

Aim and purpose

Since the OISC's inception we have been repeatedly asked about our view on the absence of an adviser, especially in cases of sole advisers. Absence from time to time is of course inevitable; however, absence should not prejudice client cases.

This note addresses the arrangements that should be made to cover an adviser's absence. It takes into account situations where absence is planned and those where it is not.

While the note is mainly aimed at sole practitioners, there are areas of good practice that should be noted by all advisers regardless of the size of the organisation.

What is covered in this guidance note?

The areas covered are:

1. Holiday or other planned absence.
2. Pregnancy.
3. Refusal of continued registration/withdrawal of exemption.
4. Bankruptcy or closure.
5. Retirement or the end of a business.
6. Unexpected absences (including detention abroad).
7. Sickness.
8. Arrangements on the death of a sole adviser.
9. Intestacy (i.e. death without leaving a will).

Commissioner's Rules and Code of Standards covered by this guidance note

This note will concentrate on specific sections of **Codes 49 and 50(a) and (b)**.

Code 49: An adviser must always act in the best interests of the client and put the client's interests before his or her own, subject to regulatory requirements and the law.

Code 50: An adviser must at all times:

- a. show due respect to the client, courts and the legal system and follow due process of law and administration;**
- b. act objectively and fairly with respect to the client.**

1. Holiday or other planned absence

- 1.1 In this regard other planned absence may include family duties, jury service or similar events. There is a continuing duty to ensure that the adviser's practice will be carried on with the minimum interruption to clients' business. Adequate arrangements must be made for the practice to be administered during the period of absence, whatever the length of that absence is. When an adviser goes on holiday for more than one week, they must have a system in place to cover any emergencies that may arise on their case files. Such a system could include a reciprocal arrangement with a suitably qualified adviser where that adviser checks the absent adviser's mail at least three times a week and undertakes work on any urgent matters, such as filling in appeal forms. The adviser going on holiday should inform their clients in writing as to who is looking after emergency matters in their absence. The adviser must leave such contact details at their premises (e.g. a notice), on their answer phone and out-of-office auto-reply notification if on e-mail.
- 1.2 If an adviser has not made adequate arrangements in advance to meet unforeseen circumstances, difficulties may arise in the conduct of clients' affairs and in the administration of the adviser's own business. For example, an accountant's report must be submitted, continued registration must be applied for and indemnity cover must be obtained notwithstanding an adviser's absence. Consequently, a sole adviser should make an arrangement with another adviser (either a CAB or other adviser who is appropriately experienced and qualified under the OISC scheme) to supervise their practice until such time as they return. It is not expected that a replacement adviser in these circumstances would be taking on new work or taking monies on behalf of the absent adviser. The substitute adviser should in normal circumstances therefore not have access to the client account nor should they make withdrawals or disbursements, but they should deposit monies or fees incurred. If fee payments are to be made, the client should make these directly to the appropriate authority.

- 1.3 Failure to have an effective system of cover in place whilst an adviser is absent may breach Code 49. Leaving for holiday without making proper arrangements to cover ongoing work is a failure to act in the best interests of the client. In such a situation there is also likely to be a breach of Code 50(b) since the adviser is required to 'act objectively and fairly with respect to the client'.
- 1.4 If a supervising adviser will be away for a month or more, arrangements must include the provision of another adviser qualified to supervise at that office.
- 1.5 If an adviser misses a court hearing date through an absence due to being on holiday or long-term illness then this may amount to a breach of Code 50 if appropriate cover arrangements had not been established.
- 1.6 The OISC is aware of the potential for business rivals to seek to take advantage of any temporary absence by poaching clients from the absent adviser. The Commissioner would take a dim view of this activity, as it would be a breach of professional etiquette. Whilst clients may exercise their right to change advisers at any time, they should not be induced to do so. Such inducement may well be a breach of Code 54:

An adviser must not abuse his or her position in respect of a client or take advantage of the client's vulnerability.

- 1.7 In taking on new cases from an absent adviser, both that adviser and their substitute must also bear in mind compliance with Code 12:

An adviser who, having taken on a client, finds that he or she cannot provide the service needed by the client must inform the client in writing, giving reasons, and where possible direct him or her to an alternative provider. This does not prohibit an adviser, with the client's consent, seeking additional advice or opinion on an individual case whilst retaining responsibility for that case. Any fees likely to be incurred for additional advice or opinion must be notified to the client in advance of seeking the additional advice or opinion. Details of the action taken and the written explanation should be recorded in the client's file.

- 1.8 And with Code 13:

An adviser who is not qualified to provide the service required or does not have the capacity to provide it, should advise the person accordingly and endeavour to direct that person to an alternative provider.

2. Pregnancy

- 2.1 The issues surrounding pregnancy are similar to those regarding planned absence above. There are, however, other considerations that must be taken into account. If an adviser is a sole trader, they must give serious thought to the disposition of their clients' cases during any planned maternity or paternity leave. It is unlikely that such leave would be short term (i.e. under five days) and appropriate steps should be taken to ensure that clients continue to receive a seamless service as envisaged by Codes 12–15.

3. Refusal of continued registration/withdrawal of exemption

- 3.1 In this situation an advice organisation cannot retain client files but must make copies of the files and retain those copies in order to comply with Code 35. Client files should be referred either to another organisation able and willing to assist the clients in question or, where no such organisation can be found, then the file should be sent back to the client/instructing sponsor. Failure to do so would be a breach of Code 49 and Code 50(b). In such circumstances advisers would only be allowed to retain their files if appealing the Commissioner's decision. The files may then be kept pending the outcome of the appeal.

4. Bankruptcy or closure

- 4.1 If the advice organisation closes due to bankruptcy or loss of funding, then the organisation must ensure that all client files are referred either to another organisation able and willing to assist the clients in question or, where no such organisation can be found, that the file be sent back to the client/instructing sponsor. Failure to do so would be a breach of Code 49 and Code 50(b). The advice organisation should however keep copies of the files as above.

5. Retirement or end of business

- 5.1 If a sole principal decides to stop practising, he or she must inform clients of the fact so that they may instruct other advisers. Failure to inform clients could amount not only to an act of negligence but also to a breach of Code 49 since there would be a clear failure to act in the best interests of the client. An adviser is not allowed to retain a small number of files upon which outstanding decisions are awaited or which the adviser anticipates will be resolved within a short time frame. Retention of client files by an organisation in this situation will lead to the suspicion of illegal working in contravention of Section 84 of the Immigration and Asylum Act 1999 (the IAA 1999) and could lead to prosecution under Section 91 of the IAA 1999. Advisers who retire from full-time practice but continue to practise on a part-time or ad hoc basis, or act as consultant with another firm, must continue to comply with Section 84 (2) of the IAA 1999, in being a qualified person under the Act and meeting all the requirements of professional conduct generally.

6. Unexpected absences

- 6.1 If an adviser has been unexpectedly detained abroad they must make arrangements for cover as soon as practicable and at the most within five working days. If there is already cover in place and that service provider is willing and able to continue to offer their services, this will be permitted. If no such cover exists, adequate arrangements must be made. The substitute adviser should develop a pro forma seeking the client's authority to take over the progress of their case in these emergency circumstances.

7. Sickness

- 7.1 An adviser must have systems in place to cover sick absence of more than a week. The adviser must ensure that a designated person is attending to all emergency work that has arisen from the adviser's caseload. In cases of long-term sick absence (i.e. for more than a month) the adviser must include the provision of another adviser qualified to supervise at that office so as to enable the effective delivery of service to their clients.

8. Arrangements on the death of a sole adviser

- 8.1 A sole adviser should make a will containing adequate provision for the running of the practice, after his or her death, by another registered organisation that is regulated by the OISC, or for the disposal of the business in other ways.
- 8.2 The sole adviser should ensure that the executors are able to make arrangements immediately after their death to appoint an appropriately regulated adviser to run the practice, pending the practice's disposal. The deceased adviser should leave clear instructions in his/her will about how the business is to be wound up and cases disposed of.
- 8.3 Clients should be notified in writing of their right to seek alternative legal assistance from another organisation, even if the practice is purchased by another registered adviser.
- 8.4 The sole adviser's client account should be frozen on death. The incoming adviser should immediately open fresh books to deal with the deceased adviser's cases until that practice is disposed of or closed. The incoming adviser will normally arrange with the deceased sole adviser's bank to open a new client account with an overdraft matching that of the existing client account. The incoming adviser must make arrangements for the former client account balances to be transferred to the new (overdrawn) client account as soon as the grant of representation is registered with the bank or building society. The incoming adviser must not draw money from the new account in any circumstances where it would be improper to draw the same amount from the old account.
- 8.5 A similar arrangement can be made for office account purposes.
- 8.6 No further monies should be paid into the deceased adviser's client account. Clients' money received by the practice must be placed in the new account operated by the incoming adviser. The incoming adviser should encourage the personal representatives to supply an accountant's report up to the date of death. The incoming adviser must deliver a separate report in respect of any other client monies, which he or she has held in any other practice.

9. Intestacy (i.e. death without leaving a will)

- 9.1 If an adviser dies intestate, then the administrators of the estate must either pass the client files back to the client/instructing sponsor or refer the client files on to another organisation which is legally entitled to provide immigration advice or services.