

# Practice note on Working with Solicitors

## Aims and purpose of this practice note

**Section 83 of the Immigration and Asylum Act 1999 places a statutory duty on the Immigration Services Commissioner requiring her to promote good practice.**

**This note, which supports that duty, sets out the Commissioner's views regarding OISC regulated advisers working with solicitors. The note should not be seen as a set of definitive instructions, but rather as a statement on best practice. The note has been developed with assistance from the Solicitors Regulation Authority (SRA). Their assistance is gratefully acknowledged.**

**Attention is drawn to the Commissioner's Code of Standards, specifically Codes 3-9; 11; 15-16; 33-47; 67-69; 81-90**

What is covered in this practice note?

1. Background
2. Working as agents for solicitors
3. Routine sub-contracting
4. One-off referrals

## Background

1. In the March 2006 OISC Guidance Note on Signposting and Referrals, when considering Agency, the Commissioner stated:

*4.1 Advisers must not act as agents on behalf of solicitors or other legal representatives. Advisers must not enter into an agency relationship with solicitors or other legal representatives for the provision of immigration advice or immigration services to the adviser's existing client. The adviser must refer the case to a competent professional adviser.*

2. Since then the Commissioner has continued to consider the relationship between OISC regulated advisers and solicitors.
3. Some solicitors have asked OISC regulated advisers to act as their agents, either at directions hearings or at full hearings at the First tier Tribunal (Immigration and Asylum Chamber). Further, the OISC has been asked whether such arrangements could become permanent relationships. This note clarifies the position.

### Working as agents for solicitors

4. In considering any relationship between solicitors and OISC regulated advisers, it must be appreciated that these professionals adhere to two separate regulatory codes. The specific OISC Codes mentioned above which are particularly relevant are as follows:

#### **Code 9.**

An adviser must always act in their client's best interests and put their interests before the adviser's own, subject to regulatory and legal requirements.

#### **Code 11.**

An adviser must ensure that the client receives a full explanation, using an interpreter to explain if necessary, the implications of their position and any proposed course of action. This advice and any instructions must be confirmed in writing.

#### **Code 37.**

An adviser, after having obtained the client's consent, may obtain additional advice or opinions on the client's case while still retaining responsibility for that case, provided that it is within the adviser's OISC-authorized competence level to obtain such advice or opinions.

#### **Code 43.**

An adviser who, having taken on a client, finds that they cannot provide the service needed by that client because it would require them to act beyond either their authorisation or their business resources, should inform the client of this immediately in writing and, in any event, must do so within three working days, giving the reasons why they cannot continue to act, and, where possible, should direct the client to another provider.

### Code 90.

An adviser must not give or send a client's documents to any person other than the client unless the client has given written authorisation. This does not apply where there is a legal requirement.

5. These Codes are reflected in the Solicitors' *Code of Conduct* under which solicitors must have regard to:

Rule 1.04 – acting in the best interests of each client:

Rule 1.05 – providing a good standard of service to clients;

Rule 2.01(b) – refusing to act or cease to act for a client.....where the solicitor has insufficient resources or lack the competence to deal with the matter.

### Routine Sub-contracting:

6. Routine sub-contracting between an OISC adviser and a solicitors firm must not happen. Potential immigration clients may be vulnerable and often have little or no grasp of English or the legal system. As the outcome of the case may well be crucial to the client and their families, the OISC is adamant that clients must at all times know who is acting for them, in what capacity and, if things go wrong, to whom to complain and what about. There should be, as far as reasonably practicable, a seamless service. Solicitors, for their part, would be at risk under one or more of the Rules above if they were to routinely sub-contract work to another firm.
7. It is important for both regulators (the OISC and the SRA) that there is continuity of representation, so far as possible, and that clients are confident that the person representing them at the tribunal knows all about their case. If there is to be any form of on-going referral of cases between advisers and solicitors both the OISC and SRA would have to be satisfied that in each case the client's best interests were being served.

### One-off referral

8. Such referrals are allowed where the referral is genuinely needed because of an emergency situation. Such situations may arise when, for whatever reason, the solicitor's firm cannot attend the hearing AND the hearing cannot be adjourned. However, the solicitor's will still

need to obtain their client's informed consent to make such a referral, and, as mentioned above, would have to be satisfied and able to demonstrate that the arrangement was in their client's best interests. The onus for ensuring that full and timely instructions were delivered to the OISC regulated organisation remains with the solicitor's firm.

9. Several issues arise in a one-off type referral including:

- a. *Who is the agent and who is the principal and, if something goes wrong, who would be liable?* – the solicitor's firm would be the principal and, as such, would remain answerable to the client and the SRA.
- b. *What organisation has regulatory responsibility?* – In all matters the SRA would regulate the solicitor and the OISC the OISC regulated organisation.
- c. *How would such relationships be policed?* – The SRA would regulate the solicitor's involvement. If they received a complaint from the client concerning the conduct of the OISC regulated organisation, the SRA would pass this on to the OISC for investigation. However, depending on the circumstances, the conduct of the OISC regulated organisation could lead to an investigation of the solicitor's firm's decision to appoint the OISC adviser as their agent.
- d. *Who holds the client file and how would Professional Indemnity cover work in such a situation?* – The file would be held by the solicitor's firm. It would be responsible for ensuring that copies of all relevant papers/information were supplied to the OISC regulated adviser together with the solicitor's instructions to act as their agent.
- e. *Would a one-off referral as in (d) above be a breach of such issues as confidentiality and conflict of interest?* – The solicitor's firm would be responsible for all the work done under the retainer and any negligence claim made by the client would therefore be brought against the solicitor's firm. However, that would not prevent the solicitor's firm joining the OISC regulated adviser to any action, if the solicitor was of the view that the OISC regulated organisation was responsible, either wholly or in part, for the negligence. The SRA therefore expects that any solicitor would wish to consider the risk involved (as required under the SRA Code of Conduct) and this would include considering the OISC firm's indemnity arrangements (as required in Codes 67-69 of the OISC's Code of Standards).

It would be a breach of confidentiality by the solicitor's firm to disclose information concerning their client to an OISC regulated adviser without that client's specific informed consent.

- f. *What about an agency fee?*- Before instructing an agent, the solicitor's firm would be expected to agree the fee, or at the very least, costs information equivalent to what a solicitor would have to provide to a client under rule 2 of the Code of Conduct, and to discuss this with the client.

Codes 45-47 of the *OISC Code of Standards* do not allow OISC regulated advisers to demand or accept referral fees from anyone. The OISC adviser must be certain that any payment received cannot be interpreted as an inducement.

- g. *Would the SRA have any issues with solicitors acting as agents on behalf of OISC regulated advisers?* - A solicitor's firm can accept a referral of a client from another business, but such an arrangement must comply with the provisions set out in rule 9 of the SRA's Code of Conduct. The practical effect of this is that the solicitor's firm would have to confirm the instructions direct with their client before commencing to act and would need the client's consent to disclose any confidential information to the OISC regulated organisation.