphold the rule of law and the administration of justice and we adopt a risk-based approach in doing so. This means we focus on misconduct most likely to harm the public interest, ensuring that any decision to investigate is proportionate, balancing the public interest with the interests of the individual or firm whose conduct or behaviour has been called into question. This commitment mirrors our statutory obligation to: "...have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted...", (section 28 of the Legal Services Act 2007).

## **Making the decision to investigate**

When we receive a complaint or report we assess the information brought to our attention by applying a three-stage test, called our Assessment Threshold Test. This helps us decide if we should investigate. The test is:

1. Has there been a potential breach of the SRA's standards or requirements based on the allegations made?
2. Is that breach sufficiently serious that, if proved, is capable of resulting in regulatory action?
3. Is that breach capable of proof?

A complaint or report will only pass the Assessment Threshold Test, and be investigated further, where the answer to all three stages of the test is 'yes'. Sometimes, based on the information we have, we cannot tell whether a stage of the test is met. If this is the case, we try to get more information by carrying out some initial investigation to help us decide.

Unless there is a good reason not to, we will tell the person who made the complaint or report whether the matter passed the Assessment Threshold Test. If it does not meet the test, we will tell them why not.

Where the concerns appear to relate solely to poor service, we direct complainants to the Legal Ombudsman, who has powers to investigate service and provide redress to clients. Unless the information also suggests a serious breach, we will not investigate the matter further. If the Legal Ombudsman, having investigated the matter finds evidence to suggest there are, in fact, serious issues, they will let us know so that we are able to do so.

## **Relationship between the Assessment Threshold Test and the Enforcement Strategy**

The Enforcement Strategy sets out our approach to regulation and underpins how we decide what is serious and what we tolerate. It supports our Assessment Threshold Test when we decide if a potential

breach is sufficiently serious to justify us taking action. Therefore, we are guided by the Enforcement Strategy when we consider stage 2 of the Assessment Threshold Test.

## **The Stages of the Assessment Threshold Test**

### **1. Has there been a potential breach of the SRA's standards or requirements based on the allegations made?**

Our first step, is to confirm if the information relates to an individual or firm we regulate. If not, the matter falls outside our jurisdiction and we proceed no further.

If the information relates to an individual or firm we regulate, we assess whether it suggests a breach of our standards and requirements. We do not require proof of any breach at this stage of the test, we are merely considering if the information raises a question of wrong-doing.

In doing so, we will not take as read a complainant's description of events, but will use our own judgment to identify the relevant issues. For example, a complainant may accuse a solicitor of breaching an undertaking in breach of our Standards and Regulations. However, we can see that, in fact, the complaint is about a failure to pay a simple business or personal debt, which would not generally be a breach of our Standards and Regulations. Here, the complaint would not meet stage 1 of the Assessment Threshold Test and would proceed no further.

### **2. Is that breach sufficiently serious that, if proved, is capable of resulting in regulatory action?**

In line with our Enforcement Strategy we focus our resource on the most serious complaints and reports.

Some matters are serious in isolation because of the nature of the potential breach or risk. Other matters are serious because they form part of a persistent failure to comply or a pattern of behaviour. Therefore, we will look at the information provided to us in the context of other information we have about an individual or firm. We will also consider any aggravating and mitigating features which are present.

We will not investigate a potential breach that is minor in nature, where the evidence suggests it is unlikely to be repeated and there is no ongoing risk. However, we will keep a record of the information so that, if we receive further information in the future, we can identify patterns that indicate a more serious issue.

Sometimes we receive complaints or reports that we have already investigated. If that is the case, and we have already considered the potential breaches or risks raised by the information, we will not

generally consider this to be a matter which is sufficiently serious for us to investigate. However, where a previous investigation has been closed without a formal decision on the facts, and a later report raises substantively new information about the closed investigation or suggests a pattern of similar concerns, we may decide to investigate. In certain circumstances we may revive the old investigation too.

### **3. Is that breach capable of proof?**

When we consider this stage of the Assessment Threshold Test, we take into account the evidence given to us and that capable of being gathered in support. We bear in mind any references to available evidence and what we think we could realistically get from the complainant, the firm or individual complained about, or from any third party.

We are mindful that some complainants find it difficult to articulate their concerns or find the evidence they need. Therefore, we always consider carefully if there are lines of investigation we can explore in order to substantiate serious concerns.

#### **Example 1**

Mrs X is currently engaging in divorce proceedings. She is seeking agreement to a financial settlement and contacts us to complain that her husband's solicitors have failed to respond to her solicitors

In the meantime, Mr X is arranging to sell the marital home, and reports separately to us that he has made it clear that he needs to complete the sale quickly, but that the conveyance is being held up by the buyer's solicitors.

Both of the firms complained about have a duty to provide a proper standard of service to their client. However, this duty does not extend to the complainant in each case. There is nothing to suggest that the solicitors are not acting appropriately, on the instructions of their client. In particular, they are under no obligation and indeed, cannot, respond to third parties without their clients' instructions.

There are no indications of any breach of our Standards and Regulations or any suggestion of any risk to the clients, the public or the wider public interest. Therefore, the complaints fails stage 1 of our Assessment Threshold Test and we will not investigate. We will contact the complainants and tell them why we have decided not to investigate their concerns.

#### **Example 2**



Mr O reports the behaviour of his former partner, Ms P (now the sole practitioner), in relation to her failure to make payments due to him under the agreed terms of his deed of resignation. He also says he has personally obtained two county court judgments against Ms P who has failed to comply with those judgments for two weeks now. Again, the judgments relate to debts due to Mr O although they are not for significant amounts.

We do not usually take action where the issues complained of relate solely to a civil dispute, such as an employment or partnership dispute unless there is evidence of a lack of probity or actual or potential harm to clients. The real answer to Mr O's complaints lies in pursuing legal remedies before the courts and Employment Tribunal.

At this stage, the report fails to meet stage two of our Assessment Threshold Test and so we will not investigate. However, if the sums due were for large sums of money we might consider investigating because this might indicate financial problems on the part of Ms P which could have an adverse impact on clients of the firm.

### **Example 3**

A client of Firm ABC contacts us to complain that the firm failed to return her calls promptly and has not keep her updated as to progress of her house sale.

The complaint relates solely to the service provided to the client and does not raise a serious breach for us to investigate. It therefore fails to meet stage 1 of our Assessment Threshold Test. The Legal Ombudsman (LeO) can investigate complaints of poor service.

The client reports the concerns to (LeO) which starts an investigation into the standard of service ABC provided to the client. Three months later LeO contact us to say it appears ABC has failed to account to the client for £3,500 received from the buyers for fixtures and fittings. If true, this does raise a question of breach of our Standards and Regulations because it may suggest failures of controls, or dishonest or reckless misappropriation of funds. It therefore passes stage 1 of the Assessment Threshold Test and stage two since it is sufficiently serious.

Given the evidence sent to us from LeO the matter would also pass stage three of the Assessment Threshold Test. Even if LeO had not been able to provide evidence at this stage, the matter

would still pass stage 3 of the test because this type of report is capable of being evidenced on further investigation.

We will therefore investigate.

### **Further help**

If you require further assistance, please contact the [Professional Ethics helpline](https://rules.sra.org.uk/contactus1) [<https://rules.sra.org.uk/contactus1>].