## Guidance

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## Conflicts of interest

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## Status

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions

## Who is this guidance for?

All solicitors, registered European lawyers (RELs) or registered foreign lawyers (RFLs).

All SRA-regulated firms, their managers, compliance officers and employees.

## Purpose of this guidance

To help you to understand your obligations in relation to conflicts.

## Introduction

Your obligations in relation to conflicts are set out in paragraphs 6.1 and 6.2 of the Code of Conduct for Solicitors, RELs and RFLs [https://media.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and Code of Conduct for Firms [https://media.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] (referred to collectively as ("the Codes"). They have the same wording in both of the Codes, but different considerations may sometimes apply to an individual and to a firm.

References in this guidance to a client includes a prospective client (and the plural shall be interpreted accordingly). It is better to avoid a conflict from arising in the first place by declining to take on a client or clients where necessary rather than have the conflict arise during the course of a retainer.

## Own interest conflict

You cannot act if there is an own interest conflict or a significant risk of one (paragraph 6.1 of the Code).

As set out in the SRA Glossary, an own interest conflict means:

- any situation where your duty to act in the best interests of any client in relation to a matter conflicts
- or where there is a significant risk that it may conflict

with your own interests in relation to that or a related matter.

When it comes to an 'own interest' conflict, there are no exceptions to the ban on acting. So, for example, obtaining your client's consent to act will not change the position. Neither will telling the client to obtain independent advice as to whether to allow you to continue to act, if you will be conflicted if you do so.

Circumstances that can give rise to an own interest conflict or a significant risk of one include:

a. A financial interest of yours or someone close to you. For example, a client asks you to carry out due diligence on a company which you or your spouse/partner own shares in.
b. A personal or business relationship of yours. For example, where you are asked to advise on a claim against a relative of yours, a friend or someone with whom you are involved with in a common financial enterprise.
c. Your role as an employee. For example, a client asks for advice in relation to a dispute involving your employer or a fellow employee.
d. Your own conduct (as a firm or an individual). For example, the wrong advice has been given to the client or the wrong action taken on their behalf. See our guidance on Putting matters right [https://media.sra.org.uk/solicitors/guidance/putting-matters-right-own-interest-conflicts/] .

## Where acting for two or more clients creates a conflict of interest or a significant risk of one

You should not act in a matter where you have a conflict of interest or a significant risk of one, subject to certain specified exceptions (paragraph 6.2 of the Codes). The same applies to parts of a matter; particular tasks or "aspects" of it.

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

For this situation to happen, you must be currently acting, or intending to, act for two or more clients. For example, you would not be prohibited

from acting for a client even if you previously acted against them in family proceedings on behalf of their former partner.

The position where a current client has an adverse interest to a former client is dealt with in paragraph 6.5 of the Codes and in our guidance on confidentiality [https://media.sra.org.uk/solicitors/guidance/confidentiality-client-information/] .

The most obvious example of conflict is where the matter itself concerns a dispute between two or more current or intended clients. For example, paragraph 6.2 of the Code will prevent you acting for both sides in litigation generally, or advising both sides in a dispute between, for example, a landlord and tenant.

Other less direct examples of circumstances that can give rise to a conflict of interest or significant risk of one include:

- Two clients seeking separately to purchase a particular asset or to be awarded a particular contract.
- Acting for an investor and the scheme in which they will be investing.
- One client selling or leasing an asset to another client.
- Agreeing a commercial contract between two clients.

Although you should not normally act for two or more clients in these scenarios, this does not mean that you can never do so, if on the facts, there is no significant risk of a conflict arising.

This may be the case if for example, the clients are already agreed on all of the relevant terms and all of the relevant information relating to the transaction can be shared openly between them. However, if you foresee the need for substantive negotiations between the clients, then you should not act unless one of the exceptions under paragraph 6.2 applies (see below). This is because it is likely that a conflict will arise.

You may also need to consider if there would be disclosure concerns if all information material to their matter cannot be disclosed to each client and they have not agreed an appropriate waiver on an informed basis.

You must always be sure that it is in each client's best interests for you to act. Bear in mind that if you were acting for just one client, you normally would be negotiating their position and putting forward solutions that favour their interests over the other client. So by acting for both, you may be limiting the service that you would provide.

Our guidance set out in the Restricting your retainer [#restricting] section can help when deciding whether you can act, and how you handle the matter if you do.

A conflict of interest can also arise relating to a client if you are acting for another client on a related matter. See our case studies [https://media.sra.org.uk/solicitors/guidance/conflict-of-interest/] .

## Exceptions under paragraph 6.2

Paragraph 6.2 of the Codes allows two exceptions to the prohibition on acting for more than one client where there is a conflict of interest or a significant risk of one. These exceptions are subject to you still being able to act in all of the clients' best interests.

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

## Substantially common interest

This exception applies in situations where there is a clear common purpose between the clients and a strong consensus on how that purpose is to be achieved. It could be where two clients want to instruct you to advise them on the purchase or setting up of a business together, or taking out a lease as joint tenants.

## Competing for the same objective

This exception applies when 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. This may be the case, for example, where two or more clients instruct you to act for them as competing bidders and/or those involved with the funding of bidders in respect of the sale of a business being sold through a structured auction process.

"Objective" may mean an asset, a contract or business opportunity which two or more clients want to acquire or recover through a liquidation (or some other form of insolvency process). It could also be by means of an auction or a tender process or a bid or an offer, but not a public takeover.

## How to apply the exceptions under paragraph 6.2

You can only rely on either exception if a specific set of conditions are all met:

i. all the clients have given informed consent, given or evidenced in writing, to you acting

What will constitute the clients' informed consent to you acting, despite the conflict or risk of it, will vary according to the circumstances. You must make sure that all the clients have given their agreement with

appropriate knowledge and understanding of the situation. If the client is more vulnerable, you will need to take this into account when giving them the necessary information.

ii. where appropriate, you put in place effective safeguards to protect your clients' confidential information

You have a duty to protect your clients' confidential information. Where there is a conflict of interest, or a potential one, it is likely that information relevant to the matter cannot be passed by you between clients. This could be because of a lack of consent to disclose it or because it is not in the client's best interests to do so.

In these circumstances you must not act or cease acting - for one or both clients – unless either of the following situations apply.

First, you are a firm and can put effective safeguards in place. This will need to include separate fee earners acting for the clients. The courts have made it clear that (unless different arrangements are agreed to, as described in paragraph 6.5(b) of the Code for Firms) such safeguards require established, structural separation within a firm so that confidential information cannot pass from the lawyer acting for one client to the lawyer acting for the other client.

Alternatively, it may not be "appropriate" for effective safeguards to be put in place. This might arise, for example, where your clients consider it desirable for the same lawyer(s) to represent them, and they agree with you which information can and cannot be shared, and therefore that structural safeguards to protect their confidential information are not required.

You will need to ensure that you obtain informed consent from each client that no structural safeguards are needed. This will need to cover your agreement not to share with them  material information which is confidential to the other client/s (and which those client/s have not consented to the disclosure of) which you would otherwise be required to share under paragraph 6.4 of the Code of Conduct for Individuals/Firms. You must also be satisfied that your clients understand what sort of information you will not be able to disclose and that it remains in the best interests of each client to act on this basis during the course of the matter. However, in these circumstances, effective safeguards under this provision will not be required.

iii. you are satisfied it is reasonable for you to act for all the clients

In deciding whether it is reasonable to act for all of the clients, you will want to consider factors such as:

- The respective knowledge and bargaining power of the clients. Is one party particularly vulnerable or in a relatively weak position and

should be referred for independent advice? For example, one client may be an individual and the other a corporate entity with access to an in-house legal team. Or it could be that one client may be facing financial problems which would put them under pressure to reach an agreement that might not be in their best interests.
- The extent to which there will need to be negotiations between the clients. The more serious any unresolved issues are, then the less it is likely to be reasonable for you to act.
- Any particular benefits to the clients (eg speed, convenience, cost) from you acting for both.
- Any risk of the inappropriate transmission of confidential data.

## Restricting your retainer

One way to remove the risk of a conflict of interest, or potential conflict, will be to restrict your retainer in a matter. This way you are only acting for / advising the client or clients on those aspects of the matter where a conflict is not likely to arise.

## Examples

1. Two commercial clients are considering purchasing a business either together or in competition. You are instructed by both to perform due diligence in relation to that business, on the understanding that all information you obtain will be shared with them both. If they then decide to compete with each other for the purchase, one or both of them will need to instruct an independent lawyer.
2. A debtor and creditor have agreed to settle a dispute over repayment and come to you to have the agreement drawn up by a solicitor. They are not asking you to advise either party on the merits of the settlement.

In these situations:

- 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. We have seen examples of solicitors limiting their retainers relating to investment schemes so that clients are not advised on the risks of the transaction and consequently suffer serious losses. Such behaviour has amounted to misconduct. See our warning notice on this issue [https://media.sra.org.uk/solicitors/guidance/investment-schemes-including-conveyancing/] .

- The limited retainer should therefore not be put in place so you can avoid giving advice to one or more parties on risks or difficult problems. We would normally expect limited retainers to be entered into only at the clients' request rather than at your suggestion. This is particularly true where the clients concerned are not sophisticated commercial entities.
- Where clients come to you with an agreement, you should make sure that they have been advised to take independent legal advice on its terms and have either taken such advice separately or have been clear they do not wish to do so.
- It must be in all parties' best interests for you to proceed. For example, if the arrangement is significantly unfair to one party then, even though you are not advising on its merits, it would be inappropriate for you to act. You should advise that party to get independent legal advice. There must also be no real disadvantage to any of the clients of you acting via a limited retainer, rather than them instructing separate solicitors.
- You should also be confident that here has been no undue influence or duress, no imbalance of bargaining power, or no vulnerability or position of weakness on the part of either client that would make it unfair for you to act.

## Further help

If you require further assistance, please contact the Professional Ethics helpline [https://media.sra.org.uk/contactus] .