

## Guidance

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# Supporting your client with interviews during external investigations

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#### *Status*

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

#### *Who is this guidance for?*

All solicitors (either in-house solicitors or solicitors in private practice) and all law firms, their managers, and employees.

#### *General*

There may be situations where solicitors are instructed to represent employers, either in-house or as an external firm, where the employer becomes the subject of an external investigation.

This could be, for example, where they are being investigated by the Health and Safety Executive, the Care Quality Commission, or another government agency, including the police.

An investigation is a very serious matter for the employer concerned as well as individual employees directly involved in any incident and any subsequent investigation. In such situations, solicitors need to consider and be clear from the outset who exactly their client is.

#### *Purpose of this guidance*

This guidance explains your responsibilities under the Standards and Regulations and our Codes if, as a result of any external investigation, you are asked to be present when an employee/third party is being interviewed.

In these situations, solicitors need to be mindful of:

- any uncertainty about who exactly the solicitor is acting for
- the existence of a possible client conflict due to the solicitor mistakenly seeking to represent both the individual employee and the employer, who may have different or conflicting interests
- confidential information being put at risk
- there being no opportunity for the employee or person being interviewed to receive independent legal advice
- unfair advantage being taken of third parties.

## *Standards and Regulations*

We expect you to act in accordance with our Principles

[<https://www.sra.org.uk/solicitors/standards-regulations/principles/>] , including acting:

- in a way that upholds public trust and confidence in the solicitors' profession (Principle 2)
- with independence (Principle 3) and integrity (Principle 5)
- in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice (Principle 1).

## *Our Codes of Conduct*

You should always consider the issues highlighted in the relevant sections below and have regard to the requirements set out in our Code of Conduct for Solicitors, RELs and RFLs [<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>] ('the code').

In particular, paragraph 8.1 of the code emphasises that you must be clear who you are acting for.

For example, this could occur when a witness statement is being taken from the employee or they are being interviewed as part of a health and safety Investigation. Are you acting for the employee, the employer, or both?

## *Acting for the employer*

In situations where an employer you represent is the subject of an external investigation, typically the client will be the employer. This might include providing representation and advising the employer throughout the course of an investigation, up to and including any action taken against them.

If you are acting only for the employer, and not for the employee, you may provide information to the employee about the process that is likely to be

followed.

You must, however, make sure the employee understands that you are not acting for them, that you owe duties only to the employer, and that you cannot advise them. You should also make it clear that anything they say will not be treated as confidential and will, in most circumstances, be reported to the employer.

It is also important that if you are acting for an employer, you make it clear to an employee that they are not obliged to agree to you attending any interview.

Given the imbalance of power between the employer and employee, a solicitor acting for an employer might also be at risk of breaching paragraph 1.2. Paragraph 1.2 of the code states that you must not 'abuse your position by taking unfair advantage of clients or others'.

This would be engaged if they were to approach an employee for consent to attend an interview if it was likely to be detrimental to the employee's interests to agree.

In all the circumstances, if you are acting for an employer, you should always advise the employee of their right to obtain their own advice from any appropriate source before attending an interview. This could be through a trade union or an independent solicitor.

Where you need to consider any of these issues, you should always record your decisions and how you reached them.

### *Acting for both employer and employee*

If you are asked to act for both the employer and the employee, you should give very careful consideration before deciding whether to accept instructions. This is because of the risk of a conflict of interest [<https://www.sra.org.uk/solicitors/guidance/conflicts-interest/>] arising.

For example, the duty to tell the employer client about information provided by the employee in an interview may conflict with the duty of confidentiality owed to the employee client.

Where the entire responsibility for an incident clearly rests with a third party outside the organisation, then you may consider that there is no difficulty in you representing both employer and employee.

However, you should consider very carefully whether, at the early, pre-investigative stage, that conclusion can safely be reached and make a record of the reasons for your decision.

If there is any doubt whatsoever, you should assume that the potential for conflict exists and make sure that the employer and employee are independently represented. The question of conflict should be kept under constant review throughout the investigation.

When the employee is the controlling mind of the company or is authorised to represent the employer in connection with the matter, the employer and employee's interests may be sufficiently aligned so that no risk of conflict arises. Again though, the question of conflict should still be kept under constant review throughout the investigation, and your consideration of the matter recorded.

### *Acting for one employee only*

If the employer is funding you to act for the employee, on the clear understanding that you will be acting solely for the employee, there should be no problem. It will be clear that, regardless of who is funding you to provide your advice, the employee is your client.

Your duty is to act in the employee's best interests and to observe the usual duties of confidentiality owed to a client. You may provide information to the employer about the interview or their evidence only if the employee has given informed consent.

You must consider whether this is in the best interests of your client before seeking such consent.

### *Acting for more than one employee*

Where the employer funds you to act for more than one employee, you must assess whether there is a significant risk of conflict between those potential clients. This must be done before you decide whether to accept instructions to act for more than one client, in light of the risks of a conflict arising and the need for you to disclose confidential information from one employee client that is material to another employee client's situation.

### *Further help*

Read our Conflicts of interest guidance

[<https://www.sra.org.uk/solicitors/guidance/conflicts-interest/>]

If you require further assistance please contact the Professional Ethics helpline [<https://www.sra.org.uk/contactus>]