

Warning notice

Warning notice

Offensive communications

Offensive communications

Updated 25 November 2019 (Date first published: 24 August 2017)

Status

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

Who is this warning notice relevant to?

This guidance is relevant to you if:

- you are a solicitor, a registered European lawyer (REL) or a registered foreign lawyer (RFL) and your communications fall short of the standards expected of the profession, whether in the course of private practice, or practising in a non-LSA business (ie a business which is not regulated by any of the approved regulators or outside practice)
- you work in an SRA-regulated practice as a manager, consultant, employee or trainee, whether as a lawyer or an unqualified person, in relation to communications made by you during the course of business or outside work
- you are an SRA-regulated firm, or the COLP in an SRA-regulated law firm.

The Standards and Regulations

You must comply with the Principles [<https://www.sra.org.uk/solicitors/standards-regulations/principles/>] and in particular:

- Principle 2 – act in a way that upholds public trust and confidence in the *solicitors'* profession and in legal services provided by authorised persons
- Principle 3 – act with independence
- Principle 5 – act with integrity
- Principle 6 – act in a way that encourages equality, diversity and inclusion

You must also have regard to the relevant paragraphs in the Code of Conduct for Solicitors, RELs and RFLs [<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>] and the Code of Conduct for Firms

[<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>] , but in particular those paragraphs referred to below.

Our concerns

We have experienced a significant increase in the number of complaints concerning inappropriate communications, specifically in relation to (but not limited to) emails and the use of social media, both inside and outside of practice.

Examples of the type of behaviour we have investigated, (and which we subsequently referred to the SDT), include:

- making offensive or pejorative comments relating to another person's race, sexual orientation or religion
- referring to women in derogatory terms and making sexually explicit comments
- making comments which harass or victimise the recipient
- using language intended to shock or threaten
- making offensive or abusive comments to another firm about that firm or its client, or to individuals who are unrepresented

The warning below focuses on social media, but also includes emails and texts. It is also relevant to communication by telephone or letter.

Our expectations

That individuals below regulated by us comply with the Principles and the Codes, as appropriate.

- A solicitor, REL or RFL, or
- You work in an SRA-regulated law firm in any capacity

We expect you to behave in a way that demonstrates integrity and maintains the trust the public places in you and in the provision of legal services.

In the context of letters, emails, texts or social media, this means ensuring that the communications you send to others or post online do not contain statements which are derogatory, harassing, hurtful, puerile, plainly inappropriate or perceived to be threatening, causing the recipient alarm and distress.

In addition to Principle 6 above, if you are a solicitor, a REL or an RFL, paragraph 1.1 of the Code for Solicitors, RELs and RFLs requires that you

do not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services.

We treat any communications which are offensive seriously, whether on the grounds of any of the 'protected characteristics' under the Equality Act 2010 or otherwise. The protected characteristics are age, race, disability, religion or belief, pregnancy or maternity, sex or sexual orientation, gender reassignment and marriage or civil partnership. Depending on the circumstances, you may be at risk under all of the Principles referred to above.

You should also note that where a court or tribunal makes a finding that you have committed an unlawful act of discrimination in a communication sent or posted by you, we will treat that as prima facie evidence of misconduct which may give rise to disciplinary proceedings.

Bear in mind that sending an offensive, threatening or harassing communication may also amount to a criminal offence (eg under section 1 of the Malicious Communications Act 1988, section 127 of the Communications Act 2003 or the Protection from Harassment Act 1997). Depending on the circumstances, committing any of these offences or failing to comply with the Equality Act 2010, could leave you at risk under Principles 2, 5 and 6.

Communications in the course of business

Inter-office emails

The Principles referred to above apply not only when communicating with third parties outside the firm, but also to emails addressed to colleagues within your firm. We expect you to act at all times with integrity and the fact that you intended such communications to be private will not excuse your conduct. Once sent, you have no control over what happens to your email and by using your firm's email system, you run the risk that others may be able to access those emails.

Likewise, you cannot justify your conduct on the grounds that you did not intend to cause offence, or that the recipient(s) of your email was not offended. One of our key concerns as a regulator is to uphold the public's confidence in the integrity and high standards of the profession. You may therefore be at risk of disciplinary action if you send an email which has the potential of causing offence to third parties and/or undermining public trust in the profession.

Entering into an exchange with others which you perceive or intend to be humorous can pose a particular risk, especially when your humour is at the expense of others; what may seem to be light-hearted banter to you may be

offensive to a third party. You should ensure that you do not inadvertently cross the line and become offensive in any of the ways referred to above.

Communications with clients

Most firms these days communicate with their clients by email or text rather than by letter. However, there are inherent risks in this. Such forms of communication by their nature are more 'instant' and tend to be less formal than letters.

This can lead to the blurring of the line between client and friend and the informality, together with the expectation of a quick reply, makes it easy to overlook the need to consider carefully what you are saying.

Being on friendly terms with your client or using informal language is not of course a problem in itself, but you must be careful to ensure that your communications remain professional at all times, both in the tone and content. This is particularly so where it is foreseeable that the communication is likely to be disclosed to a wider audience at some point.

If a client makes derogatory, discriminatory or inappropriate references to others in their communications to you, you should not participate or endorse those comments, nor pass the offensive comments on if it is not necessary to do so. Where your client's comments are potentially in breach of the law, you should draw this to your client's attention.

Communications with other opposing lawyers and litigants in person

It is not uncommon for emails with the other side in relation to a client's matter to be robust, particularly in litigation. However, you should ensure such communications do not cross the line by using inflammatory language or being gratuitously offensive, either to the other side or about their client.

Your role is to act in the client's best interests; antagonising the other side is unlikely to achieve this. We expect you to remain objective and not allow the matter to become personal, regardless of the provocation or your client's instructions. You are not your client's 'hired gun' and you may be at risk under Principle 3 if you allow your independence to be compromised by being drawn into using offensive language or making offensive comments in order to meet your client's expectations.

It is equally important to remain professional when dealing with an individual who is representing themselves or has appointed a McKenzie Friend. In a recent decision, the SDT fined a solicitor for his heated and abusive exchange of emails with a litigant in person, calling this 'completely unacceptable'. The SDT said it was the solicitor's responsibility to maintain his professionalism regardless of what that person may have done.

Managers and supervisors

As a manager of an SRA-regulated firm, you are responsible for ensuring that all those in your firm comply with the Standards and Regulations (paragraph 2.3 of the Code for Firms). You will therefore be at risk under the Principles referred to above if you become aware of such emails, but do not take appropriate steps to stop the behaviour and deal with the sender(s) (for example, in accordance with your disciplinary policy).

This also applies if you are not a manager, but you are responsible for supervising a colleague's work and do not take steps to stop the behaviour.

Bear in mind also that as a manager of an SRA-regulated practice, if you are of the view that the sender's comments are capable of amounting to serious misconduct or which you believe should be brought to our attention for investigation, you have an obligation to report the individual(s) to us in accordance with paragraphs 3.9 and 3.10 of the Code for Firms. For more information see our guidance on our reporting and notification requirements.

Solicitors, RELs and RFLs, wherever they are practising, have a similar obligation to report (paragraph 7.7, Code for Solicitors, RELs and RFLs). However, if you are not in an SRA-regulated practice, your duty to report will only arise if the person whose conduct gives rise to your concern is regulated by us or by one of the other approved regulators.

Conduct outside the course of business

Solicitors, RELs and RFLs

The above Principles continue to apply to you (as the context admits) outside your practice, whether in some other business capacity or in your personal life. It is in this sphere – namely outside of work – that we are currently receiving the majority of complaints.

The risk referred to above – namely that social media by its nature tends to encourage instant communication without the necessary forethought – tends to be greater when you are outside a work context. You must at all times be aware of the content you are posting and the need for professionalism.

This is especially true if you are participating in online discussion (whether this be on Facebook, Twitter, other social media, forums, blogs, etc) and you have identified yourself as, or are known to be, a solicitor. You should bear in mind the possibility that users will re-share the content you have posted on their own social network, potentially leading to rapid sharing with a huge number of users. Similarly, you cannot rely on your own privacy settings to prevent the posting from being passed on by others.

Even if you do not identify yourself as a solicitor, anonymity is not guaranteed; material which you post under a pseudonym may still be traced back to you or you may be identified as a solicitor if you include a photograph of yourself.

You should also consider carefully before retweeting an offensive comment. Unless you refute the content, you will be at risk of being seen as implicitly endorsing it. If it comes to your attention that a third party has accessed your computer and posted an inappropriate comment in your name on a social media network, you should take immediate steps to go online to refute the comment. It is advisable in any event to regularly audit your online presence to remove any material which makes you uncomfortable.

Trainees and other managers or employees

If you are the COLP or a manager of an SRA-regulated firm, you must take all reasonable steps to ensure that the firm complies with our regulatory arrangements. This includes ensuring that the firm has effective systems and controls in place:

- to meet the requirements of the Standards and Regulations (paragraph 2.1, Code for Firms), and
- to identify, monitor and manage all material risks to the business (paragraph 2.5)

If a member of your firm sends or posts an inappropriate or offensive communication, it not only puts you at risk under the Principles above, it also has the potential of causing significant damage to your firm, both in terms of reputation and financially; for example, if clients react by withdrawing their business or are deterred from instructing your firm. In some circumstances, you could also be liable for your employee's actions (eg if the communication amounts to victimising or harassing a third party).

To comply with the Code, you should assess the potential risks to your firm in light of the above, taking into account the nature and size of your firm to determine whether you need to put in place a social media policy or some other system or controls. It is likely to be easier to take disciplinary action against a staff member if you have a social media policy in place dealing with its improper use.

To be effective, you should ensure that members of your firm are conversant with any policy or system you put in place.

Remember: if a complaint is made against an individual in your firm, you may be asked to demonstrate how you ensured compliance with paragraphs 2.1 and 2.5 of the Code for Firms.

Enforcement action

If an issue arises, failure to have proper regard to this warning notice is likely to lead to disciplinary action.

For further information on our approach to taking regulatory action, see our Enforcement Strategy [<https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/?epiprojects=3>] and in particular, our topic guide Use of social media and offensive communications [<https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/?epiprojects=3>] . This sets out examples of common mitigating and aggravating features which we are likely to take into account in determining the seriousness of the breach.

Further guidance

For guidance on any of the above conduct matters, contact the Professional Ethics helpline [<https://www.sra.org.uk/home/contact-us/?epiprojects=3#helplines>] .

For advice on creating a social media policy for your firm, see the Law Society's practice note. [<https://www.lawsociety.org.uk/support-services/advice/practice-notes/social-media/>]

The Crown Prosecution Service has issued guidance on hate crime [<https://www.cps.gov.uk/prosecution-guidance>] , which can include offensive communications.