

Conflicts and Confidentiality

The clash of the obligations



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Learning Outcomes

- Clash of the Obligations! Identifying conflicts between and with clients.
- When can you act in a conflict situation.
- Conflict Horizon - what you can do if the matter has the potential to become a client conflict.
- The Special Cases of Conveyancing.
- Its not all about conflicts - when the issue is confidentiality.



What is a Conflict of Interest?

(taken from the) **SRA Code for Solicitors and for Firms**

6.1 You do not act if there is an own interest conflict or a significant risk of such a conflict

means any situation where your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.



What is a Conflict of Interest?

(taken from the) **SRA Code for Solicitors and for Firms**

6.2 (*client conflict*) You do not act in relation to a matter or particular aspect of it if you have a conflict of interest or a significant risk of such a conflict in relation to that matter or aspect of it, unless: (*we'll come back to that!*)

means a situation where your separate duties to act in the best interests of two or more clients in relation to the same or a related matters conflict.



Identifying Potential Conflicts

Own Interests – Register of Interests

- Senior staff who have influence
- Depends on your firm, include others?
- Family/relations?
- Email check?
- Confidentiality from staff



Client Interests

- Conflict search on all parties
 - Prospective client
 - Prospective other parties
 - Clients in system
 - Other parties in the system
- Email check?

Professional Embarrassment



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Identifying Potential Conflicts – Client Conflict



- Who is a client?
- Are the two or more clients involved in the same matter?
- Are the matters related?
- Would fulfilling your duty to do your best for one client mean you could not act in the best interests of the other?
- Are there exemptions (*)?
- If no to the above, are there confidentiality / disclosure issues? (*)

Some examples include:

- Similar businesses competing against each other
- Buyer and seller
- Parties in dispute
- Lender and borrower



When can you act in a conflict / significant potential conflict?

6.2 unless...

- the clients have a substantially common interest in relation to the matter or the aspect of it, as appropriate; or
- the clients are competing for the same objective,

and the conditions below are met, namely that:

- all the clients have given informed consent, given or evidenced in writing, to you acting;
- where appropriate, you put in place effective safeguards to protect your clients' confidential information; and
- you are satisfied it is reasonable for you to act for all the clients.

** Watch the poor drafting 🙄

(taken from the) SRA Code for Solicitors and for Firms



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When can you act in a conflict / significant potential conflict?

- substantially common interest - means a situation where there is a clear common purpose between the *clients* and a strong consensus on how it is to be achieved.
- competing for the same objective – e.g. auction or tender process, another person decides who is successful. Specialist industry.
- informed consent to you acting, in or evidenced in writing – audit trail!
- put in place effective safeguards to protect your clients' confidential information – ethical walls, different teams, protecting files – as appropriate!
- you are satisfied it is reasonable for you to act for all the clients – depends on the clients, their needs, their sophistication as users of legal services, their balance of power etc. Audit trail!



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Conflict Horizon – Not significant Potential for Conflict

- Flag the potential for conflict up front
- Can you warn the clients of them?
- Set parameters around the retainer carefully
- Keep under review
- Invite a second pair of eyes
- If you reach a significant or actual conflict – brakes!



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When things go wrong

(taken from the) **SRA Code for Solicitors and for Firms**

7.11 / 3.5. You are honest and open with clients if things go wrong, and if a client suffers loss or harm as a result you put matters right (if possible) and explain fully and promptly what has happened and the likely impact

Vs

Howell Jones SDT decision: Agreed own interest conflict when tried to put right



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What do you need to do?

SRA Guidance

- Not all mistakes lead to an own interest risk
- Tell client of mistake
- Straight forward remedy, with consent, OK
- Is it a conflict? Depends on circumstances
- Merits of options – always independent advice and firm could pay for

Assess risks/benefits – any point along the line at which your personal interests would interfere with the ability to act in the client's best interest

Steps

- Engage PII
- Record the decision making process
- If going to cease to act – you may still be able to take urgent time sensitive steps before another firm is on board



The special case of Conveyancing

Purchaser / Lender

- Substantially common interest
- Informed consent
- Safeguards?
- Reasonable?
- 2011 Code IB 3.7
 - Standard mortgage
 - Private residence
 - Reasonable and in best interests
 - Certificate of title in form approved by Law Society and Council of Lenders
- Be clear what are the disclosure responsibilities



Buyer / Seller

- Can it pass the test of informed consent?
- Reasonableness?
- Safeguards – are different offices and fee earners enough?
- Commercial seller and individual buyer – can it be reasonable?
- Maxine Madderson*
- 2013 SRA guidance
- CLC takes a different view



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It is not all about conflicts – Confidentiality

(taken from the) **SRA Code for Solicitors and for Firms**

6.4 You make the client aware of all information material to the matter of which you have knowledge, except when

- disclosure is prohibited in the interests of national security or the prevention of crime;
- your client gives informed consent in writing, to the information not being disclosed to them;
- you believe that serious injury will be caused to your client or another if the information is disclosed; or
- the information is contained in a privileged document mistakenly disclosed.



It is not all about conflicts – Confidentiality

(taken from the) **SRA Code for Solicitors and for Firms**

6.5 You do not act for a client in a matter where that client has an interest adverse to the interest of another current or former client for whom you* hold confidential information which is material to that matter, unless:

- effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or
- the current or former client whose information you or your business or employer holds has given informed consent, in writing, to you acting, including to any measures taken to protect their information.

* You is you personally, or the firm



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Key Takeaways

Systems to
identify your
conflicts

If it doesn't feel
right, check

Audit trail

Confidentiality

Is it
reasonable?

Embarrassment



Questions?



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Tackling compliance for lawyers

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Client and Own Interest Firms



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