Guidance

Guidance

Putting matters right when things go wrong, and own interest conflicts

Putting matters right when things go wrong, and own interest conflicts

Published: 25 November 2019

Print this page [#] Save as PDF [https://beta.sra.org.uk/pdfcentre/?type=Id&data=656330030]

Status

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

Who is this guidance for?

All solicitors, registered European lawyers (RELs) or registered foreign lawyers (RFLs).

All SRA-regulated firms, their managers, compliance officers and employees.

Purpose of this guidance

To outline certain key considerations for putting matters right when you identify that things have gone wrong through the fault of you or your firm.

Paragraph 7.11 of the Code of Conduct for Solicitors, RELs and RFLs [https://beta.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and paragraph 3.5 of the Code of Conduct for Firms [https://beta.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] states that "*You are honest and open with clients if things go wrong, and if a client suffers loss or harm as a result you put matters right (if possible) and explain fully and promptly what has happened and the likely impact...*" This applies, where the context permits, to former as well as current clients.

This guidance addresses how to deal with matters when meeting these obligations presents a risk of an own interest conflict.

An ‘own interest conflict’ arises in any situation where your duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter. Paragraph 6.1 of each of the Codes of Conduct above, require that "*you do not act if there is an own interest conflict or a significant risk of such a conflict.*"

Introduction

Not all occasions where things go wrong, or where you make a mistake, give rise to a risk of a conflict.

For example, the consequences of a defect in title may be put right through purchasing a title indemnity policy; and the other side in a contract negotiation might be happy to correct an obvious or inadvertent drafting error. Where a time limit is missed in litigation proceedings, the solicitor may be able to stay on the record to rectify the situation.

In any event, the codes of conduct make it clear that you should inform the client promptly about what has happened and of any consequences for their matter, being open and honest in your communication with the client.

Where there is a straightforward remedy (as above) you should explain this and obtain informed consent from the client to take steps to rectify the situation. As ever, you should consider carefully how to ensure they are able to fully understand the issues, depending on their circumstances and needs.

Conflict of Interests

Your client may, for good reason, wish you to take steps to put matters right and your professional obligations require you to do so wherever possible. However, you will need to consider carefully whether you are able to advise on any remedial options, or continue to act for the client on any remedial steps, given your duty not to act where there is an *own interest conflict* or a significant risk of an *own interest conflict.* This will be a matter of professional judgment in all the circumstances.

For example, you will not be able to advise on the merits of options for the client to rectify the matter, or any losses they have suffered, where one of these is to bring a claim against you for professional negligence. In this situation you should advise the client to take independent legal advice. You may wish to offer to pay for this. Once the client has considered the options, having been advised, you may be able to act for the client in taking any further, remedial steps, in the matter. Further guidance on the way to approach your consideration of these issues is set out below.

Assessing the risks and benefits of remedial action

You will need to consider carefully the remedial steps that could be taken, and whether there are any points along the line in which your personal interests would interfere with your ability to act in the client's best interests. The factors you take into consideration before making your decision might include for example:

- How complex and costly is the remedial course likely to be?
- How certain is the outcome – does it rely on the actions or decisions of third parties or the court?
- Will your client need to make decisions along the way which will involve the relative merits of options which include taking action against you?

For example, following a mistake made by your firm in a transfer deed which has resulted in a reduction in the value of the land in question, the purchaser makes a lower offer and the client needs to consider whether to accept or to pursue a claim against you. Or whether to accept a settlement offer in proceedings, where their negotiating position is low as a result of your error. This may also involve the client deciding on the degree to which they would need to have mitigated their own loss for the purposes of any claim against you. In these types of circumstance, you would not be able to act.

- Are you able to accept the mistake and make admissions?

It may become difficult to continue to act in a matter whilst defending your reputation and/or resisting liability. This will be particularly the case if the remedy turns on you making admissions, for example in an application to set aside an order.

Paragraph 7.9/3.5 of the Code refers to a "significant risk". When you are documenting your pathway you will need to consider how likely it is that the conflict may arise and also how material (or conversely, peripheral) it is to the work you are doing for the client.

If there is a risk of conflict, are you able to mitigate against this, reducing the significance or existence of the risk? This will be fact specific, but may include:

- Restricting the work you do. You may be able to take certain steps which do not present a risk of conflict, with another firm or adviser involved at key stages, for example to offer independent advice or carry out certain steps.
- Offering to pay the costs of the remedial work. You will need to consider whether you wish to pay all costs or limit this to a proportion of the costs or certain steps – bearing in mind where litigation is involved if this will cover adverse cost orders, appeals, satellite proceedings etc. Depending on the circumstances, this may

not reduce the risks sufficiently, for example if unexpected or additional costs arise and you need to advise on options where you have a personal interest.

Engaging with your insurers

You will normally need to consult with your insurers at the earliest possible opportunity.

The mistake may comprise a "notifiable circumstance" under your policy. Bearing in mind that claims handling is generally undertaken by your insurer even if the claim is within the policy excess, you should liaise with the insurer from the outset and throughout the claim. In particular before making any admission as to liability, as you are likely to need their consent to do so.

If you are seeking to recover the costs of, for example, paying for the client to take independent advice or to reimburse any legal or other costs, or losses they suffer, then you will need to agree with your insurers how the matter will be handled and what they are prepared to pay.

Recording the decision-making process

It is important you think through and anticipate the above issues carefully - and, where appropriate, reassess the risks at key stages of the remedial process. You should maintain a detailed and accurate record of the decision-making process in order to clearly justify your reasoning and show how you have analysed the risks and issues at each stage. This should include the fact that independent legal advice has been obtained by the client, if this is the case.

Ceasing to act

If, having done so, you conclude that you are unable to act, you will need to inform the client accordingly, and that they will need to seek legal advice elsewhere.

We recognise that it may on occasion be impossible for a new firm to be instructed in time, if urgent steps need to be taken in order to protect your client’s position. In those circumstances we recognise that it is acceptable for you to do what is necessary to protect the client’s interests for example, by issuing an application to the court should a limitation period be imminent. If you need to inform your insurer (as above) you should do so first, and get informed consent from your client to act. You should then immediately refer your client for independent legal advice.

Further help

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