

BEALE&CO

Guidance Note for Solicitors on Own Interest Conflicts

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This note provides guidance for solicitors and SRA regulated law firms on the circumstances in which own interest conflicts are likely to arise, the approach that the SRA takes to such cases, and the steps that firms can take to both prevent own interest conflicts, and to manage them if they arise during the course of a matter. This note does not cover other conflicts of interest scenarios (i.e. conflicts of interest between two or more clients).

1. WHAT IS OWN INTEREST CONFLICT

- 1.1 The SRA Glossary states that an 'own interest conflict' arises in any situation where a solicitor's/firm's duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with the solicitor's or the firm's own interests in relation to that or a related matter. For matters to be related there must be a reasonable degree of relationship between them. By way of example, matters which concern the same asset or parties are likely to be related.
- 1.2 When it comes to an 'own interest' conflict, there are no exceptions to the prohibition on acting¹. Accordingly, obtaining a client's consent to act will not change the position and allow a solicitor to continue to act if there is an own interest conflict.

2. SRA'S REGULATORY REQUIREMENTS

- 2.1 The SRA's rules on own interest conflict are set out in paragraph 6.1 of the **Code of Conduct for Solicitors, RELs and RFLs** and paragraph 6.1 of the **Code of Conduct for Firms** ("the Codes").

The SRA Codes

- 2.2 Para 6.1 of the Codes state:

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

- 2.3 Paragraph 7.11 of the SRA Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.5 of the SRA Code of Conduct for Firms require that:

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

- 2.4 The words "if possible" put solicitors and firms on notice that there will be circumstances where, as a result of an own interest conflict, the matter cannot be put right and they must cease acting. There is also no specific reference to current clients, so it is likely this paragraph extends to former clients as well.

¹This is different to other conflict situations, such as conflicts of interests between two or more clients where it may be possible to still act providing certain conditions are met.

- 2.5 The obligation to put things right (if possible) has to be balanced against paragraph 6.1 of the Codes which prohibit solicitors and firms from acting if there is an own interest conflict or a significant risk of one.

SRA Principles

- 2.6 These state that solicitors and firms must act:
- 2.6.1 In a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons (Principle 2).
 - 2.6.2 With independence (Principle 3).
 - 2.6.3 With integrity (Principle 5).
 - 2.6.4 In the best interests of each client (Principle 7).
- 2.7 A solicitor or firm could also potentially breach some or all of the above SRA Principles if they continue to act where there is an own interest conflict or serious risk of one.
- 2.8 The SRA's Principles and Codes describe the standards expected of solicitors and firms. Breaches of these Principles and Codes can lead to regulatory action against the individual solicitor, REL or RFL and/or against the firm itself as an entity, or its managers or compliance officers, who each have responsibilities for ensuring that the standards and requirements are met. It is therefore imperative that solicitors, RELs and RFLs (who will be personally accountable) and firms exercise good judgment in applying these standards to real life situations and are able to justify their decisions and actions.

3. FACTORS TO CONSIDER IN DECIDING IF THERE IS AN OWN INTEREST CONFLICT

- 3.1 The SRA's Conflict of Interest Note provides guidance on this point and states that circumstances that can give rise to an own interest conflict or a significant risk of one include:
- 3.1.1 *A financial interest of the solicitor/firm or someone close to either:*
 - 3.1.2 *A personal or business relationship of the solicitor/firm. For example, where a solicitor is asked to advise on a claim against a relative, a friend or someone with whom they are involved with in a common financial enterprise.*
 - 3.1.3 *A solicitor's role. For example, a client asks for advice in relation to a dispute involving an employer or a fellow employee.*
 - 3.1.4 *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.*
- 3.2 Not all occasions where things go wrong, or where a mistake is made, will give rise to a risk of a conflict.
- 3.3 For example, the consequences of a defect in title may be put right through purchasing a title indemnity policy, or the other side in a contract negotiation might be happy to correct an obvious or inadvertent drafting error. Where a time limit is missed in litigation proceedings, the solicitor may be able to stay on the record to rectify the situation.
- 3.4 A client may be keen for the solicitor/firm to put matters right and remedial options should be considered within the context of the duty not to act where there is an own interest conflict or a significant risk of an *own interest conflict*. This will be a matter of professional judgment in all the circumstances and is discussed in more detail below.

- 3.5 In any event, the Codes make it clear that a solicitor/firm should inform the client promptly about what has happened and of any consequences for their matter, being open and honest in their communications.
- 3.6 Where there is a straightforward remedy (as above at paragraph 3.3), this should be explained and an informed consent obtained from the client to take steps to rectify the situation. The solicitor should ensure the client fully understand the issues, having regard to their circumstances and needs. It is worth remembering that a solicitor/firm cannot advise on the merits of options for the client to rectify the matter, or any losses they have suffered, where one of those options is to bring a claim against the solicitor/firm for professional negligence (discussed further below). In this situation the client must be advised to take independent legal advice. It is not sufficient for the solicitor/firm to proceed with the transaction on the basis that they advised the client to take independent legal advice, but they chose not to do so. Even if the client has taken independent legal advice, caution should be exercised in continuing to act and this is discussed below.

4. TELLING THE CLIENT

- 4.1 Once an own interest conflict has been identified, the client should be informed as soon as possible of the situation.
- 4.2 If there is a mistake which could give rise to a claim by the client against the solicitor/firm then it is likely that paragraphs 6.1, 7.11 and 3.5 of the Codes are triggered and the solicitor/firm cannot act. It is advisable to be open with the client and explain that the professional conduct rules prevent the solicitor/firm from proceeding unless independent legal advice is obtained. The firm can offer to fund this advice, but caution should be exercised to ensure that any proposal does not prevent the client receiving genuine independent legal advice.

5. HOW TO DEAL WITH AN OWN INTEREST CONFLICT

Taking Remedial Action

- 5.1 Any remedial action cannot be pursued if there is an own interest conflict or a significant risk of one. Before a solicitor/firm decides to undertake remedial action there are several factors which should first be considered, such as:
- 5.1.1 Will the client need to make decisions along the way which will involve considering the merits of options which include taking legal action against the solicitor/firm? Clients are not obliged to embark upon risky mitigation or remedial steps, and they can be better off pursuing a loss of chance claim. If the client needs or is likely to need advice on the merits of bringing a claim against the firm versus pursuing remedial action, then there will be an own interest conflict, and the firm cannot provide such advice.
- 5.1.2 How certain is the outcome - does it rely on the actions or decisions of third parties or the court? Is there a risk that any remedial action could make the client's position worse? Unless the firm promises to make good that potential worsening, it is difficult to see how the firm could act.
- 5.1.3 Does the firm/solicitor have a financial stake in the outcome of the matter? Will the firm be responsible for all the costs of the remedial steps or just some? If it is only some then there is likely to still be an own interest conflict.
- 5.1.4 What kind of mistake has been made, and could it have reputational issues for the firm? If the quality of a firm's mistake could become a contentious issue in the remedial action, then the firm probably has an own interest conflict.

- 5.1.5 Will the solicitor/firm need to accept a mistake was made and/or make admissions? Are there any disputed liability issues? If there are then there will be an own interest conflict. If full admissions are made it will be easier for remedial action to be pursued (as the risk of own interest conflict is minimised) but this will require PI insurers' involvement. However, the ongoing costs of remedial action should be considered beforehand.
- 5.1.6 Even if a conflict is not immediate, is there a **significant risk** that one will arise as the matter progresses?
- 5.2 There has been recent case law (*SRA v Howell Jones 2018*) whereby the Solicitors Disciplinary Tribunal ("SDT") confirmed that informing the client of the issue and offering to put the mistake right (at their own cost) was not sufficient to resolve an own interest conflict; the client should also be advised of the alternative option of a professional negligence claim and the firm should cease to act. Whilst that case is fact specific, it does serve as a cautionary tale. There the client was dissatisfied with a financial settlement in divorce proceedings (where the firm had been advising him) and the firm obtained a counsel's opinion (at their own expense) who advised the settlement was unfair but there was the possibility of an application to court to retract the agreement. The firm (with the approval of their Professional Indemnity Insurer) proposed two options to the client: a) dis-instruct them and obtain advice from another firm; b) the firm would refund the fees charged to date and make the application to retract the settlement agreement at no cost to the client. The client chose option b) but the application was unsuccessful and the court made a costs order against the client, which the firm paid. The SDT found that the firm should have ceased acting instead of making the proposals as the firm could not give independent advice on the merits of bringing a claim against itself.
- 5.3 The *Howell Jones* case does demonstrate how difficult a task it can be to put right a mistake whilst not falling foul of an own interest conflict. Given the importance the SRA places on the requirement to avoid own interest conflicts, even where one pursues remedial steps with the best of intentions, in circumstances where one of the options for the client to rectify the problem is to bring a claim for professional negligence against the firm or solicitor, then the firm or solicitor will have an own interest conflict and should cease to act. The SRA's guidance does leave the possibility of the solicitor/firm being able to continue to act in a scenario such as the *Howell Jones* case but it seems this would only be possible if: a) the solicitor/firm insisted on the client obtaining independent and confidential legal advice and the client obtained such advice; b) the client still wished the solicitor/firm to act and it was possible for the solicitor/firm to continue acting in the client's best interests while taking the remedial steps. However, this should be balanced against how any decision to continue acting would be viewed objectively, and in hindsight after the outcome is known. Given the unpredictability of any remedial action, ceasing to act is usually the safest course of action.
- 5.4 The firm should consult with their Professional Indemnity Insurers at the earliest possible opportunity as the mistake or own interest conflict may be a "notifiable circumstance" under the policy. They should be consulted before considering an admission of liability (as their consent will be needed for this) and ideally before informing the client of the mistake.

Document Everything

- 5.5 The firm should keep a detailed and accurate record of the decision-making process in order to justify how the decision was made having considered the risks and issues². In addition, firms should ensure they have conflict of interest policies and procedures in place along with providing regular training on these issues for fee-earners.

²Paragraph 2.2 of the Code for Firms in fact places a requirement to maintain such records.

Decline or Cease to Act

- 5.6 If it is concluded that there is an own interest conflict or significant risk of such a conflict arising, then the solicitor/firm should cease to act and inform the client and advise that they seek legal advice elsewhere. On the occasion that there is insufficient time for a new firm to be instructed, urgent steps can be taken to protect the client's position (i.e. issuing an application to the court should a limitation period be imminent). In these circumstances Professional Indemnity Insurers should still be informed (as above) and an informed consent obtained from the client.

6. WORKED EXAMPLES

- 6.1 We set out below some examples of what mistakes are likely to be capable of being rectified under paragraphs 7.11 and 3.5 of the Codes and what mistakes put the individual or firm in an own interest conflict position, requiring them to cease acting.

Example A

- 6.2 The firm made a mistake in a transfer deed which has resulted in a reduction in the value of the land in question, the purchaser makes a lower offer, and the client needs to consider whether to accept or to pursue a claim against the firm. Can the firm continue to act? No, as it would involve the client weighing options for the purposes of a professional negligence claim.

Example B

- 6.3 The firm has made a drafting error on a contract; there follows settlement discussions in a claim concerning the contract and the client's negotiating position is lower as a result of the firm's drafting error. Can the firm continue to act? No, for the same reasons as Example A.

Example C

- 6.4 Firm ABC acted for H and W in the purchase of their home. H and W had 2 children. They separated but did not divorce. W passed away and R was the executor of her estate. H informed R that the property was held as joint tenants so would not pass to W's estate but to H. H sought to sell the property and instructed ABC in this regard. The property was sold and the sale proceeds were sent to ABC for onward transmission to H. Before the sums were remitted to H, R (as executor of W's estate) brought a claim against H seeking a declaration that the property was held as tenants in common and so 50% reverted to W's estate; they also joined ABC to the claim seeking an order that they hold the sale proceeds to order. ABC continued to act for H in defence of the claim against him by R. Before any defence was filed, ABC agreed a consent order with R for the claim to be discontinued against them in return for providing an undertaking to hold the sale proceeds pending determination of R's claim against H. Was the firm correct in continuing to act? Firm ABC ensured H was fully aware of the position; separate teams within ABC acted for H and in respect of the claim against ABC. The Firm's insurers were involved, and the issue was resolved before any significant own interest conflict arose and indeed before any Defence was filed.

Example D

- 6.5 Firm XXX hired a new partner (P) who held themselves out to be experienced in a niche area of employment law. P prepared pleadings and undertook a preliminary hearing themselves (rather than instruct Counsel as per Firm XXX's usual procedures). The judge made an adverse costs order stating the pleadings were inadequate (and provided a very tight timetable for amended pleadings to be filed) and was highly critical of P's work. Firm XXX reviewed the matter and all other files P was dealing with and during an investigatory meeting P admitted their experience had been exaggerated. The client was informed and Firm XXX paid for independent counsel to consider a professional negligence claim against the firm and to see if amended pleadings could be filed within the tight timescales directed by the court. Counsel advised that new pleadings could and should be prepared which was how the matter proceeded. There was also insufficient time for a new firm to take over conduct and prepare new pleadings within the timescales. Firm XXX also reported the matter to its insurers and the SRA explaining they had been misled by P's experience. Was Firm XXX able to continue with this remedial action? Yes. Firm XXX had self-reported. Firm XXX were open and honest with the client, met the costs order and the client was aware of the option of a professional negligence claim but there was also insufficient time for a new firm to undertake the remedial action.

Example E

- 6.6 An in-house solicitor instructed an external law firm to carry out work for his employer where one of the employees of the external firm was a close relative of the in-house solicitor. This is an own interest conflict, and the in-house solicitor faced disciplinary action by the SRA.

Example F

- 6.7 A solicitor is appointed as a professional deputy by the Court of Protection, and they seek to appoint their own firm to manage the investments of the client and provide administrative functions. Can they do this? The solicitor needs to ensure there is no own interest conflict and this can be done by: a) obtaining a selection of independent quotes for the legal services; b) instructing the firm which is in the best interests of the client and document why that decision was made; c) if significant legal costs (i.e. over £2,000) will be incurred then make an application to court for specific authority to instruct their own firm.

Example G

- 6.8 A solicitor is instructed by a client to draft their will, and the will seeks to appoint the solicitor as the executor. Is this permissible? Only if the solicitor has satisfied themselves that the decision to appoint them as an executor has been made on a fully informed basis.

Example H

- 6.9 A client instructed a solicitor to draft their will which made a gift to the solicitor's family member. In a similar case, the solicitor was disciplined by the SRA as the client had not been advised nor had they taken independent legal advice before instructing the solicitor to draft the will.

7. QUICK SUMMARY GUIDE

- 7.1 Assess if there is an own interest conflict or risk of one considering the factors above.
- 7.2 Consider if this is a 'circumstance' or 'claim' that should be reported to PI Insurers.

- 7.3 Explain the position to the client as openly and honestly as possible (ideally having had input into how to do this from PI Insurers).
- 7.4 Consider if independent advice is needed (i.e. from independent Counsel) and whether that should include advising on the merits of a professional negligence claim and/or any remedial action. This should also involve consideration of what is needed to rectify the problem or issue.
- 7.5 Consider if any remedial action can be taken and if this would fall foul of an own interest conflict. Consider if there are any urgent steps which need to be taken to protect the clients' position.
- 7.6 Document all internal decision-making and take external advice where necessary.
- 7.7 If there is an own interest conflict or significant risk of one and no urgent steps are needed then the solicitor/firm should cease to act and advise the client(s) to seek independent legal advice. Consider the need to self-report to the SRA.
- 7.8 If there is no own interest conflict the solicitor/firm can continue to act but should keep the matter under review.

GET IN TOUCH

If you have any questions relating to the information discussed in this guidance, please contact Joe Bryant, Claire Revell and Vashti Wyatt.



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