

Editor's note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors Norton Rose Fulbright Hong Kong, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

COMPETENCE OF SOLICITORS

It is trite that a solicitor has a duty to act competently when providing legal services to clients. A few important issues in connection with this overriding principle of solicitors' competence are highlighted below.

The duty to act competently is set out in principle 6.01 of the Hong Kong Solicitors' Guide to Professional Conduct. In gist,

- A competent solicitor should possess the skill, experience and ability and apply his/her knowledge of law required for the matter he/she is handling.
- If a solicitor is consulted on a subject area which he/she is not familiar, the solicitor should recognise the limit of his/her ability, and only act in, and handle, those matters that fall within his/her competence.
- A solicitor who holds out as having considerable experience in a specific area of law is required to demonstrate a higher level of competence in that area of law. Therefore, extra care should be taken by solicitors when they consider what contents are to be included in their marketing materials.
- Given its evolving nature, it is important for solicitors to keep abreast of new developments in the law to ensure that they possess the required legal knowledge and skill in order to maintain their competence.

Assistance from other parties

(a) Instructions to, and reliance on, counsel

- When certain tasks require advice/assistance from counsel, a solicitor should instruct a competent counsel to assist while continuing to exercise his/her own independent judgment.
- Solicitors must continue to exercise sufficient care and control in the matter.
- Solicitors need to ensure that the instructions to counsel are proper and complete and include all relevant facts and documents.
- The Court has held that relying on counsel's advice is not a valid defence in claims against solicitors. In gist, a solicitor must (a) not "blindly" rely on counsel's advice, (b) continue to exercise his/her independent judgment, (c) not allow his/her own skill and judgment to be governed entirely by counsel, and (d) ensure that counsel's advice contains no obvious errors. See judgments in Locke v Camberwell Health Authority [1991] 2 Med LR 249 and Ridehalgh v Horsefield [1994] Ch 205.

(b) Advice from foreign lawyers

- If the matter involves a foreign law element, solicitors should seek appropriate assistance from a qualified foreign lawyer (whether he/she is from a foreign law firm or he/she is a registered foreign lawyer of a Hong Kong firm ("RFL")). A separate and important point arising from the above is that if a solicitor advises on an area of foreign law which he/she is not competent and authorised/qualified to advise on, any claim arising out of such work will likely not be covered by the Professional Indemnity Scheme given such work will very likely be construed as falling outside the

solicitor's firm's "Practice" (as defined in Rule 2 of the Solicitors (Professional Indemnity) Rules (Cap. 159M)).

- Firms should expressly limit their retainer to advising on Hong Kong law only, if they do not have RFLs within their firms to advise on the foreign law element involved in the matter.
- If a foreign law firm is to be engaged, solicitors are suggested to ask the client to enter into a separate retainer directly with the foreign law firm. If solicitors are required to pass on advice from the foreign law firm to the client, they are also recommended to include an appropriate "disclaimer" in such communication with the client so that it is clear which law firm has provided such advice.
- Where the matter is to be handled by a RFL employed by a Hong Kong firm, it is important to bear in mind that the RFL can only practise the law of the jurisdiction in which he/she is qualified, and is not allowed to advise on or practise Hong Kong law.

(c) Engagement of experts from non-legal fields

- Solicitors must always be mindful that there may be certain areas or aspects of the matter being handled where involvement of professionals from non-legal fields (e.g. surveyors, accountants etc.) is required. They should also consider the timing of engaging such expert (if required).
- Where the performance of a task requires the input of such non-legal expert, solicitors should duly advise the client, seek their client's instructions to obtain the required expert advice, and ensure that the appointed expert has the required expertise to perform the engagement.
- If a non-legal expert is to be engaged, solicitors are suggested to ask the client to enter into a separate retainer directly with the non-legal expert.
- Notwithstanding the appointment of the non-legal expert, a solicitor must continue to exercise his/her independent judgment.