

Editor's Note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors P.C. Woo & Co., issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

Acting for clients through their authorised representatives

It is common for solicitors to act for clients (in particular, overseas clients where face-to-face meetings are not always possible) through their authorised representatives. It is imperative for solicitors to obtain basic information about their client to verify the client's identity and to obtain written instructions from the client that he/she wishes the authorised representative to act on their behalf. Failure to do so can expose solicitors to disciplinary proceedings and civil claims. This bulletin is intended to highlight some key guidelines and issues.

Client Identification and Verification

Section A of Practice Direction P – Guidelines on Anti-Money Laundering and Terrorist Financing (“PDP”) stipulates that it is mandatory for solicitors to take reasonable measures to obtain basic information on the identity of the client and verify the client's identity when establishing a business relationship.

Original documents (e.g. identity card or passport of an individual, certificate of incorporation or registration of a company or other legal entity) should be inspected whenever possible for verification purposes. It is also advisable to note down when the original documents were inspected and when the copies were taken. (Paragraph 105 of Annexure 3 of PDP)

Solicitors may rely on client identification and verification conducted by specified intermediaries (including an overseas office of their law firm) or third parties provided that: (a) the intermediary/third party is adequately regulated or supervised and has appropriate measures in place to comply with the client identification and verification requirements¹, and (b) copies of the client identification and verification documents must be obtained from the intermediary/third party and kept as a record. (Paragraph 118 of Annexure 3 of PDP)

For clients who are individuals, reasonable measures must be taken to obtain and verify (a) the name; (b) identification documents such as identity card or passport; (c) address as confirmed by documents such as a recent utility bill or bank statement; and (d) occupation or business. (Paragraph 106 of Annexure 3 of PDP)

For corporate clients, reasonable measures must be taken to (a) identify the person purporting to give instructions on behalf of the client and verify his identity; (b) verify that such person is duly authorised (e.g. obtaining a copy of the company's board resolution evidencing the conferring of authority on the person concerned); (c) obtain proof on the legal status of the client such as certificate of incorporation, the identities of the directors, office address and constitution documents; and (d) identify and understand the beneficial ownership and control

¹ For example, financial institutions, lawyers, auditors and company service providers.

structure of the client and take reasonable steps to verify the identity of the persons having such ownership or control². (Paragraph 107 of Annexure 3 of PDP)

Instructions from clients via their authorised representatives

Where instructions are received not from a client but from a third party purporting to represent that client, a solicitor should obtain written instructions from the client that he wishes him to act. In any case of doubt, he should see the client or take other appropriate steps to confirm instructions. (Principle 5.06 of the Hong Kong Solicitors' Guide to Professional Conduct Volume 1 ("**Guide**"))

This Principle should particularly be borne in mind when instructions are received to commence or defend litigation; a solicitor is required by law to be properly authorised to act on behalf of a litigating client; if he is not he may become personally liable for costs if the action is struck out. (Commentary 2 of Principle 5.06 of the Guide)

For good practice, the written instructions from the client should identify (a) the name of their authorised representative; (b) identity document number of the authorised representative; (c) the scope of the authorised representative's authority (i.e. what is the authorised representative permitted to do on behalf of the client); (d) the time period during which the authorised representative may act, if applicable; and (e) the means by which the authorised representative can be contacted.

The signed original written instructions should ideally be kept by the solicitors.

While there are no express requirements for solicitors to obtain identification documents of the authorised representative, it is advisable to do so to ensure that the authorised representative is the person they claim to be.

After an authorised representative is appointed, it may not be necessary to seek instructions directly from and give advice directly to the client (although this would depend on the scope of the authorised representative's authority). However, solicitors should ensure that the client is copied into all communications between the solicitor and the authorised representative (unless the client had made an informed decision and expressly indicated to opt out of receiving such communications). If discussions take place over the phone, a contemporaneous written record of the conversation should be prepared and an email or letter summarising the discussion sent to both the client and authorised representative. This is to ensure that at all material times the client is fully aware of the developments of their matter and to give the client an opportunity to comment or raise objections if they do not agree with the authorised representative on the advice from the solicitor or way forward.

Possible consequences for failing to comply with PDP or Guide and to take reasonable steps to confirm authority

² For good practice, the solicitors may consider obtaining the records of a beneficial owner available in the public domain (e.g. the significant controllers register) or requesting documents or information in relation to the beneficial owner's identity from a reliable and independent source: paragraph 108 of Annexure 3 of PDP.

Failure to verify the client's identity and to obtain written instructions from the client for the appointment of an authorized representative can expose solicitors to civil claims.

Where a solicitor is held to have acted without authority, the Court has power to order them to personally bear costs thrown away under inherent jurisdiction and statutory jurisdiction under section 52A of the High Court Ordinance (Cap. 4) and Order 62, rules 8 and 8A of the Rules of the High Court (Cap. 4A)³: *Qiyang Limited & Others v Mei Li New Energy Limited* (HCA 420/2011).

Separately, failing to comply with the PDP or Guide may also lead to disciplinary proceedings against the solicitor. It is important to note that the Professional Indemnity Scheme does not cover disciplinary investigation or disciplinary proceedings against a solicitor.

Key Takeaways

- Reasonable measures should be taken to verify a client's identity.
- Solicitors may rely on client identification and verification conducted by specified intermediaries; however, solicitors should ensure that they obtain copies of the client identification and verification documents from the intermediary/third party and keep them as a record.
- Clear written instructions should be obtained from the client where they wish to appoint an authorised representative to act on their behalf.
- Even where an authorised representative is instructed by the client, solicitors should ensure that the client is kept fully informed of the developments of their matter.

³ This is fault-based. The Court has to find that the solicitor acted "improperly or unreasonably".