

SAMPLE

The logo for infolegal features the word "infolegal" in a lowercase, sans-serif font. The "info" is in white and the "legal" is in a light blue color. A yellow curved shape, resembling a stylized 'i' or a drop, is positioned above the 'o' in "info".

infolegal

law firm compliance advice and training

conflicts and confidentiality

factsheet 11

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Conflicts and Confidentiality

Factsheet 11

1. Introduction

- 1.1. The provisions in relation to conflicts and confidentiality can be found in chapter 3 and 4 of the SRA Code of Conduct and can be seen as an extension to Principle 4 of the Handbook requiring all practitioners regulated by the SRA to act in the best interests of each client'
- 1.2. Chapter 3 deals with the situation where the interests of different clients are in conflict and also when the interests of the client are in conflict with the firm or someone within it. Chapter 4 deals with the problems of safeguarding confidential information, including where information that is confidential to one client would be relevant on another client's matter.
- 1.3. The special topic of property conflicts is dealt with at Infolegal Factsheet 12.

2. Conflicts checking

- 2.1. The first few outcomes of chapter 3 deal with the obligation to screen instructions and to monitor for conflicts so as to be able to decide whether the firm can accept the instructions or continue to act.
 - O (3.1): 'effective systems and controls in place to enable you to identify and assess potential conflicts of interests';



3. 'Own interest' conflicts

3.1. O (3.4) provides that you cannot act in situations where your interests as a firm conflict, or there is a serious risk that they might do, with the client's. This would seem to be in line with the current rule 3. There are no permitted exceptions to this situation.

3.2.



3.3. In relation to O (3.2) firms have taken differing views on how carefully they need to monitor for 'own' conflicts. In smaller firms a simple guidance note to all personnel that they must declare any personal interests should they arise may well be sufficient, but the larger the firm the more likely it is that some form of formal declaration and a register of interests will be required.

4. Client conflicts

4.1. O(3.5) deals with the more common situation of conflicts between different clients and is very much in line with the former rule 3. This type of conflict is defined in the Glossary to the Handbook as being 'any situation where you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties might conflict'.

4.2.



risk' of a conflict developing, as when acting for different family members or shareholders.

5. What are the permitted exceptions?

5.1. There are two permitted exceptions to acting where there is a conflict of interests between clients (but never in situations of 'own' conflicts):

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- the clients are competing for the same 'objective' (such as at an auction) where you have explained the relevant issues to both parties, they have consented in writing to your acting, there is no other conflict between them, unless the clients specifically agree no individual acts for or is responsible for the supervision of the work done for more than one of the clients in the matter and you are satisfied that the benefits to the clients of your so doing outweigh the risks that they face (O(3.7)).

5.2.



5.3. The second of these two exceptions is aimed at large corporate clients and, usually, bidding contests for a company or its assets where well accepted procedures apply. Its application

is, therefore, very limited and most firms would be well advised to avoid it.

6. The main points arising from the IBs to chapter 3

- 6.1. Other points worthy of note in chapter 3 on conflicts include the suggestions that you should not get involved 'in a personal capacity' in dealing with a client, as by selling or buying from, or lending to or borrowing from that client, unless they have obtained independent legal advice (IB(3.8)). This seems to suggest that simply advising them to seek such advice may be insufficient – it would be wise to insist that it is obtained as a condition of proceeding in this manner. The considerations of exercising a power of attorney for a client are to be found at IB(3.10).

7. Confidentiality and disclosure

7.1.



- 7.2. In practical terms this is often more difficult than it sounds, however, as seeking that consent might in itself reveal confidential information as to the interests of the new client on whose behalf you are making those enquiries. The clear ruling remains that the duty of confidentiality to client 'A' must prevail over the duty of disclosure to client 'B', and unless suitable arrangements can be put into place the work for client 'B' must be declined.

7.3.



notwithstanding the possession of confidential information for another that would usually need to be disclosed to the client. Such arrangements might arise informally in any type or size of firm, as where a new member of staff is not assigned to matters where they had professional dealings at a previous firm, or in a more complex manner in (usually) the much larger practices only.

7.4.



7.5. The circumstances where such arrangements might be acceptable are set out in much less detail at O(4.4), with the rider at O(4.5) that firms that opt to go down this route must have 'effective systems and controls in place'. The conditions for this were very much more explicitly stated in the 2007 Code and are likely still to be consulted by firms considering whether such arrangements could or should be for them.

8. Confidentiality checking

8.1. Finally, it is worth noting that the sort of monitoring arrangements envisaged by chapter 10, and which are likely to be of concern to the newly nominated COLPs should include identifying 'risks to client confidentiality appropriate to the size and complexity of the firm' (IB(4.1).

8.2.

