SRA Warning Notices: Take Heed

Published 11 October 2018

Warning Notices published by the SRA over the summer have highlighted concerns about solicitor involvement in potential financial impropriety. The Notices reflect what in practice the SRA is focussing on in the regulatory investigations and disciplinary proceedings that we have been dealing with. As such, whilst a summary is set out below, both Warning Notices should be read in full (including when updates are issued in due course), given the very serious consequences of failing to comply with SRA requirements.

Investment Schemes

On 23 June 2018 a Warning Notice on investment schemes[1] was published. The SRA is concerned that solicitors are giving credibility to risky and dubious schemes, for example, schemes involving property investment projects [which require high deposits for an off plan property, with the deposit used to fund the development], or taking leases of assets, e.g. hotel rooms or care home rooms. High returns are promised, but investors may not be warned of the risks involved, unfair contract terms, or that insurance bonds (protecting their cash) may ultimately prove worthless.

Solicitors involved in these schemes can face complaints and/or claims from disgruntled investors. In addition, without FCA authorisation, serious criminal offences can be committed if the scheme falls within the definition of a "collective investment scheme"[2] . Not only that but regulatory action by the SRA may follow.

Before becoming involved in investment schemes, solicitors should ensure they are familiar with all relevant SRA Warning Notices and the SRA Principles, and critically examine the scheme. Schemes will evolve, so just because a particular scheme has not already been subject to adverse comment or regulatory action is no comfort. Be aware of the following:

- If the client is the scheme promoter, investors should be told in clear and strong terms to take independent advice. In any event, solicitors must rigorously consider the transaction to ensure that they are acting with integrity (and are upholding all SRA Principles), the scheme is legitimate, and that investors are not being misled or taken unfair advantage of. If not, the solicitor should cease to act.

- If the client is the investor, the Warning Note sets out issues for consideration, and warns of the danger of relying on a "limited retainer" if this is not at the client's genuine request [and where other red flags mean the solicitor simply should not be involved at all].

- Acting for both the promoter and the investor should set alarm bells ringing given the likely conflict of interest.

Improper use of client account

The SRA's emphasis on financial regulation is also demonstrated by the updated Warning Notice published on 6 August 2018 on "*Improper use of a client account as a banking facility*"[3].

Rule 14.5 of the Solicitors Accounts Rules prohibits solicitors from providing banking facilities through a client account, unless relating to an underlying transaction or a service forming part of normal regulated activities. The Warning Note reiterates the Rule, and the accompanying case studies helpfully illustrate its application to particular facts[4] and emphasise that convenience/benefit to the client is insufficient justification, by itself, to hold and pay out funds. In some of the case studies the application of Rule 14.5 seems obvious. However, for example, we anticipate there will be firms where the distinction between acting as Trustee, and being instructed to act for Trustees has not been applied consistently, so that inadvertent breaches are occurring.

So what can firms do to avoid falling foul of the Rule 14.5? Some practical steps include:

- Ensure all relevant staff (not just lawyers) are aware of Rule 14.5 and have read the Warning Notice and case studies, and have completed appropriate training;

- Review the firm's procedures for matter opening, to ensure proper consideration is given at the outset to there being a genuine transaction;

- Regular file reviews, to include consideration of monies held, could identify potential issues before any payments are made in breach of Rule 14.5. File reviews should be for all levels of fee earner, not just junior staff. Some of the high profile cases which have resulted in proceedings before the Solicitors Disciplinary Tribunal have involved senior

  partners.

- Promote a culture – through published policies and leadership example - of continued review of why funds are being held, and active consideration of whether a payment request can legitimately be actioned.

A useful question to ask is "**Why can't this money simply be paid back to the client?**"

Footnotes

[1] https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Investment-schemes-(including-conveyancing)--Warning-notice.page#note2

[2] See s.235 Financial Services and Markets Act 2000

[3] See: http://www.sra.org.uk/bankingfacility/

[4] See: http://www.sra.org.uk/solicitors/code-of-conduct/guidance/case-study/improper-use-client-account-banking-facility.page

Return to main page

Authors

Catrin Davies
Newport
+ 44 (0)1633 657682
cadavies@dacbeachcroft.com

Naomi Park
Leeds
+44 (0)113 251 4793
npark@dacbeachcroft.co.uk