

# Guidance

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### Bringing criminal proceedings

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Updated 25 November 2019 (Date first published: 8 August 2016)

#### *Status*

This guidance is to help you understand how and when we may bring criminal proceedings

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

All SRA regulated firms, their managers, role holders and employees.

Solicitors, registered European lawyers (REs) and registered foreign lawyers (RFLs).

Consumers.

#### *Purpose of this guidance*

We explain in this document our approach to bringing proceedings against individuals who have committed certain criminal offences. These include:

- individuals who we do not regulate, but who have pretended to be solicitors or entitled to carry out activities for which they need to be authorised, when they are not;
- those we do regulate and who have taken certain steps which undermine our regulatory role.

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

#### *Our power to commence criminal proceedings*

We have the power to issue different types of criminal proceedings under the legislation dealing with the regulation of legal services. This involves us starting proceedings, usually in the magistrates' court for the area where the offence took place.

We can bring criminal proceedings when:

- an unqualified person has acted as a solicitor (Section 20 of the Solicitors Act 1974) or pretended to be or used the title, or a description, implying that they are a solicitor (Section 21 of the Solicitors Act 1974).
- individuals or firms have carried on a reserved legal activity, or pretended to be entitled to do so, when not entitled (Section 14 of the Legal Services Act 2007; Section 16 of the Legal Services Act 2007; Section 17 of the Legal Services Act 2007). The offence can also be committed by a firm's managers or members if they consented or connived to the offence or if it was attributable to their neglect (Section 197 of the Legal Services Act 2007).
- Individuals seek or accept employment but fail to disclose the fact that they have been struck off, suspended from practice as a solicitor or are prohibited from restoration to the roll without an Order of the Solicitors Disciplinary Tribunal (SDT) (Section 42 of the Solicitors Act 1974 and Schedule 2, Section 9 para 10 of the Administration of Justice Act 1985).
- individuals seek or accept employment or payment from a solicitor or a firm when they are subject to a section 43 control order, without previously informing them of the order (Section 44 of the Solicitors Act 1974).
- a recognised body describes itself or holds itself out as being recognised when it is not (Section 10 of the Administration of Justice Act 1985). The offence can also be committed by 'officers' of the firm (such as managers) if they consent or connive to the offence or if it can be attributed to their neglect (Sections 10(3) and 10(4) of the Administration of Justice Act 1985).
- A body corporate (or one of its directors or servants) implies the body is qualified to act as a solicitor when it is not (Section 24 of the Solicitors Act 1974).

We can also bring criminal proceedings in respect of certain failures to cooperate with us as a regulator, including where individuals or firms:

- knowingly, or recklessly, provide to us false or misleading information or documents (Section 44BC (3) of the Solicitors Act 1974; paragraph 14 Schedule 13 and Part II of the Legal Services Act 2007 in relation to non-authorised persons).
- falsify, conceal, destroy or otherwise dispose of a document which is or would be relevant to one of our investigations (Section 44BC (1) of the Solicitors Act 1974).
- pay out of their firm's accounts any sums of money at a time when such payments have been prohibited by service by us of an intervention notice (Schedule 1 Part 2 paragraph 6(6) of the Solicitors Act 1974; Schedule 14, paragraph 3(10) of the Legal Services Act 2007).



- apply to us to be a licenced body and fail to identify any non-authorised person who holds an interest in the body (Schedule 13 paragraph 11 of the Legal Services Act 2007).
- fail to notify us of any person whom the licensed body expects to hold such an interest when the licence is issued, and the kind of interest held or expected to be held by that person (Schedule 13 paragraph 11 of the Legal Services Act 2007).
- fail to notify the non-authorised person of having identified them in the application or explain to that person that it is an offence for them to fail to provide documents and information to the firm as it requires (Schedule 13 paragraph 13 and 14 of the Legal Services Act 2007).

### *Deciding whether to commence criminal proceedings*

We receive reports of possible criminal offences from a wide range of different sources. We may become aware of criminal conduct from our own work or be alerted by another authority or member of the public.

Prosecuting criminal offences acts as a deterrent to those who may consider committing offences related to legal services.

When assessing the information and considering what course of action we should take, we work a similar way to that contained in the Code for Crown Prosecutors (CPS Code).

We only decide to start criminal proceedings when we are satisfied that both parts of a two-stage test are met. These stages are:

- the evidential test; and
- the public interest test.

If we are not satisfied that both these tests are met but we consider that some action is required, we can take other regulatory or disciplinary action. Regulatory action (controls) and disciplinary action are not mutually exclusive and we may do both.

#### *The evidential test*

We must be satisfied that there is enough evidence to provide a realistic prospect of conviction against the individual concerned on each charge. We consider their explanation, if any, and how that might affect our case against them.

A realistic prospect of conviction is an objective test. It means that a jury, or bench of Magistrates, or a Judge hearing the case alone, properly directed

and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

In doing so, we take account of the fact that the criminal courts apply the criminal standard of proof which means a court can only convict if it is sure a defendant is guilty.

In deciding whether there is enough evidence to meet the realistic prospect test, we consider the evidence in our possession and any further evidence we will be able to obtain once we have made the decision to issue proceedings. This is because we may request further information or documents after the decision is made, in order to present the case more fully.

We may also gather further evidence to deal with points raised in defence of the proceedings. We will consider whether the evidence can be used and is reliable. We will give appropriate weight to the evidence we have. For example, we will place less weight on witness evidence that is vague and omits important dates and facts.

If a matter does not pass the evidential test, we will not issue criminal proceedings.

#### *Public interest test*

If the evidential test is passed, we consider if it is in the public interest to bring a prosecution. We take action to protect the public and support the rule of law and administration of justice. For example, it may be necessary to remove the risk to consumers of an unauthorised or struck off solicitor handling their case, or their money. Clients of unregulated individuals who are misled in that way cannot obtain redress from the Legal Ombudsman and are often unable to claim on any insurance policy.

We also take the principle of regulatory cooperation seriously and will prosecute those who attempt to avoid our regulatory action or compliance with our Standards and Regulations, for example by deliberately fabricating or destroying documents.

A list of public interest factors for and against starting proceedings is set out below. The list is not intended to be exhaustive, and in some cases, there will be factors weighing in each direction which we will need to balance against each other.

#### *Factors in favour of starting proceedings*

The more serious the offence the more likely it is we will prosecute. Criminal proceedings are more likely when there is evidence that:



- the act was pre-meditated, repeated (or is likely to continue or be repeated), systematic or dishonest
- a client or other person's interests have been seriously compromised, or they have suffered financial loss
- any victim of the act was vulnerable or discriminated against
- the individual or firm has a poor disciplinary or regulatory history
- the individual or firm has been previously warned about a potential criminal offence or has previous criminal convictions.

#### *Factors against starting proceedings*

Proceedings are less likely to happen when:

- the individual was at the time of the offence, suffering from mental or physical ill health which contributed towards the offence
- the individual is currently suffering from mental or physical ill health such that bringing criminal proceedings would have a seriously harmful effect on their health or would impact on the person's right to a fair trial
- the individual or firm has co-operated fully with us, in particular correcting the problem when they are able to
- there has been a significant passage of time since the alleged offence was committed (bearing in mind the reasons for any delay).
- the level of any harm caused is low.

#### *Example 1*

Mr H was struck off the roll by the Solicitors Disciplinary Tribunal (SDT) three years ago. The SDT found that he had acted dishonestly. Despite being struck off, Mr H has continued to act as a solicitor, providing conveyancing and probate services to family, friends, and previous clients over many months, often charging significant fees for doing so. On several occasions, Mr H has acted through a firm that gave the impression he is regulated by us when he was not.

We prosecute Mr H for acting as a solicitor when not qualified to do so and carrying on a reserved legal activity when not entitled. The Judge sentences Mr H to a custodial sentence of three months, concurrent on each count.

#### *Other action we may take*

Where we regulate the individual, we can decide to use our regulatory powers to protect the public. We may do this alongside a criminal

prosecution although if the public interest test for bringing a prosecution is not satisfied we may take regulatory or disciplinary action in any event.

The action we take will depend on how serious we regard the conduct. For example, we might send a letter to require the individual or firm to do something (such as change their publicity to clarify their registration status) or warn them that repetition of the conduct might lead to us start criminal proceedings. However, if we have evidence, for example, that a non-lawyer, such as Head of Finance and Administration in a licensed body was conducting reserved work which harmed clients' interests, we might decide to disqualify them from holding that or another key role in a licensed body in the future, as well as starting criminal proceedings for acting when unqualified to do so.

We may decide our regulatory powers alone is a more proportionate response or if we consider the offence cannot be proved to the criminal standard.

### *Example 2*

Mr Z completes his legal education but has not finished his period of recognised training. He is not therefore admitted as a solicitor. He is asked by a friend to help him in his divorce proceedings. He does so free of charge and writes to his friend's husband describing himself as a solicitor.

We investigate Mr Z for the offence of using the title of solicitor. Mr Z accepts he has acted foolishly and says that he will not do it again. We considered the offence is a one off, and it would not be proportionate to issue criminal proceedings. We send Mr Z a letter warning him about his conduct.

In all cases, we may also decide to refer the matter to another body, including the police, if for example the offence forms part of a wider case they will be considering. We will work with other prosecuting authorities in deciding who should lead on a particular case.

### *Further help*

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