Guidance

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Unregulated organisations Conflict and confidentiality

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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?

Solicitors, SRA registered European lawyers (RELs) and SRA registered foreign lawyers (RFLs) providing services to the public as an employee of or otherwise on behalf of an entity that is not authorised by any of the approved regulators under the Legal Services Act 2007 (a "non-authorised business").

This guidance therefore covers situations where the client's retainer is with the non-authorised organisation and not with you as a solicitor, REL or RFL practising on your own behalf.

References in this guidance to a solicitor include references to a REL or RFL unless otherwise stated.

Purpose of this guidance

To help you to understand your obligations in relation to conflicts of interest and keeping clients' information confidential.

Before you take up your employment

As your employer is a non-authorised organisation, you will wish to refer them to this and other related guidance and discuss with them any arrangements, policies or procedures necessary to support you to meet your ethical and regulatory obligations when providing services to the public.

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.

You will want to discuss your employer's system with them and consider what steps you can take if it does not seem adequate. The best solution would be to work with your employer to create an effective system. Alternatively, you will need to introduce checks yourself in relation to your clients, to highlight such issues.

As part of your discussions with your employer in relation to your obligations as a solicitor, you may also want to discuss with them the appropriate training of staff on confidentiality and conflicts of interest and confirm that employees' contracts contain appropriate provisions to address these issues.

Conflicts

Your obligations in relation to conflicts are set out in Paragraphs 6.1 and 6.2 of the SRA Code of Conduct for Solicitors, RELs and RFLs [https://media.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/#rule-6] ("the Code"). These are set out in further detail below.

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 [https://media.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/#rule-6]).

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 there is a significant risk that it may conflict, with your own interests in relation to that or a related matter.

This relates to your own personal interests, and so applies irrespective of the fact that your employer is not authorised by us and that it, and your colleagues, may not be subject to similar regulatory obligations.

There are no exceptions to the prohibition on acting if there is an 'own interest' conflict. So, for example, obtaining your client's consent to act will not change the position.

Examples of circumstances that can give rise to an own interest conflict or a significant risk of one are:

a. A financial interest of yours or that of someone close to you. For example, a client asks you to advise on a claim against a company in relation to which you or your spouse/partner own a number of shares.
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 or that of your employer - for example the wrong advice has been given to the client or the wrong action taken on their behalf.

It will be the normal assumption 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 act for a client whose interests conflict with your employer's there will be a clash between the potential pressure on you in terms of your contract of employment (including for example your obligations to share all information with your employer, to further their interests and act in good faith towards them) and your duty to act in your client's best interests with undivided loyalty.

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

You should not act in relation to a matter or a 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, subject to certain specified exceptions (paragraph 6.2 of the Code [https://media.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/#rule-6]).

A conflict of interest means a situation where your separate duties to act in the best interests of two or more clients conflict. Again, this applies to you personally, and those for whom you act whether you are solely responsible for their matter or are involved only with part of their work or as part of a team. The position of your employer is set out below [#employer] .

For this situation to arise you must be currently acting (or intending to act) for two or more of the relevant clients. The position where a current client has an adverse interest to a former client gives rise to issues regarding disclosure of information you may hold and is dealt with in paragraph 6.5 of the Code - see below [https://media.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/#rule-6-3] .

The most obvious example of this situation arising is where the matter itself concerns a dispute between the clients. For example, you cannot

advise both sides in a dispute between a landlord and tenant, or a debt recovery matter.

Other 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 the clients. However if you foresee the need for substantive negotiations between the clients to have to take place, or you consider that is likely that all information relevant to the matter cannot be shared between the clients then you should not act, as it is likely that a conflict will arise.

In any event, you must still be sure that it is each client's best interests for you to act. 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 clients you will be limiting the service that you will provide. You will therefore need to follow the guidance set out in the "restricting your retainer" section below in deciding whether you can act and in the way that you handle the matter if you do.

Although the more obvious examples of conflict of interest occur when you are acting for all of the clients on the same matter, a conflict of interest can also arise where one or more of the clients are involved in related matters and an issue arises in one matter that impacts on the other: The key question is whether you are unable because of the work for each to act in the best interests of all the clients.

Exceptions

Paragraph 6.2 of the Code allows two exceptions to the prohibition on acting for one or more clients where there is a conflict of interest or a significant risk of one.

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 include scenarios where two clients want to instruct you to advise them on the purchase or setting up of a business, as partners, or taking out a lease as joint tenants.

Competing for the same objective

This exception applies in 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" may mean an asset, a 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 a tender process or a bid or an offer, but not a public takeover.

This exception will generally apply to regulated firms in which separate teams will act for each bidder. In practice, it is therefore very unlikely that you will be able to act as an individual solicitor for two or more clients under this exception because the clients are likely to need to keep at least some information confidential from each other. See below for further discussion of this issue.

In any event, paragraph 6.2 of the Code provides that 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 will vary according to the circumstances. The obligation is on you to make sure that all the clients have given their agreement with appropriate knowledge and understanding of the situation. If the client has a particular vulnerability, you will need to take this into account when providing the information and deciding whether to accept consent.

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

You have a duty to protect your clients' confidential information (see below). Where there is a conflict of interest or potential conflict of interest you could find yourself in a situation where information relevant to the matter cannot be passed by you between one client and the other - either because of a lack of consent to disclose or because it is not in the client's best interests to disclose it. If there is a risk of this situation arising you should not act for both clients. The courts have made it clear that such safeguards in this context require, for example, 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 (see below). Since you would be a single individual in possession of the information for both clients, there is no way that you can put up "effective structural safeguards" in your own mind to protect the information.

i. 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. For example, is one party particularly vulnerable or in a relatively weak position and should be referred for independent advice This would include, for example, a scenario where one client is an individual and the other is a corporate entity with access to an in-house legal team.
- 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 (e.g. genuinely niche specialist knowledge, speed, convenience, lower cost) from you acting for both.

The position of your employer

Paragraph 6.2 applies to the clients that you as a regulated person act for, and not the wider clients of your firm or employer where you are not personally acting. For example, you may be prevented from personally acting for client A and client B, but 6.2 does not prevent you from acting for client A whilst someone else in the firm acts for client B.

However, you must inform client A of the position, it must be in client A's best interests for you to act for them nonetheless, and you must be able to take the appropriate steps to protect client A's confidential information. This could be via a structural separation within the firm so that confidential information cannot pass from you to the employee acting for B (see the "Keeping client information confidential [#client] " section below).

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 - so that you are only acting for or 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. They decide to instruct you to perform due diligence in relation to that business, on the understanding that all information you obtain will be shared with them both and that if they decide to compete with each other for the purchase then 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 because they want to have the agreement drawn up by a solicitor. They ask you to act in relation to that aspect only, without advising 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 which issues you are not and what risk this entails for them. In relation to the issues that 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 for clients who are taking part in investment schemes so that those clients do not receive advice on the risks of the transaction and suffer serious losses in consequence. Such behaviour has amounted to misconduct[1][#n1].
- The limited retainer should therefore not be put in place for the purpose of you avoiding 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, particularly where the clients concerned are not sophisticated commercial entities.
- Where clients come to you with an agreement you make sure that both parties have been advised to take independent legal advice on the terms of that agreement 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 on the face of it significantly unfair to one party then even though you are not advising on the merits of the matter it would be inappropriate for you to act without that party securing 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 on the part of either client that would make it unfair for you to act.

Keeping client information confidential

Duty of confidentiality

Paragraph 6.3 of the Code requires you to keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents.

This duty of confidentiality is one of the core professional principles set out in section 1(3)(e) of the Legal Services Act 2007 and exists as both a legal as well as a regulatory obligation.

The courts have stated that the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. It is not limited to the duty not to communicate the information to a third party. It is a wider duty not to misuse it, i.e. without the consent of a client or former client to make any use of it or to cause any use to be made of it by others otherwise than for the client's benefit.[2 [#n2]]

You will want to be satisfied that your employer has appropriate arrangements in place to help you to meet your obligations in relation to confidentiality. This will mean that any information supplied to you by clients is kept confidential by your employer in accordance with data protection law and any terms of engagement between your employer and the client. For example:

- Information should not be passed to third parties (such as, for marketing purposes) without the client's consent.
- Personal data should not be used for a purpose other than for which it was supplied (in accordance with data protection legislation).
- Confidential information regarding one client should not be passed to another.

Making clients aware of all information material to their matter

Paragraph 6.4 of the Code provides:

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:

a. the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;
b. your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;
c. 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

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

It will be difficult for a client to give informed instructions if they are not aware of all matters relevant to their case. You should be open with clients, but there are occasions when you are under some other obligation which may prevent this. The circumstances set out in paragraph 6.4 (a), (c) and (d) will be rare.

It will be more common for you to find yourself in the position where your duty of confidentiality to another current or former client (A) prevents you from disclosing evidence that you obtained in relation to A's case to your new client (B). The fact that you cannot meet your obligations to B because of your obligation to A will be no defence in those circumstances either to a claim against you by B[3 [#n3]] or in relation to a breach of your obligations under paragraph 6.4.

In these circumstances you must therefore not act for B unless you obtain B's informed consent to the information not being disclosed to them.

Informed consent means that the client must have some understanding of the importance of the information to their case, and any prejudice that there may be in non-disclosure. This will mean giving some indication of at least the broad nature of the information to be withheld and its relevance to the matter. Even if you do obtain B's informed consent, then you should only continue acting for them if it is in their best interests to do so. In practice therefore, you are only likely to be able to continue acting for B if the non-disclosure does not cause them any real prejudice.

In some circumstances you may be able to obtain client A's informed consent to disclose the information to client B - see below.

Adverse interests and confidential information

Paragraph 6.5 of the Code provides:

"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.

Where this duty arises, it goes wider than the duty under 6.2 in the Code, because it also applies to situations where your proposed client has an interest adverse to a current or former client of your business or employer.

Example

You work for X and Co, a non-authorised firm. Client A wishes to instruct you for advice in relation to a long running dispute over a lease that he has taken from B. The search of X and Co's database reveals that another employee of X and Co, gave B some advice on the lease in relation to a dispute with A last year. X and Co is no longer acting for B.

It is likely that A will have an interest which is adverse to the former client B for whom your employer holds confidential information. This will prevent you from acting for client A - unless either of the two exceptions apply (see directly below).

Exceptions

There are two exceptions to the prohibition in paragraph 6.5 of the Code.

Either

a. Effective measures are taken which result in there being no real risk of disclosure of the confidential information.

The test for such measures (sometime known as "information barriers") being seen as effective is quite high. The measures must protect one client's information from the other -which will include protecting the information from you as his lawyer and must therefore be adopted at the firm level by your employer

The leading case on the matter, Prince Jeffrey Bolkiah v KPMG [1998] UKHL [https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd981218/prince01.htm] sets out the following principles:

- The courts will take a strict approach to protecting clients' information. A former client cannot be protected completely from accidental or inadvertent disclosure of confidential information but should be protected from any real risk of the disclosure. A real risk does not have to be substantial - but must be more than merely fanciful or theoretical.
- Once a former client has established that a firm is in possession of information which was given in confidence and that the firm is proposing to act for another party with an interest adverse to theirs in a matter to which the information is or may be relevant, the burden is on the firm to show that, even so, there is no real risk that the information will come into the possession of those now acting for the other party.
- Where a firm seeks to rely on internal information barriers to prevent there being a risk of disclosure of the information, then these barriers should be an established part of the organisational structure of the firm and not, for example, be created in an ad hoc way that relies on individuals rather than established systems. So, for example, information barriers that are placed between separate departments within a firm are more likely to pass the test of there

being no real risk of disclosure than barriers placed between employees that are drawn from the same team and who are used to working and sharing information with each other.

Examples of effective measures that you would therefore wish to see in place within your employer's structures and procedures in order to protect your own and the client's position could therefore include a combination of:

- Systems that identify the potential confidentiality issue
- Separate departments handling the cases
- Separate servers so that information cannot be cross accessed
- Information being encrypted, and password protected
- Relevant individuals in the firm being aware of the "information barrier" and knowing not to cross it
- Appropriate organisational policies and training for staff

Or

a. B has given informed consent, given or evidenced in writing, to you acting, including to any measures taken to protect their information.

The concept of informed consent is discussed above. It will include an understanding of any possible prejudice that could occur. In the example above where you are acting for A, if your employer is putting in place measures to protect B's information it would be necessary for someone else in your firm to seek that consent from B as you will be unable to do so without B's confidential information being disclosed to you.

Further guidance

Unregulated organisations - for employers of SRA-regulated solicitors [https://media.sra.org.uk/solicitors/guidance/unregulated-organisations-employers-sra-regulated-lawyers/]

Unregulated organisations - giving information to clients [https://media.sra.org.uk/solicitors/guidance/unregulated-organisations-giving-information-clients/]

Further help

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

Notes

1. See https://www.sra.org.uk/solicitors/guidance/investment-schemes-including-conveyancing/ [https://media.sra.org.uk/solicitors/guidance/investment-schemes-including-conveyancing/]

2. Prince Jeffrey Bolkiah v KPMG [1998] UKHL
[https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd981218/prince01.htm]