

# Guidance (Draft)

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### Identifying your client when working in-house

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#### *Draft, related case study*

This draft guidance should be read in conjunction with the following draft case study: Identifying your client when working in-house case study [<https://www.sra.org.uk/solicitors/guidance/identifying-client-working-in-house-case-study/>].

#### *Status*

**This is draft guidance.**

This guidance is to help you understand your obligations and how to comply with them. In the future, we may have regard to it when exercising our regulatory functions.

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

This guidance is for in-house solicitors employed by organisations not regulated by the SRA.

#### *Introduction*

As an in-house solicitor, the identity of your client will generally be clear from your employment contract. This will usually be your employer.

However, the legal and managerial structures of employing organisations will vary, so this guidance sets out key considerations. For example, the organisation that you work for may have a complex structure, and you may be asked to advise other companies within a group.

Knowing who you are acting for is key to making sure you meet a range of professional obligations, including taking appropriate instructions, managing conflicts and ensuring client confidentiality.

Principle 7 of the Standards and Regulations requires you to act in the best interests of your client. Accordingly, making sure you know who your client

is and being clear on whether you can act is key to discharging your regulatory obligations to act in their best interests.

This obligation must be balanced against your other regulatory obligations, such as the need to act in a way that upholds public trust and confidence in the solicitors' profession (set out within Principle 2) and with independence (Principle 3). These take precedence over an individual client's interests.

You also have duties to ensure you do not act if you have a conflict of interest or a significant risk of conflict in accordance with rules 6.1 and 6.2. This may be a conflict between your own interests and that of the client or it may arise where you have more than one client with divergent interests. Alongside this, you also have an ongoing duty to keep the affairs of your client confidential unless such a disclosure is permitted by law.

This guidance will help you accurately identify your client and so navigate any regulatory risks.

### *Acting for your employer*

'Employer' means the organisation you work for by virtue of your contract of employment. If you are employed by a services company, your contract will set out to whom you are to provide advice.

You are therefore required to act in the best interests of the organisation as a whole, rather than in the interests of particular individuals within it.

Unless explicitly agreed otherwise therefore, your client will be the part of the organisation responsible for organisational decision-making at the most senior level and ultimately accountable for the organisation's performance; therefore the governing body - for example the Board of directors or partnership - rather than any particular director, partner or individual. For the purposes of this guidance, we will use the term 'governing body' to capture all types of senior oversight boards across all sectors.

We use the phrase governing Board to describe the most senior body of individuals with overall accountability for operational risk and performance and responsibility for organisational strategy and decision-making. With charities, the governing Board will be the Board of Trustees. In NHS bodies, the governing Board will be the Trust Board. In private and public companies, the governing Board will be the Board of Directors. In local authorities, the governing Board is the Council and a statutory Monitoring Officer will be appointed pursuant to section 5 of the Local Government and Housing Act 1989 (LGHA 1989).

While it is likely that your instructions will come from executive leaders or from other colleagues working within your organisation, your obligations to your 'client' should be focussed on the needs of the governing body of your

organisation, taking account of the organisation's corporate and strategic objectives and risk profile.

When receiving instructions, you need to decide on whether you can act. To do this, in-house solicitors should think about the following:

- Identify the client
  - Are you certain who your client is?
  - Are instructions being provided on behalf of the employer?
  - If you are advising a particular team or division within the organisation, have they delegated authority to handle the matter on behalf of the employer?
  - Are instructions being provided on behalf of a separate entity or individual connected to the employer? If so, are you entitled under your contract to advise?

In-house legal teams should consider putting a 'who is my client' policy in place which contains details of:

- Related bodies or types of related bodies or individuals which are typically acceptable to advise.
- Details of delegations from the governing body which clearly identify responsibilities for providing instructions to the in-house legal team and from which categories of work colleagues within the employer group.
- Who to speak to if the position is unclear.
- Conflicts of interests
  - These occur where your duty to act in the best interests of your client in relation to a matter conflicts with your own interests in relation to that or a related matter.
  - These may also occur if you are acting on behalf of a separate entity/individual to your employer client and your separate duties to act in the best interests of your employer and of the separate entity/individual, in relation to a matter or related matters, conflict.
  - You are unable to act on a matter if there is a conflict or a significant risk of one arising. Read our further guidance on conflicts of interest [<https://www.sra.org.uk/solicitors/guidance/conflicts-interest/>], including any exceptions which might apply.
- Confidentiality
  - You are generally required to disclose information within your knowledge, that is material to a matter, to your client.

- Does your employer expect you to treat certain matters as confidential to one team or group within the organisation or can you disclose to another team or group?

It should be noted that there may be circumstances in which compliance with our Principles means that you should disclose confidential information without your client's consent. This could, for example, be to report specified criminal offences or to prevent harm to your client or a third party.

Read our further guidance on the duty of confidentiality

[<https://www.sra.org.uk/solicitors/guidance/confidentiality-client-information/>] and on reporting concerns about wrongdoing when working in-house

[<https://www.sra.org.uk/solicitors/guidance/reporting-concerns-wrong-doing-working-in-house-guidance/>].

### *Systems for instructions, advising and reporting.*

In-house legal teams should make sure that colleagues know how to instruct and work with the team. Having a system in place can also help make sure you are able to allocate/escalate instructions by reference to levels of risk. This could be for example through a dedicated mailbox or through a digital portal or platform. Alternatively, colleagues may be able to approach you or members of your team directly.

In-house solicitors may have informal discussions with colleagues across their organisation,. However, a lack of controls around formal instructions could put the legal function at risk of carrying out work for colleagues where you do not have all the relevant information and of ad hoc advice or opinions being relied on out of context. This may also lead to no, or an improper, understanding of the risk level of instructions and a failure to identify confidentiality and conflicts risks.

Typically, governance structures are comprised of an overarching governing body and an executive team. But there may be additional decision-making committees and boards established within your organisation. And it is likely that where the responsibility lies for decision-making in that corporate governance structure will differ depending on the type or nature of decision being made, and the level of risk it may bring. Therefore, you should think about who or which board/committee will be ultimately responsible for making decisions in relation to the matter when circulating your legal advice.

In less complex structures responsibility may nonetheless be split between different teams or individuals. Either way, you will need to consider carefully how widely your advice will be circulated within the organisation, as it is relevant to maintaining confidentiality and legal professional privilege.

Legal professional privilege belongs to the 'client', and in the in-house context this means your colleagues who are authorised to request and receive legal advice on behalf of the employer client. It may be useful, therefore, to separate communications containing legal advice from other communications with colleagues that are not of an advisory nature or relate to litigation. Colleagues should be encouraged to limit circulation of legal advice within the organisation to those colleagues authorised to instruct the legal team.

It will not be possible to maintain Legal Professional Privilege where your client is using that information to commit a criminal offence or other wrongdoing as this negates your duty of confidentiality. We set out further guidance on the 'iniquity exception' in our guidance on confidentiality [<https://www.sra.org.uk/solicitors/guidance/confidentiality-client-information/>] .

### *Reporting lines*

It is not necessary for all solicitors in an in-house team to have reporting lines to the governing body. But any solicitor heading up a legal team should consider how legal risks can be escalated. Members of the team without a direct reporting line to the governing body should nevertheless have clear channels by which they can raise and escalate any concerns they might have.

If you are acting as the sole General Counsel in an organisation, ideally you should have a direct reporting line to the governing body. It's possible that if you are General Counsel in an organisation, you are also a member of the executive team, in which case a direct reporting line to the governing body is already established.

Please refer to our reporting client wrongdoing guidance

[<https://www.sra.org.uk/solicitors/guidance/reporting-concerns-wrong-doing-working-in-house-guidance/>] for further guidance on establishing internal reporting lines.

### *Setting expectations*

Formalising how instructions are received and managed can help to avoid in-house teams being unfairly pressured by individuals who do not have authority to instruct it. Establishing ways to identify where conflicts may arise and who the duties of confidentiality are owed to will help to avoid any regulatory breaches.

Organisational policies and terms of engagement enable in-house solicitors to inform the organisation of the ethical standards that underpin their work. Such policies should cover:

- the solicitor's duties to the employer
- guidelines on confidentiality

- from whom the in-house solicitor takes instructions (including how that can be delegated)
- what should occur in the event of potential conflicts of interest within the group.

### *Navigating legal risks*

Legal and regulatory risks can arise at any time during the lifetime of a matter you have been instructed to advise on. Establishing ways to identify, monitor and record such risks will help to ensure that they can be managed and addressed appropriately which will benefit both in-house legal teams and employers.

Identifying patterns and trends by using risk records can also help to identify any training needs in the in-house legal team and across the organisation. It is important all in-house solicitors, regardless of their seniority, are clear on how to report any risks or issues that might conflict with the organisation's best interests or any of the solicitor's regulatory obligations.

### *Acting for related bodies/third parties*

You may be asked to act for a body related to your employer. This could include, for example, an employer's holding or subsidiary company. From a regulatory point of view, it is possible for you to act for your employer and another client as long as there is no actual or significant risk of a conflict with your employer's interests, as highlighted above.

### *Managing conflicts*

An example that could give rise to a conflict of interest, would be where the employer and its subsidiary have different corporate objectives or the subsidiary intends to grow its operation's while the parent envisages them being scaled down.

In considering how to manage the conflict you may want to ask yourself the following questions:

- how aligned are the interests of the subsidiary to corporate objectives of employer?
- are there appropriate arrangements/agreements in place so that expectations relating to confidentiality surrounding the subsidiaries dealings are addressed?
  - are there existing structures in place for safeguarding/sharing information?

An example of an own interest conflict would arise where a local authority in-house solicitor acts in an advisory capacity to a licensing committee and

then is subsequently asked to act as an advocate for the local authority if the licensing committee's decision is appealed. If the decision is appealed to the magistrates court, consideration should be given to whether that solicitor has an own interest conflict in representing the authority at the appeal hearing.

### *Maintaining legal professional privilege*

When an in-house solicitor is advising bodies related to the employer, caselaw indicates that they should be wary of whether privilege will continue to hold, and to whom that privilege is owed. (See *Three Rivers District Council v The Bank of England (No 5)* [2004] UKHL 48 [<https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-2.htm> ] )

### *Acting for colleagues on personal matters*

It's possible that you might be asked to advise on personal matters for colleagues who are employed at your organisation. From a regulatory perspective, you can do this as long as there is no conflict of interest, or no significant risk of one arising, between your employer and the colleague you are being asked to advise. However, there are important considerations to be aware of before you decide to act.

First of all, you should check the terms of your employment contract to ensure that there aren't any clauses that would prevent this. Advising a colleague where your employment contract prohibits this will place you in breach of its terms.

You should also pay attention to issues of confidentiality, conflict of interest and legal professional privilege. For example, should your colleague ask you for advice on their employment contract, this may place you in conflict with your duty to act in the best interests of your employer. It may also risk the need to disclose confidential information to the individual that you have obtained through your work.

You should also consider whether the terms of your insurance would extend to advising colleagues on personal matters and review your policy before deciding to act. Taking on legal work outside the terms of your contract of employment may amount to acting as a freelance solicitor. Find out more in our acting as a freelancer [<https://www.sra.org.uk/solicitors/guidance/preparing-sole-practitioner-regulated-independent-solicitor/>] guidance.

### *Working on behalf of your employer for members of the public*

In some circumstances, you may as an in-house solicitor provide some services to members of the public on behalf of your employer.

For more information on acting for external clients as an in-house solicitor, please see to our unregulated organisations for employers of SRA regulated lawyers [<https://www.sra.org.uk/solicitors/guidance/unregulated-organisations-employers-sra-regulated-lawyers/>] guidance.

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Not in effect