Conflicts of interest

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1. Introduction

The duty of a lawyer not to act where there is a conflict of interest is one of the most fundamental duties a lawyer owes to a client. This is so whether the conflict is between the interests of two clients, or between the lawyer's own interests and those of the client. In this chapter, we refer to these as 'client conflicts' and 'own interest conflicts' respectively.

The consequences for a law firm and the lawyers concerned of acting where there is a conflict of interests may be significant. Reputational damage may be severe, there may be disciplinary consequences, clients may be lost and fees may have to be written off. The firm may also be liable to compensate the client.

The rules that apply vary from jurisdiction to jurisdiction and it is not intended that this chapter should provide a detailed analysis of all the rules that may be found around the world, but we shall consider some examples by way of illustration.

Lawyers are under a professional duty to avoid conflicts, not merely to undertake conflict searches. Conflict searches alone do not prevent conflicts – it is the decisions made by lawyers, based on those searches and other information known to them, that are critical. Where a conflict or potential conflict is identified, the firm may have to:

- turn down an engagement; or
- exclude an office or particular lawyers from a multi-jurisdictional team if this would put them in breach of their own professional body's rules; or
- limit the retainer.

It is important to keep in mind that conflicts do not just arise at the beginning of a proposed instruction – they may arise at any time, and those arising during the course of a retainer may be harder to spot and more difficult to handle.

First, let us look at the two types of conflict in general terms, though we do so appreciating that there will be many variations between how the rules are expressed in different jurisdictions.

1.1 Client conflicts

Lawyers are generally prohibited from acting for a client in circumstances where there is a conflict, or a significant risk of conflict, between the interests of that client and another client in relation to the same or a substantially related matter.

In some jurisdictions, this may only apply to current clients, the interests of

former clients being protected instead by the continuing duty to keep the former client's affairs confidential after termination of the retainer. In other jurisdictions, particularly in the United States, the lawyer may be subject to an express duty not to act against the interests of a former client.

This will encompass all situations where doing the best for one client in a matter will result in prejudice to another client in that matter or a related matter.

Prohibited conflicts between the interests of clients may be obvious, such as acting for buyer and seller of the same asset, where negotiations are required on price or other key terms, or acting for opposing parties in litigation; they may, however, be more subtle, because the achievement of a client's objective on one matter, for example succeeding on a disputed point of law in litigation over the disputed meaning of a rent review clause on property X, may adversely affect the interest of another client in a dispute over a similarly worded rent review clause on property Y.

Identifying conflicts in less obvious cases may present challenges to the establishment of effective systems and, once identified, may require the exercise of professional judgment. Key to the decision-making process will be whether the lawyer can act in the best interests of the client. Sometimes, the fact that one is even asking the question whether there is a conflict is sufficient to identify that there is one.

1.2 Conflict between the duty of confidentiality and the duty to disclose

A lawyer generally owes clients a duty to continue to keep their affairs confidential after the retainer has concluded. The lawyer also owes clients a duty, during the currency of the retainer, to inform them of any information the lawyer has in his or her possession that may be material to the current client's instruction. The effect of these two duties may be to create a conflict between the duty of confidentiality owed to the former client and the duty of disclosure owed to a current client. It may be possible in some circumstances to overcome this difficulty with the consent of each client, but otherwise the lawyer may be unable to act.

1.3 Own interest conflicts

Conflicts between the interests of the client and the lawyer's own interests are particularly serious. While there may be exceptions in the case of client conflicts, for example permitting the lawyer to act in certain circumstances with client consent, there will be no exceptions where there is an own interest conflict.

1.4 Liability for breach

A lawyer who acts for a client when there is a conflict of interest, whether with the interests of another client or with the lawyer's own interest, may be liable to compensate the client. That may mean an award of damages, or in some jurisdictions, an account of profits.

By way of illustration, an example in the English courts was the case of *Hilton v Barker Booth & Eastwood*.[1] The defendant solicitors acted for both a seller (Mr Hilton) and a buyer (Mr Bromage) on a commercial property transaction, contrary to the

1 [2005] UKHL 8.

conduct rules then in force. The solicitors failed to disclose to the seller that they knew that the buyer had a criminal record for bankruptcy offences which had resulted in imprisonment. They also failed to disclose that they were lending money to the buyer to complete on part of the transaction. After the contract was completed, the buyer defaulted and Mr Hilton was left with substantial losses, which led to his bankruptcy. Attempts at recovery from the buyer failed.

The solicitors defended the claim on two bases. First, the conviction was a matter of public record. Secondly, had the claimant instructed other solicitors, those other solicitors would not have known of the conviction and, they said, their breach therefore caused no loss. The defence succeeded initially but the claimant won on appeal. Put simply, the solicitors were in breach of duty to Mr Hilton, and could not complain if they had put themselves in that position by their own actions.

Note the comments of one of the judges on appeal, Lord Scott of Foscote:

The reason why it would have been a breach of the solicitors' duty to Mr Bromage to inform the appellant of Mr Bromage's bankruptcy and criminal conviction was not because the information was "confidential" but because it was their duty as Mr Bromage's solicitors to do their best to further Mr Bromage's interests in the transaction in respect of which Mr Bromage had instructed them.[2]

The firm was found liable to compensate the claimant.

1.5 Reputational risk – and sanctions

For a lawyer, reputation is all. The loss of client confidence, and the risk of disciplinary action and publicity, may be the most significant driver for ensuring that the firm has effective systems. In a recent case in New York, a prominent litigation firm was sanctioned by the court, in a decision that castigated the firm for failing to identify, and then for failing to withdraw when the conflict was pointed out, in a case where it had sought to act adversely to a party for whom it had negotiated the same agreement that it was now in dispute.[3]

1.6 Lawyers may be bound by more than one set of rules

Firms with lawyers who qualified in other jurisdictions need to be aware that those lawyers may be subject to more than one set of professional rules. This can be an issue particularly for non-US firms who employ US lawyers, as the US rules may be more restrictive, and it may in some instances be necessary to consider excluding a US lawyer from a particular engagement if the involvement of that lawyer would put him or her in breach of their own bar rules. Significant problems can arise when a firm is operating in multiple jurisdictions where the rules governing conflicts differ.

2. Differing rules in outline

In this section we set out a brief outline of the applicable conflicts rules in a selection of jurisdictions in order to illustrate how they may vary and to raise awareness of

2 At paragraph 7.
3 *Madison 92nd St Assoc, LLC v Marriott Int'l, Inc*, No 13 Civ 0291, (CM), 2013 WL 5913382 (SDNY Oct 31, 2013).

how different lawyers who are asked to advise on the same matter may be subject to different restrictions. It is of course essential to refer to the rules themselves when considering their application to any given situation.

Identifying the differences in rules is important to gaining an understanding of the issues that, depending on the nature of the firm's practice, may need to be addressed in establishing systems for checking and managing conflicts.

2.1 United States

The American Bar Association (ABA) Model Rules of Professional Conduct serve as models for the ethics rules of most states in the United States, although the actual rules adopted in the individual states may vary significantly from the Model Rules and from each other. Model Rule 1.7 of the Model Rules[4] provides: "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest". The rule explains that a concurrent conflict of interest exists if either "the representation of one client will be directly adverse to another client", or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer".

The ABA's comment on Model Rule 1.7[5] explains that "a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated". This is stricter than, for example, in England and Wales. However, notwithstanding the general prohibition referred to above, Model Rule 1.7 does permit the lawyer to act in defined circumstances provided each client gives informed consent in writing.

Model Rule 1.8 addresses own interest conflicts in a variety of scenarios, including prohibiting lawyers from entering into business transactions with clients unless the terms are fair and reasonable to the client and disclosed in writing, and the client has been informed of the desirability of seeking independent legal advice. The client must provide informed consent in writing.

The rule also prohibits lawyers from using information related to representation for the benefit of the lawyer or a third party, such as another client, and from soliciting gifts from clients.

Model Rule 1.9 prohibits a lawyer from acting against a former client on "the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client"; there is an exception where there is informed written consent from the former client. The rule is particularly concerned with confidentiality. We shall look later at what may be meant by "the same or substantially related matter".

Model Rule 1.10 provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9". However where the restriction under

4 www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html.

5 www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7.html.

rule 1.9 arises from the disqualified lawyer's prior firm, an ethical screen or information barrier may be used, subject to compliance with specified requirements.

2.2 England and Wales

The Solicitors Regulation Authority (SRA) regulates solicitors in England and Wales. Solicitors form by far the largest branch of the legal profession in the UK, and it is the rules applying to them that we shall look at in this section. Other lawyers, such as barristers, have separate regulators with their own rules.

Conflicts of interest are governed by Chapter 3 of the SRA Code of Conduct 2011. As mentioned earlier, the position in relation to former clients is governed by the confidentiality principles addressed in Chapter 4 of the Code of Conduct.

Chapter 3 prohibits solicitors from acting where there is conflict, or a significant risk of conflict, between two or more current clients, or between the lawyer and the client. There are two exceptions in relation to client conflicts, but none in relation to own interest conflicts. In each case there are requirements that must be satisfied, including a requirement for informed consent in writing and that it is reasonable to act for both parties.

The first exception is where the clients have a 'substantially common interest' and have provided informed consent in writing. It must be in the clients' best interests. A 'substantially common interest' is defined in the SRA Glossary as "a situation where there is a clear common purpose in relation to any matter or a particular aspect of it between the clients and a strong consensus on how it is to be achieved and the client conflict is peripheral to this common purpose".

It is debatable, therefore, whether this is in fact an exception at all, as the implied underlying premise is that there is no conflict.

The second exception is where the clients are 'competing for the same objective', sometimes referred to as the 'auction exception'. This is defined as "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 and 'objective' means … an asset, contract or business opportunity which one 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 which is not public". There must be no other conflict in relation to the matter, and "unless the clients specifically agree, no individual acts for, or is responsible for the supervision of work done for, more than one of the clients in that matter".

Importantly, these are the only exceptions. There is a general note that consent may cure a conflict. If, under the SRA rules, there is a conflict and neither of the two exceptions applies, the firm cannot act. An information barrier will not cure a conflict – it can only have an application where there is an issue in relation to confidential information, and then only subject to strict conditions.

Firms are also required to "have effective systems and controls in place to enable [them] to identify and assess potential conflicts of interests". They must have systems and controls for identifying both client and own interest conflicts appropriate to the size and complexity of the firm and these must also extend to the identification of commercial conflicts.

In contrast to the United States, the knowledge of one person is not imputed to others in the firm.

2.3 Europe

Europe encompasses many different jurisdictions, each with their own different rules. Rules may, for example, only prohibit acting in the same matter, rather than related matters. Whether clients can waive a conflict may vary from state to state. There may also be differences in whether lawyers who encounter a conflict between the interests of two clients may continue to act for one, or must cease acting for both. Rules on confidentiality, often referred to as professional secrecy, may in many countries be enforced by the criminal law.

The Council of Bars and Law Societies in the European Union (CCBE) has a Code of Conduct applicable to cross-border work, the conflict position of which is broadly equivalent to English rules, save that there is no reference to 'related matters' and the 'common interest' and 'auction' exceptions do not feature.[6]

2.4 Common law

Common law jurisdictions are not only subject to regulatory rules but may also be subject to the common law itself. If the rules are the same, then this may not matter greatly, but it can in certain circumstances expose lawyers to 'double jeopardy' – the risk of complying with one set of obligations to the letter, but finding oneself in breach of other obligations. Breach of bar or law society rules may expose a lawyer to disciplinary sanction, but breach of the common law may expose the lawyer to a claim for damages, an account of profits and an order restraining the lawyer from acting further.

The provisions of the SRA Code of Conduct in England and Wales are broadly in line with the common law, save that clients may waive a conflict at common law but under the SRA Code of Conduct this does not permit the lawyer to act unless one of the two exceptions (common interest or the 'auction exception') applies.

2.5 Duties continuing after the retainer

We have already looked at ABA Model Rule 1.9 in section 2.1 above. It will be recalled that this prohibits a lawyer who has formerly acted for one client subsequently acting for another party in the same or a substantially related matter if the other party's interests are materially adverse to the former client's interests, unless that former client consents in writing.

In England and Wales, the fiduciary duty owed to a client generally ceases when the retainer comes to an end, but, as in other jurisdictions, the duty of confidentiality continues, so it is important to ensure that one can identify when the retainer has come to an end. Lawyers are often bad at tidying up the loose ends when a matter is all but concluded and this can mean that the retainer has not ended, and a current client conflict arises that could have been avoided. Failing to identify that one instruction was not in fact concluded was an issue, albeit only one of many, in the recent English case of *Georgian American Alloys v White & Case*.[7]

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6 See www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf.

2.6 Acting against current clients

An important area of difference between jurisdictions is whether a lawyer is prohibited from acting in any matter against a current client, or only where the two instructions are in the same or related matters. The ABA Model Rules adopt the restrictive approach, preventing the lawyer from acting against a current client unless the client consents and the matter is unrelated. In England and Wales, and many other jurisdictions, the restriction applies only to the same or related matters, but there may of course still be a commercial conflict which would in practice preclude the lawyer from acting.

3. Who is the client?

3.1 Subsidiaries and affiliates

The complexities of commercial life mean that many clients are part of larger groups of companies or affiliated in other ways. This can introduce additional layers of complexity to checking and managing conflicts. Rules may even specify that different legal entities in the same group are to be treated as one, as the Swedish Bar rules provide.[8] But even where that is not the case, there may either be a commercial conflict, or client-imposed terms may preclude the lawyer from acting.

3.2 Corporate clients and directors or employees

Care needs to be taken when acting for corporate clients because, intentionally or otherwise, the lawyer may assume duties to individual directors, managers or employees. It is important to ensure that, if a duty is not intended to arise, the individuals are made clear about the position.

The interests of the person conveying the instructions may be identical to those of the company, or they may diverge. An example in England and Wales and doubtless many other jurisdictions would be the defence of a claim by an employee for harassment and discrimination in the workplace. The employee may allege that a particular supervisor has been instrumental in the behaviour of which he or she complains. The supervisor may confess privately to the lawyer that some of the allegations may be true. The lawyer needs to be absolutely clear about where his or her duties of loyalty lie.

The solution to this scenario will be fact sensitive and may be subject to differences in the applicable conflicts rules. It is not therefore possible to provide a definitive answer to resolve this issue. By way of general guidance, however, in England and Wales, the lawyer should first identify whether the supervisor is a client, which certainly will be the case if the supervisor is a party to the proceedings and the lawyer is on the court or tribunal record as acting for him or her, and may be so in other circumstances too.

In that event, the lawyer has received confidential information from one client (the supervisor) while acting for another (the employer). It may be to the supervisor's

7 [2014] EWHC 94 (Comm).

8 Rule 3.2.3 of the Code of Professional Conduct for Members of the Swedish Bar Association www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/Code_of_Professional_Conduct_with_Commentary.pdf.