

# A rogue in your midst (Pt 3)

In the final of a series of articles, **Frank Maher** advises upon how to tackle rogue partners & employees



This is the last of three articles on the problems of rogue partners and employees. The first described the variety of roguish behaviour with which we may be concerned – broadly any which puts the fabric of the firm at risk (see “A rogue in your midst (Pt 1)”, 166 *NLJ* 7720, p 21)—and the second identified some of the ways we can expose them (see “A rogue in your midst (Pt 2)”, 166 *NLJ* 7726, p 21). This article looks at some of the things you may need to consider if you find a rogue, and some which might usefully be taken in advance, albeit in the hope that you never have the problem.

## Fact-finding

The starting point will be an initial fact-find. In many cases, the rogue’s colleagues will find it incredible that a person they may have worked alongside for many years could do anything other than act in the best interests of clients and the firm, so there may be a cautious start to the investigation. However, as we shall see, care is needed, particularly in the area of document creation.

## Authorities & interested parties

Depending on the nature of the roguish behaviour, you may have to deal with a variety of authorities. The SRA will be top of the list more often than not, but you may also need to consider reporting to the National Crime Agency and/or the police, HMRC (for example in the case of over claimed expenses, not an uncommon

occurrence), the Information Commissioner (where there has been misuse or loss of personal data), or even, depending on the rogue’s work type, regulators of clients such as the Charity Commission.

There will also be other interested parties, including partners, the clients, professional indemnity and fidelity insurers, the bank and the firm’s accountants. These cases may also attract the attention of the press. What to tell this long list of people and when to tell them may not always be clear-cut. Great care is needed, because you risk creating documents which may be disclosable to regulators, or in subsequent litigation. Remember that while the rogue is still a member of the firm, they may be entitled to copies of anything created, so caution is needed.

## Seek guidance

Taking external legal advice may assist by cloaking documents which are prepared for the dominant purpose of seeking legal advice in legal professional privilege. This, and guidance on a major project management task while exploring unfamiliar territory, are among the reasons why many firms seek external legal advice at the outset. Some LLP agreements contain provision for the management to seek legal advice and keep it confidential, but this may not be straightforward. It may be necessary for the management to take advice in their personal capacity.

## Recovery action

It will usually be necessary to consider recovery action against the culprit. This might involve applying for freezing orders, or in some cases the police may seek a restraint order under the Proceeds of Crime Act 2002. However, your insurers will almost invariably want to have control of recovery action. Note that there can be a conflict here, either because there may be substantial uninsured losses to which insurers’ subrogated rights do not extend, or because insurers are fishing around to see if they can decline indemnity on the basis that other partners have “condoned” dishonesty.

In some cases, the concern may not be recovery of money, but taking clients and staff, and misuse of confidential information, which may require a springboard injunction to restrain the rogue.

Meanwhile, the firm is put to considerable expense, with both non-chargeable time and the expense of external legal and accountancy advice. You may be in the throes of expelling the partner and would obviously prefer not to pay out drawings, undrawn profit and capital if there is a large recovery claim to be pursued. These are areas where a well-drafted LLP or partnership agreement may be of assistance. The drafting of these has moved on in recent years, so if yours has not been dusted off and reviewed in recent times, now may be the time to seek advice, rather than leave it until you have a problem, when you may be stuck with an outdated one. Thought can then be given to including appropriate procedures and protections for the firm in the agreement.

Rogue partners can be highly damaging to the firm. Perhaps surprisingly, however, out of the very many firms with these problems which the writer has advised over the years, nearly all have survived, despite the heavy black clouds which loomed at the start of the investigation. The small number which have failed have generally been due to the increased costs of insurance; most of those limped on for a year or more, but finally folded under the burden of the expense, as it may take a long time to bring the insurance premiums down to a relatively normal level. Those who fail are usually the smaller firms, though one was rather larger with £20m turnover.

The message is, therefore, that if you take control of the situation at the start, the prospects of survival are generally good. **NLJ**

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