

How can solicitors comply with STaRs when advising clients about ATE insurance in commercial disputes?

The introduction of the SRA Standards and Regulations (STaRs) has significantly altered solicitors' professional obligations to their clients in many different ways. In this article, we examine a litigator's responsibilities when advising clients about After the Event (ATE) insurance in commercial disputes.

The launch of STaRs in November 2019 was met with much fanfare, and many articles followed outlining the key changes solicitors needed to be aware of. One area that was largely overlooked at the time relates to a litigation lawyer's personal obligations when advising clients on ATE insurance in commercial disputes.

As a result, many litigators may unwittingly find themselves in breach of various SRA duties and requirements when acting for clients in commercial disputes. In the process, they would not just be exposing their firms to potential penalties but may find themselves personally liable too.

To understand what these duties and requirements are and how solicitors may fall foul of them, we need to look at:

1. SRA Standards and Regulations 2019 (STaRs) including the SRA Principles and the SRA Code of conduct, and
2. SRA Financial Services (Conduct of Business) Rules.

1. SRA Standards and Regulations 2019

The SRA Standards and Regulations introduced in November 2019 mark a sea change by the SRA. Gone is the narrow focus on law firms and entity-based regulation; instead, the emphasis is now on an individual solicitor's personal professional responsibility.

SRA Principles

The starting point is the SRA's seven principles, which apply to "all individuals authorised [by the SRA] to provide legal services" as well as authorised firms and their employees.

Among these principles are the requirements for individuals to act in "in a way that upholds public trust and confidence" in the profession and "in the best interests of each client".

Code of Conduct for Solicitors

The principles are supported by two codes of conduct: one for firms and one for individuals. A solicitor's personal responsibilities are therefore separated from those of their firm for the first time.

The SRA says that individuals (referred to as "you") are personally accountable for compliance with the code. The standards apply to an individual "irrespective of your role or the environment or organisation in which you work".

Among the specific requirements imposed on solicitors are the following:

"8.6 You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them."

"8.7 You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred."

Solicitors need, therefore, to be proactive about the advice they give concerning the handling of each case. This includes how it is funded, the likely costs, and the suitability of products such as ATE insurance.

As a result, depending on the facts of the case, a litigator may be personally in breach of STaRs if they fail to advise about the suitability of ATE.

They cannot hide behind "the way the firm does things" and must, as the principles say, "always be prepared to justify [their] decisions and actions".

Nor can they simply refer a client to a litigation funder or After the Event insurer with whom their firm has a relationship and assume they have fulfilled their personal obligations.

2. SRA Financial Services (Conduct of Business) Rules

The SRA is a designated professional body under Part 20 of the Financial Services and Markets Act 2000 (FSMA). This enables law firms to carry on certain financial services activities without being directly regulated by the Financial Conduct Authority.

If a firm is satisfied that it can rely on Part 20 of FSMA, it must notify the SRA of this fact and confirm the financial activities it carries on. Such activities include advising on contracts of insurance such as After the Event insurance.

The SRA Financial Services (Conduct of Business) Rules regulate how firms and individual solicitors carry out these activities.

The relevant rule in relation to After the Event insurance is Rule 11. Rule 11.1 states:

"11.1 Where you propose, or give a client a personal recommendation for, a contract of insurance, then in good time before the conclusion of an initial contract of insurance and if necessary, on its amendment or renewal, you must provide the client with information on whether you:

- (a) give a personal recommendation on the basis of a fair and personal analysis;
- (b) are under a contractual obligation to conduct insurance distribution exclusively with one or more insurance undertakings, in which case you must provide the names of those insurance undertakings; or
- (c) are not under a contractual obligation to conduct insurance distribution exclusively with one or more insurance undertakings and do not give advice on the basis of a fair and personal analysis, in which case you must provide the names of the insurance undertakings with which you may and do conduct business."

Solicitors should be aware that this obligation is now a personal one and not one that can be discharged by the law firm (NB use of the word "you" here, as in the Code of Conduct). From our experience, previously, many solicitors would recommend a litigation costs insurer with whom the firm had a relationship and consider their job done. Now, if they make a recommendation, it must be a "personal recommendation on the basis of a fair and personal analysis".

Rule 11.2 goes on to expand upon a solicitor's duties when making a recommendation:

"11.2 If you inform a client that you give a personal recommendation on the basis of a fair and personal analysis:

- (a) you must give that personal recommendation on the basis of an analysis of a sufficiently large number of insurance contracts available on the market to enable it to make that recommendation; and
- (b) that personal recommendation must be in accordance with professional criteria regarding which contract of insurance would be adequate to meet the client's needs."

Many solicitors may feel that this obligation is too onerous due to the amount of work and time involved. If so, they would be wise to avoid making any kind of recommendation. At this point, we would suggest they contact a reputable local insurance broker who can advise them and recommend an insurer or managing agent such as Harbour Underwriting.

The law firm would then work with the broker to ensure that underwriting requirements are met.

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