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Sorry seems to be the hardest word

Making a mistake when advising a client can lead to costly consequences: John Gould advises on the best approach when accidents happen

IN BRIEF

- A lawyer who realises that they may have been negligent when advising a client needs to be very careful about what they do next.
- It is essential to consider key duties before attempting to rectify the mistake.
- Simple remedial actions may be possible, but it is unlikely that litigation with third parties could be conducted by the potentially negligent firm.

It comes as no surprise that, from time to time, lawyers make mistakes which cost their clients' money. Most lawyers are alert to the possibility, but a lawyer who realises that they may have been negligent needs to be very careful about what they do next. Relying on 'common sense' could turn possible negligence into professional misconduct, a breach of fiduciary duties, or even a new basis for a claim where none existed before.

Rushing to rectify

It is a natural thought that a lawyer who has made an error should do whatever is necessary to rectify their mistake so as to minimise or even prevent any loss to the client. It may be very uncongenial to stop acting and tell the client to look elsewhere to have the problem sorted out. Once other lawyers are consulted, the client may well be lost and the costs of rectification are likely to turn into compensation.

The great majority of lawyers' errors are discovered before they have any consequences and, subject to a little embarrassment, are easily corrected without risk or cost to the client; perhaps a document has to be re-produced and re-executed. Sometimes, however, it is not so simple. Where, for example, a limitation date is missed, a third party stands to gain from the error, and remedying the problem may actually be complex and contested. Rectification may involve negotiation and potentially litigation.

A solicitor may believe that they are in the best position to resolve the issue in the client's interest, and perhaps they are. They are likely to be very familiar with the issues, very well motivated to obtain a resolution and even prepared to work without charge as the price of getting out of gaol. Many clients are reluctant to have their relationship with their solicitor disrupted and would be very happy if the problem could be solved without unpleasantness. A primrose path may be taken, accompanied by expressions of contrition, forgiveness and optimism, which nevertheless leads to consequences which are much worse for the lawyer than simply losing a single client.

Key duties to consider

Although lawyer and client have a common purpose in resolving the problem, their interests are rarely fully aligned and, if the lawyer launches ill-advisedly into an attempted rectification, serious difficulties may well start to accumulate. This is even more likely if the lawyer has failed to consider their key duties before continuing to act to make good their mistake.

First, the solicitor is required by their fiduciary duty to disclose material information to their client. The discovery of an error which may affect the client is material information. A solicitor who intentionally withholds material information is likely to be in breach of their fiduciary duty. Care is, however, needed as to how the required information is provided; it is not appropriate or necessary to make any admission of negligence or liability. A full confession may feel cathartic, but the fiduciary duty to the client sits alongside the contractual duty to professional indemnity insurers not only to notify circumstances which might lead to a claim, but also not to admit liability. Admissions which prejudice an insurer can lead to any compensation paid being recoverable against the insured solicitor.

The common law duty to inform the client to seek independent legal advice arises where the solicitor knows or ought to know that there is a significant risk that they have been negligent. The 'potential' for an allegation is not sufficient unless the risk is significant. It is not enough for a breach of fiduciary duty to show that the solicitor negligently failed to inform the client or failed to advise the client to seek independent legal advice. The negligent failure to inform and advise may be sufficient to create a new cause of action in negligence if it causes loss but, for breach of the fiduciary duty, the intentional withholding of information or advice amounting to conscious disloyalty to the client is likely to be required.

Even the negligent failure to inform and advise may expose the solicitor to additional losses. If costs are incurred and adverse costs awarded in attempting to litigate out of the problem, additional recoverable losses may arise if the solicitor has departed in any way from the advice an independent adviser would probably have given.

Whether or not there is a significant risk that previous advice was negligent is to be assessed at the time the possible negligence comes to light. It is not permissible to remain silent on the basis that the solicitor is confident that their advice was correct. This is so even if eventual litigation against a third party shows that no error was made.

A solicitor's obligations under the Solicitors Regulation Authority's (SRA's) codes of conduct are not necessarily the same as those under common law, but they are an indication of the standard of conduct to be expected of a reasonably competent solicitor. Paragraph 7.11 of the Code of Conduct for Solicitors, Registered European Lawyers (RELs) and Registered Foreign Lawyers (RFLs) and paragraph 3.5 of the Code of Conduct for 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 was supplemented in November 2019 by guidance—'Putting matters right when things go wrong and own interest conflicts'.

The guidance gives good practical advice as to how to reconcile the desire to rectify in the client's best interests and the risks of own interest conflicts.

Once the client has been properly informed and advised to obtain independent advice then, if the matter is still current, comes the question of whether the solicitor can continue to act. The possible claim against the solicitor has introduced the solicitor's own interests into the matter. An own interest conflict may well arise where a solicitor has been negligent, or there is a significant risk that the solicitor has been negligent, in earlier advice given on the matter on which the solicitor is continuing to advise the client. An obvious potential difference relates to how the possible negligence is to be resolved, which is different from the common interest that it is resolved.

There may be issues for advice or negotiation with the counterparty in a transaction which could benefit the solicitor by correcting the mistake or mitigating its consequences. It may not be in the client's interest to achieve that by concessions in relation to other issues. Any point which directly or indirectly touches or concerns the mistake has the potential for interests to conflict.

The same issue arises if the potential negligence is discovered after the matter is completed and the solicitor has to consider stepping back in in an attempt to negotiate a remedy or perhaps litigate against a third party to remedy the possible error or mitigate its consequences. This should be regarded as a new retainer (even if it is one which is unremunerated) and the own interest conflict considered.

In some cases, the client's informed consent may allow the solicitor to continue, notwithstanding the potential own interest conflict. To obtain informed consent, the client must be given all the information necessary to make a fully informed decision. This is likely to include:

- the risk that the retainer may have to be terminated if the potential conflict becomes actual;
- the possibility of independent advice or representation;
- the consequences if the retainer has to be terminated subsequently in terms of expense and disruption;
- any limitations under which the solicitor will have to operate;
- the risk of actual conflict; and
- the nature of the potential conflict.

Unless the solicitor has admitted liability and provided an indemnity, the chance of a recovery against the solicitor themselves is likely to be a relevant factor in the client's decision. This is hardly something about which the solicitor can properly advise. It follows that the circumstances in which competent independent legal advice is not essential, before substantive attempts to remedy are made, are likely to be rare.

There may be other consequences of failing to deal with the identification of possible negligence correctly. If the retainer is continuing, in 'relatively exceptional' cases a failure to advise the client of possible negligence or to seek independent advice could amount to a new cause of action and thereby be relevant to limitation (see *Gold v Mincoff, Science & Gold* [2001] Lloyd's Rep PN 423 per Neuberger J). It has been suggested, however, that this could only arise if the solicitor knew or ought to have known that they were guilty of an earlier breach of duty (*Ezekiel v Lehrer* [2002] EWCA Civ 16, [2002] All ER (D) 267 (Jan)). This aligns with the conscious disloyalty required for a breach of fiduciary duty. The loss of a limitation defence is likely to prejudice insurers.

A narrow escape

So when might it be possible to attempt to litigate one's way out of trouble? The issues have been examined very recently by the High Court in *Cutlers Holdings Ltd (formerly Sheffield United Ltd) and another v Shepherd and Wedderburn LLP* [2023] EWHC 720 (Ch) (Mrs Justice Bacon). The allegations of negligence against SW arose from a dispute about the ownership of Sheffield United Football Club which is now owned by Prince Abdullah bin Mosaad bin Abdul Aziz Al Saud—a Saudi prince. SW acted for Sheffield United Ltd (SUL), who were the previous owners of the club, in relation to its agreement with the prince and then throughout the subsequent litigation between them between 2018 and 2020.

The allegations of negligence related to an investment and shareholders agreement and an option agreement between SUL and the prince, but there was also an allegation of negligence and breach of fiduciary duty based on SW's failure to advise SUL in 2018 (and thereafter) that SW were in a position of own interest conflict. This was on the basis that SW had been responsible for drafting and advising SUL on the meaning and effects of the agreements, but had failed to advise SUL that it should seek independent legal advice. The possible problem with the drafting had arisen because the parties fell out and the prince successfully used what were described as 'devices', to avoid obligations to purchase the club's ground at a price higher than he said he could afford.

As an aside, the claims were also made against two SW partners personally both on the basis of alleged negligence and breach of a personal fiduciary duty. An individual can be liable as well as their firm if they assume responsibility for a matter so as to create a special relationship between them personally and the client. The court will look for evidence in their statements or conduct, but will also take into account any provision excluding personal liability in the retainer agreement (see *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, [1998] All ER (D) 174). The test as to whether a personal fiduciary duty has arisen is probably the same. The court found that the two partners had not assumed responsibility.

The claim that SW's failure to advise their client of a conflict of interest in relation to the litigation was a breach of their fiduciary duty was rejected. This was on the basis that a breach of fiduciary duty must be intentional, not merely negligent. It is not necessary to show that the solicitor was dishonest, but it is necessary to show it was conscious and deliberate.

The court did find, however, that the failure to tell SUL to seek independent advice about their possible negligence was itself negligent. It didn't matter which argument as to the correct interpretation of SW's drafting was correct. There was a significant risk that the devices used by the prince would succeed and that would open SW to a claim which was sufficient to generate a conflict. SW were also found to be negligent in failing to advise SUL that there was an own interest conflict, and in failing to advise SUL to seek independent legal advice on that point before continuing to act. There were also various findings of negligence in relation to their earlier drafting and advice.

Notwithstanding these findings, the claims failed because the claimants failed to show that things would have worked out differently even had SW provided non-negligent advice. Accordingly there was no recoverable loss—a narrow escape based on unpredictable facts.

On a practical level, a lawyer must decide whether the risk that they have been negligent is significant or merely theoretical. If it is significant, they must inform their client of the possibility (without admitting liability) and invariably advise that they obtain independent legal advice. Simple remedial actions may be possible, but it is unlikely that litigation with third parties could be conducted by the potentially negligent firm given the potential for an own interest conflict. Informed consent might, in some cases, allow a solicitor to continue to act where it is in the client's best interests that they do so, but that is unlikely to be sufficient for heavy litigation unless the alleged error is no longer a relevant issue. NLJ

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