CLIENT CARE

Conflict of interests

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This practice note sets out how to identify and manage situations where a conflict of interest arises, or there is a significant risk of a conflict of interest occurring.

It also provides guidance on the duties of confidentiality and of disclosure, and how to manage situations where these duties come into conflict.

This practice note covers the broad range of potential conflict scenarios, with specific guidance for the different types of practices and ways in which an individual may practise.

This practice note is the Law Society's view of good practice in this area, and is not legal advice. For more information, see the legal status.

1. Introduction

1.1 Who should read this practice note?

This practice note is relevant to all law firms and sole practitioners authorised by the Solicitors Regulation Authority (SRA).

It is also relevant to individual solicitors, registered European lawyers (RELs) and registered foreign lawyers (RFLs), wherever they practise.

Under the SRA Standards and Regulations (STARs), solicitors can practise:

- as recognised sole practitioners
- through authorised bodies (partnerships, limited liability partnerships, and companies authorised by the SRA)
- through licensed bodies (entities with some non-lawyer ownership and/or management)
- as freelance solicitors without needing to be specifically authorised by the SRA

In addition, in-house solicitors are able to provide some legal services to their employer's clients and customers.

This practice note sets out guidance on identifying and managing situations where a conflict of interests arises, or there's a significant risk of such a conflict arising.

It also provides guidance on the duties of confidentiality and of disclosure, and how to manage situations where these duties come into conflict.

This practice note covers the broad range of potential conflict scenarios, with specific guidance for the different types of practices and ways in which an individual may practise.

1.2 What is the issue?

Firms authorised by the SRA to provide legal services are required to have in place systems and controls that enable them to comply with all the SRA's regulatory arrangements.

These systems and controls should be appropriate to the size and complexity of a firm's practice and the nature of work undertaken.

It is by using these systems and controls that firms will be able to identify potential conflicts of interest and issues with the duties of confidentiality and disclosure.

Separate to the above, solicitors have a personal responsibility to identify potential conflicts. This applies whether an individual is:

- providing services through a firm authorised by the SRA
- working for an unregulated entity
- practising on a freelance basis

All solicitors must be familiar with the standards expected by the SRA in relation to conflicts of interest.

Those working outside of an SRA-authorised firm should look to implement their own personal systems and controls that will enable them to check for potential conflicts. This could comprise, for example, a matter inception checklist or protocol.

There is no single objective test to determine whether or not there is a conflict of interests.

Identifying potential conflicts in differing scenarios is a judgement for you and your practice and one that you will need to be able to justify should you decide to act.

Some of the areas you will need to consider include whether:

- in taking on the work, you are able to provide a proper standard of service to your clients
- the individual circumstances of the clients mean it will be acceptable for you to act (in particular, paragraph 1.2 of each of the SRA Code of Conduct for Solicitors (SCCS) and the SRA Code of Conduct for Firms (SCCF) prohibits you from abusing your position by taking “unfair advantage of clients or others”)
- you hold any confidential information that might make it difficult for you to act given your duty to disclose information to your client where such information is material to a matter on which you are acting for that client (paragraph 6 of the SCCS and SCCF), even where there is no conflict of interest as defined in the rules

The prohibition on acting where there is a conflict of interests, or a significant risk of such a conflict arising, is a core obligation which has formed part of the regulatory framework for some considerable time.

Similarly, the duties of confidentiality and of disclosure are fundamental tenets of solicitors’ professional obligations.

In respect of the duty of confidentiality to current and former clients, the scope of this practice note is limited to the professional conduct obligations set out in the SCCS and SCCF.

There are overlapping obligations in the law on legal professional privilege and in data protection legislation. For further information, see our:

- practice note on legal professional privilege
- GDPR and DPA guidance for solicitors in law firms

2. SRA Standards and Regulations

The STARs contain specific obligations in respect of identifying and avoiding conflicts of interest, and your duties of confidentiality and of disclosure.

These are set out in the following sections with key aspects highlighted.

It is important to remember, however, that there may be other parts of the STARs that apply in specific circumstances that are not listed in this practice note.

You should make sure you are familiar with the overall requirements and refer directly to the STARs when necessary.

2.1 SRA Principles

There are seven core principles the SRA says “comprise the fundamental tenets of ethical behaviour” it expects all those it regulates to uphold.

The key principles relating to conflicts of interest and your duties of confidentiality and disclosure are that you must act:

- in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice
- in a way that upholds public trust and confidence in the solicitors’ profession and in legal services provided by authorised persons

- with independence
- with honesty
- with integrity
- in the best interests of each client

Although the introduction to the SRA Principles does not form part of the Principles, it states:

> "Should the SRA Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests.
>
> You should, where relevant, inform your client of the circumstances in which your duty to the court and other professional obligations will outweigh your duty to them."

In situations involving potential and actual conflicts of interest and conflicts between your duties of confidentiality and disclosure to your client, you should carefully consider whether:

- you are able to continue to act for your client, or
- to do so will involve you breaching one or more of the SRA Principles or rules as set out in the SCCS or SCCF

2.2 SRA Code of Conduct for Solicitors, RELs and RFLs

The SCCS applies to individual solicitors, RELs and RFLs wherever you practise.

It also applies irrespective of your role, or the environment or organisation in which you work.

If you are working for an organisation which is an unregulated entity, you should discuss with your employer how you can implement a suitable compliance framework to enable you to meet your regulatory obligations (see section 9.1 below).

This practice note sets out the specific rules that apply to conflict of interests situations.

You should, however, also be aware of the following requirements of the SCCS:

- you do not abuse your position by taking unfair advantage of clients or others (1.2)
- you maintain your competence to carry out your role and keep your professional knowledge and skills up to date (3.3)
- you consider and take account of your client's attributes, needs and circumstances (3.4)
- where you supervise or manage others providing legal services:
  - you remain accountable for the work carried out through them, and
  - you effectively supervise work being done for clients (3.5)
- you keep up to date with and follow the law and regulation governing the way you work (7.1)
- you are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA's regulatory arrangements (7.2)
- you identify who you are acting for in relation to any matter (8.1)
- you give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them (8.6)
- you ensure that clients understand the regulatory protections available to them (8.11)

2.3 SRA Code of Conduct for Firms

The SCCF applies to firms and sole practitioners authorised and regulated by the SRA.

The SRA says:

> "These aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services to clients. These apply in the context of your practice: the way you run your business and all your professional activities (subject, if you are a licensed body, to any terms of your licence)."

In addition to the rules on conflicts as detailed in this practice note, other relevant parts of the SCCF are:

- you do not abuse your position by taking unfair advantage of clients or others (1.2)
- you have effective governance structures, arrangements, systems and controls in place that ensure:
  (a) you comply with all the SRA's regulatory arrangements, as well as with other regulatory and legislative requirements, which apply to you

  (b) your managers and employees comply with the SRA's regulatory arrangements which apply to them

(c) your managers and interest holders and those you employ or contract with do not cause or substantially contribute to a breach of the SRA's regulatory arrangements by you or your managers or employees

(d) your compliance officers are able to discharge their duties under paragraphs 9.1 and 9.2 (2.1)

- you keep and maintain records to demonstrate compliance with your obligations under the SRA's regulatory arrangements (2.2)
- you remain accountable for compliance with the SRA's regulatory arrangements where your work is carried out through others, including your managers and those you employ or contract with (2.3)
- you identify, monitor and manage all material risks to your business (2.5)
- you keep up to date with and follow the law and regulation governing the way you work (3.1)
- you're 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 (3.5)
- you ensure that the service you provide to clients is competent and delivered in a timely manner, and takes account of your client's attributes, needs and circumstances (4.2)
- you ensure that your managers and employees are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date (4.3)
- you have an effective system for supervising clients' matters (4.4)

3. Own-interest conflicts

The rule on own-interest conflicts contains a strict prohibition on acting in any situation where your own interests (as an individual or under the SCCF, as a firm) conflict, or there is a significant risk they may conflict, with your duty to act in the best interests of your client.

There are no exceptions to this prohibition.

Paragraph 6.1 of the SCCS and SCCF states simply:

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

Own-interest conflicts, or risks of own-interest conflicts can arise in a variety of scenarios such as, for example, if:

- a client wants to make a gift of a significant amount to you, or to leave you a legacy in their will
- you lend money to, or borrow from, your client
- you sell to, or buy from, your client
- you have, or might obtain, any personal interest or benefit in a transaction in which you act for the client
- you have an interest in a business which you then recommend as an investment to a client
- you have a personal relationship with the client which impacts on your ability to advise them independently, impartially, and as to what is in their best interests
- you have a personal relationship with the client which impacts on your ability to advise them independently, impartially, and as to what is in their best interests
- there has been a negligent act or omission on a matter in which you or someone else within your firm is acting

These are examples and not an exhaustive list of when an own-interest conflict may arise.

In any situation where there is an own-interest conflict, or a significant risk of one, you will need to consider whether you must:

- decline to act
- terminate the retainer if you have already accepted instruction, or
- advise the client to take independent legal advice on that aspect of the matter

The correct response will depend on the particular circumstances giving rise to the potential or actual conflict.

It is essential that you have appropriate systems in place to enable own-interest conflicts to be identified.

What is an appropriate system will depend on various factors, including:

- the size and number of offices of a firm
- the areas of law in which it provides legal services

Many firms keep a register of personal interests held by its managers and employees.

This is a useful tool to enable checks to be carried out, though you should be aware of data protection considerations when collecting data about the firm's personnel.

4. Conflict of interests

Paragraph 6.2 of the SCCS and SCCF states:

> "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:
>
> 1. the clients have a substantially common interest in relation to the matter or the aspect of it, as appropriate; or
> 2. the clients are competing for the same objective,
>
> and the conditions below are met, namely that:
>
> 1. all the clients have given informed consent, given or evidenced in writing, to you acting;
> 2. where appropriate, you put in place effective safeguards to protect your clients' confidential information; and
> 3. you are satisfied it is reasonable for you to act for all the clients."

The definition of a conflict of interest is set in the SRA glossary.

This makes it clear that a conflict of interest will arise if you are acting for two or more clients in the same or a related matter, and your duties to act in the best interests of each of those clients conflict.

Under this definition, you will not have a conflict of interest for the purposes of paragraph 6.2 if you are only acting for one client, even though the opponent or other relevant party may be a former client of the firm (although you will need to consider your duty of confidentiality to your former client as against your duty of disclosure to your current client – see section 6 below).

The following guidance applies to solicitors practising through entities authorised and regulated by the SRA, and to freelance solicitors.

If you are a solicitor practising through an unregulated entity, refer to section 9.1 below for guidance on your conflict of interest obligations.

4.1 Conflict of interests checks and training

Conflict of interests checks should always be carried out before accepting a new matter, even where the retainer will be for a longstanding client.

You should make sure you have sufficient information to enable you to conduct appropriate checks. This will include details such as, for example:

- the name of your client(s) and other relevant parties
- their addresses
- relevant business interests

Consideration should be given in each instance to the nature of the retainer, so additional information can be obtained when necessary to enable appropriate checks to be conducted.

Training should be provided to those individuals within the firm tasked with carrying out the checks, and the matter reviewed at appropriate intervals for potential conflicts.

4.2 Establishing whether you are in a conflict situation

There is no single objective test as to whether there will be a conflict of interests in any given situation.

Rather, identifying potential conflicts in differing scenarios is a judgement for you and your practice and one that you will need to be able to justify should you decide to act.

A key factor to consider is whether doing your best for one client means there will be prejudice to another client in the same or a related matter.

4.3 The same or a related matter

The definition of a conflict applies if the matters in which the firm is acting are the same or related, as dictated by common law (see section 4.5 below).

Examples of where the matter is the same, and there would be a risk or actual conflict of interests, include:

- a divorce where the firm is asked to act for both husband and wife

- the private loan of money where the firm is asked to advise both the lender and the borrower on the terms of and security for the loan

These are clear examples of situations where there is a conflict of interests.

In practice, the situations requiring analysis are likely to be more nuanced.

Examples of related matters include acting for:

- one client on a loan where the loan is to be secured on another client's property
- all partners on the sale of one partner's interest in the business to the others

4.4 Limiting the retainer

Whilst it may be possible in some circumstances to avoid a conflict of interests by limiting the retainer to, for example, just effecting the mechanics of a transaction (without advising either party on surrounding issues), or to formalising clients' pre-agreed terms in a legal document (without giving legal advice on the meaning and implication of those terms) you should always exercise caution in doing this.

The SRA guidance on conflicts of interest states:

> "Both clients must understand the limits of your agreed retainer. You should be clear with the clients from the outset which issues you are advising on and what you are not and what risk this entails for them.
>
> In relation to what you are not advising on, the clients must understand the meaning and importance of those issues in relation to the matter. You should not act if it will leave one or more of the clients without advice in a way that is likely to prejudice them."

You should consider whether, in spite of you limiting the retainer and ensuring all clients understand the effect of this, there may, for example, be some inequality of bargaining power or vulnerability on one client's part which means independent advice should be sought by one or both clients.

Independent advice for the purposes of these rules means advice from a separate person or entity unrelated to you or your firm.

If you decide to limit your retainer, you will need to make clear to the clients:

- which elements of the matter you are able to advise on (these elements will comprise your "limited retainer"), and
- what are the defined areas of possible conflict on which you cannot therefore advise

In addition, you must notify the clients that one or more of them may need separate advice in the event that a conflict of interests situation materialises notwithstanding your limited retainer (and that this may not be cost or time efficient for them, since in those circumstances they will need to bring new legal advisers up to speed with their matter).

You should also consider whether, in light of such issues, you would be acting in accordance with Principle 7 (acting in the best interests of each client) by taking on the work, or whether the clients' best interests would be better served by them each using an adviser who can advise them on a full-retainer basis.

4.5 Case law

In addition to the obligations set out in the SCCS and SCCF, the common law is a useful source of guidance for how to approach conflict of interests questions.

The rules centre on the fact that a solicitor is a fiduciary who has a duty of loyalty to their client and is bound to defend and advance the interests of that client.

Where that duty cannot be fulfilled, and where a solicitor's advice would be different as a consequence of acting for two or more clients, a situation of conflict is likely to have arisen.

The solicitor as a fiduciary

The duties owed by a solicitor to his client were discussed in *Bristol and West Building Society v Mothew* [1997] 2 WLR 436, a case involving a solicitor acting jointly for a mortgage lender and a borrower.

In his judgment, Millett LJ stated:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence".

He went on to say that:

> “A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other”.

The passage above captures the idea that a fiduciary must not be inhibited from acting in the best interests of their client by the existence of their relationship with another client.

This was reiterated by Millet LJ in *Prince Jeffrey Bolkiah v KPMG* [1998] UKHL 52 whereby he stated:

> “[A] fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation”.

The SRA’s regulatory rules have since built upon such statements.

Whereas the above comments suggest a fiduciary may act for two principals with potentially conflicting interests where those principals give consent, that position is now modified by the two sole exceptions to the conflicts rules (see section 5 below).

Further, the term 'client' is now taken to mean 'existing client', such that the rule on conflicts attaches only to work being done for two clients at the same time.

This is in contrast to the rule on confidentiality, which attaches to former clients where confidential information belonging to a former client is still held by a firm – see section 6 below.

What is a 'potential' conflict?

The case law establishes “the potential conflict must be a reasonable apprehension of a potential conflict, not a mere theoretical possibility” (*Re Baron Investments (Holdings) Ltd* [2001] 1 BCLC 2722).

See also *Boardman v Phipps* [1967] 2 AC 46, where the test the court applied was whether the reasonable man would think a conflict was a real possibility.

The leading case on conflicts of interest is *Marks and Spencer Plc v Freshfields Bruckhaus Deringer* [2004] EWHC 1337 (Ch) and [2004] EWCA Civ 741.

An injunction was granted to prohibit Freshfields from continuing to act for Revival Acquisitions Limited (Revival) (owned by Sir Philip Green) on its offer to acquire Marks and Spencer (M&S).

The reason for granting the injunction was that Freshfields had previously advised M&S on a number of commercial and employment matters and continued to be involved in negotiating one of their key contracts, for the Per Una clothing range (also referred to in the judgments as the “Davies contract”).

The potential conflict came to light when Freshfields became aware that the Per Una contracts would be the subject of a due diligence question by Revival.

Throughout the submissions, arguments were made about what constitutes a “potential” conflict, and how closely connected two matters must be before they may be considered “related”.

In the decision, despite arguments made on Freshfields’ behalf that the suggested conflict of interests was “not real but purely theoretical” and that the work on the Per Una contract was not material, the judges found potential for a conflict.

In particular, their view was that it was not certain that the takeover offer would not be hostile.

At first instance, Justice Collins held that:

> “I am satisfied that there is a real or serious risk of conflict. The Davies contract is a very important part of the M&S business.
>
> On the evidence before me, it is also a very important part of the tactics of the bid and it does seem likely that some form of criticism will be made of it, and that if Freshfields are acting for the consortium they will be putting their names or at any rate approving documents which are in direct conflict with their present duty to act in the best interests of M&S in connection with the restructuring of the contracts.”

This decision was followed in the Court of Appeal. Lord Justice Pill opined “there is plainly a potential conflict of interest involved", whilst Lord Justice Kay held:

> “It seems to me that the [first instance] judge was entitled to conclude that any such bid as might be made for the shareholding of the claimant company was one that potentially might be a hostile bid since there could be no sort of guarantee that the directors of the claimant company would recommend any such bid to its shareholders.

> Further, there was evidence before the judge that entitled him to conclude that the Davies contractual arrangements might well become one of the significant battle grounds if any such hostility was joined".

The work for M&S was, consequently, deemed prohibitive of Freshfields acting on the offer being made by Revival.

What is the relevance of whether a matter is a 'related' matter?

In *Marks and Spencer v Freshfields*, counsel for Freshfields argued the authorities suggested the double employment rule (the rule applicable to a fiduciary acting for more than one principal) was relevant only to single transaction cases.

Freshfields' counsel challenged the application of the rule to instances where solicitors acting in a particular matter for a client then wished to take on another client in a new matter.

This was rejected both at first instance and in the Court of Appeal. At first instance, Lawrence Collins J held "there must be some reasonable relationship between the two matters, but they do not, in my judgment, have to be the same".

In the Court of Appeal, Lord Justice Pill said:

> "I would accept that there must be a degree of relationship between the two transactions, but I am quite unable to accept the submission that the language used by Lord Millett in Bolkiah […] is confined to same transaction cases".

Taking the above into account, it was held that the work Freshfields had carried out for M&S was connected closely enough to the bid that it would prohibit Freshfields from acting.

The key issue to consider was whether there was any degree of conditionality between the work for one client and the work for the other client.

Lord Justice Kay stated that:

> "If the defendant is to act for those making the bid its partners may be called upon at various stages to give advice as to the tactical approach to be adopted by the bidders in the circumstances of the bid becoming hostile.
>
> The claimant company is entitled to know that any such advice cannot possibly be influenced in any way by the knowledge that the defendant has of its affairs as a result of its relationship with the defendant as its client, even if the defendant does not directly reveal the information to the bidders.
>
> Where there is a matter which may feature prominently in any attempt to win over the shareholders of the claimant company, it seems to me wholly impossible to have the necessary degree of confidence that the claimant company will not be adversely affected by the bidders having the benefit of the defendant as their solicitors with the solicitors having previously acted for the claimant company on the very subject matter which may come to prominence in the bid.
>
> This, in my judgment, precludes the defendant from acting for the bidders."

5. Exceptions to acting in conflict of interests situations

Paragraph 6.2 of the SCCS and SCCF sets out, at paragraphs (a) and (b), two exceptions where it may be possible to act even if there is a conflict of interests.

When deciding whether to act in these situations, your overriding consideration should be whether you are able to act in the best interests of each client, as required by Principle 7.

Inclusion of the exceptions in the SRA Codes of Conduct reflects the fact there may be situations where, if the qualifying conditions are met, then despite a conflict of interests, the clients' separate best interests may be served by you acting for two or more clients.

This might be the case, for instance, where it is disproportionate in terms of cost for clients to retain separate solicitors, and any risk of a conflict is peripheral.

It is important that you and your practice always exercise caution when acting in accordance with these exceptions.

You should record your decision and the reason for it if you decide to act in these circumstances.

5.1 Substantially common interest

You may be able to act in a situation where there is a conflict of interests or a significant risk of a conflict in relation to the matter, or an aspect of it, where the clients have a substantially common interest and the relevant conditions (outlined in section 5.3 below) are met.

A substantially common interest is defined by the SRA as "a situation where there is a clear common purpose between the clients and a strong consensus on how it is to be achieved".

This definition envisages situations of clear common purpose (and an agreed route to it) and is not the same as situations where there is simply a common interest.

Examples of situations where there may be a “substantially common interest” include acting for:

- various individuals in setting up a company
- the husband and wife on the sale of the matrimonial home as part of a consent order in a divorce matter
- members of the same family in relation to their affairs

If you consider that you are able to rely on this exception in order to act for the clients, you should document your analysis of the situation.

You should make sure that it is in the clients’ best interests for the firm to act for all parties, and you should ensure the clients understand the relevant issues.

In particular, you should explain to the clients that, should the matter evolve and they no longer have a substantially common interest, the firm may need to cease acting for one or more of them and that they may then need to take independent legal advice.

You should advise the clients of this possibility in writing at the outset of the matter and the clients should signify their agreement.

You must always keep a situation where you are acting for two or more clients under review.

This includes deciding whether, at any time, a point has been reached where it would be untenable to continue to represent both or all clients fairly, without either or any of them being prejudiced. At such point, you must cease acting for one or more clients.

5.2 Competing for the same objective

The SRA Codes of Conduct also permit you to act for clients where there is a conflict of interests or a significant risk of a conflict if the clients are competing for the same objective, and provided that the relevant conditions (outlined in section 5.3 below) are met.

The SRA defines competing for the same objective as meaning any situation in which two or more clients are competing for an 'objective' which, if attained by one client, will make that 'objective' unattainable to the other client or clients.

'Objective' means an asset, contract or business opportunity which two or more clients are seeking to acquire or recover through a liquidation (or some other form of insolvency process) or by means of an auction or tender process or a bid or offer, but not a public takeover.

5.3 The relevant conditions

The conditions that must be met if either of the exceptions to the conflicts rules are to be relied upon, are that:

- all the clients have given informed consent, given or evidence 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

Informed consent

The requirement for informed consent means clients must understand the relevant issues and the implications of giving such consent.

You should obtain their consent in writing, or have some other written evidence of their consent, to you acting.

You should consider whether your client is a sophisticated user of legal services such that they will be able to understand the implications of you acting in these circumstances and therefore be in a position to give informed consent.

You should document this carefully so that you are able to demonstrate that any consent given was "informed consent", as the onus will be on you to justify this position should any problems arise.

Safeguards to protect confidential information

If you are acting for clients in reliance on the "competing for the same objective" exception, you must implement effective safeguards to protect clients' confidential information.

You should have regard to your common law obligations in respect of the protection of confidential information. See section 7 below for further guidance.

You should bear in mind that implementing effective confidentiality safeguards is likely to be more difficult for smaller firms or for firms where the physical structure or layout of the firm means that preserving confidentiality is challenging.

If you are acting for clients who have a substantially common interest, you should consider whether certain items of information belonging to any of them may not be shared with others, and whether the other clients are willing for you to proceed on this basis (see section 6 below on the duties of confidentiality and disclosure).

In such circumstances, structural safeguards to protect confidential information may not be appropriate.

You should nonetheless document the reasons for taking such an approach, alongside details of the informed consent obtained – which should include agreement from each client that structural safeguards to protect the relevant information are not required.

Reasonableness

When relying on one of the exceptions to the conflict provisions in the SRA Codes of Conduct, there is an overriding requirement that it is reasonable for you to act.

Factors to consider include whether:

- there is some inequality of bargaining position
- one of the clients is vulnerable in some way, or
- one client has more to lose

These are examples – not an exhaustive list. You should consider reasonableness having regard to the parties and the matter as a whole.

6. The duties of confidentiality and disclosure

Guidance on the duties of confidentiality and disclosure is included in this practice note because they are relevant to the issue of conflict of interests.

When carrying out conflict checks, you should also factor in enquiries as to whether you or your firm or employer is in possession of information which is confidential to a current or former client, but which may be material to a current client's matter.

6.1 The duty of confidentiality

Paragraph 6.3 of the SCCS and SCCF states:

> "You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents."

Your duty of confidentiality continues after the retainer has ended and even after the death of a client (in which case, it passes to their personal representatives).

However, the rule provides for situations where the duty of confidentiality no longer applies.

It is overridden if you have a legal obligation to disclose confidential information (for example, under legislation such as the Proceeds of Crime Act 2002).

Alternatively, your client may consent to disclosure of confidential information (with such consent needing to be informed consent).

6.2 The duty of disclosure

Paragraph 6.4 of the SCCS and SCCF sets out your duty, as an individual, to disclose to a client all information of which you are personally aware and which is material to the client's matter.

Obligations on individuals

Paragraph 6.4 of the SCCS states:

> "Where you are acting for a client on a matter, you make the client aware of all information material to the matter of which you have knowledge, except when:
>
> 1. the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
> 2. your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;
> 3. you have reason to believe that serious physical or mental injury will be caused to your client or another if the information is disclosed; or

4. the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed."

The exception at (a) above is intended to address any potential risks that would arise, for example, from tipping off a client in relation to money laundering offences.

Although not expressly stated within the SRA Codes of Conduct, we would expect it to continue to be the case that your duty of confidentiality to one client must take precedence over your duty of disclosure to another client (meaning you cannot simply elect which one should take precedence – see *Hilton v Barker Booth & Eastwood (a firm)* [2005] UKHL 8).

This does not, however, mean that your duty of disclosure, as outline in paragraph 6.4 of the Codes, is negated.

This does not, however, mean that your duty of disclosure, as outlined in rule 6.4 of the SCCS and SCCF, is negated.

Consequently if you, as an individual, are in a situation where you personally have information that is confidential to a current or former client but is also material to another client's matter on which you are working, you are unlikely to be able to continue to act for that other client, because of your conflicting duties of confidentiality (to your first client) and disclosure (to the client to whom the information would be material).

Your duty of confidentiality continues regardless of whether you have a current retainer with the client to whom the duty is owed.

Where the clients do not have adverse interests, it may be possible for you to simply obtain informed consent for you to vary your duty of disclosure (as envisaged by (b) above), thereby (in some circumstances) enabling you to act.

Alternatively, the client to whom you owe a duty of confidentiality may give their informed consent to you disclosing their confidential information to the other client.

Obligations on firms

Paragraph 6.4 of the SCCF states:

> "Any individual who is acting for a client on a matter makes the client aware of all information material to the matter of which the individual has knowledge except when:
>
> 1. the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
> 2. the client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;
> 3. the individual has reason to believe that serious physical or mental injury will be caused to the client or another if the information is disclosed; or
> 4. the information is contained in a privileged document that the individual has knowledge of only because it has been mistakenly disclosed."

If your conflict check reveals your firm is in possession of information that is confidential to a current or former client, but which may be material to another client's matter, the firm itself is not prevented from acting where informed consent under (b) above has not been obtained, provided that separate teams are involved and appropriate safeguards are in place to protect the confidential information.

Whether this is possible to achieve will depend on the systems available.

You may also want to consider whether, notwithstanding that you may be able to comply with the conflict and confidentiality obligations, your acting may give rise to professional embarrassment or could jeopardise your firm's relationship with a client.

This could the case, for example, where you are asked to prepare an employment contract for a company that is planning to recruit an individual who is known, as a result of work undertaken by the firm on another matter, to be under investigation for fraud.

6.3 Acting in an adverse interest situation

Paragraph 6.5 of the SCCS states:

> "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 of you or your business or employer, for whom you or your business or employer holds confidential information which is material to that matter, unless:
>
> 1. effective measures have been taken which result in there being no real risk of disclosure of the confidential information; or
> 2. the current or former client whose information you or your business or employer holds has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information."

An equivalent provision appears in paragraph 6.5 of the SCCF. Where an adverse interest applies, you must exercise caution before accepting instructions to act.

Acting in reliance on the "effective measures" exception depends upon whether you can comply with your common law obligations in respect of safeguarding confidential information (see section 7 below).

Due to the difficulties in operating effective measures, firms more commonly seek the informed consent of the current or former client to their acting, including to any measures taken to protect that client's information (information barriers). This will involve making the client aware of the potential consequences if things were to go wrong.

Given the risks, informed consent in this context is usually only likely to be able to be given by sophisticated clients.

You should ensure that you carefully document:

- your analysis of the situation
- the discussions you have with your client or clients, and
- the information you provide to them in order to obtain any consent to act

Although we set out below examples of the sorts of safeguards you should consider when implementing information barriers, you must check the legal position.

Complying with these suggested steps does not necessarily mean you have discharged your legal obligations.

7. Information barriers

The SRA has issued guidance for solicitors practising through unregulated entities on information barriers which you may find useful, even if you are practising through an SRA-authorised practice.

The guidance refers to the case of *Prince Jeffrey Bolkiah v KPMG* [1998] UKHL and you should have regard to this when considering your position.
General considerations when implementing information barriers include:

(a) that the client who might be interested in the confidential information acknowledges in writing that the information held by the firm will not be given to them

(b that all members of the firm who hold the relevant confidential information ("the restricted group") are identified and have no involvement with or for the other client who is interested in the information

(c) that no member of the restricted group is managed or supervised in relation to that matter by someone from outside the restricted group

(d) that all members of the restricted group confirm at the start of the engagement that they understand that they possess or might come to possess information which is confidential, and that they must not discuss it with any other member of the firm unless that person is, or becomes, a member of the restricted group, and that this obligation shall be regarded by everyone as an ongoing one

(e) that each member of the restricted group confirms when the barrier is established that they have not done anything which would amount to a breach of the information barrier, and

(f) that only members of the restricted group have access to documents containing the confidential information

The SRA guidance on confidentiality of client information has examples of other potential arrangements for implementing information barriers.

When implementing information barriers, you must always check the legal position.

Complying with any suggested steps does not necessarily mean that you have discharged your legal obligations.

8. Scenario-specific issues

8.1 Acting for a buyer and seller

You are not permitted to act for the buyer and seller where there is a conflict of interests or a significant risk of such a conflict arising (see paragraph 6.2 of the SCCS and SCCF).

The decision rests with you and your practice as to whether there is a conflict of interests or a significant risk of one in the circumstances, taking into account whether:

- the seller and buyer are, for example, persons related by blood or marriage
- the sale is at an undervalue or a gift, or

- the seller and the buyer are both established clients of the firm

Assessing whether or not there is a conflict of interests

In the instances when you might decide that you can act for both buyer and seller, it is up to you to show the basis for your decision and justify your actions to the SRA.

In our view, it would be good practice to record your decision and the reason(s) for it if you decide to act in these circumstances.

If you decide to act, you should actively monitor the situation for a conflict of interests arising, bearing in mind there could be considerable implications for each of the clients and for others involved in a series of linked transactions (such as a conveyancing chain) should you need to withdraw because of a conflict situation.

If you decide there is no conflict of interests between a buyer and a seller, then you must consider whether, in acting, there is any risk of not adhering to any of the principles.

The key principle you should take into account is Principle 7, which requires you to “act in the best interests of each client”.

Other key principles are Principle 3 (“act with independence”) and Principle 5 (“act with integrity”).

The provisions in paragraph 6 of the SRA Codes of Conduct on confidentiality and disclosure are also important, as further outlined below.

Confidentiality and disclosure

In addition to dealing with conflicts, you must also bear in mind your duties of confidentiality and disclosure to your clients.

You must consider confidentiality issues carefully when considering acting for more than one client, such as for a buyer and seller.

There may be a situation where a buyer wants you to keep information confidential, but this information may be material to the seller.

In this situation, your duty of confidentiality will prevail and you will usually have to cease acting for the seller.

Another example is when a situation arises where questions posed to the seller and buyer are inconsistent and there is a mismatch, which then could lead to a conflict of interest.

In addition, you may also find that confidentiality issues arise in relation to former clients. The duty to maintain confidentiality about the affairs of your client is ongoing.

As a general rule, you must not disclose information about any client, present or former, without their consent.

8.2 Acting for clients who are the lender and borrower

You may only act for both parties where there is no conflict of interests between the two, and no significant risk of such a conflict arising (see paragraph 6.2 of the SCCS and SCCF).

The risk of conflict is high if non-standard terms are being used or if, in the case of a standard mortgage, you do not use the approved certificate of title.

Assessing whether or not there is a conflict of interests

You should not assume, when acting for both lender and borrower in individual or corporate matters, that there is no conflict of interests.

Rather, you must consider each case in the light of the provisions in the SCCS and SCCF, including whether there is an imbalance in bargaining power between the clients.

If you decide to act for both parties, it is our view that it would be good practice to record your decision and the reason for it.

In addition, you must comply with the relevant principles. In these circumstances, the key principle you should take into account is Principle 7, which requires you to act in the best interests of each client.

Confidentiality and disclosure

You must at all times take into account the provisions relating to the protection of clients’ confidential information and the disclosure of material information to clients, as set out in paragraph 6 of the SCCS and SCCF.

There may be circumstances when a borrower discloses to you information that you are required to keep confidential, but which you also have a prima facie obligation to disclose as material information to the lender.

For example, if you are made aware that a borrower has lost their job, you have an obligation to keep this confidential, notwithstanding that this may be material information you are obliged to disclose to the lender.

In this situation, your duty of confidentiality would prevail but you would not ordinarily be excused from your duty of disclosure if you continued to act for the lender.

Although contractually modifying your duty of disclosure may enable you to continue to act for the lender in some cases, you should ask yourself whether continuing to act would be appropriate if, for example, you became aware of a fraud on the lender (and you should consider whether it would be appropriate for you to continue to act for the borrower if you had reason to believe that the borrower may have misinformed the lender).

You may also find that confidentiality issues arise in relation to information you hold for former clients.

The duty to maintain confidentiality about the affairs of your clients is ongoing.

As a general rule, you must not disclose information about any client, present or former, without their consent.

8.3 Relations with third parties in a conveyancing transaction

Paragraph 1.2 in the SRA Codes of Conduct requires you to refrain from abusing your position by taking unfair advantage of clients or others with whom you deal.

Although not restated in either the SCCS or SCCF, the SRA Code of Conduct 2011 placed solicitors acting for a seller of land under an obligation to “inform all buyers immediately” where that seller intended to deal with more than one buyer.

It would be sensible to continue this practice, provided you are able to get the seller’s consent for you to disclose the information (since the information would be confidential to the seller’s retainer).

Should a seller refuse to grant this consent, it is likely you would need to cease acting to avoid breaching Principle 5 ("act with integrity").

9. Additional considerations for solicitors working in different types of business

9.1 Working in an unregulated business

If you are practising through an unregulated business, the SCCF will not apply. However, you must consider your personal obligations under the SCCS.

The SRA has issued guidance for individual solicitors practising through unregulated businesses and their employers:

- unregulated organisations for employers of SRA-regulated lawyers
- unregulated organisations giving information to clients

You should refer your employer to this guidance and discuss what steps you and the employer will need to take to enable you to meet your regulatory obligations.

Specific advice on your duties around conflicts of interest and confidentiality are set out in the SRA guidance note on unregulated organisations: conflict and confidentiality.

The note states:

> “It will be important for you to be in a position to be able to identify when a conflict may arise or when it will be necessary to prevent confidential information being passed on.
>
> This is normally achieved in part by having in place conflict checking procedures, usually IT based, which use a database to automatically identify previous or current clients and related names and businesses.
>
> Without access to such a system that identifies conflicts (for example when new clients are taken on), there is a risk of you not complying with your obligations.”

If there is not already a system in place to enable you to carry out conflict checks, the guidance states you should introduce your own checks to enable you to identify any issues.

The SRA guidance also suggests you should discuss with your employer appropriate training of relevant staff on conflict and confidentiality requirements.

For further guidance on this and other considerations, see our practice note on solicitors offering legal services to the public from unregulated entities.

Conflicts of interest

As mentioned above, there is a strict prohibition on acting where there is an own-interest conflict.

There will be a presumption that where the client's interests conflict with your employer's interests, then they will also conflict with your own interests, and you should therefore not act.

If you are in a situation where there is a conflict of interests between two or more clients, or a significant risk of such a conflict arising, you are unlikely to be able to act personally for both clients and you should follow the guidance in the sections above.

As your employer is not regulated by the SRA, it will not be bound by the SCCF and therefore will not necessarily be prevented from providing services to another client where their client's interests conflict with those of your client.

However, in such a situation you must:

- inform the client for whom you are personally acting of the position
- be sure that it is nonetheless in their best interests that you continue to act for that client, and
- take appropriate steps to protect their confidential information

Confidentiality

Your personal duties of confidentiality and disclosure to your clients are set out in detail in the sections above.

You will need to ensure that your employer has appropriate systems in place to enable you to comply with your duty of confidentiality to your clients.

You and your employer will also need to bear in mind obligations under data protection law.

You should also consider taking specific legal advice as to whether any advice or work that you carry out for your client through an unregulated entity will be covered by legal professional privilege.

See sections 6.2, 6.3, and 7 above for further guidance on whether it would be appropriate to refer a client to another person or department of your employer by implementing safeguards to protect confidentiality.

9.2 Working as a SRA-regulated freelance solicitor

As an individual regulated by the SRA, the SCCS will apply to you and the work you do.

You will need to develop and implement you own systems to enable you to identify and manage potential conflicts of interest and the duties of confidentiality and disclosure.

These systems are likely to include the use of a database of clients with details of their matters and other relevant parties.

You should also bear in mind your obligations under data protection legislation.

10. Further information

10.1 Practice notes and guidance

GDPR and DPA guidance for solicitors in law firms

Practice note on legal professional privilege

Practice note on conflicts of interests in criminal cases

Practice note on solicitors offering legal services to the public from unregulated entities

SRA guidance on:

- confidentiality of client information
- conflicts of interest
- unregulated organisations – conflict and confidentiality
- unregulated organisations – for employers of SRA-regulated lawyers
- unregulated organisations – giving information to clients

10.2 Practice Advice Service

Our Practice Advice Service offers free and confidential support and advice on legal practice and procedure.

You can contact us on **020 7320 5675** from 9am to 5pm on weekdays.

10.3 SRA Ethics helpline

For advice on ethical issues, you can call the SRA's professional ethics helpline on **0370 606 2577** from 9am to 5pm on weekdays.

Legal status

Practice notes represent the Law Society's view of good practice in a particular area. They are not intended to be the only standard of good practice that solicitors can follow. You are not required to follow them but doing so will make it easier to account to oversight bodies for your actions.

Practice notes are not legal advice, and do not necessarily provide a defence to complaints of misconduct or poor service. While we have taken care to ensure that they are accurate, up to date and useful, we will not accept any legal liability in relation to them.

For queries or comments on this practice note contact our Practice Advice Service.

SRA Principles

There are seven mandatory principles in the SRA Standards and Regulations which apply to all aspects of practice. The principles apply to all authorised individuals (solicitors, registered European lawyers and registered foreign lawyers), authorised firms and their managers and employees, and to the delivery of regulated services within licensed bodies.

Terminology

Must – a requirement in legislation or a requirement of a principle, rule, regulation or other mandatory provision in the SRA Standards and Regulations. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or regulations.

Should – outside of a regulatory context, good practice, in our view, for most situations. In the case of the SRA Standards and Regulations, a non-mandatory provision, such as may be set out in notes or guidance.

These may not be the only means of complying with legislative or regulatory requirements and there may be situations where the suggested route is not the best route to meet the needs of a particular client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why your alternative approach is appropriate, either for your practice, or in the particular retainer.

May – an option for meeting your obligations or running your practice. Other options may be available and which option you choose is determined by the nature of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

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Client care

Civil litigation / Ethics / Freelance solicitor / GDPR / Legal professional privilege