# A Practice Made Perfect

29 Oct 2014

**Aziz Rahman of Rahman Ravelli explains why an insolvency practice has to know exactly when its staff or its clients could benefit from legal advice.**

It is, to put it mildly, a delicate situation. When an insolvency practitioner enters a business it is a time of emotion for those owning and working for the company. Upset, anger, confusion and uncertainty are just some of the feelings in what is a fraught environment.

Many of those in the workplace will have expectations that the insolvency practitioner is the one to put things in some sort of order. Some optimists may even believe that the practitioner may just be able to save the company and usher in a new, more prosperous future. Such optimism, as all practitioners will know, is often likely to be misguided. But it indicates the seriousness of the situation for all concerned. For the company's owners and employees, their futures are at stake. For the practitioner, it is an environment that offers no scope for error: should they act inappropriately, they could find themselves with some serious questions to answer.

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Every practitioner knows they have to follow best practice and ethical guidance. There is that constant awareness that complaints can be made to the appropriate professional authorising body. While the first hint of any complaint is likely to be made to the practitioner themselves – which offers him the chance to manage it personally – it could, if not handled to the other party's satisfaction, eventually end up with disciplinary sanctions, claims for compensation and, putting it bluntly, a whole lot of unwanted aggravation. If the other party is not satisfied with a course of action taken by a practitioner, they can approach the court that is dealing with the case. As it is only the court that can alter a practitioner's decision, anyone unhappy with what has been done as part of the insolvency is likely to seek their own legal advice about the options available to them.

**Which places an onus on the insolvency practitioner to be able to count on legal expertise themselves.**

Such situations can be delicate. In our experience of cases arising out of insolvency disputes, two important points are worth remembering. Firstly, and most obviously, if the insolvency practitioner uses shrewd judgement and follows professional guidelines they are unlikely to land themselves in a dispute with the other party. And even if that does happen, they will be on safe legal and professional ground when it comes to explaining their actions. The second point is that it is always worth bearing in mind the availability of legal advice.

This latter point is one that most professionals are well aware of. But with insolvency the need to seek legal advice can arise in a number of situations.

Certainly, a disgruntled party may take it upon themselves to seek legal advice if they either feel unhappy with the conduct of the insolvency practitioner or simply believe it is the only way to defend their assets and interests. In response to such a development, it would not be surprising if the practitioner concerned then sought their own legal advice in order to ensure their professional standing is not damaged.

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What the practitioner also has to bear in mind, however, is that they may also face situations where they have a responsibility to inform the other party that they may require legal representation.

If, while going about their work, the practitioner recognises or suspects evidence of wrongdoing, they should be telling those associated with the company that they are going to need to be legally represented. In such circumstances, the other party needs the legal representation to protect them should an investigation develop. If this does happen, it is vital that the other party is informed at the earliest possible point. This is not only to make sure they are prepared if and when a criminal investigation begins – it is also to ensure that the practitioner has upheld their professional duty.

Section 4(c) of the Ethics Codes for Members produced by the Insolvency Practitioners Association in January of this year states "An insolvency practitioner has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. An insolvency practitioner should act diligently and in accordance with applicable technical and professional standards when providing professional services."

It could be argued that failing to notify a party that they may need legal representation is a failure to provide a "competent professional service". This would inevitably lead to problems for the practitioner. But when should they tell someone that they need to obtain legal representation? How soon is too soon? And when would be considered too late? The answers to these questions will vary with each individual insolvency case. But as soon as the practitioner knows or suspects something untoward they should act: either by telling someone they should obtain legal representation or, as a first step, consulting with a specialist legal advisor themselves to have their suspicions of wrongdoing confirmed or dispelled and the legal situation clarified.

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Not doing this could quite clearly be seen as a breach of their duty to exercise skill and care when giving insolvency advice. Furthermore, section 230.1 of the code of ethics says: "When an insolvency practitioner intends to rely on the advice or work of another, the insolvency practitioner should evaluate whether such reliance is warranted. The insolvency practitioner should consider factors such as reputation, expertise, resources available and applicable professional and ethical standards. Such information may be gained from prior association with the expert or from consulting others." While this section of the code is not compelling practitioners to seek legal (or other types of) advice, it is making it clear that there is an expectation that they will seek and use relevant expertise when it is necessary. A failure to do so could be seen as a major shortcoming.

We live in a time when litigation is increasingly seen as the way to right perceived wrongs. Each insolvency practitioner runs the risk of a professional negligence action each time they take on a case. A proven failure to advise someone to seek legal advice at the earliest appropriate opportunity could be costly to a practitioner.

The investigating authorities in the UK – and, to some extent, abroad – now have more legislation on their side, greater powers and more technology to detect wrongdoing than at any other time. If they identify criminality in a collapsed business they will expect this to have been identified and acted upon by the insolvency practitioner. Money laundering, fraud and bribery are especially "flavour of the month" with investigators. If the practitioner has not identified illegality, failed to raise it with the relevant people or not advised those likely to face investigation they will need legal representation then it will not just be those who ran the business facing very serious questions.

Insolvency practitioners can be the most important dispensers of advice and expertise when a business collapses. But it is vital that they recognise when they and others are in need of legal expertise.

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