

Innovate waiver report (004647-18)

SRA Practice Framework Rules 2011 (PFR)

14 December 2018

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A: Key facts

1. Digilegal ('DL') is an established legal tech company which was founded 10 years ago. The main purpose of the business is providing an online platform for customers to prepare simple wills. By providing a wholly online service it is accessible by sections of the public who would find visiting a solicitor problematic or who might otherwise not be able to afford to make a will.
2. A waiver is required because DL would like its solicitor employees to hold themselves out as solicitors whilst advising clients DL's clients. Rule 1.1(e) and 4.1(a) of the SRA Practice Framework Rules (PFR) currently disallow this.
3. Rule 9 of the PFR provides that these solicitors will be "practising" as solicitors if they are involved in legal practice and held out as solicitors.
4. Rule 1.1 of the PFR sets out the ways that solicitors are permitted to practise. Specifically, Rule 1.1(e) allows them to practise for an unregulated entity such as DL provided they comply with Rule 4.
5. Rule 4.1 restricts solicitors who are employed by an unregulated entity to undertaking work for their employer unless they can rely on one of the limited circumstances set out in Rules 4.4 to 4.26.
6. The work which will be undertaken by DL falls outside of any of the circumstances set out in Rules 4.4 to 4.26. These rules do not allow solicitors to act for the public generally.
7. Solicitors who work in unregulated businesses can advise members of the public generally if they comply with the separate business rules contained in Chapter 12 of the SRA Code of Conduct. These rules do not allow solicitors to practise as solicitors through the separate business so they must not describe themselves as solicitors or undertake any reserved legal activities or immigration work.

B: Case report

Application summary

8. This is an application for a waiver of Rules 1.1(e) and 4.1(a) PFR to allow solicitors employed by DL to act for DL's clients in relation to will writing advice, and to describe themselves as solicitors while doing so.

Summary of relevant rules and policy

9. Rule 1.1(e) of the PFR reads as follows:

[You may practise as a solicitor from an office in England and Wales in the following ways only] ... (e) as the employee of another person, business or organisation, provided that you undertake work only for your employer, or as permitted by Rule 4 (In-house practice).

10. Rule 4.1(a) reads as follows:

If you are a [solicitor](#), [REL](#) or [RFL](#) conducting [in-house practice](#): (a) you must not act for [clients](#) other than your [employer](#) except in the circumstances in 4.4 to 4.26 (all of which are subject to 4.1(b) and 4.2) and where you are able to act without compromising the [Principles](#) or your obligations under the [SRA Code of Conduct](#).

11. Rule 9.2(b) reads as follows:

[You will be practising as a solicitor if you are involved in legal practice and:] ... (b) you are held out explicitly or implicitly as a practising solicitor.

12. Chapter 12 of the SRA Code of Conduct reads as follows:

You can be a manager or employee of a separate business. However, you cannot practise as a solicitor ... in a separate business except as permitted by Rule 4 ... of the [PFR].

Waiver criteria

13. Before granting an application for a waiver we will need to be satisfied that, in the applicant's specific circumstances, a waiver is compatible with the regulatory objectives in section 1 of the Legal Services Act 2007, which are:

- protecting and promoting the public interest;
- supporting the constitutional principle of the rule of law
- improving access to justice
- protecting and promoting the interests of consumers
- promoting competition in the provision of legal services
- encouraging an independent, strong, diverse and effective legal profession
- increasing public understanding of the citizen's legal rights and duties
- promoting and maintaining adherence to the professional principles

We will then consider any competing objectives and reach a decision that best serves our public interest purpose: namely providing consumers with appropriate protection and supporting the rule of law and administration of justice.

14. A waiver will not be granted if:

- the requirement is one imposed by statute
- it would undermine our public interest purpose as set out above
- if there is another way for the applicant to achieve their objective and which is reasonable to pursue.

Applicant's comments

15. DL states that it strives to provide a high quality and ethical service to the public. DL wants to improve its service to customers by providing a more seamless high quality will writing advice service to customers delivered in an innovative way. The applicant is of the view that allowing its employed solicitors to practise as such will allow them to provide the highest quality legal drafting and advice to members of the public. Currently, such work is handled by non-solicitor will writers or outsourced to a solicitor or barrister.

16. DL has applied for a waiver in our 'space for innovation' which is aimed at assisting current providers of legal services to develop their business in new ways. The regulatory changes we are proposing include simplifying our regulations, improving access to justice and promoting competition in the legal services market. These changes are consistent with our regulatory objectives set out in section 1 of the Legal Services Act 2007.
17. The Applicant contends that the current rules prevent them from recruiting highly calibre solicitors as they are reluctant to take on employment where they are prevented from describing themselves as "solicitors" in their professional capacity. They want to be able to recruit solicitors in order to improve the service that they offer to their customers. Where consumers make mistakes the solicitors will be able to identify this and contact the customer directly as opposed to advising them to take external legal advice.
18. Currently, customers are referred to external solicitors where their queries cannot be answered by will writers. This results in a fragmented customer experience and there is a risk that customers chose not to (or cannot afford to) consult external solicitors and proceed with their wills without a full understanding of the issues.
19. The Applicant is of the view that allowing the in-house solicitors to update documents etc will reduce the need to outsource these services to external solicitors. This would be much more efficient for the business and will reduce DL's expenditure freeing up money which can be used to invest in new technology and products.
20. As a consequence of new technology and products customers will benefit from being able to access a wider range of quality, affordable documents which have been rigorously checked by DL's internal solicitors who have the necessary experience and are best placed to carry out this task.
21. Allowing a waiver will enable DL to engage more closely with their customer base and to build relationships with consumers such as hospices who may be wary of engaging with new technology.

Adviser's comments

22. There is merit in the Applicant's contentions. Enabling solicitors to work more freely in the unregulated legal services market is in line with our proposals for flexibility and removing barriers to growth in the offering of legal services. This includes allowing solicitors to practise as such in unregulated entities in respect of unreserved legal activities such as will writing.
23. Solicitors already participate in the unregulated legal services market, but they are unable to use their solicitor title in doing so. It is arguable that allowing solicitors to practise as such through unregulated entities benefits consumers as it facilitates access to cost effective legal advice from ethical and well-regulated legal professionals. It therefore supports access to justice and promotes competition in the delivery of legal services, both regulatory objectives in section 1 of the Legal Services Act.
24. I agree with the applicant's view that solicitors are reluctant to give up their solicitor title when providing legal services therefore allowing a waiver is likely to assist the business to recruit high calibre solicitor employees who are best placed to assist the business to move forwards with offering a more complete will writing service.

Regulatory risks

Identified risks

25. Any benefits of allowing solicitors to practise more widely than is currently permitted under our rules needs to be considered against any risks to consumer protection, one of our regulatory objectives under the Legal Services Act.
26. The PFR intentionally restrict the freedom of in-house solicitors to act for third parties and for the time being they are an integral part of the SRA's entity-based regulation which centres on authorised bodies and their managers rather than individual solicitors. This is seen to be in the best interests of consumers as it allows the SRA to hold managers to account for breaches occurring due to their policy decisions that result in a failure to act in the clients best interests and to comply with proper governance and sound risk management principles. It allows the SRA to achieve its regulatory objective of protecting and promoting the public interest.
27. Clients of an unregulated entity do not have the same protections afforded to them as clients of a regulated law firm who are afforded statutory protections under the Solicitors Act, are protected by mandatory professional indemnity insurance, access to the Compensation Fund and the ability to complain to the SRA and/or the Legal Ombudsman.
28. Another concerning risk is that it causes confusion to consumers who may not understand the difference in how the services being offered by solicitors are regulated and the protections available to them.
29. It is arguable that in the applicant's case any risk to consumer protections are nominal. DL is an established business which already provides will writing services to its clients. The employed solicitors work will be supervised by a solicitor with 12 years post qualification experience and a Director with 3 years membership to the Society of Will Writers.
30. Its services are covered by professional indemnity insurance up to a level of £2 million which they consider is sufficient for the type of work they undertake. Where the value of an estate is over £900,000 the work will be referred to other law firms.
31. DL do not propose to hold client money.
32. They have a money back guarantee and clients can leave feedback on their Trust Pilot Review page which are published. They have in place a complaints procedure. The Society of Will Writers also has a complaints procedure.
33. DL is aware of the need to identify conflicts of interest and will not act or cease to act where there is a conflict or a significant risk of a conflict arising.
34. They have safeguards in place to ensure the protection of client confidential information. All private or personal correspondence is stored on a secure server and destroyed after 30 days. All staff with access to the data bases are trained and enter into a NDA. All payments are handled securely off-site by their payment providers.
35. DL will ensure that the public and customers are informed that DL is not a law firm regulated by the SRA. Any solicitors engaged by the client are employees of DL. The solicitor will cease to act if they identify

Conditions

36. The power to impose conditions is discretionary and there is no requirement for the SRA to impose conditions. We should never consider the imposition of conditions as automatic, but as a proportionate outcome to and identified risk, and in line with good regulatory principles.
37. If a waiver is granted, the recommended conditions are set out in my recommendation at the end of the report.

Publication

38. We now publish a summary of all waiver decisions we make on our website. We do not publish the detail of the supporting information provided. Normally we publish only the following:
- Applicant's name, SRA id number, type and address;
 - Waiver detail – rule, decision, conditions, outcome and reason;
 - Period of waiver.
39. In deciding whether to publish, we consider the circumstances including:
- Any impact on the rights of consumers or third parties and if so, the extent of this;
 - The interest or relevance of the waiver decision to other firms;
 - Any adverse effect on the commercial interests of the firm concerned;
 - Any confidentiality obligations
40. We balance any reasons for not publishing against transparency and the interests of consumers, markets and other third parties.
41. I recommend that we publish a summary of the application, the waiver granted and the reason for granting it or not.

Recommendation

42. My view is that the circumstances of the application justify granting a waiver. I therefore recommend granting a waiver of Rule 1.1(e) and 4.1(a) of the SRA Practice Framework Rules to enable the solicitors employed by DL to hold themselves out as solicitors when advising DL's clients in respect of unreserved legal activities.

Recommended conditions:

- The solicitors employed by DL do not undertake any reserved legal activities or immigration work;
- DL has in place professional indemnity insurance that is reasonably equivalent to that required under the SRA Professional Indemnity Insurance Rules;
- That there is compliance with the relevant provisions in the SRA Handbook, including having in place systems and procedures to identify conflicts of interest and to ensure client confidentiality;

- To ensure all staff receive training on client confidentiality;
- To ensure that the clients of DL are aware of the way the services provided to them are regulated and the protections available to them;
- DL to provide progress updates to us as and when requested;
- The waiver is limited to a period of 24 months but is revocable on reasonable notice;
- That we are notified of any material change of circumstances within 14 days;
- The grant is without prejudice to any other application.

43. The published reasons for the decision are as follows: -

This is an application under SRA Innovate. The applicant wanted its employed solicitors to be able to provide will writing services and advice to its clients whilst describing themselves as solicitors. Without a waiver DL would need to outsource these services to external law firms resulting in a fragmented customer service and additional costs.

We are satisfied that a waiver meets the requirements of our waivers policy. It is compatible with the regulatory objectives in section 1 of the Legal Services Act 2007. There are no risks to consumer protection and the waiver does not otherwise undermine the public interest.

Date: 20 December 2018
Author: Annette O'Carroll, Ethics Adviser, Professional Ethics

Applicant's comments attached:

Do the applicant's comments change your recommendation?

C: Correspondence

Document	Date	Page no.